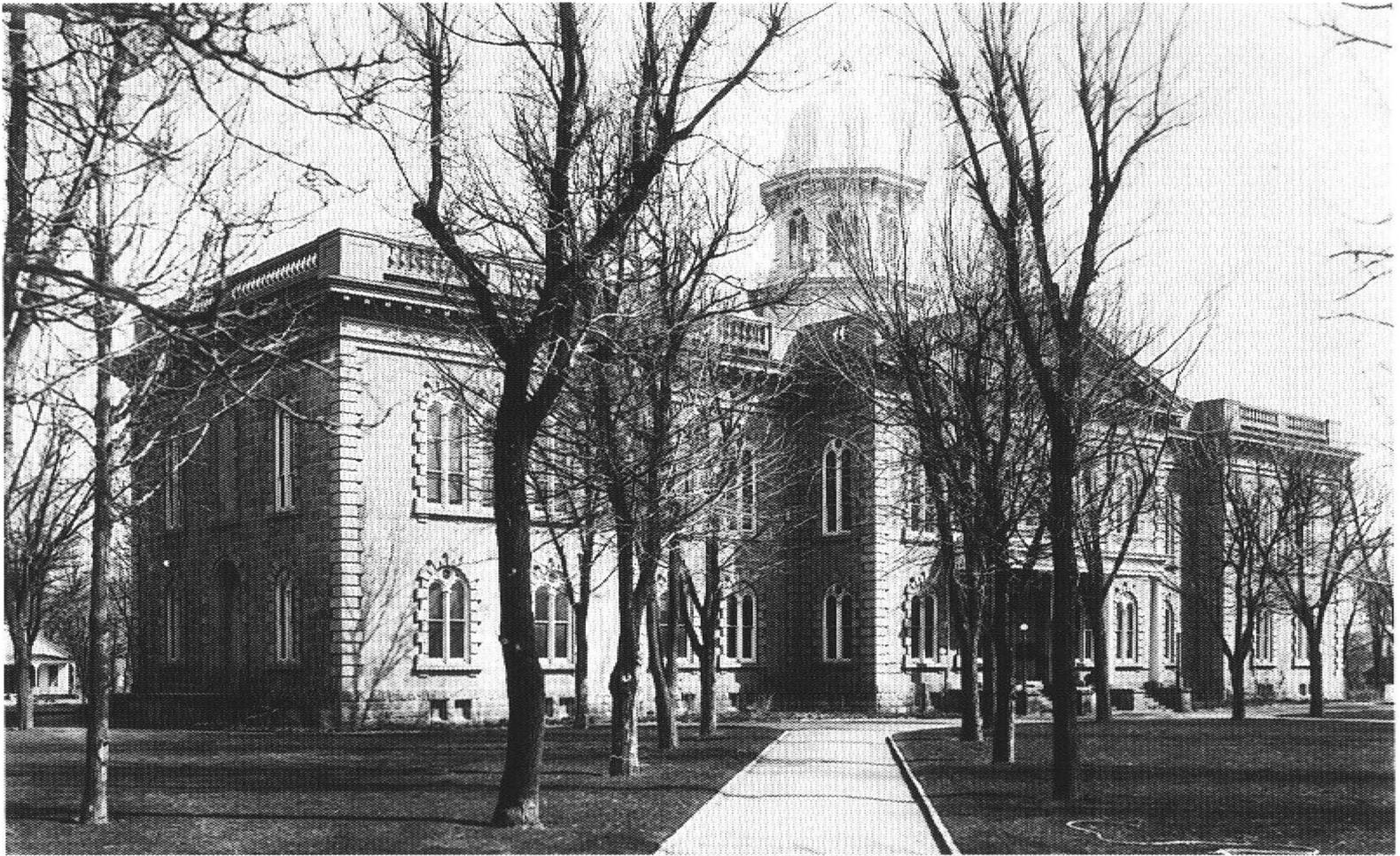


Nevada

Historical Society Quarterly



SPRING 2000

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Nevada

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Correction: In the Winter 1999 issue of the *Nevada Historical Society Quarterly*, the biography for Dwight L. Smith, author of the article "Samuel E. Tillman and the Wheeler Survey," was inadvertently omitted. We run it now, with apologies to Professor Smith.

Dwight L. Smith is professor emeritus at Miami University of Ohio. He is a noted bibliographer of the American and Canadian West as well as a scholar of western American exploration.

FOREWORD

Michael W. Bowers, Guest Editor

It is with great pleasure that I serve as guest editor for this special issue—The Law and Courts in Nevada— of the *Nevada Historical Society Quarterly*. As a longtime scholar of public law in general and, more specifically, in Nevada, I have seen firsthand the dearth of scholarly research and publication on these topics. To date, for example, there is no published history of the Nevada Supreme Court, and other legal institutions such as local courts and district attorneys have been uniformly neglected as topics for study. Basic research available for decades in other states has not even been conducted within the state of Nevada. For instance, when in 1990 I gathered and analyzed data on judicial elections in the state, it was the first time that such foundational scholarship had ever been published.¹

I am hopeful that this special issue of the *Quarterly* will achieve two separate, but related, goals. First, this edition contains four articles presenting information about Nevada law and courts of which the reader is most likely unknowledgeable. Thus, at a minimum, we hope to enlighten our readers regarding these long-ignored topics. Second, it is my more general hope that the publication of this special issue will stimulate further research on law and courts in Nevada. That scholarship in this area has long been woefully lacking is apparent to even the most casual observer.

My pleasure at serving as guest editor for this issue of the *Quarterly* is tempered by my sadness that the first article in it is a memorial tribute to Gary Elliott of the Community College of Southern Nevada. This eulogy by Gary's colleague at CCSN, Michael Green, informs us of the true magnitude of our loss in Gary's unexpected death in summer 1999. Gary had been one of the most ardent and vocal supporters of a special issue on law and the courts and had spoken with me many times regarding the article on consensual sexual relations policy that he intended to submit for publication. I am pleased that Michael Green was able to locate Gary's draft of the article and complete it for publication in this issue.

"The Touchy-Feely Totalitarians and the War on Privacy" is Elliott's examination and critique of the University and Community College System of

Nevada's various policies on consensual relations. In his own inimitable way, he surveys American notions of privacy and our frequent inability to live up to our professed principles of liberty. Ultimately, Elliott concludes that consensual relations policies are merely one more intrusion into individual liberty and an invitation to administrative (i.e., governmental) lawlessness.

Elmer Rusco's "The Civil Rights Movement in Hawthorne" is an excellent example of the kind of research that scholars in Nevada should do more frequently. Through his examination of original sources such as government documents and contemporary newspapers and his personal interviews with civil rights, media, and government leaders of the time, Rusco reveals the fascinating tale of the only small town in Nevada in which the civil rights movement reached significant proportions. The origins and development of that movement are richly told and documented, and ultimately suggest the impact that a few deeply committed individuals, on either side, can have in a struggle as important as protecting the constitutionally guaranteed civil rights of the state's citizens.

Bruce Alverson's "The Limits of Power: Comstock Litigation, 1859-1864" tells a tale of bribery, corruption, and litigation during the Comstock era. As he discovers, the combination of an immature legal system and unsuitable mining law was an invitation to the judicial chaos that developed first in the Nevada Territory and, later, in the state. Alverson's article seems destined to become the definitive work on that aspect of this tumultuous period in the state's history.

"Judicial Selection in Nevada: A Modest Proposal for Reform" by this author is a rumination on Nevada's method of judicial selection. I suggest that, if the state is unwilling to change its system of electing judges, then perhaps other structural changes could be made to better ensure judicial independence while maintaining some form of accountability to voters. Specifically, I propose fourteen-year terms for each Nevada Supreme Court justice and explain how such a system might simultaneously achieve the goals of independence and accountability among the state's highest judges.

Finally, the editors of the *Quarterly* and I would like to dedicate this special issue of the journal to the memory of Gary Elliott. Gary was fond of saying that, in Nevada, he would always have to be known as "the other Elliott." However, to those of us who knew him, he will be remembered as the Elliott who was never afraid to speak out in the interests of liberty and who contributed greatly to our knowledge of Nevada history, politics, and public policy. When all is said and done, he will be remembered most fondly as our friend and colleague.

NOTES

¹Michael W. Bowers, "The Impact of Judicial Selection Methods in Nevada: Some Empirical Observations," *Nevada Public Affairs Review*, no. 2 (1990).

GARY ELLIOTT 1941-1999

Michael S. Green

This special issue of the *Nevada Historical Society Quarterly* is dedicated to the memory of Gary Elliott. When he died on July 11, 1999, Nevada lost one of its most prolific, influential, and unusual scholars; the Community College of Southern Nevada lost one of its most distinguished and respected professors; his colleagues lost a friend, a mentor, and an exemplar.

Gary Eugene Elliott was born on October 17, 1941, in Los Angeles. Until he was nearly fifty, he pursued a career in law enforcement, first as a policeman and then as a Drug Enforcement Administration agent. While doing so, he earned his bachelor's and master's degrees at California State University, Los Angeles. His first lengthy exposure to Las Vegas was as a DEA investigator (probing drug use by Howard Hughes), and he later was assigned to the agency's southern Nevada office.

In the early 1980s, Gary decided to pursue further graduate studies in history. He enrolled at the University of Nevada, Las Vegas, earning a second master's in 1984, and was invited to join both the Phi Kappa Phi national honor society and the Phi Alpha Theta history honor society. He went on to teach both halves of the United States history survey course at UNLV and at what was then Clark County Community College.

I am grateful to my CCSN colleagues Alan Balboni, Earnest Bracey, Royse Smith, and especially DeAnna Beachley and John Hollitz, for their assistance, as well as to Robert Faiss of Lionel Sawyer and Collins. I also am grateful to *Las Vegas City Life*, where portions of this essay originally appeared, and to managing editor Geoff Schumacher.

A scholarship in memory of Gary E. Elliott has been established at the Community College of Southern Nevada. For more information, contact Michael Green by e-mail at greenm1@nevada.edu or by telephone at (702) 651-4457.

Michael S. Green is a professor of History at the Community College of Southern Nevada and book review editor for the *Nevada Historical Society Quarterly*. He is completing his Ph.D. in history at Columbia University. He and Gary Elliott edited *Nevada: Readings and Perspectives* (Nevada Historical Society).

However, western and Nevada history beckoned. While he was greatly influenced by his graduate committee of Joseph A. Fry, Eugene Moehring, and Jay Coughtry, he also acquired a great interest in western history from Robert Davenport's graduate colloquium in the subject. At the suggestion of Candace Kant, then his department chair at the community college, he developed a course in Nevada history. He found the subject fascinating and useful: "I read Professor Jerome Edwards's book, *Pat McCarran: Political Boss of Nevada*. Aside from being interested in McCarran's colorful, and often outrageous, public statements, I was struck by the many references to his successor—Alan Bible."¹

Soon he began work on his Ph.D. at Northern Arizona University. His adviser, Monte Poen, a distinguished scholar of Harry Truman, wanted him to come up with a dissertation topic. "After some indecision and preliminary research, I discovered that Senator Bible's papers were readily available and that he was living in nearby California," Gary wrote. "Thus began a seven-year trek through more cartons of documents and papers than I care to recall."²

The result was a dissertation completed in 1990 and published in 1994 by the University of Nevada Press as *Senator Alan Bible and the Politics of the New West*. It won praise from Bible's friends and family for its judicious portrait of a quiet, unassuming, hard-working senator. It won the admiration of scholars such as Robert Dallek, author of a two-volume biography of Bible's friend Lyndon Johnson, for its careful analysis of the rise of the Sunbelt and the workings of the United States Senate. And it won both the Wilbur S. Shepperson Humanities Award for outstanding book published by the University of Nevada Press and a certificate of achievement from the Western Writers of America.

The study of Alan Bible marked both a progress and a resurgence in Nevada history. It was the first in-depth biography of a Nevada political figure of the postwar era. While it demonstrated Bible's links to the modern Nevada political economy of gaming and tourism—Bible's shepherding of the Southern Nevada Water Project clearly affected the rapid growth of Las Vegas—this work also explained Bible's connections to Nevada's past as a protector of its land, water, and mining interests. The study made clear how a senator from a small state could be successful in the upper house of Congress: as "a workhorse, not a showhorse," which was the title of one of Gary's articles on Bible. It described the author, too.

Preparation of the book inspired Gary to pursue other scholarly endeavors. He published six articles in the *Nevada Historical Society Quarterly* and *Halcyon* based on his research of Bible's career. Two articles, one on water issues and another (with Candace Kant) on the McCarthy era in Nevada, appeared in Dina Titus's *Battle Born: Federal-State Conflict in Nevada During the Twentieth Century*. His extensive interviews with Bible gave him considerable experience in oral history, and his in-depth research gave him a profound understanding of the politics, economy, and society of postwar Nevada. As a result, even before completing the dissertation, he began conducting interviews for what became *Hang*

Tough! Grant Sawyer: An Activist in the Governor's Mansion, an oral history published in 1993 with Tom King, who heads the University of Nevada Oral History Program.

As the interviewer, Gary guided the former governor through his life story. His knowledge and research greatly impressed Sawyer, his wife Bette, and his daughter Gail. More important, perhaps, the governor-turned-corporate lawyer and the DEA agent-turned-historian enjoyed being together. "The most striking personal characteristic about Gov. Sawyer is his sense of humor, which is shown throughout this work," Gary wrote. "While he can speak long and passionately on issues, when it comes to himself, he is not at all that serious. He can laugh at himself." The description fit not only the interviewee, but also the interviewer.³

His work on Sawyer led Gary into still more research. In 1996, he published a two-part study in this journal on legislative apportionment, which had changed dramatically in Nevada during Sawyer's tenure. At the time of his death, Gary had just begun work on a history of the law firm that Sawyer founded with the Las Vegas attorney Sam Lionel.

The Sawyer project also led, indirectly, to another oral history. Gary's talent in the field, his interest in civil rights and liberties, and Sawyer's own activities as governor in behalf of civil rights helped lead Gary into a set of interviews with Dr. James McMillan, whose work as president of the Las Vegas chapter of the NAACP led to the desegregation of Las Vegas casinos in 1960. The interviews with McMillan prompted still more publications. The civil rights activist's oral history, *Fighting Back: A Life in the Struggle for Civil Rights*, appeared in 1997. In the four years it took to finish the book, Gary wrote,

I got to know Dr. James B. McMillan well, to respect him, and to admire what he has done with his life. His friends call him 'Mac'; I call him Mac too, because it seems natural to do so, and I hope he counts me among his friends. What I like most about Mac is that his approach to life is the antithesis of what is commonly referred to today as 'politically correct.' He would be more at home among professed bigots, arguing against their stereotypes and fallacies, than in the company of polite society with its thinly disguised petty politics and hollow conversation

—another apt description of interviewee and interviewer. Gary further detailed McMillan's long struggle against racism and segregation in a biography written for Richard O. Davies's *The Maverick Spirit*, published in 1998.⁴

Studying Bible, Sawyer, and McMillan gave Gary a deep knowledge of Nevada history in general and southern Nevada in particular. So did teaching the subject. In 1991, he joined the faculty of the Community College of Southern Nevada, where he again taught both halves of the United States history survey, Nevada history, and specialized courses on constitutional and environmental history. His knowledge and professionalism impressed not only his students and colleagues, but also Heritage Media of Encinitas, California, which invited him to write a history of Las Vegas. Gary completed *The New Western Frontier:*

An Illustrated History of Greater Las Vegas early in 1999 and saw it through to publication. It is a highly readable coffee-table book with the kind of heavily interpretive slant that his readers would expect of him.

Gary also extended his scholarship beyond Nevada. His teaching and his work on McMillan had prompted him to begin work on a document collection of African-American constitutional history. Like his oral history subjects, he felt strongly about many issues, and in recent years dedicated himself to a struggle of his own in behalf of privacy rights. This culminated in the publication early in 1999 of "Consensual Relationships and the Constitution: A Case of Liberty Denied," in *The Michigan Journal of Gender and Law*. He also began writing the article that appears in this journal, a study of Nevada's response to the issue.

In little more than a decade, Gary published two books, two oral histories, nine refereed scholarly articles, five articles for edited works, two co-edited volumes, and nine book reviews. He had begun work on two more volumes, was planning two others, and was writing book reviews and articles. His work presented a strong point of view. He argued cogently that Nevada leaders had to learn or know how to function within the system of federalism under which the United States is governed. He wrote eloquently and ardently in behalf of environmental issues, especially the creation of the Great Basin National Park. His book on Las Vegas showed how the city has fit into the national ethos and stressed the importance of careful state control of its main industry, gaming. His writing on Sawyer and McMillan defended their own sometimes unpopular stands.

What made his scholarly output all the more impressive was the size of his teaching load. At the Community College of Southern Nevada, teaching is emphasized; since it is a teaching institution, scholarship goes almost wholly unrewarded and unsupported financially. However, Gary shared with many of his colleagues the belief that good teaching requires research into the subject being taught. He taught at least five courses a semester, sometimes six so that he could offer more specialized classes. That meant teaching about 175 students a semester—in other words, a great deal of time spent in class preparation, grading, and, inevitably, advising. He was a highly demanding and exacting professor, for which his students and colleagues deeply respected him. That required spending even more time with his students, helping them meet his demands and those of their other classes. This he did with good cheer, encouragement, and a sense of commitment. Several of his students have gone on to study history or law, and credit him with influencing them.

If this seems like a typical obituary of a typical scholar, that is about to change. Gary was not the typical scholar. He was no ivory-tower academic. That is one reason his students appreciated him. While he rarely discussed his past with them, he conveyed his understanding that they had lives outside the classroom, because he did, too. It also gave him a different perspective from most

of his colleagues. To a complaint from one of them about the heavy teaching load, he responded, "Quit your whining. At least nobody's shooting at you." From personal experience, he knew what that was like.

"Quit your whining" was an Elliottism. He had several of those. Another, whenever something bad or silly had happened, was "Say it's not so." Whenever someone displeased him, he would say, "Somebody ought to slap him silly." They became familiar around our department office, and usually were directed at the pompous, the officious, and the humorless. Gary was none of those.

All of his colleagues respected him, and some of them cherished him. When he was based at CCSN's Cheyenne campus, and also during visits after he switched to the Henderson campus, he would spend hours discussing history and research with other professors. His colleagues were his friends; they looked to him for advice and comradeship, and he gave them in so great a measure that the debt could never be repaid.

They also found him to be an enigma. When he was in Las Vegas, he stayed at a small hotel-casino, the Klondike Inn, at the far end of the Strip. He promptly became friendly with everyone from the owner to the porters. Then he moved into a mobile home and proudly declared himself trailer trash. He also had a house in Crestline, California. There he leaves his wife, Debbie; his daughter and son-in-law, Kimberly and Paul Hooper; their daughter, Cassidy; and a legion of family and friends.

It was quite a commute from Lake Arrowhead to Las Vegas, but he said it was no problem. Besides, he could more easily separate his work and personal life, which enabled him to organize his time so effectively that he was and remains a marvel. Spending weekends in Southern California also meant that he could go to USC football games, which he viewed as something akin to a religious experience.

He also leaves behind a sadder and lonelier junior partner. Gary was kind and indiscriminating enough to see me as an equal, despite our differences in age (I am younger), experience (I have not been shot at—yet), and wisdom (I have far, far less of it). We met in the fall of 1983 in a class at UNLV. We became friends then, and close friends as time went on. He was on the search committee that hired me at CCSN, and his office was next to mine for two years. We edited a reader together, presented what proved to be his final conference paper together, read one another's work and took pleasure in pointing out and hashing out errors or faulty interpretations (I had a lot more of both than he did) and were planning other projects when he died.

To describe my sense of loss is hard. It cannot begin to compare with that of his family. I am grateful that he did not linger or suffer. I cannot think of him without smiling, because he was like the men he interviewed: dedicated and opinionated, but funny and fun to be around; he was serious about everything but himself. But I have lost one of the greatest friends I have ever had, a true

mentor, and a great influence on my life.

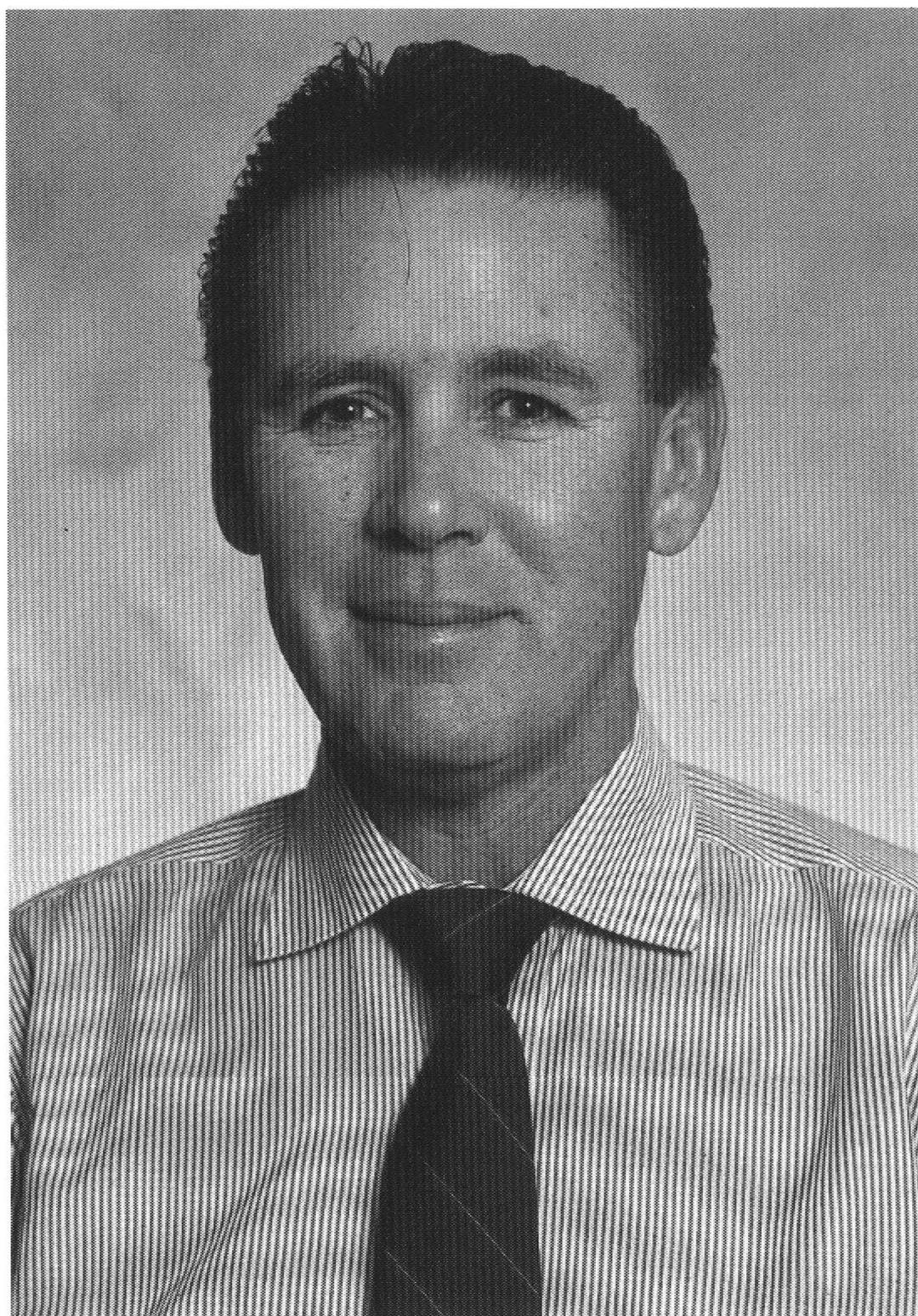
Gary Elliott was only fifty-seven when he died, but he accomplished more in the time he had than most of us would if given twice as long to live. When he was diagnosed with cancer and told that he might die soon, he told me, and told me to tell others, "No whining. I haven't been cheated." But we, his friends and family, were cheated out of more great scholarship, great teaching, and great times.

Notes

¹Gary E. Elliott, *Senator Alan Bible and the Politics of the New West* (Reno and Las Vegas: University of Nevada Press, 1994); xi.

²*Ibid.*

³Grant Sawyer, Gary E. Elliott, and R. T. King, *Hang Tough! Grant Sawyer: An Activist in the Governor's Mansion* (Reno: University of Nevada Oral History Program, 1997); xxii.



Professor Gary E. Elliott, 1941-1999. Author of *Senator Alan Bible and the Politics of the New West*.

THE TOUCHY-FEELY TOTALITARIANS AND THE WAR ON PRIVACY: Administrative Lawlessness and the UCCSN

Gary E. Elliott

Completed and edited by Michael S. Green¹

Perhaps no personal privilege is greater than the right to privacy, often described as the right to be let alone. Yet lawmakers, employers, medical conglomerates, insurance companies, financial and research institutions, and administrative agencies of government have, until recently, breezily dismissed claims of privacy and personal autonomy—all in direct opposition to a growing body of constitutional law and in direct opposition to the persistent and expressed wishes of the public. The most intimate and personal details of life have been collected, collated, correlated, tabulated, and then sold to anyone willing to pay a modest fee for the information—or made available via the Internet. Only in the late 1990s, it appears, has privacy become an issue for decision makers, resulting in the introduction of legislation and the issuance of directives designed to protect Americans from unwarranted or undesired intrusions into their personal lives. Vice President Albert Gore declared privacy “a basic American value” and, calling for an “electronic bill of rights,” added, “You should have the right to choose whether your personal information is disclosed.” As legal journalist and professor of law, Jeffrey Rosen wrote,

the dirty little secret about the politics of privacy is that although polls show that a majority of people are for it, many of the best organized interest groups are strenuously against it. Corporations oppose any privacy protections that would restrict their ability to use personal information in marketing schemes. In the nineteen-nineties, some feminists have been arguing that the courts, by protecting privacy at home and at work, have created a zone of peril for women, where men are free to batter and harass them with impunity At the other end of the spectrum, Focus on the Family, which lobbies for the Christian right, recently squelched a proposed right-to-privacy amendment to the Colorado constitution, on the ground that it might encourage abortion and gay rights and allow children to lock their bedroom doors without parental consent. State and federal law-enforcement groups are also powerful foes of privacy reform. In fact, the only consistently pro-privacy group in national politics has been the Ruby Ridge wing of the libertarian right, which opposes federal authority in all its forms.

Some politicians who have taken a leading stand on this issue, such as Sena-

tor Richard Bryan (D-Nevada), have found themselves part of an unlikely coalition of liberals, moderates, and conservatives who support the idea of individual rights and civil liberties, and oppose unwarranted governmental intrusion into private lives. Unfortunately, much of this interest in privacy has been comparable to closing the barn door after all of the horses inside have raced to the next state—not to mention sounding the bugle call and starting the fire that drove out the horses. Some of those now committed to protecting privacy have been among its most persistent violators. What is most distressing about the attempt to rebuild the shattered concept of privacy is the complicity of government, at all levels, in requiring individual disclosure of these personal details in the first place. Some lawmakers and agency heads act as agents for commercial interests, rather than respond to what should be their principles or the desires of their principals, the people. Others have an entirely different but no less threatening agenda that has sunk deep roots in twentieth-century America.²

Their actions, reflected in the demand for and unthinking acceptance of consensual relationship policies at most institutions of the University and Community College System of Nevada, are the subject of this article. For this state's higher education system to be engaged in this kind of assault on privacy is ironic, indeed: Nevada and Nevadans long have advocated, explicitly and implicitly, the right to be left alone. Often, this has been with the intention of pursuing economic self-interest: miners who came to Nevada in search of a new life through mineral wealth, and then gamblers who welcomed the chance to ply their trade where it was legal and they no longer faced the constant threat of arrest. The issue of profitable self-interest also has manifested itself in Nevada's treatment of sex: it is, after all, the only state in which prostitution is legal. And Nevadans have made abundantly clear that they object to governmental intrusions into their business. According to Mike O'Callaghan, a two-term governor of Nevada who is now a newspaper editor and publisher:

Americans have always worried about Big Brother in Washington, D.C., but Little Brother in Carson City can ... become more deadly. Every legislative session attempting to broaden law enforcement wiretap powers, enforce use of polygraphs and open up personnel records finds some degree of success. All attacks on privacy are presented in the "need to know" category and when presented piecemeal sound reasonable to those legislators who aren't deep thinkers. When all added together, over the period of several sessions, the damage to personal privacy is tremendous.³

O'Callaghan is not alone among Nevadans concerned about threats to and issues surrounding privacy. The *Las Vegas Sun* has devoted several editorials, syndicated and local columns, and news stories to the importance of preserving individual privacy. The *Las Vegas Review Journal* has crusaded in favor of open public records on the proper grounds that government must be open and the people are entitled to know how their tax dollars are spent. Legislators have debated the questions of how accessible such records ought to be and whether, for example, the use of cameras to catch traffic violators at intersec-

tions violates the rights of a driver who is presumed to have the right to expect privacy within his or her vehicle. At the 1999 session, one of the arguments surrounding a proposed toughening of state ethics laws concerned the definition of what constitutes the sort of “personal relationship” that would prompt elected officials to recuse themselves from voting; the state Senate majority leader William Raggio (R-Washoe County), declared that requiring disclosure of a relationship to the extent of listing ownership of individual shares of stock went too far.⁴

The higher educational system that the legislature funds has no compunction about requiring the disclosure of an even more private relationship—indeed, the most private relationship. It has sought to define personal relationships, impose standards of behavior, and require disclosure of the most intimate kind of personal details, all based on dubious claims of protecting those who have not necessarily asked for protection and of avoiding potential financial loss, and all based on constitutional grounds that would have to improve even to be dubious. To be sure, UCCSN is only one of many government and administrative organizations to wage war on privacy. As this study shows, those who are supposed to be deep thinkers—indeed, Nevada’s deepest thinkers—have acted either from unwitting ignorance of privacy rights or from a knowing and cavalier disregard for them. Some of them simply have sought to do what they think is right. In the process, though, they have done considerable—and, in some cases, perhaps irreparable—harm to individual rights.⁵

I. HISTORICAL BACKGROUND

Privacy as an idea and a force in American life is largely a phenomenon of the late nineteenth and twentieth centuries. The progressive movement of the early twentieth century rejected the nineteenth-century notion of liberal individualism rooted in personal autonomy. Critics and intellectual leaders such as John Dewey posited that autonomy should be replaced by a more general individualism that acknowledged the interdependence of the individual and society. Dewey and many others had in mind an optimistic view of a benevolent government at the head of a cooperative, participatory democracy. Dewey believed that social interests must determine the extent to which society recognizes individual rights. For those who refused to accept or adopt community standards, coercion by government was a legitimate exercise of power.⁶

Like Dewey, Herbert Croly rejected liberal individualism. He preferred a sliding scale wherein the amount of liberty left to the individual would vary according to time, circumstance, and whether societal interests would be endangered. Both Dewey and Croly were insensitive to the possibility of repression because, like most progressives, they had a vision of the good community or good society that transcended individual rights. This attitude places them

squarely and ironically in what might be called the more modern view of progressivism as a movement that tended to place religious, racial, and societal conformity above all else—a view that might be called politically correct in both the good and bad sense.⁷

For many progressives, though, the excesses associated with World War I proved sobering. The repression of civil liberties went well beyond what Abraham Lincoln pondered or tried during the Civil War, when the fighting took place within the nation's borders and more clearly threatened the nation's existence than the trench warfare in Europe between 1914 and 1918. Measures such as the Espionage Act of 1917 and the subsequent Great Red Scare of the years on either side of 1920 shook the progressives' faith in a truly benevolent government. The relentless drive to stamp out dissenting opinions and impose a uniform standard of thought and expression forced even Dewey to be apprehensive about the future. In November 1917, he declared, "The postwar liberal who for expediency's sake would passively tolerate invasions of free speech may be preparing the way for a later victory of domestic toryism." In 1919, in *Schenck v. United States*, Justice Oliver Wendell Holmes, Jr., agreed that the state had the power to prevent those exercises of free speech—and thus, it may be interpreted, of freedom—that created a particular danger, such as shouting fire in a crowded theater. Yet Holmes, whose judicial ideology was rooted in the belief that the legislature and the people needed the freedom to act and experiment, blanched at his colleagues when they relied on his opinion and other precedents to justify rulings that limited free speech in peacetime. By the 1920s, many of the earlier progressives became dedicated civil libertarians, but the movement's intellectual leaders, like Dewey and Croly, maintained their preference for societal rights over individual liberty—a precarious balancing act between individual and property rights, long a characteristic of judicial interpretation of the Bill of Rights and the Fourteenth Amendment.⁸

More important, however, progressives of Dewey and Croly's ilk maintained their fidelity to a society in which centralized management was the key to order and efficiency in the service of social justice. In assessing the effect of progressivism upon freedom, the historian Eric Foner observed that bureaucratic management undermined personal autonomy and that liberty itself was becoming obsolete. In *Liberalism and the Limits of Justice*, Michael Sandel wrote, "Rights secured are not subject to the calculus of social justice but instead function as trump cards held by the individual against policies that would impose some particular vision of the good on society as a whole." The progressive rejection of liberal individualism in deference to state-supported social science management amounts to little more than government enforcement of "political correctness" long before that term gained popularity.⁹

In the years between the two world wars, the works of James Madison were trotted out to illustrate the horrors of a society hurtling toward a centralized despotism. Democratic governments could endanger freedom, and had recently

done so because the rights that an individual may assert against the government paled in significance before the larger claims of necessity. More frightening still was the growth of the modern bureaucratic structure that rendered the notion of a free person obsolete because of the importance of missions, goals, teamwork, and team players. If liberty meant the absence of coercion by the state, then most of the liberty and liberalism of the earlier history of the republic had vanished in the pursuit of progress.¹⁰

The Great Depression and World War II accelerated the pace and growth of central planning and the control needed to combat economic dislocation and subversion. For example, the Smith Act, passed in 1940, was similar in scope to the 1917 Espionage Act, which was used to prosecute those who protested against the war. In 1940, J. Edgar Hoover, director of the Federal Bureau of Investigation, acted without permission or statutory authority in beginning work on his custodial-detention index, or list of persons the FBI deemed dangerous. The idea was to compile dossiers on communists and their sympathizers in labor, civil rights, and education, to be assembled into a general warrant of arrest in case of a national emergency. Even when Attorney General Francis Biddle ordered the program cancelled in 1943, Hoover ignored the order, preferring to wait for an attorney general who was more accepting of his thinking. In the interim, nearly twenty-thousand persons were listed in the security index on mere suspicion. The unelected internal-security bureaucrats had successfully ignored constitutional safeguards. It was the classic triumph and defeat of progressive idealism.¹¹

Yet there was much more—and worse—to come. Harry Truman's administration instituted a loyalty program in 1947 that allowed federal employees to be dismissed if grounds supporting a reasonable belief of disloyalty could be established. In 1951, the standard was changed from a reasonable belief of disloyalty to a reasonable doubt of loyalty to the United States. With the 1953 inauguration of President Dwight Eisenhower came another change: security would be emphasized over loyalty. The standard for determining who was or was not a security risk would be the "bad-tendency doctrine," which once had been reserved for the resolution of free-speech cases under the First Amendment. Here, the threshold was so low that the government needed only to demonstrate that past actions, speech, writings, or associations might lead to a bad result in order to revoke or deny a security clearance.¹²

The "bad-tendency doctrine," invoked by bureaucratic officials, produced devastating results. Nowhere in the government were there more zealous gatekeepers than at the passport office. The distinguished scientist and Nobel laureate Linus Pauling refused to answer charges that he was a communist and accordingly was denied a passport. The federal government unsuccessfully tried to deport, prosecute, and revoke the passport of Harry Bridges, the controversial president of the International Longshoremen's Union, because of his associations with suspected communists; it took him nearly twenty years

to prevail in his struggle to clear his name. But little could compare with the indictment and trial of twelve leading communists for violating the Smith Act of 1940. The trial, known as the Battle of Foley Square, lasted nine months, with the government weighing in with a campaign of intimidation and threats aimed at the attorneys for the defendants. Tom Clark, President Truman's attorney general and later a Supreme Court justice, urged the disbaring of lawyers who represented communists, adding that defendants who do not share the values of other Americans deserved no representation. Feeling the pressure, the American Bar Association in 1951 recommended expulsion of communists and advocates of Marxist-Leninist ideology from the ABA. The cumulative effect of this barrage from the government made a mockery of the right of the defendants to a fair trial. In summing up the episode, the historian Stanley Kutler has said that the Battle of Foley Square shows what can occur when government officials work in tandem with majority sentiment to treat liberty and due process in a cavalier manner.¹³

By the 1960s, the student movement reflected, in part, the sense of powerlessness in the face of bureaucratic institutions. Students, professors, and scholars from a wide range of disciplines read and debated Aldous Huxley's *Brave New World* and George Orwell's *1984*. These two examples of "negative utopias" contained a warning for the future—the lack of power and hope of modern man in a bureaucratized society in which all sense of individuality is lost. In *1984*, Orwell depicts a society governed by consensus where truth is determined by majority rule and "anyone in the minority must be convinced that he is insane." Independence is surrendered either to the state, to the party, or to the corporation. In the words of Erich Fromm, "We present our society as being one of free initiative, individualism, and idealism, when in reality these are mostly words. We are a centralized managerial industrial society of an essentially bureaucratic nature." Almost forty years after Fromm's assessment, Eric Foner concluded that suspicion of the centralized state was the focal point of 1960s protests: "They rejected the elitist strain that had marked liberal thinking from the progressives to postwar advocates of national economic planning as well as social science managerialism."¹⁴

The persistence in the belief and rationale for a centralized, benevolent state is the intellectual force that dominates the thinking, conscious or unconscious, of those who support consensual relationship policies. Like their ancestors, the progressives, they, too, are hostile to liberal individualism and autonomy—not simply the kind that all too often reflected the misbegotten Social Darwinism of the nineteenth century, but the sort that Orwell and other social commentators saw as a grave danger in the twentieth century and beyond. To call it liberalism or conservatism is to miss the point. From all sides of the ideological spectrum has come a threat so great that some commentators have even announced "the death of privacy."¹⁵

II. THE ORIGINS OF CONSENSUAL RELATIONSHIP POLICIES

The origins of consensual relationship policies and similar regulations in use throughout the country are difficult to determine. Late in the 1980s, many universities began adopting codes against hate speech. Both the University of Michigan and the University of Wisconsin adopted codes that banned certain kinds of speech; the United States district court in both jurisdictions held that these rules violated the First Amendment's protection of free speech. Despite arguments by scholars against governmental restraint of speech, the federal courts had to step in to remind colleges and universities that freedom of speech is the first of the rights guaranteed by the Bill of Rights to the Constitution. As Anthony Lewis, constitutional scholar and *New York Times* columnist wrote, "the censorious are always trying to find new ways of suppression," creating "a puerile drain on the energy of people who had better things to do."¹⁶

Not long thereafter, many colleges and universities began adopting policies against sexual harassment. While such harassment certainly is the kind of evil that the state is supposed to prohibit and punish, many of these policies were introduced under political pressure. As a result, their language was imprecise, and their terms were vague and open to conflicting interpretations. Thus, the wording left unclear just what was being banned: gender discrimination or sexual language or activity. Much of that wording came from the Equal Employment Opportunity Commission Guidelines, designed to help employers follow Title VII of the Civil Rights Act of 1964, banning discrimination. The Guidelines applied not to relations between faculty members and students, but to the workplace. Whether they are public or private, universities and colleges are not and cannot be businesses because they provide no consumable commodity, serve no customers, and fall under different rules. However, the imprecise verbiage in the language their institutions adopted has freed academic administrators, almost all of whom have little knowledge of personal privacy rights and little first-hand exposure to issues of academic freedom, to write subjective sexual harassment policies. Legal and administrative quagmires inevitably have followed: professors have wound up defending their behavior before departmental and institutional committees and in court.¹⁷

While reputations and finances have suffered, the more recent consensual relationship policies (CRPs) have gone further and caused far more damage—with the doubtless unintended assistance of the American Association of University Professors (AAUP). The CRPs and their advocates either have threatened constitutional rights or already have plowed them under. The First, Fourth, Fifth, Ninth, and Fourteenth Amendments embody important guarantees of personal liberty—and, thanks to the academy, are in grave danger. In 1995, at its annual meeting, the AAUP approved a sexual harassment policy. A related directive, "Bringing a Complaint," said, "Dissemination of information relating to the case should be limited, in order that the privacy of all individuals

involved is safeguarded as fully as possible." But the document on sexual harassment included a policy statement on consensual relations:

Sexual relations between students and faculty members with whom they also have an academic or evaluative relationship are fraught with the potential for exploitation. The respect and trust accorded a professor by a student, as well as the power exercised by the professor in an academic or evaluative role, make voluntary consent by the student suspect. Even when both parties initially have consented, the development of a sexual relationship renders both the faculty member and the institution vulnerable to possible later allegations of sexual harassment in light of the significant power differential that exists between faculty members and students.

In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and avoid apparent or actual conflict of interest, favoritism, or bias. When a sexual relationship exists, effective steps should be taken to ensure unbiased evaluation or supervision of the student.¹⁸

While the AAUP may be correct that such sexual relations are "fraught with the potential for exploitation," the organization's standards are fraught with legal and intellectual inconsistencies, and thus with the potential for lawsuits and disgrace. Because the AAUP issued the two statements so close together, it linked the issues of sexual harassment and consensual relationship policies when no link legally exists; one does not necessarily lead to the other. The AAUP expressed concerns about privacy, but in the wrong case: while Title VII and Title IX violations recognize no constitutionally protected right to privacy, those two provisions of the Civil Rights Act of 1964 say nothing about consensual relations. The federal government has no involvement. Thus, anyone involved in a consensual relationship has or should have a reasonable expectation of privacy. Nor do lawful consensual sexual relations appear to be a widespread problem or clearly lead to problems for academe, meaning that the state has been given no reason to intervene.¹⁹

Why the AAUP has issued such a statement, or government entities have intervened, is unclear. The AAUP appears to have relied for support upon a 1988 article by Peter DeChiara, "The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students," which appeared in the *Columbia Journal of Law and Social Problems*. According to DeChiara, a consensual relationship between a faculty member and a student is "free from any intentional threat by the teacher." He argues in favor of a ban on such relationships because they could lead to legal harm or classroom favoritism—although he states that no threatening behavior has occurred and offers no evidence to show that these relationships are frequent or troubling. Thus, a legal scholar and the academy's leading professional organization, both third parties with no particular standing, have claimed that the government and the academic institution, also both third parties with no particular standing, have the right to regulate personal activities. Worse, they claim this right not because something has happened, but because something might happen. And they do so without apparent concern over the threat to the privacy to

either participant in the consensual relationship.²⁰

Nor does their concern about favoritism hold legal water. The AAUP Statement on Professional Ethics, mentioned in the sexual harassment policy, states “the ethical responsibility of faculty members to avoid ‘any exploitation of students for . . . private advantage.’” The AAUP adds that such relationships may lead to an “apparent or actual conflict of interest, favoritism, or bias”—thereby putting greater stock in appearance than in actuality, much as previous associations were enough to justify denial of passports and other privileges at the height of the intellectual repression during the McCarthy era.²¹

Almost as problematic as the legal issue is the question of how selective the AAUP and the academy are in applying such standards. While heightened sensitivity to favoritism is welcome, arguing that favoritism automatically results from consensual sexual relations between a professor and a student is to assume the worst. Granting that the chances of favoritism increase if the student is enrolled in one of the professor’s courses, the student might have no need or desire to gain favor with the instructor—in other words, it is mere speculation, except that this speculation neither questions the integrity of the two parties nor forces a violation of their privacy. And these policies have been applied to relations between a professor and a student without specifying whether that student is enrolled in the professor’s course—a clear case of institutional interference not merely in private lives, but in an area where it and the state have absolutely no compelling interest. No possibility of favoritism exists in that situation, yet privacy takes a beating—but few discourage (or should discourage) faculty participation in student clubs and honor societies, or advisers working closely with dissertation students, associations which are just as likely to induce that feared favoritism.²²

These policies have led to what can only be called miscarriages of justice. Jane Gallop, a professor of English and comparative literature at the University of Wisconsin, worked closely with a student until she criticized the student’s performance, leading to a volatile encounter. Nothing romantic or overtly sexual had happened, but she was charged with sexual harassment and later cleared by the school’s office of affirmative action. The university concluded that her dealings with the student violated its policy against “consensual amorous relations.” In another case, a university suspended a male professor for one year without pay because he violated a ban on consensual relations—although the student in question never filed a complaint.²³

This kind of Orwellian nightmare results from two problems. The first is ignorance of just what sexual harassment is. Title IX of the Education Amendments of 1972 clearly prohibits it. In 1997, the Department of Education’s Office of Civil Rights published *Sexual Harassment*, which explains that sexual harassment can exist only when the conduct in question is unwelcome. Examples would be a quid pro quo, where the student must submit to unwelcome sexual advances, requests for sexual favors, or other sexually oriented

conduct in return for a grade, participation in a school activity, or something else that is part of the student's education (as in trading grades for sex); or creating a hostile environment through sexual harassment that somehow limits a student's ability to benefit from an education (making the person's life so miserable as to make education or proper performance impossible).²⁴

The other problem is that, ignorant or not, many in the academy seek to define sexual harassment according to what they believe it to be. Leading scholars who have written on this subject reflect in their work the efforts of administrators and their supervisors and representatives to turn consensual relations into sexual harassment. Nancy Davis argued in her article "Sexual Harassment in the University" that institutions should concentrate on "formulating policies that emphasize education and sensitization of the faculty," instead of "the more legalistic enterprise of defining sexual harassment," and include more activity under the definition of "sexually inappropriate behavior." DeChiara has written, "In deciding whether to enter a sexual relationship with a teacher, a student *may* take into account the teacher's power," and since "the student *may* see the teacher's power as a direct threat, and that threat *may* strongly influence *her* decision ... the student *may* feel pressured . . .," (emphasis added).²⁵

Anyone with respect for law, and equal justice under it, should find such arguments frightening. Davis would toss aside the law and make policy, doing which she finds agreeable when the purpose would be to make a policy that she finds agreeable; whether she would feel the same if a legislative body or administrative agency decided to ignore such precedents as *Roe v. Wade* is open to debate. DeChiara's use of the conditional makes clear that just as a student "may," a student also "may not," except that he refuses to consider that possibility, as though the student and the professor both are incapable of civilized, rational, legal thought and action. DeChiara's use of pronouns makes his agenda clearer: The student is "her," not "him or her," which suggests his expectation—and the academy's—that the victim is certain to be a woman.²⁶

Both scholars ignore or would eviscerate a body of law that is part of the cornerstone of American liberty. More than a century of constitutional law is readily available for perusal by those who would institute consensual relationship policies and thereby mangle privacy rights. As early as 1888, Judge Thomas Cooley's treatise on torts referred to the right to be "let alone." Two years later, the Boston attorneys Samuel Warren and Louis Brandeis published a landmark article, "The Right to Privacy," in the *Harvard Law Review*, that Brandeis was able to expand and expound on after his subsequent appointment to the United States Supreme Court. In 1928, dissenting from the 5 to 4 majority in *Olmstead v. United States*, Brandeis declared, "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Brandeis's successor, William O. Douglas, first articulated the link between the Fourteenth Amendment's due process clause and the right to privacy in *Griswold v. Con-*

necticut, a 1965 case in which the Court struck down a Connecticut law that banned the use of contraceptives, even by married couples. Douglas argued that the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments, all incorporated by the Fourteenth, create what he described in other opinions as a “zone of privacy,” which Justice Harry Blackmun later cited in his opinion in *Roe v. Wade*. In his 1972 opinion in *Eisenstadt v. Baird*, which threw out a law banning sales of contraceptives to unmarried couples, Justice William J. Brennan, Jr., pointed out that a couple “is not an independent entity with a mind and heart of its own, but an association of two individuals If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁷

Another precedent central to this issue is contained in *Bowers v. Hardwick*. Both scholars and administrators have cited this 1986 decision upholding Georgia’s ban on homosexual sodomy as the legal basis for imposing consensual relationship policies upon faculty and students. The Court ruled that a compelling state interest existed for Georgia’s ban, although Blackmun’s dissent assailed the state’s claim that it acted to protect public health, reduce the spread of communicable disease, and maintain a decent society. Granting that a dissent makes no law, the majority opinion clearly contradicts those who use it to expand state power. Arguing the case for *Hardwick*, Professor Laurence Tribe of Harvard Law School contended that the law exceeded the government’s authority to make private sexual conduct between consenting adults a criminal act. Writing for the majority was Justice Byron R. White, named to the Court in 1962 by John F. Kennedy. Unquestionably the most conservative Democratic appointee since the days of the New Deal, White is considered conservative on crime issues and moderate on obscenity. He made himself abundantly clear: “We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.” White added, “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” Those who would argue against the importance of Blackmun’s views in dissent or Justice Lewis F. Powell’s insistence in providing the deciding vote on construing the matter narrowly cannot explain away the majority’s statement that *Bowers v. Hardwick* deals exclusively with the issue at hand, and not with broader questions.²⁸

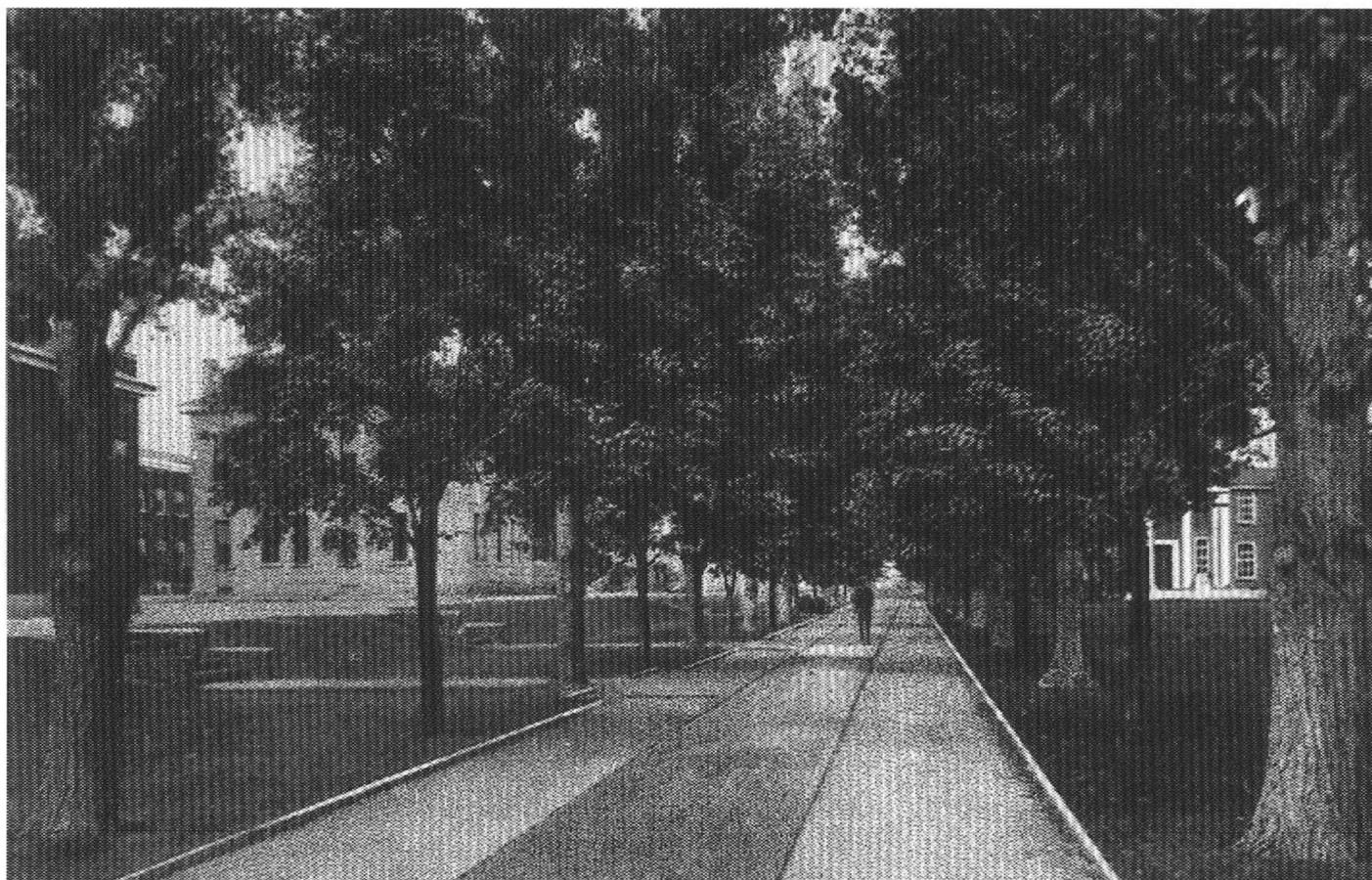
Nor does the body of law support the idea that consensual relationship policies rest on a compelling state interest in protecting members of society from any kind of lawlessness or discrimination. First of all, a relationship that is consensual is, by definition, legal. If it ceases to be consensual, it is then non-consensual or a form of harassment, and becomes a matter for the state or the courts because the activity is no longer legal. If the relationship is consensual,

it cannot be discriminatory, either. However, the gravamen of the issue is that the policies themselves are discriminatory, and DeChiara's choice of language provides only one example. The policies are written in such a way, and their defenders write and speak in such a way, as to make clear that the intent is to protect women students from male faculty. This is not only insulting, but illegal: As the high court stated in 1982, the "test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions," such as the view that a naïve, eighteen-year-old girl is at the mercy of predatory male professors—a notion that students, especially young women, find astonishing, even preposterous.²⁹

Equally astonishing is the academy's ignorance of important legal precedents. Two cases from the Ninth Circuit Court of Appeals apply to the issue of consensual relationship policies, yet academic administrators and legal counsel in Nevada, which is part of the Ninth Circuit, have shown little interest in either. In *Thorne v. El Segundo*, a female applicant for a job in the police department lost her chance for a job when she was forced to admit to an affair with a married officer. When she sued, the Ninth Circuit ruled in her favor, holding that the police department "invaded her right to privacy by forcing her to disclose information regarding personal sexual matters" and limited "her freedom of association." In *Cohen v. San Bernardino Valley College*, the Ninth Circuit ruled for a professor who fought disciplinary action taken against him when a student complained about the material he used in class and the college found that his use of the material fit the definition of a hostile learning environment. The Ninth Circuit found that the college's language, taken from Title VII of the Civil Rights Act of 1964, was broad and inapplicable.³⁰

III. THE NEVADA EXAMPLE

Civil libertarians are entitled to a lack of confidence in the protection of individual rights in higher education, given the sorry history of firings during anticommunist scares such as the McCarthy era. Nor should they hold out much hope for Nevada. In the 1950s, the president of the University of Nevada in Reno tried to fire five tenured faculty members for testifying about academic administrators before a legislative committee, resulting in a court battle, public controversy, the resignations of distinguished professors such as the novelist Walter Van Tilburg Clark, and administrative changes. In the early 1980s, what was then called the University of Nevada System sought to impose a new university code that gave an institution's administrator the right to order psychiatric examinations of employees, prompting another round of public disputes. In the mid-1990s, members of the university's Board of Regents, including sev-



Quad at the University of Nevada, Reno. (*Nevada Historical Society*)



Mackay Stadium on the University of Nevada, Reno campus in 1959. (*Nevada Historical Society*)

eral still on the board, violated the state's open-meeting law by using telephones and fax machines to censure a board member.³¹

The situation involving consensual relationship policies is little better. Several of the institutions in the University and Community College System of Nevada (UCCSN) have in place policies designed to govern the sexual conduct of consenting adults if one of the persons occupies, holds, or has direct power over the other person. The same holds true for "romantic relationships," a term undefined in any of the policies.

Assuming the existence of a consensual or romantic relationship, each institution—with the exception of the Community College of Southern Nevada, and then only barely—encourages or requires the disclosure of such a relationship. Western Nevada Community College's policy states: "To avoid possible sanction, the person in the position of power or authority over the other *must*, at the beginning of such a relationship, report its existence to his or her supervisor." The University of Nevada, Las Vegas (UNLV) has a similar requirement, except that *both* parties are required to report the relationship: "Both parties are equally responsible for reporting the existence of the relationship to the appropriate supervisor at the beginning of the relationship." By contrast, the University of Nevada, Reno (UNR) does not specifically require that the relationship be reported: "Parties involved in such a relationship *should* consult with the department head, dean, supervisor, or the office of affirmative action." The policy at Truckee Meadows Community College is similar to that of UNR: "If any party involved in such a relationship is in doubt whether a professional power differential does exist, he or she should consult with the department head, dean, supervisor, or the Affirmative Action Office. Even when there does not appear to be such a power differential in a relationship, the parties involved are advised to consult with the department head, dean, or the Affirmative Action Office."

The reasons for such regulations are clearly set forth in the policy statements. UNR declares,

The University of Nevada, Reno policy prohibits romantic or sexual relationships only in circumstances in which one of the individuals is in a position of direct professional power over the other. In that circumstance, both the university and the person in the position of superior power are vulnerable to charges of harassment from the person in the position of lesser power or from third parties. Where such relationships exist and no complaint has been made, a warning, verbal or written, shall be given to both involved parties by the chair, dean or director over both parties. Only in the case of a complaint being brought as a result of the relationship will the Office of Affirmative Action become involved.

Thus, UNR claims that a third party, someone with no involvement in the relationship, may charge harassment—an absurd premise. Further, even if no one complains about the relationship, a superior is given the right to issue a written warning that might show up in a personnel file, potentially to the det-

riment of one or both of the parties.

The statement of purpose by UNLV is similar—and similarly debatable:

The University of Nevada, Las Vegas prohibits romantic or sexual relationships between members of the university community when one of the individuals involved has direct professional influence or direct authority over the other. In that circumstance, both the university and the person in the position of influence are vulnerable to charges of sexual harassment from the person in the position of lesser power and/or by third parties.

When a romantic or sexual relationship exists, both parties involved may be subject to disciplinary action. Both parties are equally responsible for reporting the existence of the relationship to the appropriate supervisor at the beginning of the relationship. A self-report will be kept confidential by the supervisor unless university policy requires him/her to divulge it. Once the university administration learns of a romantic or sexual relationship, whether through self-reporting or otherwise, it will take immediate steps to eliminate the power or authority of the one individual over the other.

Although Provost Douglas Ferraro said, “We’re not proscribing behaviors. We’re not trying to determine students’ personal lives. We’re trying to remove any perceptions of coercive relationships,” UNLV’s policy certainly smacked of coercion of a different kind. Not only does UNLV permit—indeed, encourage—complaints by unaffected and uninvolved third parties, but it also ascribes responsibility for reporting the relationship to both of those involved—although one of them may be a student, neither employed by the university nor responsible to it for his or her personal and private behavior. And to state that the report is confidential “unless university policy requires him/her to divulge it” is so vague as to be unenforceable and meaningless.³²

Asked to explain these policies, the UCCSN counsel and the Legislative Counsel Bureau have relied on different approaches. Granted, both cited many of the same precedents. In addition, however, the UCCSN general counsel’s office has argued that such policies are needed to combat sexual harassment, and even has gone so far as to deny that state employees have a right to privacy. The Counsel Bureau added that consensual relationship policies fall outside the “zones of privacy” in the United States Constitution that the Supreme Court has cited, and outside of Article 1, Section 20, of the Nevada Constitution. Section 20 concludes that document’s Declaration of Rights with the assertion, “This enumeration of rights shall not be construed to impair or deny others retained by the people”—the state constitution’s equivalent to the federal one’s similar statement in the Ninth Amendment, which the high court has cited in the cases that addressed privacy. The bureau also ignored or reinterpreted provisions of such cases as *Bowers v. Hardwick* and *Thorne v. El Segundo*.

More frightening, the Legislative Counsel Bureau either misused or misinterpreted the key privacy decision of *Whalen v. Roe*. A New York State statute required that information about prescriptions be retained in a computer. Those who opposed the statute argued that it threatened individual privacy. The United States Supreme Court decided otherwise because the state had taken

steps to assure that none of the information could be divulged. Justice John Paul Stevens wrote that privacy cases “have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions.” Neither the state of Nevada nor the institutions in question offered any kind of proscription on releasing the information, but the bureau noted that, “based upon the intermediate standard of review required by a majority of courts, the self-reporting of information required pursuant to the policies adopted by UNLV and WNCC appears to bear a substantial relationship to the important interest that the schools possess in preventing romantic or sexual relationships in which there is a disparity of professional power within the college or university community.” In other words, the constitutional precedent and the individual’s privacy matter less than the need for the state to avoid lawsuits or bad publicity.³³

In 1996, the university system and the Board of Regents sought a consensual relationship policy at the Community College of Southern Nevada. A committee wrote a policy for consideration by the Faculty Senate. Gary Elliott, then a history professor at CCSN, responded before the senate:

The proposed policy does considerable violence to the personal privacy right of a student involved in a consensual relationship with a professor. His or her interest in the most personal and private matter is not considered. What if the other party does not want the relationship disclosed to a supervisor? Is the professor to honor the request, or betray the trust and confidence of the partner in order to avoid the possibility of future sanctions? . . .

The state is purely and simply barred from proscribing conduct that does not harm the parties themselves. The only acceptable position is neutrality. The rationale for the consensual relationship policy under consideration here is the potentiality principle. That is, there exists in consensual sexual relationships the potential for undesired consequences. Ergo, prohibit the relationship and the consequences will not occur This is simply a blank check for government action which the right to privacy prohibits. Speculative fears are not enough to meet the heavy government burden justifying the regulation of adult consensual behavior

If a woman’s right to abortion can be found in the 9th Amendment’s privacy protection, then I submit that consensual adult sexual relationships are similarly protected and for similar reasons

I urge you to reject the policy in the strongest possible terms and make it absolutely clear that adult consensual sex is not the business of government and cannot be proscribed by a majority vote of this body. Do not tarnish the reputation of this body as UNR has done.³⁴

The CCSN Faculty Senate then voted 15 to 0, with three abstentions, to refuse to accept the policy, to the dismay of at least one faculty member who had helped the administration write the policy.

The argument over consensual relationship policies within the system had only just begun, at least as far as Elliott was concerned. He requested that the UCCSN seek an opinion from the Nevada attorney general’s office on the constitutionality of the policies, but to no avail. Elliott then wrote to Chancellor

Richard Jarvis, pointing out the many problems both with the policy and with the UCCSN response to it and related issues. Elliott had notified the CCSN administration and Donald Klasic, then general counsel to UCCSN of the *Cohen* decision and its importance for the Ninth Circuit—again, to no avail. He provided material to a CCSN administrator, who contacted a system attorney in Elliott's presence, but still received no response. "Based on all of the above I am forced to the conclusion that there now exists within the general counsel's office a callous indifference to protected speech and an unwillingness to follow decisions and rules promulgated to protect First Amendment guarantees," he told Jarvis. Elliott also pointed out a recent, seemingly unrelated development: CCSN officials had ordered a student to stop a research project on the Internet because it included pictures of nude women. When CCSN President Richard Moore asked the system counsel to draft rules regarding Internet use, a proposal was quickly circulated. As Elliott told Jarvis, "It is deeply troubling to find the general counsel's office unwilling to return telephone calls when the issue involves academic freedom and free speech guarantees for faculty, but more than accommodating to President Moore's, and others', request to specify rules on information access."³⁵

The responses from Nevada's higher education establishment and the political leadership inside and outside it was striking. Jarvis replied that "I will not act independently of the Board of Regents in seeking an opinion of the Attorney General—not only would that be independent, it would be in direct violation of my reporting relationship and job description as defined by the Board," although his position must certainly have entailed making sure that the board and the system followed federal and state law. Also, strangely, in replying to a four-page, single-spaced letter in which Elliott addressed legal precedents and the lack of helpfulness in the system counsel's office, Jarvis said,

I should note at the outset that there are several parts of your letter to which I will not respond. First, the melodrama of "callous indifference to protected speech", "a war on privacy", and allegations about disregard for the "privileges of Nevada citizenship" may meet the standards of sensationalism and sound-bite journalism so revered in our public discourse these days; I'm not yet willing to acknowledge their utility in a serious exchange of academic concerns.

Then he proceeded to ask, citing Elliott's argument in favor of the academic freedom to study obscenity as a legitimate form of inquiry, ". . . should you, Professor Elliott, be permitted to perform in front of your class in a public setting on campus an obscene act with one (or several) of your students with whom you have established a consensual relationship?" Jill Derby, chairwoman of the Board of Regents and perhaps the leading advocate of the policies, refused to answer several letters on the issue. Several elected officials, including a regent, stated that protecting the university and community college system from lawsuits was extremely important. The system counsel's office remained

silent.³⁶

In the spring and summer of 1998, the issue and the debate became more public. Articles in two alternate weeklies, *Las Vegas City Life* and *Reno News and Review*, shed considerable light on the opposing arguments. Elliott argued that the UCCSN drew parallels between sexual harassment and consensual relationships that were nonexistent; UCCSN's assistant general counsel Karl Armstrong replied that faculty-student relationships can be "consensual up to a certain point. It's possible that at the time the person said yes just because they feared retribution. Whether that was implied or not. That's consent under coercion and when a complaint is later filed, it becomes an issue of he said-she said. We're trying to avoid both the appearance of impropriety and actual impropriety"—except that "consent under coercion" cannot be "consent." Elliott pointed out the possibility that the information would be disclosed, to which Armstrong replied that a separate filing system would be maintained and information would appear in personnel files only if disciplinary action proved necessary. This would occur if a person "does not self-report and gets caught. And they only get caught if a complaint is made"—except that nothing had been said before about a separate file, and it remained unclear as to why anyone had the right to file a complaint about a relationship in which he or she had no involvement. Elliott noted the absence of the state's compelling interest, to which Armstrong replied that university system officials "have a responsibility to both the faculty and the students to ensure that we provide them with a safe learning environment. We believe this is part of that and is a valid reason for having the policy in place."³⁷

Elliott and Armstrong also debated the statute books. According to Elliott, the Nevada legislature opposed such policies. He cited a 1993 bill, S.B. 466, which repealed the state's prohibition against homosexual sodomy. Supporting the bill in the Judiciary Committee, state Senator Mark James said, "The crime is described in the statute as being between consenting adults. Therefore, by definition, there would be two people who have consented to something, and this extends government far too far into people's private lives." Thus, Elliott believed, if the legislature believed that the state had no interest in a consensual sexual relationship between two members of the same gender, it certainly had no interest in a consensual sexual relationship between a professor and a student.³⁸

Representing the higher educational system, Armstrong pointed to Nevada Revised Statute 201.550, the result of S.B. 122, passed in the 1997 legislature. According to this statute, anyone who is "21 years of age, employed in a position of authority by a college or university and engages in sexual conduct with a student who is 16 or 17 years of age and who is enrolled in or attending the college or university at which the person is employed, is guilty of a category C felony," which is punishable by a one-to-five-year jail term and a fine. The existence of this law was due mainly to the actions of a teacher in Nye County,

Nevada, who engaged in sexual relations with underage students. To use this statute to justify the UCCSN policies was odd: It deals only with students under the age of eighteen and it became law after the universities and community colleges imposed the policies that the system counsel's office has since used it to defend.³⁹

In June 1998, Elliott appeared before the Board of Regents to argue his case. Neither the regents nor Elliott was impressed. Asked to rescind the policy, Derby called it "one of the worst ideas I've heard. We think the policies are very sound and very important and protect students in a critical way. Fundamentally, you always have to balance rights with responsibilities. We have a responsibility to provide the best environment to our students possible." Derby suggested to system counsel Tom Ray that a consensual relationships policy should simply be imposed on CCSN, prompting Ray to warn that it would lead to a lawsuit by Elliott. A UCCSN assistant general counsel, Mary Dugan, declared that a faculty-student relationship "interferes with that student's and other students' abilities to pursue their studies," adding, "There's a very clear power situation here, and to ignore it is folly." Ray told Elliott, "What we're talking about is preventing circumstances that might lead to a claim of sexual harassment. These rules are for your protection. You may think it's a consensual relationship, and then it turns out not to be. And then when they sue, I've got to defend you."⁴⁰

The discussion with the Board of Regents encapsulated the entire argument over consensual relationship policies. Elliott repeated his assertions that they violated the right of privacy guaranteed, and imposed a protectionism deemed illegal, by the United States and Nevada constitutions; he also argued that a consensual relationship cannot be defined in any way as relating to harassment. The regents and their attorneys contended that their responsibility was to protect students, that privacy was not actually violated, and that the danger that a consensual relationship might turn into a nonconsensual one gave them the right to take action. While Elliott was discouraged by the hostile reaction of some of the regents, especially Derby, and their unwillingness even to listen, he remained determined, planning legislation and consulting with the American Civil Liberties Union. Although he died in the summer of 1999, the disputes about consensual relationship policies will continue.

NOTES

¹Gary E. Elliott died on July 7, 1999, having completed a first draft of most of this essay, based in part on his article, "Consensual Relationships and the Constitution: A Case of Liberty Denied," 6 Mich. J. Gender & L. 1 (1999), 47-78. I have written the portions dealing with how this subject has evolved in Nevada, and rewritten or edited the rest. The title is Gary Elliott's; the phrase *touchy-feely* is used to convey a sense of warmth or good feelings about a specific act or action with little regard for constitutionally protected interests, and totalitarians as used in the title is defined as those who control individuals in the name of freedom.

This material reflects Gary's ideas and drafting. I debated putting my name on it with him, because even the sections I drafted owe their origins to him. I have chosen to do so for a couple of reasons.

One is that I have been involved, often peripherally, in this issue and in the preparation of this article for publication. Gary and I were close friends and colleagues who shared our work with one another; anything one of us published reflected the other's skills at editing and analysis. I had considerable knowledge of what he was doing, and we shared many ideas on the subject. At the time Gary began work on this issue, I was untenured. While I agreed with him fully, read his writings and speeches on the subject, spoke about it to fellow faculty, and even suggested and set up meetings where he and I discussed this issue with others, we agreed that public silence on my part would be wise. I am now tenured and would have been public in my involvement to the extent that Gary would have allowed.

Another is that while Gary completed part of the draft, he had not included himself in the article. Nor would he have done so. But it seemed to me that that part of it had to be written, as a matter of historical record and explanation, and I have done so. Thus, the article includes my interpretations of what has happened in Nevada. While they also are Gary's interpretations, it would be wrong for me to hide behind his name.

Finally, it is simply a matter of fairness. Gary Elliott's death has deprived supporters and opponents of consensual relationship policies of a scholar who knew the law. As his junior co-author, I confess to being less conversant with the material. However, I stand by it, as Gary would stand by it, and am prepared to defend it. I am proud to put my name on this article and add that I completely share Gary's sentiments about the material this article contains and the issue in general.

For their aid, the authors wish to thank the family of Gary Elliott; John Hollitz and DeAnna Beachley, professors of history at CCSN; and Ralph L. Denton of Denton and Lopez in Las Vegas.

²See, for example, *Las Vegas Review-Journal*, 15 October 1999, on legislative efforts to protect privacy. See also *Nothing Sacred* (Washington, D.C.: The Center for Public Integrity, 1998); Philippa Strum, *Privacy: The Debate in the United States since 1945* (New York: Harcourt Brace, 1998). Quotations are from Jeffrey Rosen, "Is Nothing Private?" *The New Yorker*, 1 June 1998, 36-41, an excellent, short, popularly written explanation and analysis of the importance of privacy.

³*Las Vegas Sun*, 2 March 1999. See also *idem*, 21 March 1999.

⁴See, for example, *Las Vegas Sun*, 2 March 1999 ("Widespread DNA Testing is Troubling"); 15 March 1999 ("A Patient's Medical File is Inviolable"); 21 March 1999 ("Legal Theft of Privacy"); 9 April 1999 ("In Matter of Guarantees, Privacy Must Not Lose Out"); 11 April 1999 ("Preserving Privacy of Our Homes"); *Las Vegas Review-Journal*, 4 February 1999 ("Modify Speech Code: UNLV to Take Another Look at Rules of Conduct"); 2 March 1999 ("The Public's Right to Know: Bureaucrats Don't Want Sun to Shine In"); 7 April 1999 ("Epitaph for Public Access: Double-dipper Snuffs Out Public Records Reform"). On the legislature, see daily coverage by the *Review-Journal* and *Sun*, March-June 1999. On the legislature and the ethics issue, see *Las Vegas Sun*, 31 March 1999.

⁵A fine example of the flip side to this argument appears in the response to the Elliott article mentioned in note 1, Margaret H. Mack, "Regulating Sexual Relationships between Faculty and Students," 6 Mich. J. Gender & L. 1 (1999), 79-112. Her argument need not be fully addressed here, but Mack writes, "Professor Elliott focuses on the right of professors to be as free from regulation in their sex with students as in their speech. My focus is on students' interest in their education and in building relationships of trust with professors" (80, 3). This statement misses the point in crucial ways, and demonstrates the failings of these arguments. One of the points of

the Elliott article was to demonstrate the effects on liberty and privacy of unwarranted governmental regulation of and intrusion into private lives, not to assure that professors have the kind of absolute freedom that no one, least of all professors, would endorse. Furthermore, Elliott argued that both professors and students were entitled to privacy; to force the reporting of any relationship between them intrudes into the lives of both. Finally, for a student to build a relationship of trust with a professor requires the two to get to know one another. While that may not lead to a sexual relationship, consensual or otherwise, those who would regulate such relationships are setting a limit and creating an atmosphere that promote another kind of discomfort: that the innocent and unharmed may be taken another way.

⁶David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997), 218-19; JoAnn Boydston, ed., *John Dewey: The Middle Works, 1899-1924* (15 vols., Carbondale: Southern Illinois University Press, 1976-83); John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Free Press, 1966), 91-92, 298-99; John Dewey and James H. Tufts, *Ethics* (rev. ed., New York: Henry Holt, 1936), 399-400.

⁷Herbert Croly, *The Promise of American Life*, Arthur M. Schlesinger, Jr., ed. (Cambridge: Belknap Press of Harvard University, 1965). On progressivism and progressive ideology, see John Milton Cooper, *Pivotal Decades: The United States, 1900-1920* (New York: W.W. Norton, 1990); Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge: Belknap Press of Harvard University, 1991). The progressive insistence that society's interest must come before individual liberty is at the core of the dispute not only between opponents and advocates of consensual relationship policies, but also between those who favor limiting the campaign contributions of corporations and individuals and those who argue that limiting corporate and individual contributions is no less a First Amendment infringement than banning hate speech, racist dialogue, or pornography.

⁸Quotation from Rabban, *Free Speech*, 301. On the tendencies of the Supreme Court in this period, see G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993). On the Lincoln connection, see James G. Randall, *Constitutional Problems under Lincoln* (rev. ed., Urbana: University of Illinois Press, 1951); *idem*, "Lincoln's Task and Wilson's," *South Atlantic Quarterly*, 29 (1930), 349-68.

⁹Eric Foner, *The Story of American Freedom* (New York: W.W. Norton, 1998), 155 and *et passim*; Michael J. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982), 9.

¹⁰Foner, *Story of American Freedom*, 183, 269.

¹¹Select Committee to Study Governmental Operations, United States Senate, Final Report, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans (6 vols., Washington, D.C.: Government Printing Office, 1976), III, 408-9. A fine exposition of Hoover's long-standing aversion to civil liberties is Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (New York: W.W. Norton, 1991). On Hoover's incursions into Nevada, see Grant Sawyer, Gary E. Elliott, and R.T. King, *Hang Tough! Grant Sawyer: An Activist in the Governor's Mansion* (Reno: Oral History Program, University of Nevada, Reno, 1993), 89-93, 136-37, 188, 196-97.

¹²Executive Order 9835, 21 March 1947; Executive Order 10241, 1 April 1951; Executive Order 10450, 10 April 1953. See also Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford: Stanford University Press, 1992).

¹³Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982), 89-117, 152-82, 244.

¹⁴Aldous Huxley, *Brave New World* (New York: Perennial Library edition, 1946, 1969); George Orwell, 1984 (New York: Signet Classics, 1961), 264, 266; Foner, *Story of American Freedom*, 289.

¹⁵*Time*, 25 August 1997.

¹⁶*New York Times*, 14 October 1994; *Doe v. University of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989); *UWM Post Inc. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wisc. 1991); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994). See also "Forum: Discouraging Hate Speech Without Codes," *Academe*, (January-February 1994), 18; Henry Louis Gates, Jr., "Truth or Consequences: Putting Limits on Limits," *Ibid.*, 14; Paul McMasters, "Free Speech Versus Civil Discourse: Where Do We Go From Here," *Ibid.*, 8.

¹⁷In addition to the above cases, see *Meyer v. Nebraska*, 262 U.S. 390 (1923), at 399, in which the

United States Supreme Court overturned a state statute banning the teaching of German, finding that it violated the liberty interests of the teacher and student, and holding that teaching and learning are "essential to the orderly pursuit of happiness by free men." See also National Association of Scholars, *Sexual Harassment and Academic Freedom* (February 1994) for a further listing of egregiousness.

¹⁸"Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," *Academe* (July-August 1995), 62-64; "Consensual Relations Between Faculty and Students," *Ibid.*, 64.

¹⁹*Ibid.* The term *consensual sexual relations* is used here to mean a lawful association between consenting adults. Obviously, if the relations, sexual or otherwise, are not consensual, they cannot be called consensual relations.

²⁰Peter DeChiara, "The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students," 21 *Colum. J.L. & Soc. Probs.*, 137-45, (1988).

²¹"Consensual Relations," *Academe*, 64.

²²Peter J. Markie, "Professors, Students, and Friendship," in *Morality, Responsibility, and the University: Studies in Academic Ethics*, Steven M. Cahn, ed. (Philadelphia: Temple University Press, 1990), 134-35; Randall Kennedy, "My Race Problem—And Ours," *The Atlantic Monthly* (May 1997, 55). The co-authors both are members of Phi Alpha Theta, a history honor society whose members, faculty and student alike, concluded induction ceremonies with a party. The co-authors also have met socially with their dissertation advisers, and can guarantee that no favoritism resulted. Students with whom the co-authors have met socially have said the same thing.

²³Jane Gallop, "Sex and Sexism: Feminism and Harassment," *Academe* (September-October 1994), 16.

²⁴20 U.S.C.'s 1681 *et seq.* (1994); Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52172 (1996) (citations omitted); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12040 (1997). See also Verna Williams and Deborah L. Blake, "Sexual Harassment: Let the Punishment Fit the Crime," *The Chronicle of Higher Education*, 18 April 1997, A56; and *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986): "The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome."

²⁵Nancy ("Ann") Davis, "Sexual Harassment in the University," in *Morality, Responsibility, and the University*, Cahn, ed., 150, 155, 166; DeChiara, "Consensual Sexual Relationships," 141, 142. In each case, emphasis is added.

²⁶Mack, "Regulating Sexual Relationships," 79, n. 1, mentions that most of these relationships are between male professors and female students, and cites Caroline Forell, "What's Wrong with Faculty-Student Sex?: The Law School Context," 47 *J. Legal Educ.* 47, 49 (1997). While the law school context is hardly the same as the community college or university context, the authors are perfectly willing to accept the premise, based on two grounds. One is that males outnumber females in the professoriat, and the law of averages makes her argument entirely plausible. The other is that it buttresses our point that these policies are designed to protect women, and the Fourteenth Amendment and Title IX of the Civil Rights Act of 1964 outlaw just such protectionist legislation.

²⁷David M. O'Brien, *Supreme Court Watch: Constitutional Law and Politics: Civil Rights and Civil Liberties* (New York: W.W. Norton, 1995), 168-69; Samuel Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890); *Olmstead v. United States*, 277 U.S. 438, 478 (1928); *Griswold v. Connecticut*, 381 U.S. 479-87 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Roe v. Wade*, 410 U.S. at 129, 152 (1973). The United States Supreme Court later overruled *Olmstead*, adopting Brandeis's reasoning in *Katz v. United States*, 389 U.S. 347 (1967). The co-author, Green, also has profited from Alice Thomas, "Right to Privacy in the Information Age," student paper, in Green's possession.

²⁸*Bowers v. Hardwick*, 478 U.S. 186-213, (1986). On White, see also Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), and Dennis Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: The Free Press, 1998). On Powell, see John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994).

²⁹*Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Co-author Green asked several of his classes for their opinions on these policies as part of a larger historical discussion

of feminism. By far, most of the students who voiced support for these policies were women. When asked why, they cited the favoritism issue. When asked whether they needed protection from male professors, their reaction ranged from negatively expressed shock to hysterical laughter. While no one would consider this a scientific inquiry, it is nonetheless instructive.

³⁰*Thorne v. El Segundo*, 726 F.2d 459 (9th Circuit 1983); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Circuit 1996).

³¹On the national situation involving anticommunism, see Ellen W. Schrecker, *No Ivory Tower: McCarthyism and the Universities* (New York: Oxford University Press, 1986). On the 1950s crisis in Nevada, see Mary Ellen Glass, *Nevada's Turbulent '50s: Decade of Political and Economic Change* (Reno: University of Nevada Press, 1981). The co-authors were students at UNLV during the early 1980s code fight and remember faculty discussing the issue; co-author Green also covered the issue as a reporter for *The Valley Times*.

³²This information is derived from the policies at the institutions mentioned in the text and from State of Nevada, Legislative Counsel Bureau, Opinion on Consensual Relationship Policies, 9 October 1998 (Brenda Erdoes, legislative counsel; Scott McKenna, deputy legislative counsel; and Eileen G. O'Grady, principal deputy legislative counsel). Ferraro quotation from *Las Vegas City Life*, 27 February 1997.

³³*Whalen v. Roe*, 429 U.S. at 591 (1977); State of Nevada, Legislative Counsel Bureau Report, 21.

³⁴CCSN Faculty Senate, Approved Minutes, May 10, 1996; Gary Elliott Files, in possession of Michael Green; confidential source, CCSN faculty. Alan Balboni, a professor of political science and longtime Faculty Senate official, and John Hollitz, a professor of history and then a faculty senator, helped Elliott write his statement.

³⁵Gary E. Elliott to Richard Jarvis, Las Vegas, 14 April 1998, in possession of Michael Green. An excellent analysis of Internet issues is Laurence H. Tribe, "The Internet vs. the First Amendment," *The New York Times*, 28 April 1999. A federal judge eventually enjoined the Child Online Protection Act, designed to protect children from obscenity and pornography on the Internet as constitutionally flawed. Whatever the eventual outcome of such laws, it is interesting and important to note that they are aimed at children. If the ability of Congress to protect children is that questionable, trying to protect adults from engaging in consensual sex seems beyond the pale. *The New York Times*, 2 February 1999; 3 April 1999; *Las Vegas Review-Journal*, 2 February 1999.

³⁶Jarvis to Elliott, Reno, 5 June 1998; Elliott to Jill Derby, Las Vegas, October 1997 and 14 April 1998, all in possession of Michael Green. Confidential interviews. The co-authors met separately and together with several regents and legislators, as friends or as interested citizens.

³⁷*Las Vegas City Life*, 16 April 1998. See also *Reno News and Review*, 24 June 1998.

³⁸*Journal of the Nevada Senate and Assembly* (Carson City: State Printing Office, 1993). See also the legislative history of S.B. 466.

³⁹*Journal of the Nevada Senate and Assembly* (Carson City: State Printing Office, 1997); Legislative history of S.B. 122. See also *Las Vegas Review-Journal*, 14 March 1997; 9 April 1997; 17 May 1997; 21 June 1997; and 5 July 1997, for accounts of legislative debates on this bill. On the arrest of a high school teacher for sexual relations with minors, see *Ibid.*, 26 February 1998, and 17 November 1998.

⁴⁰*Reno News & Review*, 24 June 1998. This account also is based on Elliott's conversations with Green about the regents' meeting, and the recollections of then-CCSN Faculty Senate chair Alan Balboni, who also was present, both to Green personally and in an address to the CCSN Faculty Senate, 3 September 1999.

THE CIVIL RIGHTS MOVEMENT IN HAWTHORNE

Elmer R. Rusco

The civil rights movement that swept the United States from roughly the middle of the 1950s to the early 1970s had its counterpart in Nevada. The outcome of this massive societal change, in terms of the constitutional/legal revolution it accomplished, was essentially the same in all states, except for the de facto extension of the right to vote to African Americans in the South, unnecessary elsewhere. The result of this revolution was that the national Constitution, plus a network of federal and state laws, for the first time systematically forbade discrimination by governments and most individuals on the basis of race.

The details of the movement differed somewhat from state to state, and also among localities. The nature of the discriminatory patterns that had to be overcome, the complex activities necessary to achieve the revolution, and the precise outcomes all differed from place to place.

Hawthorne is the only one of the small towns of Nevada in which the civil rights movement reached significant proportions, and therefore deserves special attention in a projected comprehensive treatment of the civil rights movement in Nevada. Alone among the small towns of Nevada at the beginning of the movement, Hawthorne had a proportionately large African-American population. The breadth and openness of discriminatory patterns against this minority attracted statewide interest and the degree and persistence of local efforts against such discrimination were noteworthy.

Elmer Rusco is a professor emeritus of Political Science at the University of Nevada, Reno. In addition to the individuals named in this article as sources of information, he would like to thank the state archivist, Guy Rocha, as well as Carol Silva and Mildred Springer, plus the staffs of the Mineral County Public Library, the State Historic Preservation Office, the Nevada State Library, the Nevada Historical Society, and Special Collections at the University of Nevada, Reno. He would also like to thank Rollan Melton and the John Ben Snow Trust for help with the expenses of research on civil rights in the state, and Guy Rocha and Tom King, director of the Oral History Program at the University of Nevada, Reno, for reading and commenting on an earlier draft of this article. Of course they are not responsible for any remaining errors or for the interpretation of the evidence.



Main Street, Hawthorne, Nevada, 1950s. (*Nevada Historical Society*)



Main Street looking North, Hawthorne, Nevada, 1950s. (*Nevada Historical Society*)

HAWTHORNE AND THE NAVAL AMMUNITION DEPOT

Hawthorne is newer by several decades than many other Nevada towns. It was organized quickly in 1881 as a station on the Carson and Colorado Railroad, a narrow-gauge line being built from east of Carson City to a possible linkup with the transcontinental railroad in southern California. As Table 1 shows, the town size fluctuated substantially in its first few decades.¹

TABLE 1
Total Population of Hawthorne area, 1890-1990

Year	Population of Hawthorne and subdivisions	
Esmeralda County		
1890	Hawthorne village	337
1900	" precinct	436
1910	Hawthorne precinct	471
Mineral County		
1920	Hawthorne precinct	244
1930	" "	757
1940	" township	1,229
1950	" "	4,721
	Babbitt	2,464
	Hawthorne	1,861
1960	Hawthorne township	5,277
	Babbitt	2,159
	Hawthorne	2,838
1970	Hawthorne township	5,995
	Babbitt	1,579
	Hawthorne	3,539
1980	Hawthorne township	5,166
	Hawthorne	3,741
1990	Hawthorne	4,162

Source: United States Census of Population for Nevada, published returns, 1890-1990

The economic shock from Hawthorne's loss of a direct connection to the Carson and Colorado in the early years of the twentieth century—when a bypass was constructed south of Walker Lake—was temporarily more than counterbalanced by two factors. The creation in 1911 of a new county—Mineral—with Hawthorne as its county seat and, more important, the discovery of productive mines nearby, notably the Lucky Boy mine southwest of town, helped sustain the community. Later events were difficult for Hawthorne. When a di-

sastrous fire destroyed most of the commercial center in 1926, it seemed that the town might join many others in Nevada by graduating to ghost-town status. The low point in Hawthorne's population was recorded officially as 244 in 1920 but evidently reached 150 later in that decade.

What ultimately saved Hawthorne was the federal government's decision in the late 1920s to build the Naval Ammunition Depot close to the town. The town sits in the middle of a large flat area (once part of the lakebed of Pleistocene Lake Lahontan) south of Walker Lake. This largely vacant area was also close to the Carson and Colorado Railroad; Thorne siding was located just below the southeast corner of Walker Lake. The Navy assumed correctly that a large installation for storing, and in some cases manufacturing, bombs and other military weapons could be built near Hawthorne to replace a depot in New Jersey, that had been destroyed by massive explosions in 1926.

The Hawthorne Naval Ammunition Depot was opened in 1930 with construction beginning in 1928. By the time the census was taken in 1930 Hawthorne had already exceeded its previously recorded maximum population. The town continued to grow dramatically during the decade of the 1930s.

When World War II initiated the military buildup in the United States, the depot brought the first significant African-American population to the area. Table 2 shows the population of various groups considered to be nonwhite in Esmeralda County and Mineral County from 1890 through 1990. The manuscript returns for the United States censuses of population of 1900, 1910, and 1920 were also examined for information on the nonwhite population of Hawthorne for these years.

More detail will be provided elsewhere, but the over-all ethnic pattern of Hawthorne prior to establishment of the Naval Ammunition Depot can be described simply. The Walker River Indian Reservation is within Mineral County, although some miles north of the town. Hawthorne has always had a significant relationship with the mostly Northern Paiute Indians who have long lived close to the place where the Walker River flows into Walker Lake; in the early decades the town was hostile to its Native American neighbors. Although the published census reports do not indicate this, for several decades there was an Indian village located on the outskirts of Hawthorne. The town also had a Chinatown for several decades, located between Seventh and Eighth streets and H and I streets, in the southeastern part of the town.²

Also, although the published census reports mention this only once—when a total of seventy-two Mexicans was recorded in Mineral County in 1930—by 1940 there had been small numbers of Mexicans or other Hispanics living in Hawthorne for some time. (Japanese were not recorded in Hawthorne in the 1900, 1910, and 1920 manuscript census returns although they were counted elsewhere in the county.)

However, by 1930 the Indian village near Hawthorne had almost disappeared (in that year there were reportedly only twenty-eight persons living there) and

TABLE 2
Nonwhite Population of Hawthorne Area by Race, 1890-1990

Year	Indian	Chinese	Japanese	Mexican	Afro-American	Other
Esmeralda County as a whole						
1890	887	277	0		1	
1900	832	115	1		0	
1910	628	64	60		0	
Mineral County						
1920	535	40	32		4	
1930	439	5	11	72	4	
1940	419	5	0		1	
1950	452	6	3		282	
Babbitt					226	
Hawthorne				56		
1960	472	4	10		419	Filipino 4
Babbitt					298	
Hawthorne					117	
1970	582	1	9		473	Filipino 12
Babbitt					263	
Hawthorne					210	
1980	645	0	24		384	89 ^a
Hawthorne					318	
1990	750	48	7	405 ^b	311	47 ^c
Hawthorne					260	

^aGuamanian 34, Filipino 31, other Asian and Pacific Islander 24.

^bThe total population of Hispanic origin for Mineral County was 555.

^cKorean 11, Guamanian 7, Vietnamese 6, other Asian and Pacific Islander 23.

Source: United States Census of Population for Nevada, published returns, 1890-1990

the Chinatown had vanished; there were only five Chinese persons enumerated in all of Mineral County in that year.

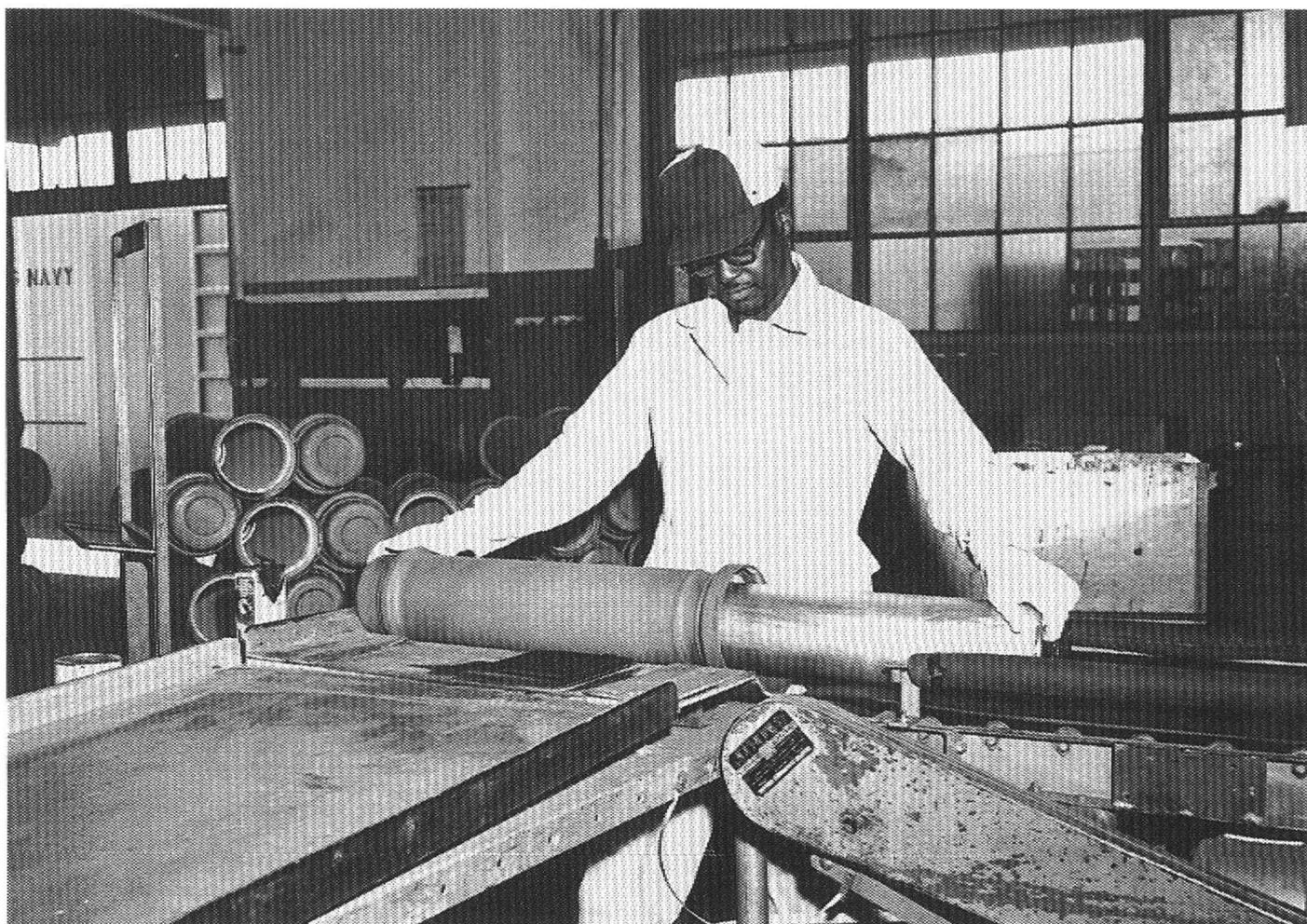
In other words, while Hawthorne had had significant minority populations earlier, from the 1920s to about 1940 the area had become almost completely white, although the noncontiguous Walker River Indian Reservation was still of significance to the town. But Hawthorne never had more than a tiny African-American population prior to World War II. The manuscript returns for United States censuses of 1900, 1910, and 1920 identify only three black residents of the town in those years. In 1910 Esta B. Kennedy, a fifty-year old woman who was a domestic servant, and Walter Nebknight, a fifty-four-year old laborer, were so identified. In 1920 there was only William Neblett, a sixty-two-year old man born in Canada, listed as having no occupation. Apparently each of the three



Hawthorne Naval Ammunition Depot, Hawthorne, Nevada, 1942. (*United States Progress Administration*)



Employees at the Hawthorne Naval Ammunition Depot, Hawthorne, Nevada, 1950. (*Otis Gray*)



Larry Carey working at the Hawthorne Naval Ammunition Depot, Hawthorne, Nevada.
(*Otis Gray*)



Governor Mike O'Callahan, left, and Otis Gray, center, on a visit to the ammunition depot. (*Otis Gray*)

lived alone. In 1930 there were only four African Americans enumerated in Mineral County, although we do not know where they lived. In 1940 there was one African American counted in the county, but this person lived in Mina, not Hawthorne.

THE ARRIVAL OF AFRICAN AMERICANS IN THE HAWTHORNE AREA

Apparently there were no African-American naval personnel at the ammunition depot during World War II because of the prejudice of Captain F. A. L. Vossler, the commanding officer from 1941 to at least some time in 1945. In 1942 the Navy contemplated sending 650 "negro recruits" to Hawthorne from the Great Lakes Naval Training Station. Captain Vossler objected vigorously, and the result was a decision by the chief of naval personnel, on October 29, 1942, that "in view of [this protest] the Bureau will not assign negro enlisted personnel to the Naval Ammunition Depot, Hawthorne, Nevada."³

The rapid wartime build-up of the Naval Ammunition Depot, which began as early as 1939, brought several hundred African Americans to Hawthorne or Babbitt, a housing area built by the depot north of Hawthorne for civilian workers. In 1944 there were 1,968 civilian employees of the Depot, of whom 467 (24

percent) were nonwhite, probably the 467 included a few Indians. In 1950 there were 282 African Americans enumerated in Babbitt and Hawthorne, and this number increased to 415 in 1960 and 473 in 1970, before declining somewhat as the Depot scaled back following the end of the Vietnam War. African Americans represented a small but significant part of the population of the area: 6.5 percent in 1950 and 9.2 percent in 1970.⁴

Table 2 also documents the population shift from Babbitt to Hawthorne; as they could, black residents left the government-owned duplexes at Babbitt to buy houses in Hawthorne. In 1950 only 56 of the 282 black residents of these two areas lived in Hawthorne, but by 1970 there were 263 black residents of Babbitt and 210 living in Hawthorne. During the 1970s Babbitt was dismantled; evidently most black residents moved to Hawthorne rather than out of the county.

This article will concentrate on the situation facing black newcomers in Hawthorne and their efforts to overcome discrimination. The situation at the Naval Ammunition Depot itself—including businesses leasing commercial facilities at Babbitt—will be mentioned only briefly. However, it can be reported that the Navy itself discriminated against its African-American employees for at least twenty years. Among other things, the depot initially practiced discrimination in employment and African Americans were confined to the “colored” portion of the housing area at Babbitt.

The rapid expansion of the Hawthorne depot coincided with rapid growth in military-related industry across the country, combined with the entrance into the armed forces of large numbers of young men, and a few women. To recruit workers quickly for the Depot there was an attempt to hire women, but also a larger effort to attract male workers from the South, where poverty and unemployment were more common than in the rest of the country.

At first there was mostly an influx of construction workers, who were typically single men, or men who had left families at home. These workers were housed largely at Camp Jumbo, which utilized the sites of two Civilian Conservation Corps camps that had been built during the 1930s north of what would become Babbitt. Little is known about these workers, but apparently at this stage there were few blacks among them.⁵

To put a human face on this process, we include a few details about how several of the black individuals, later prominent in the civil rights movement, came to the Hawthorne area to work at the ammunition depot. Manuel Gray arrived at the depot in 1944 or 1945 from Hodge, Louisiana; he worked at the depot until his retirement in April 1960. Mr. Gray was the principal organizer of the Hawthorne branch of the National Association for the Advancement of Colored People (NAACP). His sons, Manuel Gray, Jr., and Otis Gray, also worked at the depot.⁶

Otis Gray served in the Army Corps of Engineers during World War II. After his demobilization in February 1946, he visited the Hawthorne area to see his

family but decided to stay when he found that jobs were available. Otis Gray became the first (and for many years only) black supervisor at the depot; he retired in the 1990s. He was also a prominent leader of the NAACP for many years.

Oliver L. Wert came from Louisiana to work in the depot in 1950. He had grown up on his father's farm near Perry, Arkansas, about fifty-five miles north of Little Rock. During World War II Wert served in the Marine Corps, assigned to the 52nd Antiaircraft Defense Battalion on the Solomon Islands and Kwajalein, in the South Pacific. After thirty-one months in the Marine Corps, he returned to Arkansas to help his father on a new farm near Morrilton, about nine miles from the place where he had grown up. Wert worked there for several years but concluded that "you just couldn't make a living on a small farm. My dad was a good farmer but the big farms were taking over."⁷

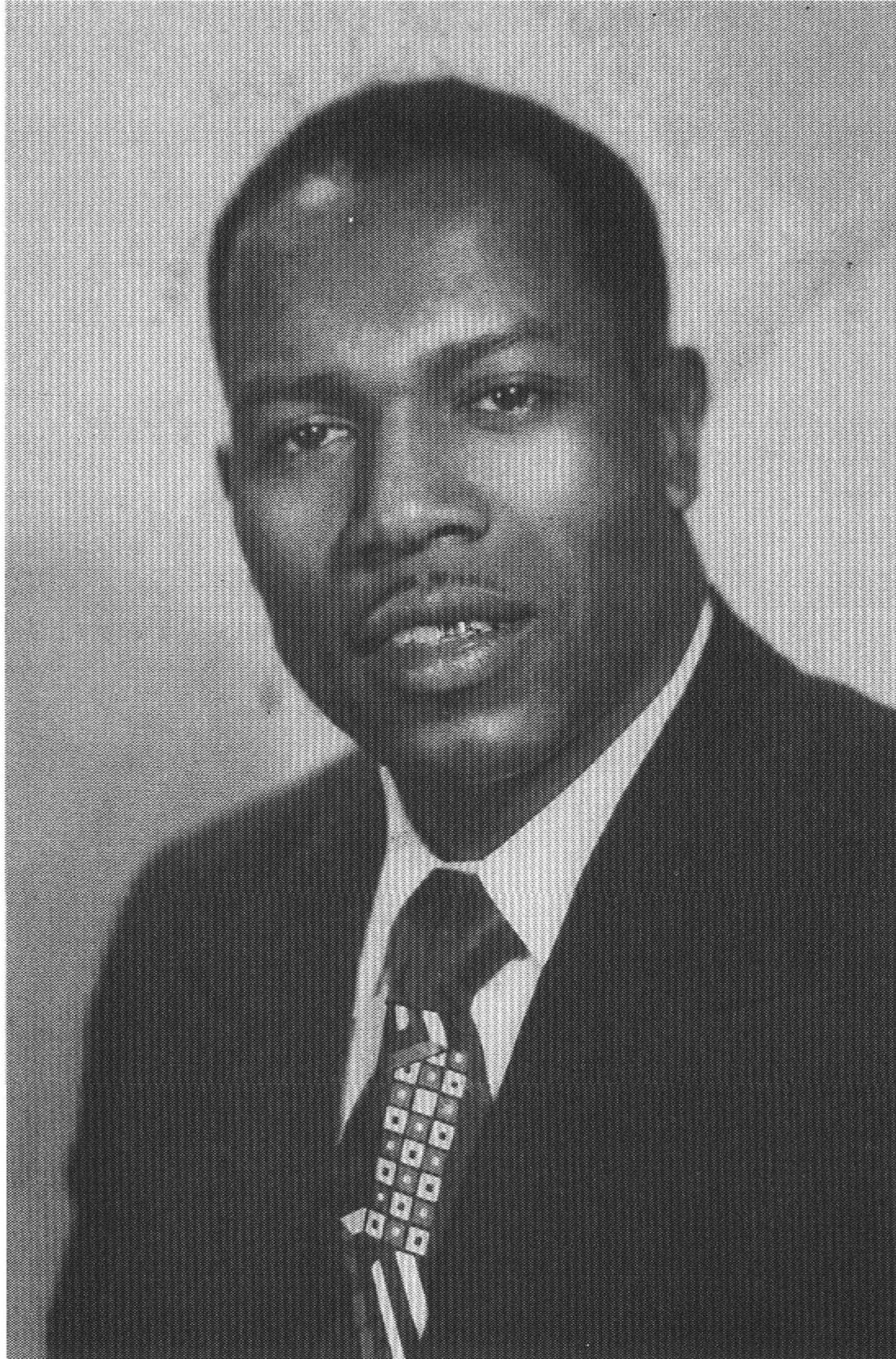
Searching for better employment, Wert heard about the expansion of the Naval Ammunition Depot at Hawthorne and a similar facility in Herlong, California, fifty miles northwest of Reno. He learned about these opportunities from friends in Arkansas and also from Clanton Williams, a friend who was already working in Hawthorne.

Wert had filed applications for employment at both depots but went first to Herlong. He found employment there at the base but before doing so supported himself by doing odd jobs. It was during this period that he met Eddie Scott; he used to drive to Reno to mow lawns with Scott, who later became one of the most important statewide leaders of the civil rights movement in Nevada. While in Herlong, Wert also met three brothers—Jim, Ardis, and Onie Cooper—who also became leaders of the black community in northern Nevada.

Wert soon moved to Hawthorne from Herlong, however, when he heard of a better job at the ammunition depot there. Nearly forty years later, Oliver Wert retired from the depot. In the meantime, he had married Clydell Gray, the sister of Otis and Manuel Gray, Jr. Wert was also one of the leaders of the NAACP branch during its most active years.

Barbara Scott was born and reared in Waco, Texas. Through a friend of her sister, she became acquainted with Shannon Harnage, who lived in Gladewater, a small town east of Dallas-Fort Worth, about sixty miles west of Louisiana. Harnage was another southerner who found employment at the depot. After several years of corresponding with him, Barbara came to the Hawthorne area to marry Mr. Harnage in 1949; in 1999 they were still living in the area. Barbara Harnage was secretary of the local branch of the NAACP for about 15 years.⁸

As these details illustrate, long-range migration is typically influenced by family or other personal ties. People respond to personal rather than to impersonal knowledge, and having relatives or friends in a new area makes the transition easier. For this reason, migrations often occur in patterns that bring together in the new location people from the same areas. Not enough informa-



Oliver L. Wert came from Louisiana to work in the depot in 1950. During World War II Wert served in the Marine Corps, assigned to the 52nd Antiaircraft Defense Battalion on the Solomon Islands and Kwajalein, in the South Pacific. (*Otis Gray*)

tion is available, however, to say whether a significant proportion of the black migrants to the Hawthorne area came from the same area or areas of the South.

THE HAWTHORNE AREA AND RACIAL DISCRIMINATION

The new black migrants encountered various forms of discrimination in their new home, ranging from rigid residential segregation at Babbitt, where most of them came first, to initial discrimination by the marines who provided law and order on the base, sometimes by literally running out of town persons suspected of some offense.

The Navy had built in the center of Babbitt—between the “colored” and white residential areas—an area called Babbitt Court, which housed various community facilities plus buildings for several businesses, leased to private persons. The movie theater in this complex had separate black and white sections—divided by a rope. The bowling alley also practiced segregation and, while the pharmacy operated by Warren E. Johnson (in 1961-62 an elected member of the Nevada State Assembly from Mineral County) accepted black customers, its soda fountain was segregated, with black and white signs depicting hands pointing to each area. Clydell Wert says that one of the things that young people used to enjoy doing was to reverse these hands.⁹

In general, the black residents found much racial hostility. Barbara Harnage



Barbara Scott from Waco, Texas married Shannon Harnage from Gladewater, Texas in Hawthorne in 1949. Shannon worked at the ammunition depot and Barbara was secretary of the local branch of the NAACP. In 1999 they were still living in the area. (Elmer Rusco)

says that she encountered more racial prejudice in the Hawthorne area in the late 1940s than she had experienced in Texas. She was insulted more often by being called a nigger. People said: "You should go back to Africa," and she was once told: "You Africans just sit over there and have babies." Mrs. Harnage, whose long-term marriage produced two children, did not hesitate to rebut these prejudiced statements, but they hurt.

In some respects, Babbitt and Hawthorne in the 1940s and 1950s were not like the South. No one attempted to deny black people the right to vote, the public school system was not segregated, and other "public institutions [in Hawthorne] such as . . . hospitals and funeral homes were not segregated." During the civil rights era, local fraternal buildings—the Veterans of Foreign Wars building and the Knights of Pythias Hall, for example—were available for use by black groups.¹⁰

Further, no housing discrimination in Hawthorne has been reported, although no doubt there were instances of prejudiced white persons declining to rent or sell to black persons or families. Today there is no African-American section of Hawthorne, and apparently there never has been such a restricted area.

Leaders of the black community believed at the time that there was some discrimination against black residents by law enforcement officials during the quarter of a century before the passage of civil rights legislation in the mid-1960s, however. For example, there was the case of Maggie Pride, a black woman found dead after being run over on the highway leading east out of Hawthorne late at night in April 1959. An autopsy suggested that she had suffered two separate traumatic events, an earlier severe head wound—which had proved fatal—and lesser injuries resulting from her collision with an automobile. It was learned also that she had been drinking before her death with several marines from the Naval Ammunition Depot, who had been driving her around in an automobile before she somehow ended up lying on the highway, severely injured. The NAACP branch officers were very disturbed by her death; branch records show that her case was discussed in at least eleven meetings of the branch or its executive committee between June 1959 and May 1961. These leaders thought there was reason to believe that she had been murdered and that her death was not investigated vigorously. They made substantial efforts to secure an adequate investigation, including locating witnesses and contacting a wide variety of state and national officials about their concerns. Ultimately, no one was arrested in the case.

Reno attorney Leslie Gray, a leader of the civil rights movement who was then a member of the Nevada Advisory Committee to the United States Civil Rights Commission, came to Hawthorne and appeared before the local grand jury about the case. This body concluded that there was not enough information to justify any indictments. However, the report of the grand jury also asserted: "It is the opinion of the Grand Jury that there was negligence shown in the collection of evidence in this case Many questions remain unanswered,

which possibly could have been answered had the collection of evidence been more thorough and efficient."¹¹

The most important discrimination problem faced by black residents of the area, however, was that a significant number of private businesses refused to accept black customers, or discriminated against black people when they were allowed to enter places of business. Such discrimination had gone on for a long time. A 1944 report by an official of the federal Committee on Fair Employment Practices noted complaints of discrimination in employment at the depot. It also stated that "Negroes are refused facilities throughout [Hawthorne], with many establishments carrying large signs which state that colored trade is not solicited." The previous use of such signs in businesses in Babbitt Court, plus specific instances of discrimination by several establishments on the depot, were also reported by this official.¹²

The two businesses most blatant in their use of these discriminatory practices—El Capitan and the Home Cafe—are discussed below. However, the black leaders asserted at the time, and in 1999, that such discrimination was widespread in Hawthorne (and had been earlier in Babbitt). For example, Oliver Wert wrote an article, published in the *Mineral County Independent News* (hereafter *Independent News*) on January 21, 1959, about a meeting in Hawthorne of the NAACP Coordinating Council, a statewide group. Part of this article states that

A standing committee from the Mineral County branch made a report of a recent survey of the places of public accommodation in the town of Hawthorne. The findings were that most places seem to think and have agreed that to serve Negro customers would cause their business to fail. Then one place is very tolerant in this respect.

Apparently the one nondiscriminating place was a cafe operated by Sarann Scruggs, a black woman who later moved to Las Vegas and, as Sarann Knight, managed the Moulin Rouge, the successor to the failed attempt to establish a casino in the Westside. In a statement written in February 1990, Oliver Wert asserted that almost all Hawthorne businesses except grocery, drug and liquor stores refused to accept black customers.¹³

Public records confirm these allegations. Two extraordinary meetings of the Mineral County Commission were held in August 1960 to consider complaints from the Hawthorne branch of the NAACP about discrimination by local businesses. The minutes of the branch show that the effort to get the County Commission to help end discrimination began in the summer of 1960. At a meeting of the branch executive committee on July 18, L. C. White reported that he had contacted the County Commission "and did get a date for a meeting on the 20th July 5:00 p.m." On July 28 the executive committee appointed a committee to meet with local business people.¹⁴

The official minutes of the first of these County Commission meetings, held August 2, are headed "Matters Relative to the NAACP." Present besides the three commissioners were District Attorney L. E. Blaisdell and County Clerk

Mary G. Barlow. Also present were several representatives of the NAACP—President Clanton Williams; chairman of the Executive Board William Parker; chairman of the Education Committee Oliver Wert; chairman of the Labor and Ministry Committee L. C. White; chairman of the Membership Committee Hershell Bryant; and Assistant Secretary John A. White. Also present was Jack McCloskey, editor and publisher of the *Independent News*, plus twenty-nine individuals listed by name and the businesses with which they were associated, although none of these persons was from the El Capitan or the Home Cafe.¹⁵

The sole topic of the August 2 meeting was a discussion of complaints made by the NAACP leaders and responses to them by the business people present. An *Independent News* article announced that the meeting would be held and that it had been called as a result of “the appearance before the board . . . of representatives of the local NAACP chapter” the previous week and that the “purpose of the meeting [was] to discuss the request of the NAACP that all persons be served in those food and drink establishments which presently do not cater to all races.”¹⁶

Unfortunately, the official minutes of the meeting contain no information about the content of the more than eighty-five statements made during the meeting, which lasted from 8:00 to 10:20 p.m. (Barbara Harnage says that “Oliver ate them out, but all it says is that he spoke.”) The meeting began with statements of the “complaint” from Parker and Wert.¹⁷

Chairman Henry R. Eddy then opened the meeting to “general discussion,” specifically inviting “each businessman to voice their [sic] opinion.” William Parker addressed a question to one of the business people—Ted Rodriguez—and then asked “if there is anything that the County Commissioners can do.” District Attorney Blaisdell responded “that there is not anything that he knows of that the County Commissioners can do, and if there is, that he would like to see the light.” Chairman Eddy “advised that the County Commissioners would not close the door on the issue” and that “the El Capitan would be contacted relative to a meeting with other food and liquor establishments that were absent.” In a newspaper article reporting this first meeting, it was stated that the purpose of the second meeting would be “to determine whether all will agree to a voluntary policy of no discrimination.”¹⁸

The newspaper story reported that the business people present had “stated they feared a substantial loss of business if the policy were to be changed, unless all such establishments agreed to change at the same time.” NAACP leaders had argued that the County Commission should support civil rights legislation to require such general compliance. The article went on to note that “officials” at the meeting had pointed out that “federal civil rights legislation is now before Congress, but that the state of Nevada never has enacted a specific law covering the issue.” The County Commission took no action to support proposed civil rights legislation at either federal or state levels. The article likewise reported no endorsement for the NAACP’s position at the meeting, and



Governor Pat Brown presents to Jack McCloskey a plaque from the California Newspaper Publishers Association. (*Jack McCloskey*)

Oliver Wert and Barbara Harnage say that no one among the many speakers expressed such support.

The second meeting, on August 8, was attended only by the commissioners, the district attorney, the county clerk, and ten businessmen representing local establishments, and George Goodall, the manager of El Capitan, who spoke although he was not listed as being present. The business people included Lindsay and Gordon Smith from El Capitan and Doris Hanson from the Home Cafe. Again, the official minutes do not contain anything about the content of the discussion, and this meeting was not reported in the local newspaper.

Barbara Harnage does not remember the October 8 meeting and thinks it likely that the NAACP leaders were not told about it. Evidently she is right. Unlike the first meeting, the second meeting was not announced in the newspaper or reported on afterward, and there is evidence that the branch was not contacted about it. When the branch executive committee met on July 28, it set the date of its next meeting for August 8, and there are minutes of an executive meeting on that date. At this meeting, there was discussion of the "drive to gain admittance to the Cafes and Motels," and the meeting approved spending money "to pay for the tape to record the meeting with the Co. Commissioners and business-men." Later this tape was apparently sent to the West Coast Regional Office of the organization. It seems clear that the branch executive committee did not know that another meeting was going on at the same time.¹⁹

At the end of the August 8 County Commission meeting the minutes record that

The Commissioners Ordered the Clerk to write Clanton Williams, President, Local Chapter of the N.A.A.C.P. and advise that the concensus [sic] of the owners and proprietors of the businesses mentioned [was] that equal service would not be given to members of the Negro race because, in their judgement, their businesses would suffer substantial economic loss if full equal rights were granted.²⁰

Clerk Barlow sent the letter to Clanton Williams on August 12. It listed the El Capitan Motel and Restaurant-Bar, the Anchor Motel, the Covered Wagon Motel, Dixie's Motel, the Rocket Motel, the Wright Motel, the Hawthorne Club, the Home Cafe, The Cliffs, and 3 R's Cafe along with the names of the representatives of these businesses who had been present on August 8, although the letter makes no mention of this meeting. The letter stated that "It appeared to be the concensus [sic] of the owners and proprietors of the businesses mentioned that equal service would not be given to members of the Negro race because, in their judgment, their businesses would suffer substantial economic loss if full equal rights were granted." As discussed below, this list included a business that was the location of the only bus station in town, and also housed a restaurant that served the bus passengers.²¹

These extraordinary events demonstrate beyond doubt that racial discrimination against black persons was widespread among private businesses in

Hawthorne in 1960 and that it was tacitly supported by the County Commission. Perhaps the statement by District Attorney Blaisdell means that he advised the Commission that it had no authority to enact an antidiscrimination ordinance. If this is what the statement means, it is not clear that it was correct. Local governments have a broad police power not enjoyed by either the state or national government, which entitles them to act in some cases to benefit the public without specific statutory authorization.

Even if it could not act to halt discrimination, nothing prevented the County Commission from stating that it disapproved of such practices but was powerless to act, and nothing prevented it from supporting state legislation (which had been proposed in previous legislatures) to outlaw such discrimination. The County Commission routinely supported legislation dealing with issues of local importance.

The *Independent News* reported of the August 2 meeting stated that, if a voluntary end to discrimination in Hawthorne were not possible, "representatives of the colored people will press for [state] legislation to implement the provisions of the equal rights in the constitution." The end of this story quotes an unnamed county commissioner as expressing some reluctance to back civil rights legislation. Reportedly this official stated, "We still hope to resolve this problem without ill feeling and without undue publicity for our community, but we also are going to try to keep candidates for office from confusing the issue for their own personal political advantage."



El Capitan Club, Hawthorne, Nevada, 1950s. (*Nevada Historical Society*)

The minutes of the NAACP branch meeting of August 15 report that a communication referring to “the previous meeting with the town officials” had been received. The import of this letter was that “the Business men of Hawthorne voted no on opening there [sic] doors to negroes.” The branch decided to write to the NAACP West Coast Regional Office about the matter.

The fact that the letter from the County Commission listed ten businesses does not mean that discrimination was limited to them. For one thing, Barbara Harnage remembers that barber and beauty shops once would not cut the hair of black residents. For another, she reports that some businesses that accepted black customers still practiced segregation. She says that in some grocery stores, for example, the clerks would wait on white customers first, even if they had come in after the black customers. For this reason, many black customers would do grocery shopping in Reno or frequent the one grocery store that treated them equally, without discrimination. The movie theater at Babbitt discriminated by seating black customers in only one part of the theater; at least one movie theater in Hawthorne had the same policy for many years.²²

The fact that two of the Hawthorne businesses were highly conspicuous in expressing their discriminatory policy may have contributed to the inaccurate conclusion that they were the only businesses in town with such a stance.²³

The Home Cafe offered Chinese as well as American food; it was owned and operated for years by Linn Leong—a Chinese American—and his family, although by August 1960 they may not have been its owners. Linda Leong, a daughter of Mr. Leong, reports that he and her mother—who was white—were divorced in 1959 or 1960 and that after this her father moved to Virginia City, where he started the Sharon House restaurant, which did not discriminate against black customers. The representative of this cafe who attended the August 8 County Commission meeting was Doris Hanson.²⁴

Barbara Harnage, Oliver Wert, Otis Gray, Bertha Woodard (an NAACP leader in Reno who often visited Hawthorne during the 1950s and 1960s), Jack McCloskey, and the *Las Vegas Review-Journal* all report that the Home Cafe had a hand-printed menu that was distributed solely to black customers. At a Hawthorne branch meeting in November 1960 the “special menu received from the Home Cafe” was discussed, and at a meeting on December 4, 1960, apparently it was decided to send to the Internal Revenue Service copies of the special menu, the Home Cafe’s ordinary menu, and a receipt showing the amount a black customer had paid for a meal. The branch also made photocopies of the special menu to distribute more widely.

Two versions of the special menu, both of which featured consistently outrageous inflated prices, are extant. One, which did not list any Chinese food, gave the price of coffee as \$12.50 per cup; refills, with meals, were \$5 a cup, and other items were similarly overpriced. The other, which listed “Chinese Dishes” and a “Special Club Breakfast,” also priced coffee at \$12.50 a cup and everything else at similar prices. (E.g., Green Vegetable Chow Yuke was at \$25. In

1956 Chow Yuke was listed as one of the dishes available in the cafe's most expensive Chinese dinner, which cost \$9.50 for the entire dinner). In addition, the special menu stated that there was a "Service Charge" of "50% of Order."²⁵

At the Hawthorne branch meeting of July 25, 1960, President Clanton Williams stated that George McNeal and Johnny Capucci had recently gone to the Home Cafe together. Capucci was a white man, and he was charged regular prices, but McNeal's breakfast was priced from the special menu; he was "charged \$20.60." McNeal reported that both had received receipts "and a signature of the waitress." In March 1963, McNeal, then President of the Hawthorne Branch, told a state legislative committee that he had paid \$20.60 for hot cakes, bacon, and coffee at the Home Cafe, and the *Las Vegas Review-Journal* printed a copy of the menu on which these charges were based. The Home Cafe was picketed several times by branch members.²⁶

El Capitan was the largest commercial business in Hawthorne. One of its owners told the Nevada Equal Rights Commission in 1962 that "40% of the economic security of that city was directly supplied by his establishment." While there is no way to confirm this statement, it is plausible. By the late 1950s El Capitan had the largest casino in town, in addition to its motel, bar and restaurant; no other business approached it in size. El Capitan bused in customers, and for a while flew them in on its own airplane, before a fatal crash ended this practice. In 1952 the club began an annual Lahontan cutthroat trout derby, with prizes for the largest trout caught in Walker Lake, and offered various other promotional activities plus live entertainment in its bar.

The business projected to the public an air of friendliness toward its customers. Typical was a statement in several of its usually weekly advertisements in the *Independent News*. This ad proclaimed: "Come As You Are—You Are Always Welcome at El Capitan Club and Lodge." But if black customers appeared (and were allowed to enter the restaurant at all) they were not served and instead were handed a printed statement which read: "Your Invitation to be in our El Capitan Club and Lodge, is revoked. We request that you leave the premises at once. The Management."²⁷

El Capitan was owned from 1944 to 1967 chiefly by two brothers who were originally from Vancouver, Canada. Lindsay and Gordon Smith had begun with a store in Los Angeles; later they moved to Silver Peak, a mining town southwest of Tonopah, where they operated a general merchandising store. When that failed in 1942, they moved to Gabbs, a town which sprang up quickly during World War II because it was the site of a magnesium mine that provided ore to the Basic Magnesium, Inc. plant in Henderson, in southern Nevada. In Gabbs the Smiths owned several businesses, one of which was a bar with a gambling area. The government closed down the magnesium mine in the middle of 1944, so the Smiths moved to Hawthorne and, in partnership with Barney O'Malia, bought a small casino owned by Mike Gallo. Later O'Malia's interest was bought by Woodrow (Woody) Loftin, who purchased

the entire business from the Smiths in 1967.²⁸

Lindsay Smith insisted at the time that his discriminatory policy was the result of his fear that he would lose customers if he served black people. An incident that took place in Carson City, as reported by publisher Jack McCloskey, makes it more likely that Smith was strongly prejudiced himself.

During a legislative session McCloskey went into the Senator Hotel, across from the state capitol, to have a drink with Lindsay Smith and Phil Ferris, the restaurant manager of El Capitan. Already in the bar were two black customers, one of whom was an employee of El Capitan; this man exchanged greetings with Ferris. Smith then asked the bartender: "Do you serve those people in here?" Told that the bar cared only about "the color of the money," Smith continued to press the issue. McCloskey reported that Smith "was somewhat aggravated, and he went out then to ask the poor cashier to get her on the ball about what was the policy—do you serve 'em?" When he came back, Smith asked Ferris if he knew the two black men and was told that one of them worked for Smith at El Capitan and that he was "one of the best maintenance men we have around." The black employee "knew what was bugging Lindsay when Lindsay saw him at the bar, but he ducked out because I guess he didn't want to lose his job at the El Capitan!" This incident may have triggered the later termination of black employees at El Capitan.²⁹

Apparently El Capitan's discriminatory policy did not extend to other minorities; the Nevada Equal Rights Commission reported in 1962 that "the Filipino, the Chinese, the Japanese, the Indian, the Mexican will all be honored [at El Capitan], thereby leaving the only minority that the discrimination was directed toward as the Negro."³⁰

What was distinctive about the policy of this business was the extreme lengths to which El Capitan went in carrying out and maintaining the policy in spite of many protests. In his oral history, Jack McCloskey admitted that the policy amounted to an "injustice" and remarked that Lindsay Smith was "bullheaded" in pursuing it.³¹

McCloskey's conclusion on this point is amply supported by the evidence. The Nevada Equal Rights Commission reported in 1962 that

the chairman [of the Commission] asked Mr. Smith if representatives of the United States government or of the State of Nevada, or other men who would be representing governmental agencies, both international and national, would visit his establishment would they be served. His direct quote was "Services would be denied if the person in question was Negro."³²

An incident involving the Nevada Advisory Committee established that El Capitan actually followed this rule. A 1963 report of the committee stated that, at the lunch recess of its hearing in Hawthorne on September 8, 1962, the chairman of the committee, the Reverend H. Clyde Mathews, Jr., called El Capitan for lunch reservations for the committee and several people assisting it: Phillip



Woodrow Wilson. (*Nevada Historical Society*)



Governor Grant Sawyer. (*Nevada Historical Society*)

Hammer, the legal counsel of the national Civil Rights Commission; a second unnamed representative of the Commission; and others, including a Mr. Schultz, who was a "personal representative" of Nevada Governor Grant Sawyer. Mathews was told that "the reservations would be honored provided neither one [sic] of these people was colored." At lunchtime the committee, accompanied by the individuals named and James Anderson of Las Vegas, a representative of the Las Vegas branch of the NAACP, went to the restaurant to eat.

Anderson and Woodrow Wilson, a member of the committee (and later the first black state legislator in Nevada's history), were black. The manager of the restaurant told this group that Wilson and Anderson "could not be served because 'We don't serve coloreds, and these boys know that'." The report added: "Naturally, we left," and then went on to state that Phillip Hammer "advised the Committee that even in his work with biracial Advisory Committees in the South he had not experienced such a denial of accommodations."³³

Even a personal telephone call from Governor Grant Sawyer, who cited a 1961 statute stating that such discrimination was against the policy of the state, could not change El Capitan's practices. On January 18, 1962, Herbert Pierce, a black realtor from Oakland, California, called the governor's office to report that he and his wife, two men from Los Angeles, and Edward Guy, a "gaming dealer" from Reno, were being refused service in the restaurant at El Capitan because of their race. Muriel Mooney of the governor's office placed long-distance calls to the restaurant, saying that the governor wished to speak with the restaurant manager. Told that neither the manager nor Smith was available and that "no one was in charge" at the restaurant, the Governor finally spoke with a waitress named Lee Boles. According to notes made by Mooney at the time,

the Governor reminded [Ms. Boles] of legislation which had been passed at the last session which said that no one should be denied service in a restaurant because they were colored; and if this was the reason these people were being denied service he wanted her to inform the manager that he personally would see that this case was called to the attention of the Human Relations Board [sic].

About an hour after his first call, Mr. Pierce again called the governor's office to report that his party "were being treated in a very hostile manner and had still had no service."³⁴

Another attempt to break down the barriers erected by El Capitan was initiated by Donal (Mike) O'Callaghan, later a two-term governor of Nevada. It was also futile. In January 1962 O'Callaghan, then the Director of Clark County's Juvenile Court Services office, assigned Nancy Ellen Williams, a black employee of his office, to accompany a teenager who was a client of the agency to a foster home in Hawthorne. Ms. Williams was pregnant and it was wintertime, so O'Callaghan authorized her husband, Jesse Bernard Williams, to go with her and the girl in a state car.³⁵

Hawthorne is about a six-hour drive from Las Vegas, so Ms. Williams and her husband were to stay overnight after delivering the girl to her foster parents. El Capitan was chosen as the motel and, because O'Callaghan knew about their discriminatory policy, he himself called in advance to make the reservation. When the Williamses drove up to the motel in the state car, Ms. Williams was told, "We cannot serve you," although she had her confirmation number. In a 1997 interview, Ms. Williams said: "I went back outside and found that every Sheriff's car in the county was buzzing around out there. I called Mike on the pay telephone and told him what had happened. He asked me to go back in again and ask them to honor my reservation. I did but they refused me again."

Nancy and Jesse Williams met later that day with several people from the Hawthorne NAACP branch—who provided them with a meal—and they then spent much of the night driving back to Las Vegas. O'Callaghan then wrote a letter to Bert Goldwater, chair of the Equal Rights Commission, copies of which he sent to the governor, the Clark County Commissioners, District Judge David Zenoff, and other persons. He proposed an investigation and suggested that, if Williams had been discriminated against because of her race, the county and state should stop reimbursing public employees for patronizing El Capitan.³⁶

Nancy Williams said that her husband told NAACP leaders in southern Nevada about what had happened and that the Reverend Prentiss Walker then "organized a carload of people who drove up to Hawthorne and held a prayer meeting over the issue. I think a bunch of kids also drove up there, weren't served and protested. Rev. Walker also later led another group to Hawthorne and picketed El Capitan."

El Capitan's policy was unbending in almost every respect. During the 1950s and early 1960s the Las Vegas-Tonopah-Reno Stage Line (LTR) ran daily buses between Las Vegas and Reno. These stopped at El Capitan for meals, but black passengers were not allowed to enter the restaurant. They had to stay on the bus while the bus driver, who had collected money from them, went into the restaurant to buy food and bring it back for them. Katherine G. Hale remembers that when student athletes from the University of Nevada, Reno were bused through Hawthorne in the early 1960s, the black athletes had to eat lunches they had brought with them on the bus while the white athletes were eating in the restaurant.³⁷

Evidently the only exception to El Capitan's sweeping discriminatory policy was that it would "feed all school groups regardless of race, color or creed," as a January 1964 statement from the business put it. But even so, in practice the result was sometimes the same. This statement of policy was prompted by a complaint filed with the Equal Rights Commission by the principal of Western High School in Las Vegas, who charged that the band from his school had been refused service in El Capitan's restaurant the previous November.

El Capitan's defense was that the members of the band were seated in the

restaurant and were going to be served when a black member of the band was stopped from playing a slot machine by a pit boss who, according to the statement issued by the club, "informed the colored boy that colored trade was not solicited in the establishment." Following this action, all the members of the band walked out of the restaurant without waiting for service.

In this case, too, El Capitan was unswayed by the personal intervention of Governor Grant Sawyer. Sawyer wrote the owners of the restaurant a letter which asserted that, if the facts in the complaint were true, El Capitan's policy was not in conformity with the "public policy" of the state, as spelled out in the 1961 law. He stated that "El Capitan is not an island, independent of public control," and reminded the owners that their place of business was licensed by the state. Governor Sawyer then stated that he would "appreciate your written notification that El Capitan does not and will not tolerate racial discrimination in any sense."³⁸

Instead of complying, Jack Streeter, El Capitan's attorney, sent a letter to Governor Sawyer declaring that "there is no Federal legislation nor State legislation that requires legitimate private enterprises to conduct their businesses pursuant to directives of government officials, no matter how lofty their office may be" and that an attorney general's opinion had held that gambling licenses could not be revoked because of discrimination. Mr. Streeter did not point out that there was another attorney general's opinion holding that the governor did have such authority.

It has been suggested that it was the influence or power of El Capitan and/or the Smith brothers that accounts for the widespread discriminatory pattern in Hawthorne. The Nevada Equal Rights Commission held a hearing in Hawthorne in November 1962. While no transcript of this hearing has been found, there are quotations from it in the 1963 report of the Advisory Committee to the United States Civil Rights Commission.

Reportedly Ted Rodriguez, operator of 3 R's Cafe, one of the businesses that refused to accept black customers, responded to a question from the chair of the Equal Rights Commission about whether his and other businesses would change their policies if El Capitan were to "relax" its discriminatory policy. Rodriguez said that "he couldn't answer for the others but positively for himself he thought it would help a great deal. He further stated in no uncertain terms that if legislation were provided, it would give the smaller businesses the protection of not being penalized either socially or economically for their open-door policies."³⁹

Passengers of the LTR bus line also encountered discrimination in Hawthorne. The ticket station for the bus line was for many years inside El Capitan. In June 1958, Virginia Givens of Hawthorne went to the station in El Capitan to wait for a bus to Reno; she was ill and was going to Reno for medical aid. Forced to wait for some time, she sat down in the restaurant to eat, and not only was not served but was forced to stand for nearly two hours before the bus came. An

attempt by the woman who sold the bus tickets to persuade Barney O'Malia of El Capitan that the policy did not apply to Givens because she was a bus passenger had no effect.⁴⁰

Givens later complained to Franklin Williams, director of the West Coast Regional Office of the NAACP, who wrote letters to Nevada Governor Charles H. Russell and to Western Greyhound Lines in San Francisco. Governor Russell wrote to Givens on April 30, 1958, that he was "sorry about the treatment" she received but that he had no "jurisdiction over Reno or Babbitt over the acts of individuals." Western Greyhound replied that its company was not involved in the bus line going through Hawthorne but that it would refer the complaint to LTR in Reno, which did not respond to the branch. The Hawthorne branch wrote to Franklin Williams on June 30, asking if he had any "legal advice" about this matter, but apparently no legal action was ever taken.⁴¹

The Nevada Advisory Committee reported in 1963 that at some later time, when the management of El Capitan "feared integration pressure," the bus depot "was moved to the building housing the Three R's Cafe" operated by Ted Rodriguez. Barbara Harnage states that "when we filed a discrimination complaint against the bus station, they moved it outside." The bus depot was not moved until February 1962, to a location "next to the 3 R's Cafe."⁴²

The fear of legal action against discrimination in this situation was not unrealistic. Segregation in bus travel had been literally fought over in the South from 1947, when Bayard Rustin led a "Journey of Reconciliation" by bus through the upper South. In 1955 the Interstate Commerce Commission had outlawed segregation by bus companies, including terminal facilities owned by the companies, although not in facilities independently owned. In 1961 there was a Freedom Ride through the South led by the Congress of Racial Equality which led to the burning of a bus, beatings for the Freedom Riders, and a regulation by the Interstate Commerce Commission (requested by the attorney general of the United States) outlawing all forms of segregation in interstate transportation, including bus terminals.⁴³

Following the 1962 hearing in Hawthorne, the Advisory Committee wrote the Interstate Commerce Commission, inquiring whether discrimination by an eating facility located in the same building as a bus station was illegal. The Advisory Committee later reported that "On February 21, 1963, I.C.C. Chairman Walrath informed the Civil Rights Commission that since the restaurant was operated completely separate from the terminal and since the carrier in no way avail[ed] its passengers of the restaurant facilities, the restaurant is not a 'terminal facility' subject to the I.C.C. regulation banning segregated terminal facilities."⁴⁴

There was also racial discrimination in private employment in Hawthorne, apparently to an extensive degree. In 1963 the Advisory Committee reported that in Hawthorne "little opportunity is offered the Negro in employment" and went on to say, "There is one Negro employed as a car washer, one works

at the hospital, and that is about all. Employment opportunities within the city of Hawthorne . . . are extremely limited for Negroes." NAACP notes on the hearing report that, at that time, there was one black deputy —Tommy Carlton —hired by the Sheriff's Department, but Oliver Wert said in 1990 that this deputy "was ordered to arrest only black violators."⁴⁵

The 1963 report also stated that "the El Capitan used to hire Negro maids and janitors but they do not now for reasons unknown." Perhaps the earlier described incident in the bar in Carson City had unfortunate effects for black employees of this business.⁴⁶

One element in the situation is that the local newspaper, the *Mineral County Independent News*, did not come out editorially against racial discrimination in the 1950s and 1960s, although it also did not support it. Further, the paper, with few exceptions, did not report the extent of discrimination in Hawthorne and reacted to factual reports in other newspapers or in official reports by attacking the persons doing the reporting rather than attempting to refute their assertions.

For example, in the aftermath of the O'Callaghan/Williams affair discussed above, "Jasper" (Jack McCloskey's front-page editorial feature) spoke of "the numerous false reports appearing in print" as a result of the incident, suggested that critics of discrimination in Hawthorne were resorting to "blanket condemnation of an entire community," and even spoke of those who had conducted a sit-in at El Capitan as people who "assert" that this business "practices discrimination." That this business would not accept black customers in almost all circumstances was not only well known but admitted by El Capitan. In the 1981 *Independent News* Centennial Issue about the history of the town, there is no mention of black residents or of the discrimination in the past.⁴⁷

The newspaper did occasionally publish signed articles written by civil rights leaders Otis Gray, Oliver Wert, and Clanton Williams, but Wert insists that some articles were rejected and others were changed without the permission of the authors; Barbara Harnage repeats this allegation. During the 1960s there were also occasional columns in the *Independent News* by R. M. Aalbu, who often reported about national civil rights activities. Aalbu often disagreed with McCloskey, and for a brief time published a rival newspaper, the *Mineral County Forum*.⁴⁸

Publisher and editor Jack McCloskey is deservedly one of the most respected newsmen in Nevada and his *Mineral County Independent News* during this time was an excellent one for a small-town paper that made no attempt to cover national, international, or (for the most part) state news. His newspaper's treatment of this issue from the mid-1950s to the mid-1960s could only have made it difficult for his readers to understand the situation fully.

It is impossible to know what most white residents of Hawthorne thought about all this discrimination, but there is no evidence that many favored action to stop the practices. The fact that no white opponents of discrimination at-

tended the crucial August 2, 1960, meeting of the Mineral County Commission, which had been announced in advance, is one such indication. Another is a "poll" taken by El Capitan of its customers. While we do not know how this survey was conducted, a very large majority of the respondents stated that they approved of refusing to allow African Americans to frequent the business and agreeing that they would cease to go to El Capitan if customers of this race were admitted. Another indicator is that, although the Nevada Council of Churches took stands against racial discrimination during the 1960s, there is no evidence of any white church in Hawthorne taking such action. Perhaps some of the many employees of El Capitan feared repercussions if they were to take a public stand on an issue about which their employers felt strongly.⁴⁹

In addition, the leaders of the NAACP branch who were interviewed in 1999 could name only R. M. Aalbu and a priest whose name could not be recalled as supporters of their position during the 1950s and 1960s. Apparently they forgot Johnny Capucci, who accompanied George McNeal when he ate his expensive meal at the Home Cafe, and probably there were other white supporters who have been forgotten. The presently surviving record does not disclose significant white support for ending racial discrimination in Hawthorne.

ATTEMPTS TO OVERCOME DISCRIMINATION IN HAWTHORNE

Various attempts to overcome discrimination in Hawthorne, from the 1950s into the 1960s, have been incidentally noted above. Almost all of these efforts originated with the Hawthorne branch of the NAACP. This was also the case in other parts of northern Nevada and in southern Nevada, where civil rights activities affected larger numbers of people. Other civil rights groups were few and far between in the state.

It is hardly surprising that the NAACP took the lead in Nevada in trying to end discrimination. Although organized largely by white idealists in 1909, the chief reason for establishing the national organization was to support the civil rights agenda of black activists, including W. E. B. DuBois and Monroe Trotter. This agenda was a reaction against the accommodationist stance of Booker T. Washington, who had accepted disfranchisement and segregation in the South, although privately he took such steps as he could against these deprivations of rights. From the beginning and for many years thereafter the national organization provided a forum for Dr. DuBois in his role as editor of *Crisis*, the organization's monthly magazine.⁵⁰

Local units of the NAACP had been organized in Nevada as early as 1919, when a Reno branch was established; there was also a branch in Las Vegas during the 1920s. But stable, ongoing local organizations have existed only since 1945, when branches in the state's two largest cities, Las Vegas and Reno, were re-established.⁵¹

There was an attempt to organize a Hawthorne branch in 1944; in that year the national office of the NAACP was sent a list of seventy-six names of charter members, with a note that "because of conditions we have been unable to organize." Otis Gray says that Frederick J. Frye, president of the Reno-Sparks NAACP from 1946 to 1949, came to Hawthorne about 1949 to try to organize a branch there. The branch operated informally for several years before receiving a charter on May 22, 1955.⁵²

While the formation of the Hawthorne branch came approximately fifteen years after the arrival of the first black workers in the area, there had been protests of discriminatory policies prior to this time. Otis Gray says that when he arrived in 1946, he went to the movie theater in Babbitt Court. He found there a rope separating the white from the Negro sections of the theater, and was so incensed that he cut the rope and sat in the white section. He was arrested by Marines—the military police at the Depot—who "threatened me with all kinds of things" but eventually let him go back to see the rest of the movie. The rope was then replaced; it was only after the branch was organized and protested against the policy that segregation was abandoned in this theater. There were also early efforts against housing segregation in Babbitt.⁵³

The branch attempted to conduct sit-ins at El Capitan on at least three occasions during the late 1950s and early 1960s. One of these was reported by the *Independent News* in its issue of February 15, 1961. "About 60 members of the National Association for the Advancement of Colored People appeared at the doors of El Capitan casino last Saturday evening, with the previously announced intention of starting a sit-in protesting the policy of the El Capitan management of not catering to Negroes." According to Oliver Wert, who was a co-captain of the demonstration, with William Parker, a sheriff's deputy denied the group entrance by sitting on a chair in the doorway, with his legs blocking the door. Wert told him: "If you move your feet, we'll go in there," but the officer would not let them in.

After this attempted sit-in, Jimmie Lee Mitchell, the secretary of the branch, wrote Governor Sawyer inquiring about whether "our rights were being violated or not by being blocked by Special Deputies at the door." Mitchell wrote that District Attorney Blaisdell had told members of the branch that he did not know whether this action was a violation of their rights.⁵⁴

There were also occasional sit-ins—or attempts at sit-ins—at other places of business in Hawthorne. Probably there were other attempts that left no records, and not all the ones for which some evidence was found are listed here.

At a branch executive committee meeting on July 18, 1960, it was reported that there would be several attempts to integrate businesses in Hawthorne, beginning on Saturday, July 16. On that date Mr. and Mrs. J. White were to undertake some kind of action, presumably a sit-in; they were to be followed sequentially by three other couples, each on a separate night.

In August 1962 Oliver Wert wrote that on August 4 of that year, "Eddie Scott

President of the Reno Branch, and Oliver L. Wert of Hawthorne, went to the 3 R's Cafe but were refused service." Barbara Harnage remembers sit-ins at the 3 R's and that a grocery store was picketed. All of these efforts were planned to be and were nonviolent; the branch received advice on how to act in such situations from the West Coast Regional Office and no doubt its leaders were also aware of the much more visible nonviolent efforts going on in the South at the time.⁵⁵

In the late 1950s the three major Nevada branches of the NAACP—Las Vegas, Reno, and Hawthorne—formed a statewide coordinating council, to increase the effectiveness of their efforts to secure state civil rights legislation. In 1956 informal meetings of a group that was at first called the Nevada NAACP Civil Rights Committee were held in Hawthorne, Tonopah, and Las Vegas. The group was inactive during 1957 but—at the initiative of the Reno-Sparks branch—reorganized in 1958, renamed itself the Nevada State Coordinating Council, and elected Ulysses Woodard of Reno its chairman. During 1958 and 1959 the Coordinating Council held several statewide meetings, in Hawthorne, Reno, and Las Vegas. Formal bylaws were contemplated but never adopted. The West Coast Regional Office was asked for advice and aided the new organization; sometimes officials of the Regional Office came to Hawthorne or other cities for its meetings.⁵⁶

During some of these meetings, members participated in sit-ins at El Capitan, in support of the local efforts. Bertha Woodard of Reno remembers participating in sit-ins at this restaurant while attending such meetings. In August 1962, Oliver Wert wrote a letter to the chairman of the Advisory Committee, reporting that on January 27, 1962, "about fifty citizens, members of the Nevada Coordinating Council attempted to obtain food at the El Captain [sic] Restaurant, but were refused service," following which "a sit-in was staged and lasted approximately 1 1/2 hours." As always, black customers were refused service and handed the printed statement of the club's policy.⁵⁷

Obviously, the primary effort to end racial discrimination in Hawthorne was made by members of the Hawthorne branch, even though—at their request—at times there were NAACP members from other places in Nevada helping them, as well as representatives from the West Coast Regional Office and state or federal investigative bodies. Oliver and Clydell Wert and Barbara Harnage and perhaps other leaders also occasionally travelled to Reno to support protests by the branch in the Truckee Meadows. For example, they joined the picket lines in front of the Reno Woolworth's store in 1960.⁵⁸

When Jack McCloskey's *Independent News* reported these events at all, it charged that the controversy over civil rights in Hawthorne was stirred up by "outsiders." In 1999 interviews, McCloskey was still incensed at the presence in Hawthorne of Las Vegas civil rights attorney Charles Kellar, as well as at remarks made in Hawthorne by Tarea Hall Pittman of the West Coast Regional Office, which McCloskey interpreted as a charge that Hawthorne—rather than

the state of Nevada—was “the Mississippi of the West.” However, Kellar never filed any suits affecting Hawthorne and the help from the regional office was minor and not very helpful to the Hawthorne branch.

Lindsay Smith vigorously resisted for many years all efforts to end discrimination at his business. He had testified before the Equal Rights Commission in 1962. However, after initially agreeing to appear voluntarily in January 1964, Smith defied a subpoena ordering him to appear before the Commission at a hearing in Hawthorne.⁵⁹

Moreover, Smith had his attorney sue the Equal Rights Commission and its individual members for damages, asserting that it had no legal authority to require attendance of witnesses or production of documents, and that its activities were hurting his business. The statute creating the Equal Rights Commission stated specifically that it could issue subpoenas, and the state Supreme Court upheld the legality of this authority on November 12, 1964. However, the effect of Smith’s suit was to halt hearings of the commission for ten months.

THE END OF RACIAL DISCRIMINATION IN PUBLIC ACCOMMODATIONS

Four general sessions of the Nevada legislature, from 1959 through 1963, refused to pass meaningful civil rights legislation. The failure of the 1961 law to end discrimination has been noted above. In June 1964, however, the United States Congress passed the Civil Rights Act outlawing discrimination in public accommodations engaged in interstate commerce. Lindsay Smith had told the Nevada Equal Rights Commission in 1962, as a 1963 report by the Advisory Committee noted, that he would “follow the law to the letter in the event non-discriminatory laws were passed by the state.” When Congress acted, he and other businesses in Hawthorne immediately abandoned their discriminatory practices.⁶⁰

There is widespread agreement that ending discrimination in Hawthorne produced no problems for anyone. In an article published in the *Independent News* in 1965, Otis Gray, then president of the Hawthorne branch, wrote: “To those who said there would be trouble when public accommodations in this locality were open to all, we are proud to say that there has not been one single incident that has happened to bring about ill-feeling between the races in this town, nor do we or the law enforcement agencies expect any.”⁶¹

Publisher McCloskey, in his 1970s oral history, agreed that “when the bars were let down and no question about the blacks entering, there weren’t all that many that wanted to go up and drink at the El Cap, or even eat there So that it didn’t bother anybody, didn’t hurt them a bit to have the black citizens in with the whites, the Orientals the Indians and all else.”⁶²

Oliver Wert, who had worked for years to win the right to go into all places of public accommodation, was at the time not willing to thank the businesses

involved for complying with the law. In 1999 Wert reported that

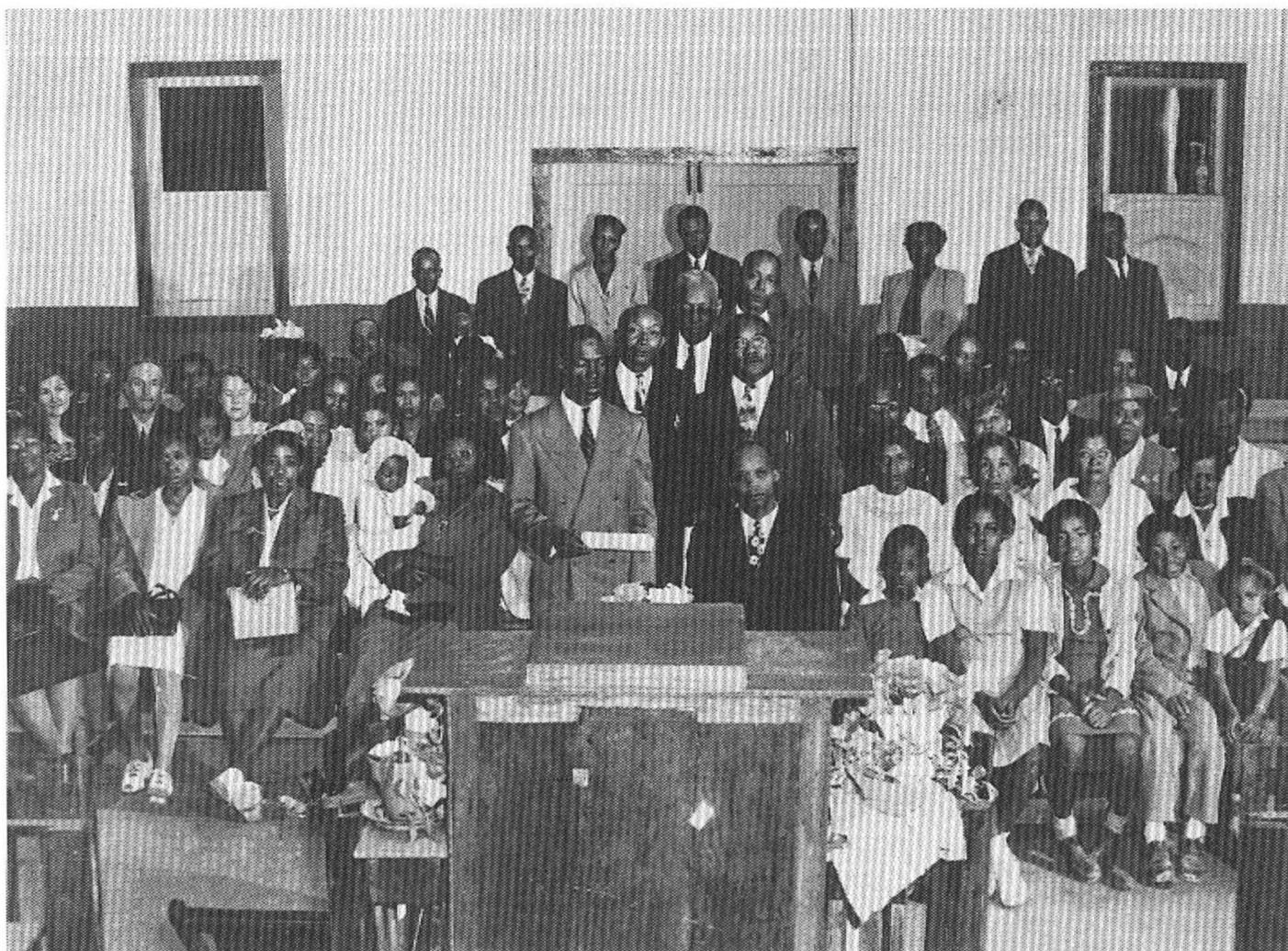
El Cap finally gave up after passage of the federal Civil Rights Act, in 1964. After we heard the bill had passed, we called people and seven or eight of us went over there; they served us, told us we could use the swimming pool, and so on. I told them: 'You had to let the federal government tell you what to do; I have no thanks for you, brother.' It was six months before I went back there.⁶³

The branch was well aware, however, that employment opportunities were not automatically provided by passage of the Civil Rights Act. In a signed article in the *Independent News* on January 16, 1965, Otis Gray wrote, "Now that we . . . have had time to assess and evaluate the passage of the [national] Civil Rights Bill, . . . we feel we must restate our aims and rededicate ourselves to achieving equality on the Economic front." He went on to say that "In all of Mineral County, we have knowledge of only three or perhaps four Negroes that are employed by the county and none by the local merchants in Hawthorne or Babbitt." By February 1972 El Capitan was reporting to the Nevada Equal Rights Commission that it had fourteen black service workers, plus an Asian and a Spanish-American service worker, a black dealer, two black keno writers, two black booth cashiers, two black cooks, a black waitress, and a black gardener as well as six Spanish-American employees in this nonservice worker category.⁶⁴

HAWTHORNE TODAY

In 1999 Hawthorne still had a substantial African-American population, by the standards of small towns in Nevada. Moreover, surviving leaders of the civil rights movement in that town were highly respected members of the community. In 1999 Barbara Harnage had been an elected member of the Mineral County School Board for seventeen years, had chaired this board for eight or nine years, and had chaired the state organization of school boards. Oliver Wert had served two four-year terms as a member of the state board that oversaw the Comprehensive Employment and Training Act (CETA); he was appointed to this position by Governors Mike O'Callaghan and Robert List. Clydell Wert had been Director of the Mineral County Advocates to End Domestic Violence for eight years in 1999.⁶⁵

No contemporary disagreement could be found that black citizens of Hawthorne are free from discrimination in public accommodations, employment, or other areas, although employment opportunities came slowly. The Werts and Barbara Harnage disagree as to whether the school district has tried hard enough to secure black teachers for the public schools; in 1999 there were still no black teachers there. The Werts and Harnage agree that the few school programs on black history are inadequate. However, everyone contacted for



In 1999 there were four predominantly black churches in Hawthorne, the oldest of which is Bethel Baptist Church, which dates back to 1943. This photo was taken in 1948. (*Otis Gray*)

this article agrees that the injustices of the past have almost completely disappeared without leaving or creating any problems.

There is no space here to discuss the institutions that black residents of Hawthorne have built within their small community, but in 1999 there were four predominantly black churches, the oldest of which is Bethel Baptist Church, which dates back to 1943. For a time, there was also a unit of the Prince Hall Masons in Hawthorne. The NAACP branch that was so active for many years was no longer in existence in 1999. There have been several businesses in Hawthorne operated by African Americans, although for many years the only ones were the place operated briefly by Sarann Hughes and the Nu-Way Cleaners, owned by Clarence Blanks.

In the 1990s, as Table 2 indicates, Hawthorne experienced a small influx of Hispanics and Asians. Like the state as a whole, Hawthorne has become more diverse racially and culturally. Presumably this will help prevent a recurrence of the discrimination that once existed.

CONCLUSIONS

Although the events recounted here can be interpreted in various ways, the author's conclusions on several points may nevertheless be of interest. First, it remains hard to understand why discrimination was so widespread and lasted so long in Hawthorne. One argument is that residents of Hawthorne were not used to seeing black faces and therefore refused to grant black people equal rights. While ethnocentrism in some form may be universal or nearly so, hostility to people outside one's own group is not. In this case it is clear that the images of African Americans were negative at the time and that this accounts for the hostility toward people not previously known personally.

Without the pre-existing negative images, firsthand experiences with the newcomers from the South should have quickly eroded prejudice. Most of the new black workers came with their families or started families after their arrival; they were not single men or homeless or persons fleeing from prosecution, but ordinary working people like the white newcomers and the longer-term residents of Hawthorne. Few were highly educated—apparently there were no black professionals in Hawthorne until the arrival of Dr. Timi Buckhaultner in the 1980s—but the educational level of white residents of the town is not high either. The absence of a local attorney sympathetic to their cause, whether black or white, or of effective legal assistance from other sources obviously hampered the NAACP in its efforts against discrimination.⁶⁶

Another possible explanation for this conundrum is that Hawthorne was for a long time dominated by the Smith brothers, who were for some reason unusually prejudiced against black Americans and somehow coerced other Hawthorne businesspeople into accepting the policies dictated by their prejudice. Lindsay Smith does seem to have been personally prejudiced in this matter, but it is not clear how he could have coerced many other owners of businesses in Hawthorne. It is also impossible to imagine that the Smiths could have coerced others into refusing to serve customers of, say, Irish descent.

In other words, either of these explanations assumes that many of the people engaging in discriminatory acts were carrying in their heads major negative images of persons of African descent—images not derived from the behavior of the newcomers but from the general culture of the nation.

The influence of prejudiced attitudes is also clear when one examines the reaction to the argument that businesses would lose customers (bigoted white customers, since there would obviously be a gain in black customers) if they accepted black trade. The answer to this fear was stated at the time and was demonstrated to be true in 1964: If there is a general law applying to all businesses, there is no place for bigots to go and therefore no reason to think particular businesses will be harmed. The failure to convert fear of economic loss into support for civil rights legislation can only be explained on the assumption that, consciously or unconsciously, the argument was supported by some-

thing other than rational calculation.

In other words, white racism, as a pattern of beliefs assigning inferiority to some people solely because of their race, has to be invoked as a major part of the explanation for the discriminatory patterns reported here. R. M. Aalbu, a local white supporter of the goals of the civil rights movement in Hawthorne, wrote in a 1963 newspaper column that "What my Negro friends must understand, and I think a very large number of them do understand, is that there is a deep-seated fear and distrust of the Negro among a large number of White people. The fact that this distrust is unfounded is beside the point." Fear can be a component of white racism, a complex and multifaceted structure of ideas.⁶⁷

The hard work and sacrifice of the civil rights movement, in Hawthorne and elsewhere in Nevada and the nation, have clearly reduced the prevalence and strength of white racist ideas. But it would be unwise to assume that a structure that has profoundly influenced American life for hundreds of years has disappeared entirely.

Another conclusion of this study has to be that, in spite of the persistence of white racist attitudes, law does affect conduct. On its face, as the lawyers say, law often either commands or condemns certain types of conduct. But it is not always the case that even constitutional laws—the most fundamental ones—are obeyed. They may even be widely and openly ignored, as was the case with national Prohibition for a decade and a half earlier in the twentieth century.

In this instance new law changed conduct; the most egregious forms of racial discrimination in Hawthorne—which had not been abandoned despite moral arguments, appeals based on constitutional rights, and nonviolent protest over many years—were dropped quickly as soon as a law was passed, and other barriers later fell as well. The legal revolution brought about by the civil rights movement moved us closer to the constitutional ideas that became part of an American consensus following the Civil War.

NOTES

¹David F. Myrick, *Railroads of Nevada and Eastern California* (Berkeley, Calif.: Howell-North Books, 1962), Vol. I, 166-210; *Hawthorne's Centennial/1881-1981, Independent News*, Special Centennial Issue, 8 April 1981, various materials in vertical files in the Mineral County Public Library, the State Library in Carson City, and Special Collections at the University of Nevada, Reno Library.

²Edward C. Johnson, *Walker River Paiutes: A Tribal History* (Salt Lake City: University of Utah Printing Service, 1975) and vertical file on Chinatown, Mineral County Museum, Hawthorne.

³National Archives-College Park, Records of the Department of the Navy, RG 19, Bureau of Naval Personnel, General Correspondence, 1941-1945, Box 1583, File "NTI-13, 45-67." In June 1944, Captain Vossler protested a visit by a black Navy band, citing the 1942 decision. A white band was sent instead. RG 19, Box 1583, File "NTI-13, 1 January 1943 -." In 1942 Captain Vossler had written a note to his son, who evidently had something to do with personnel decisions made in Washington. This handwritten note asked that if he could not get another Filipino steward to replace his current steward, "please *do not* send a colored man here and forget all about this letter" (underlining in original), RG 19, Bureau of Naval Personnel/General Correspondence/1941-1945," File "NTI-13, 45-67."

⁴National Archives-College Park, Record Group 228, Records of the Committee on Fair Employment Practices, Division of Review and Analysis, Tension Files, File "Las Vegas."

⁵In a statement written in February 1990, Oliver Wert asserts that there were also black men housed at Camp Jumbo. Statement in possession of Oliver Wert, Hawthorne branch, and copied with his permission. Material in this section is from various documents, collected from the State Historic Preservation Office, papers in possession of Oliver and Clydell Wert and copied with their permission (hereafter the Wert papers), and the Day and Zimmerman Hawthorne Corporation, which in 1999 operated the Depot, plus the author's interview with Louis Delmonico, 25 July 1999.

⁶This and the material in the following paragraph are from an interview with Otis Gray on February 16, 1999, and interviews with Oliver Wert, 16, 17 February, 21 May, 12 August 1999.

⁷Oliver Wert, 16, 17 February, 21 May, 12 August 1999.

⁸Barbara Harnage, author's interview, 25 July 12 August 1999.

⁹Clydell Wert, author's interview, 17 February 1999.

¹⁰Terri Myers, draft of article on Babbitt, n.d., 25 (copies obtained from Oliver Wert and Jack McCloskey).

¹¹Material in this paragraph and the one above it are from the Wert papers noted above, which include an incomplete file of minutes, correspondence, and other documents produced by the Hawthorne branch of the NAACP during the years in question. The case of Maggie Pride was discussed at meetings of the Hawthorne branch or its executive board at least on 2 June, 20 September, 17 November 1959, 29 February, 7, 11, 15 September, 14 October 1960, in March 1961 and 22 April, 8 May 1961. The branch contacted Governor Sawyer's office (which referred them to the attorney general), the West Coast Regional Office, the national office of the NAACP attorney Charles Kellar, and the sheriff of Mineral County. Members of the branch also located a number of witnesses to events surrounding the death of Maggie Pride. Obviously, the branch, which had no members with legal training, was severely handicapped in its pursuit of the truth in this matter by the absence of local counsel. The grand jury's report is in the *Independent News* for 17 January 1962 (p.1). The Nevada Advisory Committee to the United States Civil Rights Commission was informed of the case but did not mention it by name in its report. However, it did report that "emotional strain is also found in Hawthorne in the administration of justice" and that "the Negro people of Hawthorne feel very strongly about this issue." Possibly this refers to the Pride case. See Nevada Advisory Committee to the United States Commission on Civil Rights, *A Report. . .*, March 1963 (cited hereafter as 1963 *Advisory Committee Report*), 6.

¹²National Archives-College Park, Record Group 228, Records of the Committee on Fair Employment Practices, Division of Review and Analysis, Tension Files, file "Las Vegas," "From Kingman's Weekly Report, August 28, 1944."

¹³Oliver Wert, statement, 25 February 1990, in possession of Oliver Wert and copied with his permission.

¹⁴This and subsequent citations to records of the Hawthorne branch of the NAACP are from

the Wert papers mentioned in footnote 11, and were copied with Wert's permission. Except for a brief period—from 1946 to 1956—when there was an unsuccessful experiment with incorporation, Hawthorne has been governed by the Mineral County Commission, under provisions of Nevada law used frequently by towns too small for separate local governments.

¹⁵Records of the County Commission were examined in the office of the County Clerk-Treasurer in Hawthorne.

¹⁶*Independent News* (27 July 1960), p. 1.

¹⁷Harnage interview, 12 August 1999.

¹⁸*Independent News* (3 August 1960), 1.

¹⁹Harnage interview, 12 August 1999.

²⁰The issues of the *Reno Evening Gazette*, the *Nevada State Journal*, and the *Nevada Appeal* (deemed the most significant northern Nevada newspapers likely to report such events) for the two-week period 28 July through 10 August 1960 were searched for reports of the County Commission meetings. No such reports were found.

²¹Carbon copy of letter in file labeled "Civ. Rights" in possession of Jack McCloskey, and copied with his permission.

²²Harnage interview, 25 July 1999.

²³Jack McCloskey, in an oral history recorded during the 1970s and in discussions in 1999 with the author, asserted that El Capitan and the Home Cafe were alone in discriminating against black customers. John R. McCloskey, "Seventy Years of Gripping: Newspapers, Politics, Government, Part I" (hereafter cited as McCloskey, oral history) (Reno: Oral History Program, University of Nevada System, 1982), 310; Jack McCloskey, author's interview, 17 February 1999.

²⁴Linda Leong, author's telephone interview, 17 August 1999.

²⁵*Independent News*, 6 April 1956: p. 6.

²⁶Harnage, Wert, Gray, McCloskey interviews, personal communication from Oliver Wert, 23 September 1999; *Las Vegas Review-Journal*, 16 March 1963, p. 1. Linda Leong said in 1999 that, while she was only nine years old at that time, she had heard about this menu and thinks she was told that it was not one issued by the Home Cafe. However, there is no evidence that the cafe publicly repudiated the menu at the time.

²⁷*Independent News*, 7 February 1960; Harnage interview, 12 August 1999. A copy of this statement was in the possession of Bertha Woodard, and was copied with her consent.

²⁸Ruth Fenstermaker Danner, *Gabbs Valley, Nevada* (Gabbs, Nevada: Ruth Fenstermaker Danner, 1992), 258-62, 283-6.

²⁹McCloskey, oral history, 322-30.

³⁰1963 *Advisory Committee Report*, 5.

³¹McCloskey, oral history, 309, 312.

³²1963 *Advisory Committee Report*, 5.

³³1963 *Advisory Committee Report*, 3.

³⁴Governors' Records, Grant Sawyer, Box S/A/G6/3/2, File "Human Rights: Equal Rights Commiss," Nevada State Archives, Carson City.

³⁵This and subsequent information about these events is from an author's interview with Nancy Williams, 17 April 1997, a column by Mike O'Callaghan in the *Las Vegas Sun*, 5 November 1991, and some coverage in the *Independent News*.

³⁶*Independent News*, 24 January 1962: pp. 1, 10.

³⁷Rick Tilman, author's interview, 17 April 1997, recounting experiences of his relative who was a driver for LTR during this period, Katherine G. Hale, personal communication, 19 April 1999.

³⁸For a description of these events, including the Sawyer letter, see the *Independent News* (15 January 1964; p.1, (22 January 1964), pp. 1, 10.

³⁹1963 *Advisory Committee Report*, p. 5.

⁴⁰File in Wert papers, and copied with his consent.

⁴¹Wert papers. The records of Governor Russell in the Nevada State Archives appear to contain no material relating to this matter.

⁴²1963 *Advisory Committee Report*; pp. 5-6. The *Independent News* reported the moving of the station (14 February 1962), 1.

⁴³Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press,

1959), pp. 118-24; Fred Powledge, *Free at Last? The Civil Rights Movement and the People Who Made It* (New York: HarperPerennial, 1991), pp. 77, 253-93, Taylor Branch, *Parting the Waters: America in the King Years/1954-63* (New York: Simon and Schuster, 1988), 171-72, pp. 412-91; James Peck, *Freedom Ride*. (New York: Simon and Schuster, 1962).

⁴⁴1963 *Advisory Committee Report*, 6.

⁴⁵1963 *Ibid.*: p. 4; Wert papers.

⁴⁶1963 *Advisory Committee Report*, 5.

⁴⁷*Independent News*, (31 January 1962), p. 1.

⁴⁸About 120 issues of the weekly *Independent News* were examined for this article. These included the issues containing election news and all those during legislative sessions, plus issues around any important event which could be dated. Jack McCloskey also granted me two interviews (17 February, 12 August 1999), talked with me on the telephone several times, and allowed me to borrow his "Civ. Rights" file and copy anything I wanted from it. Oliver Wert's views are from an interview on 12 August 1999. For further information on Jack McCloskey's long newspaper career, see Jake Highton, *Nevada Newspaper Days: A History of Journalism in the Silver State* (Stockton, California: Heritage West Books, 1990), 195-9.

⁴⁹Jack Streeter to Commission on Equal Rights of Citizens, 23 January 1964, in McCloskey "Civ. Rights" file.

⁵⁰For the history of the NAACP, see Charles Flint Kellogg, *NAACP: A History of the National Association for the Advancement of Colored People* (Baltimore: The Johns Hopkins Press, 1967), and Mary White Ovington, *The Walls Came Tumbling Down* (New York: Arno Press and *New York Times*, 1969); Gunnar Myrdal, *An American Dilemma* (New York: Harper and Row, 1944).

⁵¹Records of West Coast Regional Office, NAACP, Bancroft Library, University of California, Berkeley; Library of Congress, Washington, D. C., Records of the NAACP, Branch Files.

⁵²Records of the NAACP, Branch Files, 1940-55, Box C105, File "Babitt [sic] 1944," Library of Congress, Otis Gray and Oliver Wert, interviews, 17 February 1999, Oliver Wert's undated statement (probably in 1990).

⁵³Gray, interview, 17 February 1999.

⁵⁴Oliver Wert, interview, 12 August 1999; Mitchell to Governor Sawyer 20 February 1961, in Wert papers. The governor replied 15 March without mentioning Mitchell's question; his letter referred only to his hope that the legislature would pass a civil rights bill. Governors' Records, Grant Sawyer, Box S/A/G5/1/2, File "Legislature: Civil Rights Legislation 1961," Nevada State Archives, Carson City.

⁵⁵Wert papers.

⁵⁶Material for this section is chiefly from NAACP records in the possession of Bertha Woodard, who granted permission to copy them.

⁵⁷Oliver Wert to Clyde Mathews, 7 August 1962, in Wert papers.

⁵⁸Harnage and Oliver Wert, interviews (noted in footnotes 6 and 7), Bertha Woodard, personal communication.

⁵⁹Material for this section is from an interview, 23 June 1993, with Daniel Walsh, the deputy attorney general assigned to the Equal Rights Commission during this time, papers supplied to the author about these events by Mr. Walsh, and the resulting Nevada Supreme Court opinion, *Nevada Commission on Equal Rights of Citizens v. Lindsay Smith*, 80 Nev. 169 (1964).

⁶⁰1963 *Advisory Committee Report*, 5.

⁶¹*Independent News* (13 January 1965), p.4.

⁶²McCloskey oral history, 315-16. He said the same thing in his interview of 17 February 1999.

⁶³Oliver Wert, interview, 17 February 1999.

⁶⁴Records of Nevada Commission on Equal Rights, Box ERC-0001, File "Compliance Reports - Hotels & Casinos.," Nevada State Archives, Carson City.

⁶⁵Harnage, interview, 25 July 1999; Oliver Wert, interview, 17 February 1999; Clydell Wert, interview, 18 February 1999.

⁶⁶The 1950 United States Census of Population reported that there were almost equal numbers of males and females in the nonwhite population of Mineral County—371 males and 377 females. In 1960, there was a total population of 1,079 males and 1,080 females living in Babbitt.

⁶⁷*Independent News* (9 October 1963), p.4.

THE LIMITS OF POWER

Comstock Litigation, 1859-1864

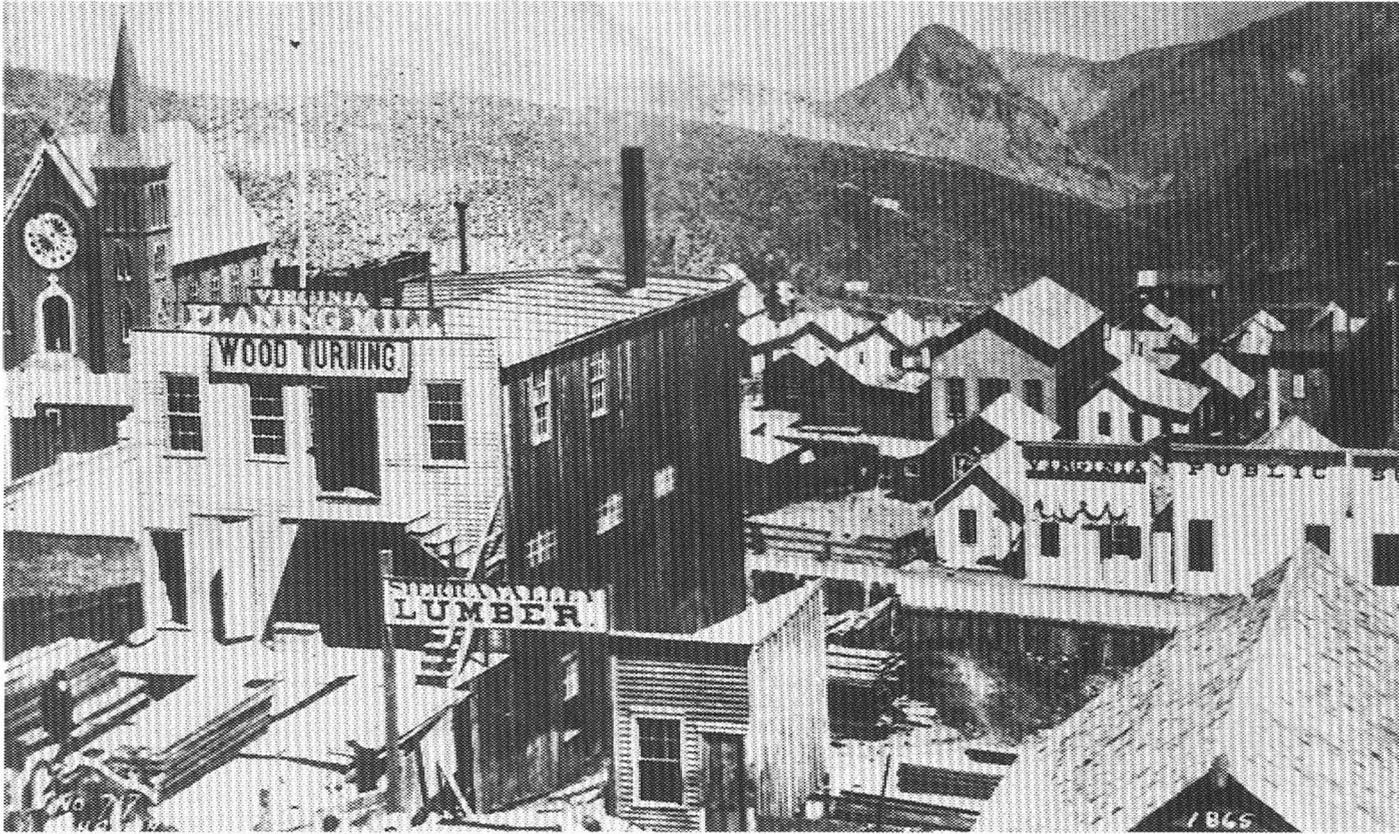
Bruce Alverson

To the question, “What do you get when you cross an immature legal system and unsuitable mining laws with a mountain of rich silver ore?” the answer is painfully obvious in the simple statistic that Comstock mine owners spent \$10 million on litigation between 1860-1865—representing one fifth of the total production of the mines and considerably more than was paid in dividends during the same period.¹ A legal “system” less than seven years old, laws inappropriate for the vast, sprawling ore bodies deep beneath the surface, vague posting and recording of claims, and casual transfers of title combined to bring productive mining to a near standstill in Virginia City only five years after the initial silver discovery. Ruthless stock manipulators and greed thrived in the primitive legal environment while litigation slowed mine production. Events eventually culminated in the resignation of the entire Nevada Territorial Supreme Court in 1864. The skeletal legal and political system that awaited the Rush to Washoe in 1859 assured the chaotic litigation that followed.

Washoe’s legal vacuum quickly absorbed the laws and customs of neighboring California gold camps. Prospectors, investors, businessmen, and lawyers brought to Carson County, Utah Territory the only mining laws they knew. Although quickly devised in the midst of the gold rush, California laws were appropriate for the relatively shallow gold mines of the region. Applying them to Nevada’s silver claims located nearly two thousand feet below the surface proved unworkable — although the full impact was unknown until many years and millions of dollars later. San Francisco’s Montgomery Street bankers and stockbrokers drove Comstock business and legal affairs, yet these same California investors, ironically, experienced losses from the inappropriate application of their own laws in the Silver State.

Congress had no sooner ratified the Treaty of Guadalupe Hidalgo, formally transferring Nevada and other southwestern lands from Mexico to the United

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Planing Mill in Virginia City, Nevada, 1865 (looking down Six Mile Canyon) (*Nevada Historical Society*).

States, than hundreds of California-bound gold seekers passed through the vast unsettled lands of present-day Nevada. Mormons and other traders soon positioned themselves along the overland trails to the mines, including the Carson River Valley where they founded Nevada's first settlement. Despite the inclusion of much of what is now Nevada as Carson County within the newly created Utah Territory on September 9, 1850, the Carson Valley judicial system developed slowly because of the area's sparse population and minimal commercial activity.

When James Finney and others located the Comstock Lode in 1858,² the judicial system in Carson County was virtually nonexistent. Beginning with its first lawsuit in 1853, the entire judicial history of the region consisted of fewer than one-half dozen petty civil cases and a similar number of criminal matters. Clearly, Carson County was wholly unprepared for the tremendous demands placed upon it by a silver discovery that produced unprecedented legal issues involving staggering sums of money.

NEVADA ADOPTS CALIFORNIA MINING LAW

Despite the fact that Washoe was in the Utah Territory, miners in Gold Canyon believed themselves free to follow the examples of California mining towns and to adopt any laws for themselves that did not conflict with either the United

States or Territorial constitutions. In reality, they framed local regulations to suit their own ideas of fairness. The mining laws adopted by the Gold Hill District in 1859, the first in the region, limited claims to 300 feet in length, "including the depths and spurs." The original locator of the quartz vein was entitled to an extra claim, or an additional 300 feet. Later modifications expanded the definition to include "all the dips, spurs, angles and variations of the vein." This concept was known as the Law of the Apex, or Apex law, which allowed the prospector the right to take the claim of a definite size on the *surface* and follow it downward at any angle(s), taking all the ore in the vein and its legitimate branches wherever they should go. In contrast, Spanish mining law recognized only the square claim location, that is, as soon as the ledge passed beyond the legal boundary of a square piece of ground, it belonged to the person owning the ground next to it. The claim had a definite and measurable boundary underground as well as on the surface.³

The Apex law was unworkable for the deep ore bodies on the Comstock because it could not be known whether a surface outcropping was a separate claim in and of itself or whether it was a dip, spur, angle, or variation of a vein of ore previously claimed by another prospector several hundred feet away. This uncertainty created the competing "single-ledge" and "many-ledge" theories that underlay the vast bulk of Comstock litigation.

For purposes of illustration, view the Comstock Lode as a spread hand reaching up the inside of the mountain with only the fingertips showing at the surface. A finger of ore discovered at the surface, separated from the adjacent fingers by valueless rock, was considered a separate ledge, or vein, and the discoverer claimed the vein with all its dips, spurs, angles, and variations. While relatively shallow mines did not penetrate the length of the fingers of ore, no one considered that the fingers would ever join either each other, or the palm, to form one big bonanza of ore. The miners logically believed these fingers represented many separate ledges or veins of ore, thus the many-ledge theory. As the miners worked down the fingertips, they found that their ledges dipped toward the west whereas the miners further down the hill and to the east of them noticed that their ledges dipped to the east. This also supported the many-ledge theory.

When the up-slope miners followed the fingers far enough below the surface, however, they curved eastward rather than continuing west. This suggested that the miners on the parallel ledges east and further down the hill were actually mining extensions of the same ledges as their counterparts to the west. Ultimately, many of the fingers came together to form the palm of a hand, which demonstrated that certain western claims were part of the same ledge as those to the east. It became more confusing as additional claims ran into each other. As one observer put it, "everyone's spurs were running into everybody else's angles."⁴ Was there just one big ledge of ore or several? Legally, was the Comstock Lode owned entirely by the original discoverer or did multiple le-

gitimate claims to the ore bodies exist? Since the Comstock mines had produced more than \$240 million by 1880, the stakes depending on this answer were enormous.⁵

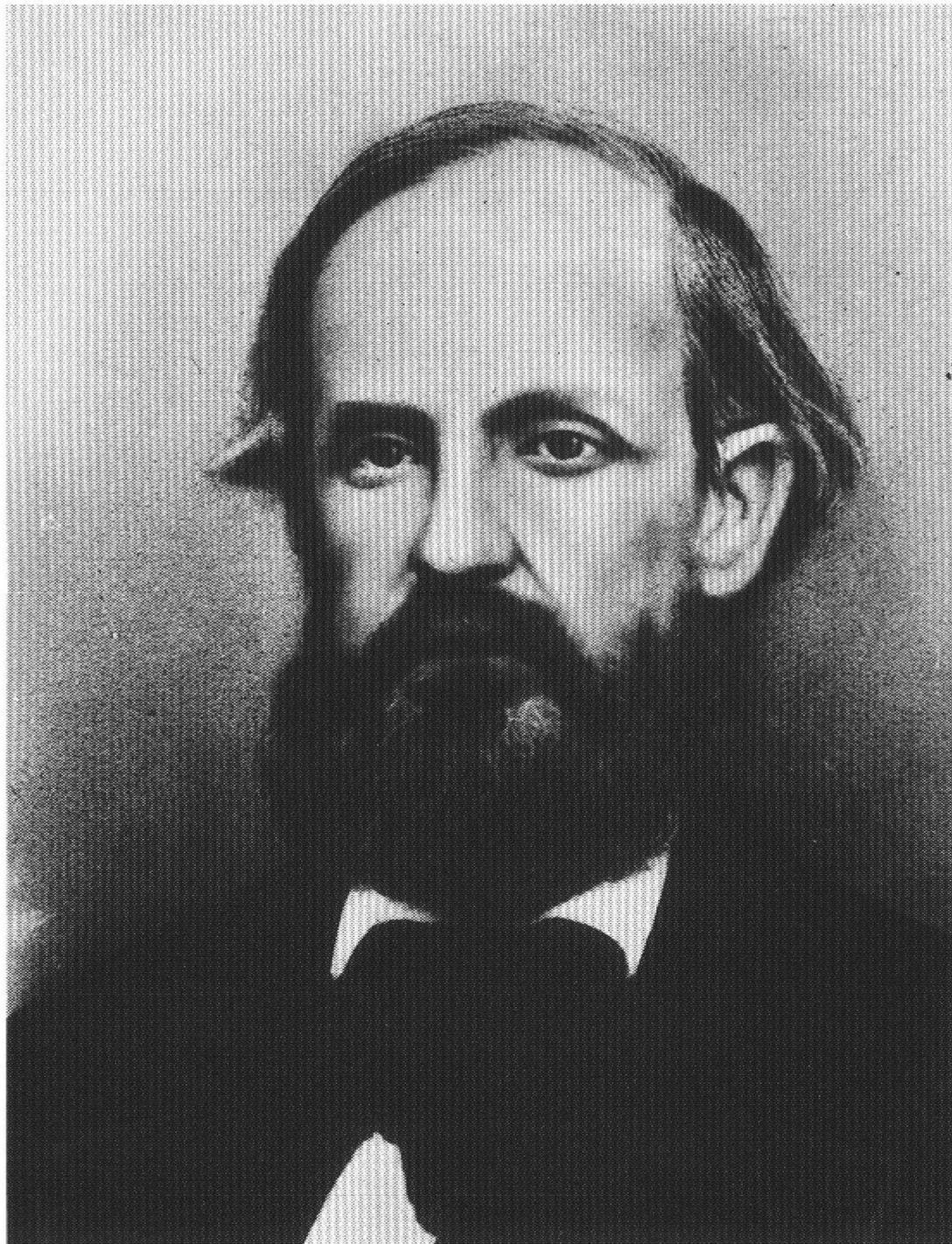
V. A. Houseworth, the village blacksmith, was the first recorder at Gold Hill and kept the record book at a saloon where it lay upon a shelf behind the bar. As Virginia City newspaper man Dan DeQuille described it, the "boys" were accustomed to taking the book from behind the bar whenever they desired to consult it, and if they thought a location made by them was not advantageously bounded, they altered the course of their lines and fixed the whole thing up in good shape, in accordance with the later developments. When the book was not wanted for this use, those lounging about the saloon were in the habit of snatching it up and batting each other over the head with it. The old book was later put in the recorder's office in Virginia City and regarded as quite a curiosity. It contains altered dates, places where leaves were torn out, and other evidence of rough treatment.⁶

Most of the claim locations recorded by the early miners were vague. Frequently, prospectors neither posted written notice on the claim site as the law required nor recorded the notice, which was the best evidence of ownership. Often, descriptions were inadequate. Sometimes notices referred to a stake or other landmark, with no description as to where that stake or landmark could be found. Practical reasons existed for delays in properly defining the claim, however. A miner might delay describing the location until he could select and stake out the richest portion, and further delay recording for as long as possible until he could be sure of the best location. And when a claim was recorded, its description would be sufficiently vague that it could later be altered if necessary.⁷

ORGANIZATION OF THE COURT SYSTEM

The court system's organization played an integral role in the legal controversies ahead. John Cradlebaugh, a pioneer lawyer who had headed a little company in the recent Indian War, was United States district judge of the Utah Territory and assigned to Carson County. Appointed by President James Buchanan in 1859, Cradlebaugh presided over all Comstock litigation while the area was part of the Utah Territory. The Utah Territorial Supreme Court sitting in Salt Lake City heard appeals from Cradlebaugh's rulings. The legal jurisdiction of both Cradlebaugh and Utah over Carson County ended when Congress created the Nevada Territory on March 2, 1861.

James W. Nye, a New York politician appointed as governor of Nevada Territory by Abraham Lincoln, arrived in the territorial capital, Carson City on July 7, 1861. Nye divided Nevada into three judicial districts and appointed Gordon N. Mott, George E. Turner, and Horatio M. Jones as presiding trial-



John H. Cradlebaugh. (*Nevada Historical Society*)



James W. Nye. (*Nevada Historical Society*)

court judges. John W. North and Powhatan B. Locke assumed the bench in August 1863 after Mott and Jones resigned.⁸

The Nevada Territorial Supreme Court, which consisted entirely of the same three trial court judges sitting together, considered appeals from the trial courts. It is interesting that a trial-court judge's decision was appealed to a bench that included the very judge whose opinion was being contested as incorrect. This lack of independence created a conflict of interest and certainly denied the parties a fresh look on appeal. The appellant obviously had one strike against him immediately because, realistically, he would not be able to convince this trial judge that he was wrong in the underlying trial. He could overturn the trial court's decision only by persuading both of the remaining two judges, rather than the relatively easier task of convincing two of three independent judges of the error in the trial court. The Chollar-Potosi controversy that was yet to come highlighted this problem.

Judge Cradlebaugh had opened court at Genoa, Carson Valley, on September 3, 1860, in the only available facility, a badly lighted room over a livery stable. Access to his courtroom was through the front door, by using a ladder from the street. Quarters for litigants and associated trial personnel were equally luxurious. Since the town overflowed with lawyers, litigants, witnesses, and jurors, an eagerly sought bundle of straw in a barn served as a bed, and the judge slept between rival attorneys. The less fortunate slept in their blankets amid the sagebrush.⁹



Early street scene of Genoa, Nevada. (*Nevada Historical Society*)

LITIGATION BEGINS

Only two years after the discovery of silver, the court considered the issue that would haunt the legal system for years — what ore bodies constituted the Comstock Lode? Was it just one ore body or many? The Ophir Mine's sloping shaft soon came in contact with McCall's vertical shaft or what was termed the "middle lead." William Stewart represented the Ophir Mine while David Terry appeared for the "middle lead boys," or the McCall claim.¹⁰ Despite the primitive accommodations, the legal contest was deadly serious. Several hundred armed men supported their respective parties and someone even shot at one witness a few times as he rode from court one morning. The lawyers, fully aware of the explosive disposition of their supporters, cautiously argued their cases. Particularly courteous in their personal remarks and examination of witnesses, they exhibited deference to the court rulings and were extremely flattering to the presiding judge.¹¹ Seeking to support his argument, Stewart directed that a tunnel be run from the Ophir claim through and into the workings of the McCall, and his miners reportedly found ore over the entire distance of thirty feet. This proved, according to him, that the Ophir and the middle lead were one body of ore. Terry's witnesses had sworn that twenty feet of granite separated the two claims.¹² In view of the conflicting testimony and hostile spectators, it is not surprising that the jury did not agree upon a verdict and the first major legal test of the competing ledge theories was inconclusive.

One of the first definitive rulings on the ledge issue involved the Burning Moscow's claim that its ledge was distinct from the Ophir's. The Ophir obtained a court order restraining Moscow's owners from further work in their mine pending arguments for a permanent injunction. Judge Mott delayed making a decision for months, then resigned. On December 28, 1863, Judge North, Mott's replacement, said he did not see how two bodies of ore could be from the same ledge since, based upon his actual examination of the mines and interpretation of the evidence, fifty to ninety feet of rock separated them. If at a greater depth, he ruled, conclusive evidence showed that these ledges blended into one, then the issue could be re-examined. The decision was a staggering blow to the single-ledge theory.¹³

The controversy continued, however, when the Gould and Curry Mining Company sued the North Potosi Mining Company over the identical issue. A surface separation of several hundred feet existed between the surface outcroppings of the Gould and the underground ledge uncovered by the North Potosi. If the apparent surface separation was real, then the North Potosi was entitled to its own separate claim. If, on the other hand, its ore body was merely a spur or continuation of the ledge owned by the Gould, then both claims belonged to the Gould. Judge North appointed John Nugent as referee to hear the testimony and report to him solely on the facts dealing with the geological

features of the lode. On August 21, 1864, Nugent determined that the two so-called ledges were part of the same vein owned by the Gould.¹⁴ Based upon that report, Judge North ordered the North Potosi immediately to cease mining operations. Thus within eight months, Judge North had found in favor of the many-ledge theory in the Ophir case, and the single-ledge theory in the Gould and Curry matter. This demonstrated the difficulty in establishing the actual position of ore bodies located deep below the surface, and the inappropriateness of the Apex law imported from California.¹⁵

As if pre-Civil War tensions had not sufficiently unsettled the social and legal environment, President Buchanan abruptly ordered the removal of Judge Cradlebaugh from the federal bench and appointed Robert P. Flenniken, a Southern sympathizer, as his replacement in January 1861. Cradlebaugh did not give up his position easily. Opening court in Carson City on January 28, 1861, he declared that Buchanan had no authority to remove a sitting federal judge until his term expired and stated his intention to remain on the bench.¹⁶

Understanding the dilemma of the lawyers and litigants, Cradlebaugh allowed counsel to withdraw their cases from his court if agreed upon by both sides. Several of the Comstock lawyers stipulated to use Cradlebaugh until the Utah Territorial Supreme Court resolved the matter. Stewart, Terry, and others tried various cases before Cradlebaugh pending the decision of a test case on appeal in Salt Lake City. Within weeks, however, Terry concluded that Cradlebaugh's opinions too closely paralleled those of Stewart. Canceling his agreement, he announced his recognition of Judge Flenniken as the only proper judge in "Nevada."¹⁷

The matter soon came to a head when the Saint Louis Company claimed that the Rich and Lucy Ella companies encroached upon its ledge from a point 200 feet away. On January 4, 1861, Cradlebaugh restrained both the Rich and Lucy Ella from mining the ledge, and the sheriff stationed a deputy at the Rich mine to preserve the property until further court order. For several weeks, the Rich Company tolerated the order but upon Flenniken's arrival, they erected a fort with armed guards on their claim, despite the deputy's protest, and invited the Saint Louis Company to forcibly remove them if they could. The stand-off directly resulted from the unanswered question as to who was the proper judge.¹⁸

Any attempted physical removal of the Rich Company from the property by the enforcement of Cradlebaugh's order would obviously result in violence, so Stewart visited Flenniken to discuss a possible compromise. A former minister to the Netherlands, Flenniken was an elderly, pompous individual who entered Virginia City as if presenting himself at the Court of Holland; the fact that he wore a fine silk hat, said to be the only one in western Utah, produced considerable comment.¹⁹ Stewart suggested that if agreeable to Flenniken, an identical suit could be filed in Flenniken's court. If the evidence satisfied Flenniken that an injunction was proper, they would make a joint effort with Cradlebaugh's



John Wesley North. (*North Huntington Library, San Marino, California*)

marshal to enforce the same order of both courts. Flenniken agreed. Noting that the controversy between the two judges compromised the territory's judicial business, Stewart also informed Flenniken that Cradlebaugh had agreed to resign if the Utah Territorial Supreme Court decided against him in the pending test case, or if Lincoln's administration, when inaugurated, agreed to pay Flenniken's salary instead of Cradlebaugh's. This, they hoped, would indicate Lincoln's choice of judge. Flenniken said the arrangement was satisfactory to him and he would make the same agreement with Cradlebaugh.²⁰

Stewart returned to his office, prepared the papers for the injunction, and the next morning called upon Flenniken to proceed as they had discussed. Flenniken not only refused to issue the injunction but denied ever having a conversation with Stewart on the subject. He even denied that Stewart visited him at all. That evening, the Pony Express delivered the Utah Territorial Supreme Court decision confirming Cradlebaugh's right to remain on the bench.²¹ Acknowledging the court's ruling against him, Flenniken publicly declared that he was no longer the judge, that Cradlebaugh was the true judge, and it was the duty of all good citizens to obey Cradlebaugh's court orders. Stewart met Flenniken and asked if he would support Cradlebaugh's position. Flenniken assured him that he would. Stewart then served Cradlebaugh's previous injunction order upon Cradlebaugh's marshal for execution the next day to remove the Rich Company from its fort on the mining property.²²

Believing the matter resolved, Stewart went to bed but was abruptly awakened early in the morning to be informed that Flenniken had changed his mind during the night and now publicly withdrew his resignation. Realizing that the Rich Company might know of Flenniken's reversal, he feared that they would forcibly resist removal by Cradlebaugh's marshal. Stewart hastily dressed, belted on his pistols, and started downtown looking for Flenniken, whom he met in front of Pete Hopkin's saloon.

After exchanging pleasantries, Stewart advised him that he had heard some bad news. "They are slandering you. They say you are claiming to be judge and defying the authority of Judge Cradlebaugh." Stewart lied and said that Cradlebaugh's marshal had deputized him to secure a posse and assist in the execution of Cradlebaugh's orders. Stewart then told the "judge" to obtain a musket and accompany him to the mining property. There, Flenniken must announce to everyone that he was not undercutting Judge Cradlebaugh's authority and that the eviction order should be obeyed. When Flenniken stepped back, Stewart grabbed him by the collar, jerked him to his knees, drew his pistol, and again told him that he had no choice but to carry a musket in front of Stewart and address the crowd at the mining property.

Stewart took him to the telegraph station and dictated four or five dispatches for Flenniken to sign which declared in emphatic terms that he was not the judge, that Cradlebaugh was, and that Cradlebaugh's orders must be obeyed. They sent the dispatches to Flenniken's marshal, his clerk, to Cradlebaugh's

marshal, and to several prominent men in Silver City, the community nearest to the fortified mine. Stewart and Flenniken waited at the telegraph office for reply messages and soon learned that Flenniken's marshal not only surrendered, but agreed to accompany Cradlebaugh's marshal to the mine, secure it, and take the armed resisters as prisoners. Later, Cradlebaugh opened court and, upon Stewart's suggestion, dismissed all charges against the prisoners because Flenniken had misled them and they only mistakenly defied Cradlebaugh's order.²³

Ethics among witnesses, jurors, attorneys, and judges sank to an all-time low during the early years of the Comstock litigation. Wholesale manufacturing of witnesses was commonplace. Parties bought and sold testimony with scarcely a pretense of secrecy. In a litigious setting shaped by those who believed that "more is better," the quantity of witnesses often prevailed over quality. Parties relied upon hoards of hired liars rather than on a few honest and competent witnesses. A hundred allegations by ignorant, prejudiced, and corrupt men often outweighed the careful reports of trained observers. Because each claimant believed his opponent was unscrupulous, the plea of self-protection justified every unethical act.²⁴ In a case that turned on the position of a location stake, one well-known attorney reportedly proposed to a witness: "Stewart has paid you a thousand dollars to swear to a lie about the location of that stake. Now, I will give you two thousand to tell the truth." Stewart, who was not thin skinned, admitted that he "fought fire with fire." In fact, it appears he provided most of the fire.²⁵

Vague recording of original and transferred mining claims created nearly insurmountable problems with property titles. A purchaser often did not know if he was ultimately buying a mining claim or a lawsuit over a title dispute. At times, key witnesses required extraordinary persuasion before accurately recalling facts surrounding a transfer of a claim. James Finney's location was the first on Mount Davidson's slope beyond question. Later sales, carelessly described, resulted in questionable titles. While purchasing a claim in September 1860, the Ophir Company demanded that the original notice of location be transferred to it. Finney claimed he had preserved the written notice but was too drunk (or too conniving) to explain where to find it. To aid his recollection, the Ophir officials induced him to enter one of their tunnels and then closed an iron gate behind him. The following morning, sober but still grumbling at his mistreatment, he demanded a shot of whiskey, then took the Ophir representatives to the area where he had concealed his notice on February 22, 1858. Finding the spot without difficulty, he removed the rocks and pulled out a script of yellow paper, covered with dust and moths' eggs, the scrawled handwriting still legible—representing the most valuable document in Virginia City. It was the original claim to the main ledge of the Comstock slope with all its dips, spurs, and angles.²⁶

While bribery of witnesses was commonplace, bribery of jurors was a con-

stant concern. Obtaining an unbiased jury was difficult because virtually every man in town had already committed himself to an opinion on the ledge theory. Speculation in mining stock was rampant, and prices rose and fell on rumors alone, especially those concerning litigation. Often, the ownership of a multimillion-dollar claim depended solely upon the "impartiality" of a juror's decision. Jury duty was prized. Not only could a juror benefit from a direct bribe, but also from a future change in price as the stock market reacted to a jury verdict — arranged beforehand.

Stewart, in his representation of the Savage Mine against the North Potosi, expressed astonishment when potential jurors came forward and declared they had no opinion, bias, or prejudice when, in fact, they had previously participated in litigation involving the very same questions under consideration. During trial, Stewart became convinced that eight of the jurors had been bribed. The court deputy in charge of the jury panel was a noted race-horse jockey named Billy Brown. Stewart asked him how the jurors had been bribed, knowing it must have gone through him, but Brown knew that divulging such information would jeopardize his life.

Stewart purchased, saddled, bridled, and tied under his office window a celebrated old race-horse. He offered to exchange the horse and \$14,000 for information concerning the bribery of each juror. Brown, who had delivered bribes totaling \$13,000, described in detail how he approached the eight bribed jury members, recounting the amount paid to each, where the transaction occurred, and repeated his conversations with each juror. Four of the twelve jurors did not accept the bribes. Upon finishing the story, Stewart gave him the \$14,000, and without going home to change clothes, Brown jumped on the race-horse and galloped away. No one heard of him again.

During closing arguments, Stewart walked up to one of the eight bribed jurors, looked at him, and told him exactly how a juror could be bribed. He illustrated it by repeating the conversation between that juror and Brown, including the place, the amount, type of money, and all the details. He did the same to each of the bribed jurors, who were now quite nervous because everyone knew their secret. Stewart then discussed the merits of the case with the remaining four jurors, telling them that the other eight would never discuss the issues in the case with them for obvious reasons. Within an hour, the jury informed the court they could not agree on a verdict and would not deliberate further. After being discharged, three of the bribed jurors, one at a time, rushed to Stewart's office and begged him not to seek criminal prosecutions against them.²⁷

Mine officials also speculated on company stocks, their own as well as those of their competitors. Money diminished loyalty, and to some it made little difference which company they victimized to reap a profit. Witnesses and jurors were not unique in selling out to bribery. Mine officials even sold out their own companies on occasion. Stewart filed suit on behalf of Sierra Nevada Mining

Company against the American Mining Company to prevent encroachment upon Sierra's property. Trial was set for February 26, 1863. Stewart suspected that the president of Sierra had sold his interest in his own company and had, in fact, secretly purchased a large amount of stock in the rival American Mining Company. Consequently, he would probably testify against his own company, Stewart's client. Armed with this supposition, Stewart attacked the Sierra president for being a turnabout, and the jury, displeased with the president's tactic, found in favor of Sierra.²⁸

The litigation between the Yellow Jacket and the Princess and Union companies illustrated three major, and common, problems involved in Comstock litigation—lying witnesses, destruction of evidence, and unethical attorneys. The legal issues involved certain aspects of the Yellow Jacket's claim location and the position of its boundary monuments. One key Yellow Jacket witness testified to seeing and reading, many times, the Yellow Jacket location notice posted on a certain stump down the hill. The cross-examiner asked only one question—would the witness read the location notice aloud to the jury. After an embarrassing pause, he admitted that he could neither read nor write. Although this witness was clearly lying, even well-described claims were not always dependable. The lawyers argued for two days over the location of a tree stump used as a monument from which one of the parties began the measurement of its claim. Finally, when the court and jury went to view it, no stump could be found. Someone had removed it overnight and leveled the ground so well that not even the spot where it stood was identifiable.²⁹

Disregarding ethics, Stewart ridiculed his rival attorney by alluding to his inexperience in Nevada jury trials. Comparing him to a young bronco horse, untrained, fresh from the plains, and brought up into the cold thin air of the mountain cities, Stewart likened this new lawyer's arguments to the first efforts of a pony that pants and gasps in the new atmosphere. Perhaps when the newcomer became acclimated and recovered his wind, he might be of service but until then, Stewart hinted, he was unfit for rivalry with a trained old war horse like himself. Stewart's personal attack effectively accomplished his two-fold purpose of provoking the lawyer and causing the jury to roar in laughter at him.³⁰ Thereafter, the new lawyer's arguments received little consideration from the jury, which found in favor of Stewart's client.³¹

Frequently, the absence of adequate legal references compromised the ability of well-intentioned judges. In one court opinion the judge wrote that he was compelled, with regret, to establish a rule of law without the aid of even a single textbook and with the assistance of only a few adjudicated cases to use as legal precedent. Not only was Nevada utilizing a derivative legal system imported from California, but the lack of sufficient law books and materials in Carson City hampered the thoughtful judicial analysis of legal principles as applied to Nevada issues.

The quality and conduct of the judges, however, proved to be the greatest

failing of the Comstock judicial system. The vast disparity between judges' salaries and the income of practicing lawyers discouraged the best legal minds (and ethical individuals) from becoming judges. Territorial supreme court justices received an annual salary of \$1,800, later raised to \$4,200. Salaries of prominent Virginia City attorneys, paid by wealthy Comstock mining companies, far exceeded those of the most successful attorneys elsewhere in America. For example, a former United States supreme court justice who had resigned his seat on the bench to become an acknowledged leader of the Massachusetts Bar earned an average income of \$40,000 during the seventeen years between 1857 and 1874. Stewart's annual income during the Comstock litigation was \$200,000. Stewart himself admits receiving \$500,000 during his first four years of Comstock litigation.³²

Underpaid judges oversaw litigation of staggering financial proportions. In 1863, the district court reportedly handled litigation valued at \$50 million.³³ Although the best lawyers in Virginia City could not, for financial reasons, accept judicial positions, the intellectual demands presiding over complicated trials involving millions of dollars really required legal minds of the highest caliber. This dilemma diminished the quality of Comstock justice. Consequently, the simple acceptance of a judgeship by a Comstock lawyer caused suspicion as to his motives, and perceived unorthodox behavior on the bench frequently transformed suspicion into outright charges of corruption.³⁴ An atmosphere of distrust permeated all aspects of the legal process.³⁵

CHOLLAR-POTOSI LITIGATION

The Chollar-Potosi controversy epitomized all that was wrong with the Comstock's bench, bar, and legal system. While the legal issues involved sophisticated questions of Virginia City mining disputes, the behavior of the judges and lawyers was deplorable. This legal travesty culminated in the forced resignation of the entire territorial Supreme Court. The case began routinely (for Comstock litigation) when, in December 1861, the Chollar alleged that the Potosi mining operations encroached upon its claim. After that, the case was anything but routine.

The Chollar and Potosi had claims next to each other—the Potosi to the east. The surface outcropping of ore, or lode, was on the Chollar's property, but as it extended downward it expanded so that it spread beyond the vertical boundary line between the two properties and into the Potosi claim. The first lawsuit arose when the Potosi tunneled to the west and intercepted a deep body of ore, or ledge, that was within the vertical boundary of the Chollar. This factual situation clearly called into issue the inherent problem with the Apex law, which allowed the originators to follow the spurs, dips, angles, and variations of a surface claim deep into the ground. The Chollar maintained its surface claim

entitled it to follow the ore body wherever it should lead, while the Potosi argued that a surface claim did not grant ownership to a well-defined underground ledge, but was restricted only to the surface. Quite simply, what rights exactly did the prospectors obtain when they recorded their original surface claims?³⁶

Early locators staking surface claims had no idea that anything of value existed at the lower depths. Few knew enough about quartz mining to detect, much less develop, a ledge and still fewer intended to search for one. However, when the deeper ledges were shown to produce rich silver, every surface claim holder maintained his right to the deeper ledges within the "dips, spurs, angles, and variations" of the vein he had located. Convinced that the ledges as well as the surface ore belonged to them, they argued that they simply would have included the ledge in their description in the first place had they known its value. The precise wording of the claim notices became an issue. Many of them claimed "quartz and surface" within a given area in their notices and insisted that by their use of the term "quartz" they meant the deeper ledges in addition to the surface ground. Some, undoubtedly used this term purposefully, but many simply respected the familiar catch words found in the texts of other notices they saw.

The week-long trial resulted in a hung jury on May 29, 1862, but a retrial on October 22, 1862, found in favor of the Chollar. The court ordered the Potosi to abandon its work on the ledge located beneath the surface boundary of the claim owned by the Chollar. When the Potosi sunk another shaft straight down, it struck the portion of the Chollar ore body that extended into the Potosi's vertical boundaries, and the parties renewed their legal contentions with cross suits filed by both companies.³⁷

Convinced that Judge Mott was biased in favor of the Chollar, the Potosi induced Mott to resign and sought the appointment of John Wesley North, known to favor the many-ledge theory.³⁸ The Potosi reportedly paid Mott \$25,000 to resign; there was no evidence that North knew of the money payment, and President Lincoln appointed him to the bench on September 14, 1863. As predicted, North decided in favor of the Potosi in the second trial and both parties took off their ethical gloves in the fight before the Nevada Territorial Supreme Court.³⁹

Upon appeal, the parties generally understood that Judge North supported the Potosi claim because he had ruled for that side during the trial while Judge Turner seemingly favored the Chollar. The third judge, P. B. Locke, was the pivotal vote. The lawyers argued the matter before the court on April 28, 1864, and awaited the decision.

That same evening, Judge North, Judge Locke and two others planned to ride from Carson City to Lake Tahoe, a distance of fourteen miles. This surprised the Chollar attorneys, Stewart and A. W. "Sandy" Baldwin, because North left the bench early that day claiming he was sick.⁴⁰ For a sick man to

make a fourteen-mile journey up the east side of the Sierra over a seven-thousand-foot pass struck them as suspicious. Stewart, Baldwin, and two friends followed the judges to the Glenbrook House at Lake Tahoe, and shortly afterward a prominent Potosi stockholder also appeared at the hotel. Because of the presence of Stewart and Baldwin, the shareholder left after only a short stay. Ever resourceful, the Chollar lawyers took advantage of the occasion to take Judge Locke to an extravagant midnight dinner and entertain him until morning.

When Locke took his seat on the bench later that same day, the Chollar people believed he supported their cause, but they soon had doubts when, on the following day, Locke cancelled plans with Baldwin and instead stayed in rooms belonging to Judge North, a known Potosi sympathizer. The following day, Sunday, the diminished confidence of the Chollar people changed to alarm when they learned that Locke was dining with Potosi representatives. When court opened on Monday, rumor spread that the Potosi had persuaded Locke to decide in their favor. Not to be outdone, the Chollar people went to Locke's chambers after court on Monday; they initiated an impromptu party, and the group decided to ride to Carson City. In keeping with his partying mood, Locke insisted on driving and predictably ran the carriage over a high bank, which broke it to pieces. The horses ran away. Securing other carriages, the party continued. Locke divided his time impartially it is said, in "drinking, quarreling with the Teamsters on the road, and hugging his companions." Back on the bench on Tuesday, he afterward enjoyed a spontaneous celebration that night with Potosi well-wishers.⁴¹

On May 5, Judge North filed his supreme court opinion, with a concurring opinion by Locke, in favor of the Potosi. Since Turner's opinion favored the Chollar, the ruling was two to one affirming the order in favor of the Potosi. Not easily discouraged, the Chollar representatives convinced Locke to file an addendum to his decision whereby he reversed himself and reopened the matter for further proceedings. Showing their own resiliency, the Potosi representatives again met with Locke, and their ally North, to persuade him to retract his addendum. Although he declined, he did agree to an evening on the town with the Potosi representatives, and after a week of the Potosi's company, he ordered his addendum stricken from the court's record.⁴² This effectively reinstated the court's decision in favor of the Potosi.⁴³ Having lost in the improper contest to sway Judge Locke's opinion, the Chollar turned its efforts toward discrediting the entire territorial Supreme Court bench.

RESIGNATION OF THE TERRITORIAL SUPREME COURT

The demise of the Territorial Supreme Court began in the fall of 1863, when James H. Hardy, an attorney whom North had referred to as a "notorious

drunk," told Stewart's partner, Baldwin, that North accepted a bribe while judge on the Burning Moscow-Ophir case. Stewart spread the story far and wide. North confronted Hardy and made him repeat the story in the presence of Stewart, Baldwin, and himself. Hardy toned down the bribery story to the satisfaction of North, who threatened Stewart with a slander suit for spreading Hardy's unfounded suspicion as fact. Although Stewart placed a notice in the newspaper acknowledging that the Hardy story, as repeated by him, was not true, the rumor had planted the seed of suspicion in the public's mind.⁴⁴

The dispute did not end there, and matters deteriorated to the point that Stewart and North engaged in a public debate at Maguire's Opera House in Virginia City on January 16, 1864.⁴⁵ This only fanned the flames and further polarized public opinion as to North's honesty. According to North, Stewart's improper threats, his physical intimidations at the point of a gun, and his buying of witnesses and juries could no longer be tolerated—even in lawless Nevada. By the spring of 1864, the issue was no longer North's conduct, but Stewart's. Claiming the need to save himself and his clients from reproach, Stewart publicly denounced North as a dishonest judge, denounced Turner as corrupt,⁴⁶ and as for Judge Locke, "He was too ignorant for denuncification." Stewart launched an attack against the entire Nevada judiciary.⁴⁷

The Supreme Court ordered Stewart to appear in court on August 22, 1864, in Carson City to defend himself against disbarment proceedings for his conduct. Stewart went on the offensive. He obtained an affidavit, complete with receipts, from the president of the Hale and Norcross Company evidencing a bribe to Turner in the amount of \$5,000 in exchange for a favorable court ruling. Stewart appeared, as ordered, with his witness and affidavits and proclaimed he was ready to proceed.⁴⁸

As soon as the judges took the bench, North⁴⁹ announced his resignation.⁵⁰ Turner then declared the court in recess until 7:00 that evening. He soon sent word that if Stewart would let up on him, he would also resign. Stewart demanded that he put his resignation in a letter to President Lincoln and a telegraphic dispatch as well. Both had to be delivered to Stewart before Turner went back on the bench or he would swear out a warrant for his arrest for bribery. Turner sent the resignations as demanded—one was mailed and the other telegraphed. Turner returned to the bench as promised, made a "self-glorifying speech," and then announced that since North's resignation had destroyed the usefulness of the court, he also resigned.⁵¹

The entire bar retired to Pete Hopkins's Saloon, located just downstairs from the courtroom, for further discussion on the status of the bench. After sufficient libation and deliberation, they decided to call on Judge Locke and allow him to resign as well. Knowing that Locke would avoid making an appearance if possible, Stewart ordered two young lawyers to go to Locke's room, and noted that "if he is locked in the room, locks can be broken." They found him in his room, dressed him, and seated him on a bench by Stewart's side. Locke

was told that the bar wanted a completely new court, and they gave him the opportunity to resign. When Locke turned to Stewart for advice and asked what he thought he should do, Stewart responded, "Do? Resign, and do it quick." They brought pen and ink, and he wrote out his resignation, which was read aloud. After that, the entire company became hilarious, and Locke imbibed so freely that, according to Stewart, he became even more stupid than usual.⁵²

The wholesale resignation was the last and best act ever performed by the Nevada Territorial Supreme Court, according to some.⁵³ Many residents believed it was a blessing to Nevada because the litigation finally stopped and allowed the miners to get back to work without the court's interference. The depleted judiciary was a strong argument for state, rather than territorial, government and although Lincoln wanted to appoint more territorial judges, the Nevada Bar passed a resolution proclaiming that it was tired of territorial judges and wanted no more courts until Nevada became a state later that year.⁵⁴

CONCLUSION

In hindsight, the Comstock needed workable mining laws such as the Spanish square claim location rather than the Apex law, formal requirements for the transfer of mining claims, a mandatory minimum time of possession of a claim before the commencement of an action to contest its title, a restructured court system, compensation guidelines to ensure an efficient and honest judiciary, and other significant changes. The financial impact of these deficiencies upon the mines and Carson Valley was immeasurable. Although certain reforms were proposed by 1862, they were insufficient and too late. Other legislation such as the formal adoption of the Apex law by the United States Congress in 1872 simply perpetuated the obvious problems.

The first federal judges would probably have been able to hold their own against the criminal element in Nevada; but opposed to the combined capital and legal talent of California and Nevada as, in important mining suits, they sometimes were, they were powerless. Statutes regarding the points at issue did not exist, and the questions involved were largely determined by the rules and regulations of mining districts, and the application of common law. Immense fees were paid to able and often unprincipled lawyers, and money lavished on suborned witnesses.⁵⁵

The mines' development simply outpaced the maturation of the legal system, the judges, and even the witnesses and jurors. Money drove everything, and the judicial system, handicapped by impractical mining laws,⁵⁶ could not keep pace. Receiving too much too soon, the law simply collapsed under a mountain of rich silver ore.

NOTES

¹Eliot Lord, *Comstock Mining and Miners* (Berkeley:Howell-North 1959),172-73.

²James Finney, alias James Fennimore and also referred to as "Old Virginia" (in whose honor Virginia City was named), discovered the Comstock Lode on February 22, 1858. He sold his interest for an old horse, a pair of blankets, and a bottle of whiskey. Changing his name to Finney, he moved to Carson Valley in 1851 after "difficulty" with a man in California whom he believed he had killed. After selling shares in sundry mining claims in exchange for food and drink, Finney died on June 20, 1861, when thrown from a bucking mustang while drunk. He owned \$3,000 in coin when he died. Dan DeQuille, *The Big Bonanza* (New York: Alfred A. Knopf, 1947), 28-29, 52-53; Lord, *Comstock Mining*, 411.

³Lord, *Comstock Mining*, 43-44; Charles Howard Shinn, *The Story of the Mine as Illustrated by the Great Comstock Lode of Nevada* (Reno: University of Nevada Press, 1980), 125.

⁴Shinn, *Story of the Mine*, 127.

⁵Lord, *Comstock Mining*, 418. The purchasing power of one dollar (\$1.00) in 1864 is equivalent to \$10.35 in 1998 dollars. Expressed in 1998 dollars, the \$240 million becomes \$2,484,000,000. Library of Congress, through the Congressional Research Service.

⁶DeQuille, *Big Bonanza*, 34-35. The book is still in the Storey County Recorder's Office in Virginia City.

⁷Shinn, *Story of the Mine*, 124.

⁸Lord, *Comstock Mining*, 101; Dean Heller, *Political History of Nevada: (Carson City: Nevada Secretary of State and State Printing Office, 1997) 220. Their resignations were "welcome," according to some. Reese River Reveille (Austin, Nevada), 12 September 1863, p. 2.*

⁹Lord, *Comstock Mining*, 101; Myron F. Angel, *History of Nevada* (Reno: University of Nevada Press, 1966), 74.

¹⁰William M. Stewart, afterward Nevada's first United States senator, was attorney for the principal mines in the early years and dominated Comstock litigation. Sporting reddish blond hair and a beard, the six-foot-two, two-hundred-pound plus Stewart was as aggressive, egotistical, and stubborn as he was physically imposing. He quickly learned to use his powerful physique, as well as his ever-present two Texas derringers, to his advantage both in and out of a courtroom. He was instrumental in formulating the Apex law in California while representing mining interests during the gold rush years. Known as the dueling judge, David Terry resigned as chief justice of the California Supreme Court in 1859 when he mortally wounded Senator David Broderick in California's most famous duel. At the outbreak of the Civil War, Terry, a Kentuckian, left Virginia City to serve as an officer in the Confederate Army, miss-

ing most of the critical Comstock litigation. Stewart and Terry arrived in Virginia City within two days of each other in March 1860. Ruth Herman, *Gold and Silver Colossus: William Morris Stewart and His Southern Bride* (Sparks: Dave's Printing & Publishing, 1975), 43-44, 182; also, an excellent and the most recent biography of Stewart is by Russell R. Elliott, *Servant of Power: A Political Biography of Senator William M. Stewart* (Reno: University of Nevada Press, 1983); A. Russell Buchanan, *David S. Terry of California, Dueling Judge* (San Marino: The Huntington Library, 1956), 3.

¹¹Shinn, *The Story of the Mine*, 128; Lord, *Comstock Mining*, 101.

¹²Stewart employed an interesting last minute-attempt to discredit Terry's witnesses' testimony that twenty feet of granite separated the claims. During an evening court adjournment and despite the fact that it was too late to present additional evidence, Stewart sent a surveyor to Virginia City with instructions to take ten men with forty small sacks and obtain samples from the vein which was supposedly solid granite. They took specimens every six inches. When court opened the next morning, the surveyor placed the sacks in front of the jury while Stewart diverted the attention of the judge and Terry. When Terry saw what had happened, he started to object since it was not proper evidence. But when he saw the jury examining the ore, he decided to remain silent. Despite this untimely and questionably ethical tactic, Stewart still did not persuade the jury to his side. William M. Stewart, *Reminiscences of Senator William M. Stewart of Nevada* (New York: The Neale Publishing Co., 1908), 134-35. Stewart wrote his autobiography nearly forty-five years after his Comstock days and without the benefit of his records and papers of those times because they were destroyed in a fire. Although criticized as often inaccurate and self-serving, his recollections were one of the best accounts from someone central to the Comstock events of 1860-64.

¹³Lord, *Comstock Mining*, 143-44.

¹⁴After recognizing that "it was one of the most important cases ever decided" in Virginia City, a newspaper observed it was also a case which could not be decided either way without subjecting Nugent to charges of corruption by the losing party. *The Daily Union* (Virginia City), 23 August 1864; also, *Washoe Weekly Star* (Virginia City), 27 August 1864. After analyzing Nugent's report, one editor, observing that the single-ledge proponents were the wealthier mining companies, suggested they purchase the contested titles and stop the litigation which was "retarding" Virginia City's progress and depressing mine values. *The Daily Union*, 24 August 1864.

¹⁵Lord, *Comstock Mining*, 165-66, 171. Grant H. Smith, *The History of the Comstock Lode, 1850-1920* (Reno: Nevada State Bureau of Mines, 1961), 74.

¹⁶The law seemed to support his position. The congressional act organizing the Utah territory provided for the appointment of federal judges to a term of four years, but contained no provision for their removal. However, another clause of the same act expressly empowered the President to remove the terri-

torial governor, secretary, United States attorney, and marshal—but no mention was made of the judiciary. By such absence, Congress arguably put the United States territorial judges on the same footing with federal judges, who were subject to removal only by impeachment. Lord, *Comstock Mining*, 104-5.

¹⁷Lord, *Comstock Mining*, 105.

¹⁸*Ibid.*, 105-6.

¹⁹*Ibid.*, 105.

²⁰Stewart, *Reminiscences*, 136-37.

²¹The reported Utah Territorial Supreme Court decisions do not include the appeal of a criminal case fitting this description. Samuel P. Davis, *The History of Nevada*, 2 vols., (Reno and Los Angeles: The Elms Publishing Co., 1913), 282. Stewart's justification for forcing Flenniken's resignation is suspect in the absence of a reported court decision. Either the court decision exists and cannot be found, or Stewart illegally forced a federal judge's resignation at gunpoint. On the other hand, Stewart's claim that he forced Flenniken's resignation at gunpoint is questionable. Flenniken received a salary for the position through March 1861 and was reported in the Comstock area as late as June 1861. Elliott, *Servant of Power*, 16, n. 66.

²²Stewart, *Reminiscences*, 137.

²³*Ibid.*, 137-39.

²⁴Lord, *Comstock Mining*, 141-42.

²⁵Smith, *History of the Comstock Lode*, 69.

²⁶Lord, *Comstock Mining*, 141-42; DeQuille, *Big Bonanza*, 29.

²⁷Stewart, *Reminiscences*, 153-59.

²⁸Lord, *Comstock Mining*, 150-51.

²⁹Smith, *History of the Comstock Lode*, 69; DeQuille, *Big Bonanza*, 35.

³⁰Not all of Stewart's courtroom attacks were as successful. A. W. "Sandy" Baldwin arrived in Virginia City in the fall of 1862. In a case in which he opposed Stewart, the court sustained several of Baldwin's objections to Stewart's methods. Stewart turned savagely, "You little shrimp, if you interrupt me again, I'll eat you." To which Baldwin quietly retorted, "If you do, you'll have more brains in your belly than you ever had in your head." Stewart soon took him into partnership. Smith, *History of the Comstock Lode*, 67.

³¹Lord, *Comstock Mining*, 147-48.

³²Davis, *History of Nevada*, 282; Lord, *Comstock Mining*, 163-64; Stewart, *Reminiscences*, 151. Stewart's \$200,000 annual income is equivalent to \$2,070,000 annually in 1998 dollars. Library of Congress, through the Congressional Research Service.

³³Lord, *Comstock Mining*, 133-34.

³⁴In a bitterly contested trial, a federal judge got down from the bench and made a speech to the jury that was a better plea for the defense than that made by its own attorney. This caused Sinc Barnes, the plaintiff, to insinuate that the court had some of the defendants' money in his pocket. When the judge's

friend took issue with the remark, Barnes retorted, "If that man is talking merely friendship, what a barn-burner of an argument he could make if he got a fee." After a jury verdict for the defendant, Barnes obtained affidavits from a majority of the jurors accusing the others of accepting bribes in the case. Armed with these sworn statements, he called on the defendant and after a slight confrontation involving a six-shooter, the matter was settled for \$200,000. Davis, *History of Nevada*, 396-97.

³⁵John F. Swift, San Francisco lawyer and later minister to Japan, wrote a novel drawing on his experiences with the Nevada bench and bar. Although admittedly "entirely fictitious," it contained "genuine descriptions" of certain business characteristics in Virginia City. Relating in great detail how judges routinely supplemented their meager salaries by using one, or more, attorneys as brokers to solicit bribes in exchange for decisions, he claimed the parties often engaged in open bidding wars for favorable court rulings. Professional jurymen and witnesses regularly testified on the same unethical basis. John F. Swift, *Robert Greathouse: A Story of the Nevada Silver Mines* (New York: Carleton Publishing, 1870), 159-60. Stewart, acknowledging the novel and recognizing his own character in the book, did not dispute Swift's description of the tactics of the bench and bar. Stewart, *Reminiscences*, 163.

³⁶The crucial legal issues were (1) whether a surface location for "quartz and surface" also constituted a "ledge location," thereby also giving them the right to the deeper bodies of ore, within the meaning of the law and (2) whether a separate ledge location, made after the surface location, entitled the ledge locator to follow the ledge with all its dips, spurs, angles and variations wherever it may go even if it should run past the vertical lines of the surface location. Specifically, did the subsequently claimed ledge location give the Potosi the right to follow their ledge into the boundaries of the Chollar claim and mine that deep body of ore? Lord, *Comstock Mining*, 153.

³⁷The Potosi claimed that the prior court decision established only the eastern boundary plane separating their ledge from the Chollar and conceded they could not proceed west of that boundary plane into the Chollar's claim. They must remain east of the line. However, they also claimed the ore deposit east of the boundary line was a separate ledge from that contained within the Chollar boundary. Alternatively, even if it was the same ore deposit, the Chollar's original surface claim did not grant the Chollar the right to the deeper ledges east of the plane because it was not within the definition of their surface claim notice. In short, the Potosi claimed that the prior verdict established only that the "surface and quartz" locations gave the Chollar the right to the surface claim and did not give them the right to follow the easterly dip of the underlying ledges which were now beneath the Potosi claim. Lord, *Comstock Mining*, 151-56.

³⁸Appointed as Nevada's first surveyor-general by Lincoln in 1861, North, a Minnesotan and avid Union supporter, soon constructed a quartz mill to process Comstock ore, a sawmill to provide timber to the mines, and borrowed

large sums of money from mine owners. This created a conflict of interest when North took the bench and presided over mining disputes. Merlin Stonehouse, *John Wesley North and the Reform Frontier* (Minneapolis: University of Minnesota Press, 1965), 165-77.

³⁹Lord, *Comstock Mining*, 154-55.

⁴⁰Seemingly unconcerned with the obvious conflict of interest, Baldwin represented the Chollar in this second suit with the Potosi despite the fact he previously represented the Potosi against the Chollar in their 1862 action which involved essentially the same legal issues. *The Potosi Gold and Silver Mining Co. v. Chollar Silver Mining Co.*, Territory of Nevada Supreme Court Opinions, Case 21, 1864.

⁴¹Lord, *Comstock Mining*, 157-59.

⁴²*Ibid.*, 159-60. Locke's addendum dated May 5, 1864, states: "It is unnecessary to express any opinion as to the merits of this cause, both parties may be heard upon the trial as to what was adjudicated in a former trial." Locke's order dated May 13, 1864, striking the addendum states: "You are directed to strike from the files in your office any addendum or qualifications to the opinion delivered by North Judge [sic] and concurred in by me, said addendum or qualification is hereby revoked by me and rendered null and void and to be of no legal effect." *Potosi Gold and Silver Mining Co. v. Chollar Silver Mining Co.*, Territory of Nevada Supreme Court Opinions, Case 21, 1864, p. 7-8.

⁴³The Chollar-Potosi controversy, which defined the high-water mark in identifying the legal issues surrounding the Comstock mines as well as the low-water mark for unethical conduct and corruption by both the bench and bar, was resolved rather unceremoniously when the two mining companies consolidated in 1865- -thereby rendering the pending legal issues moot. The estimated cost of litigation by the Chollar and Potosi mining companies prior to 1866 was \$1.3 million. Lord, *Comstock Mining*, 173.

⁴⁴Merlin Stonehouse, *John Wesley North*, 164-65.

⁴⁵The debate was called by Stewart to defend his character from charges previously made public by North. They aired a wide variety of personal attacks ranging from political disagreements regarding the recent Nevada statehood Constitutional Convention and voting rights of black citizens to charges of bribery and conflicts of interest of North while a judge. Reported extensively in the newspapers, the "victor" was clearly in the biased eyes of each particular reporter. See accounts in *The Daily Union*, 17 January 1864, and the *Virginia Evening Bulletin*, 18 January 1864. Both these newspapers were North supporters while the *Territorial Enterprise* backed Stewart, although copies of that newspaper are not available.

⁴⁶Judge Turner earned a reputation as the most shallow, egotistical and mercenary member of the Supreme Court. Virginia City Mayor R. E. Arick first charged him with being absolutely corrupt in his court decisions and for sale to the highest bidder. By summer 1862, the *Territorial Enterprise* repeatedly de-

manded his resignation. When some of the larger mining cases came before the Supreme Court in 1863, Turner really cashed in on his office. He received \$60,000 for his decision in the first Chollar-Potosi trial. On a similar, yet more humorous occasion, Turner notified a litigant that his decision depended on the delivery of \$10,000 to him before the next morning. It was past midnight before the man obtained the bribe and delivered it to Turner—more than fifty pounds in gold coin. Mrs. Turner, clad only in a nightgown, answered the door, announced that she would receive the money, then gathered her nightgown up as if an apron. When he dropped the gold coin into the apron, the coins' weight tore the nightgown completely off Mrs. Turner and left her standing nude with gold lying at her feet. Davis, *History of Nevada*, 393-95.

⁴⁷Stonehouse, *John Wesley North*, 164-70; Stewart, *Reminiscences*, 160.

⁴⁸Stewart, *Reminiscences*, 160-61.

⁴⁹The day before North stepped down, a newspaper predicted that he would resign because of "continued ill health" and a desire to "impede no longer the progress of public business." Further, the paper said that Stewart possessed facts to "compel" Turner's resignation and in fact urged Stewart to "oust" Turner should North instead resign—claiming "the people of this city" and the "entire bar" believed Stewart was "bound in honor to accomplish" that change in the judiciary. *The Daily Union*, 21 August 1864, p. 2.

⁵⁰Although maintaining that he resigned in order to prosecute Stewart for libel and ultimately to seek his disbarment, North wrote to Lincoln claiming he was "compelled by severe and protracted illness" to resign. North filed libel suits against Stewart and the *Virginia City Territorial Enterprise* in December 1864, seeking \$100,000. By consent, the parties submitted the matter to three referees. On September 16, 1865, they reported no evidence of corruption by North and that his motives were pure. However, they censured him for his conduct in connection with Locke's behavior in the Chollar-Potosi litigation. While ordering Stewart and the other defendants to pay costs of the proceedings, the referees noted there were circumstances mitigating their behavior such as the suspicion surrounding Mott's resignation and the compromising nature of North's position as judge, mill owner, debtor, and confidential friend to a leading Potosi partisan. Stonehouse, *John Wesley North*, 172; Lord, *Comstock Mining*, 163.

⁵¹Stewart, *Reminiscences*, 161.

⁵²*Ibid.*, 161-62.

⁵³The judges, particularly North, had strong supporters who believed that "Stewart and Co." forced their resignations in order to fill the seats with "suitable" judges of their own choosing. *The Daily Union*, 24 August 1864, p. 2; 25 August 1864, p. 2; 30 August 1864, p. 2; *Washoe Weekly Star*, 27 August 1864, p. 2; *Reese River Reveille*, 30 August 1864, p. 2.

⁵⁴Davis, *History of Nevada*, 395; Bancroft, *History of Nevada*, 174-75; Stewart, *Reminiscences*, 162. Upon receiving notification of North's resignation, federal

judge Stephen Field of California, California Governor Frederick F. Low, and California Senator John Conness jointly recommended to Lincoln the appointment of John F. Swift of San Francisco as his successor. Carson lawyers preferred one of their own, R. S. Mesick. Recognizing that a new state government and court would be in operation on the first Monday of December, Lincoln did not fill the vacancy. *The Daily Union*, 24 August 1864, p. 2; 25 August 1864, pp. 2, 3; 26 August 1864, p. 2; 30 August 1864, p. 2; 31 August 1864, p. 2; *Washoe Weekly Star*, 27 August 1864, p. 2.

⁵⁵Bancroft, *History of Nevada*, 172.

⁵⁶Obviously, some far-sighted legal mind formulated the "Apex law," perceiving in its application lucrative legal fees for generations to come. Davis, *History of Nevada*, 398

JUDICIAL SELECTION IN NEVADA

A Modest Proposal for Reform

Michael W. Bowers

INTRODUCTION

In a 1993 article in this journal,¹ my co-author and I examined the sordid history of the Nevada judiciary and the role played by the state's system of judicial selection in that history. We noted, for example, that judicial elections as practiced in Nevada frequently led either to nasty, epithet-laden contests beneath the dignity of the courts or to elections characterized by a lack of challengers, high rates of re-election, and low levels of voter interest. In turn, these elections" brought to a head issues of ethics, recruitment of candidates, and intracourt dispute that are exacerbated by turning judges into politicians."²

In response to a situation that we viewed as grievous, we proposed that the state adopt merit selection of its judges. In a merit system

a blue-ribbon commission of laypeople, lawyers and judges is appointed to screen applicants for judicial positions. When a position becomes vacant, this commission sends three names to the governor. The governor must choose one of these and that individual will fill the judicial vacancy. After a period of time, which varies from state to state, the judge will run in a noncompetitive retention election in which the voters will simply be asked "Should Judge X be retained in office?" and they can vote "yes" or "no." A judge who wins this retention election would serve another term and, at the end of that term, run in another retention election. Should the judge lose, the position would become vacant and the process would start all over again.³

We argued that a merit system for electing judges would eliminate, or at least decrease, many of the problems associated with the current system. For example, given that judges would run in noncompetitive election campaigns,

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a merit system would reduce the need for them to build up large campaign chests of donations originating primarily from gaming and legal interests. Thus would many conflict-of-interest problems associated with potential litigants and litigators be improved. At the same time, however, judges would continue to be accountable to the voters, but would run on their records rather than against an opponent. We also noted that, in states with merit systems, women and minorities were more likely to reach the bench, an important consideration in 1993 when only one woman and no minorities had ever served on the Nevada Supreme Court and precious few had occupied the state's lower bench.⁴

FACTORS MITIGATING AGAINST ADOPTION OF THE MERIT SYSTEM IN NEVADA

It appears clear that Nevada is unlikely anytime soon to move toward a merit system of judicial selection. Proposals for merit selection failed in both 1972 and 1988. Although the margin of defeat was smaller in 1988 (44 percent supported merit selection) than in 1972 (38 percent support), there has been little interest in the idea since the late 1980s. This is due, no doubt, to a multitude of factors. First, there is the fact of political inertia; that is, absent a compelling problem in the system, voters are hesitant to make changes. For instance, major reform proposals for the Oklahoma state judicial system were at a standstill until the mid-1960s when two state supreme court justices were convicted and sent to jail for bribery and income tax evasion and a third was impeached as the result of a court scandal. It was only then that Oklahomans adopted merit selection for appellate judges.⁵ It seems fairly clear that voters in Nevada do not perceive a problem with the current selection process. In part this is likely the result of a period of tranquility in the state judiciary after several years of scandal and open rancor.⁶

Second, the voters clearly want to hold judges accountable, and they see competitive elections as the best method for achieving this. In this they are urged on by the state's largest and arguably most influential newspaper, the *Las Vegas Review-Journal*, which at one time supported merit selection but in more recent years has editorialized against it at every opportunity.

Third, there is little incentive for judges and lawyers, the groups most educated about the state's judicial system and its shortcomings, to organize on behalf of merit selection proposals. Although a survey in the 1980s indicated that lawyers overwhelmingly favored merit selection in the state,⁷ there appears to be a disincentive to their organizing and lobbying in favor of such a proposal. Given the generally low level of esteem in which lawyers are held by most of the public, overt and public support by the legal community for merit selection would likely be cited by opponents as a reason to defeat it. Indeed, to make the point that lawyers' opinions on this matter are based on self-interest, the political scientist Harry Stumpf notes that they tend to support merit selec-

tion because it gives them "increased influence over the machinery of judicial selection itself 'Merit' selection gives them added leverage."⁸ Similarly, few sitting judges can feel comfortable publicly supporting the merit system. Again, such individuals would be accused not only of self-interest in attempting to avoid electoral competition but also of failing to trust the voters to do the right thing.

Thus does it seem clear that the political climate in Nevada is not at a point where the public is willing to adopt merit selection of judges. In addition to political inertia, any proposal will suffer from a reasonably well-organized opposition headed by the *Las Vegas Review-Journal* and a strong disincentive for supporters in the legal profession to organize and publicly campaign on its behalf.

POLITICIZATION OF THE MERIT SYSTEM

If the state's political culture is unaccepting of merit selection, it is also true that merit selection retention elections have become increasingly politicized and thus less likely to avoid the problems of fundraising and conflict of interest associated with Nevada's nonpartisan elections. This politicization is the result of increased participation by interest groups in the retention election process. More frequently than ever, "judges may be targeted for removal because their decisions are incompatible with the policy interests of the challenging and well-financed interest groups."⁹ Political scientist Traci V. Reid, for example, has written about the defeat of two state supreme court justices (one in Nebraska, the other in Tennessee) "who lost their seats when a cluster of special interest groups and other political actors challenged their retentions. Neither was accused of judicial malfeasance or incompetence. Rather, the campaigns that led to their removal stemmed from frustration over selected decisions rendered by their courts."¹⁰

Apparently, single-issue interest groups have increased their presence in retention elections and target judges for their decisions rather than their abilities. In the 1990 judicial retention elections in Florida, prolife groups targeted Justice Leander J. Shaw, Jr., of the state supreme court for a single decision on abortion in which he wrote the 4-3 majority opinion.¹¹ Similarly, a campaign was waged in 1998 in Oklahoma by "Oklahomans for Judicial Excellence" against judges whom the organization thought to be not supportive enough of business and economic growth.¹²

In all of these cases, of course, the incumbent judges were forced, frequently at the last minute, to accumulate campaign contributions, primarily from members of the legal profession. Thus, with the necessity for campaign war chests and television advertising, and the presence of actual or potential conflicts of interest, many merit system retention elections are coming to look very much

like the competitive elections they were designed to replace.

If, then, (1) the Nevada political culture is unlikely at this time to accept the merit system, and (2) merit system retention elections are evolving to resemble the much-criticized competitive elections that they supplanted, is there any hope for systemic change? Indeed, is there a need for change at all in the system Nevada uses for selecting judges?

A MODEST PROPOSAL FOR REFORM

The fact that merit system retention elections have become increasingly politicized, forcing incumbent judges in these states to behave little differently from their counterparts in election states such as Nevada, does not in any way minimize the problems of competitive judicial elections we identified in 1993.¹³ Indeed, what these new developments indicate is merely that a move to merit selection will not, in and of itself, remove the politics from judicial selection, a position that no scholar ever seriously advocated in any case. Consequently, it may be necessary to explore other avenues of reform.

There are many criticisms of the nonpartisan election approach currently used by Nevada to elect its judges. However, at bottom the two most important are: (1) competitive campaigns frequently result in negative campaigning, personal attacks, and ethical lapses by individuals who should know better, and (2) the need to campaign against an opponent requires judicial candidates to garner large sums of money to fund that campaign, creating actual or perceived conflicts of interest.¹⁴

Thus, we find our quandary. On the one hand, nonpartisan competitive elections are exceedingly popular in Nevada for choosing judges, and it is unlikely that they will be replaced any time soon. On the other hand, there are serious problems of negative campaigning, ethical lapses, and conflicts of interest associated with competitive elections that even supporters of these elections cannot refuse to recognize.

It is here suggested that, if these problematic elections must continue (and clearly the voters want them to), then the solution may simply be to have them less often. Currently, the seven justices on the Nevada Supreme Court serve six-year, staggered terms. This means that normally two or three of these positions will be on the ballot in any given general election.¹⁵ In a four-year election cycle, all seven justice positions must be voted upon at least once, possibly more.¹⁶ In a period of twelve years, voters will have lived through at least twenty-one supreme court campaigns, and conceivably more if justices appointed to fill midterm vacancies are on the ballot.

The modest proposal of this article is that justices of the Nevada Supreme Court be elected to serve staggered, fourteen-year terms. The immediate consequence of this proposal will, of course, be to reduce the number of supreme

court elections to seven every fourteen years, i.e., one every two years.¹⁷ The advantages to this system are numerous while its disadvantages are minimal.

ADVANTAGES OF A FOURTEEN-YEAR TERM

On a structural level, there would be three major advantages to fourteen-year terms for state supreme court justices: (1) reduced need for campaigns and contributions, (2) improved levels of voter information and attention, and (3) a more extensive judicial record.

Campaigns and contributions. Scholars opposed to a system of competitive judicial elections are, perhaps, most critical of the need for judges to run campaigns and, therefore to solicit contributions. Although incumbent judges will almost always be re-elected, they do, on occasion face challengers. This, of course, requires both candidates to solicit contributions. Even in those cases where an incumbent is unlikely to be challenged, it is frequently the fact that a sitting judge will stockpile a war chest sufficient to deter challengers from running.

Judicial elections can be quite expensive. In 1986, for example, "California Supreme Court Chief Justice Rose Bird and two of her colleagues spent more than \$11 million in their efforts" to stay on the bench. That same year, Ohio Supreme Court Chief Justice Frank Calabrezze spent \$1.8 million in his unsuccessful bid for re-election.¹⁸ Although Nevada is a much smaller state than either California or Ohio, this trend has held true in the Silver State as well. For example, in the 1992 supreme court race between Miriam Shearing and Charles Thompson, the most recent, truly competitive supreme court contest, total expenditures for both candidates were more than 1 million for a position that at the time paid only \$85,000 per year.¹⁹

The high costs of judicial campaigns have several implications for the administration of justice. The most important is unquestionably the appearance or actual presence of a conflict of interest. As political scientists Harry Stumpf and John Culver note,

Lawyers, fellow judges, and in some instances political action committees are the most likely outside sources of campaign funds for judges and challengers. Attorneys who contribute to an incumbent judge may feel they will be rewarded for their largesse Conversely, attorneys who actively support the incumbent's opponent may feel they will be at a disadvantage when they appear before the judge in court. In his study of judge's attitudes on judicial selection in Florida, Atkins . . . found that judges felt they were placed in a "compromising position" when they accepted contributions from lawyers who appeared before them.²⁰

Indeed, a study of Philadelphia's municipal and common pleas courts found that, during one five-year period, "defense lawyers who had either worked in or contributed money to judges' campaigns won 71 percent of their cases be-

fore those judges. Yet in the same municipal courts, an average of only 35 percent of the defendants won their cases." These figures suggest more than simple coincidence at play, and as a result these elections are now financed by the Philadelphia Bar Association.²¹

Although there is no evidence to date that campaign contributions have influenced judges in Nevada, the large sums necessary for conducting a serious campaign and the fact that these donations derive primarily from legal and gaming interests create, at the very least, the appearance of a conflict of interest when these entities appear before a judge to whom they have contributed. As noted by a Texas lawyer, "Anybody who makes a contribution to a candidate for public office expects some kind of return."²²

The advantage of fourteen-year terms for state supreme court justices in this regard is that, as the number of elections declines, so too will the need to run campaigns (too frequently, negative ones) and solicit donations. For example, over a fourteen-year period, a particular seat will come up for election once rather than twice, as it would under the current six-year term rule. Over a longer term, say forty-two years, that seat would be on the ballot three times rather than the seven that it is now. By reducing the number of judicial elections, it is logical and likely that the state would also reduce the number of negative campaigns and problems related to possible conflicts of interest. Alternatively, of course, one might argue that a system of lifetime appointments or public financing of elections, may eliminate the problem. As noted earlier, the voters of Nevada are unlikely to adopt so major a reform.

Voter Information and Attention. In addition to the conflict-of-interest problem noted above, judicial elections are characterized by a drop-off in voter participation. That is, in any given election year, a sizeable percentage of those people who vote in the top-of-the-ticket races (e.g., president election) will opt not to vote in the judicial races. This appears to be due to either a lack of interest or a lack of knowledge by the voters.

That it is due primarily to the voters' lack of knowledge about the candidates is likely given that drop-off rates are lower in partisan election systems than in nonpartisan systems. In the former, voters have a candidate's party affiliation that can be used as a voting cue; in the latter, there is no handy cue, and voters simply choose, in large numbers, not to vote. That this is true can be shown by the data in Nevada judicial elections. Between 1864 and 1914, when Nevada's judicial races were partisan, average drop-off was only 3.6 percent in the thirty elections that occurred. Between 1915 and 1965, the drop-off rate in the thirty nonpartisan judicial elections rose to 28.13 percent. And between 1966 and 1998, the drop-off rate changed only slightly, to 25.7 percent in thirty-three races.²³

Voters cannot, perhaps, be particularly faulted for low levels of knowledge in judicial races. Under the *Code of Judicial Conduct*, for example, judges are prohibited from making "pledges or promises of conduct in office other than

the faithful and impartial performance of duties of the office," nor can they announce their "views on disputed legal or political issues."²⁴ Given that all judicial candidates will pledge to perform their duties in a fair and impartial manner, there is frequently little to distinguish one from another. It is perhaps this characteristic of judicial elections that is chiefly responsible for encouraging candidates to "go negative," attacking their opponents on personal, rather than professional, grounds in an attempt to differentiate themselves from their competition.

A second possible reason for voters' inaction is that there are frequently several judicial races appearing on an already crowded ballot. For example, in 1998, not only were all district court seats up for election, but so too were four supreme court seats. These races were in addition to the dozens of others on the ballot for United States senator, United States representative, the six state constitutional officers, the state senate and assembly, county commissioners, county clerk, county treasurer, and so on. It is easy for judicial races, usually low-key affairs anyway, to get lost in the jumble.

Although the fourteen-year term proposed here would do nothing to change the *Code of Judicial Conduct*, it would reduce the number of supreme court races appearing on the ballot in any given year and over the long term. Once the system is in place, normally only one supreme court race would appear on the ballot every two years. Under the current system, at least two, and sometimes three, high court races normally appear on the ballot every two years. Reducing the number of supreme court races in each election by one-half to two-thirds would allow voters an opportunity to concentrate on a single race rather than on two or three. Although a reduction in the number of judicial elections could not guarantee more voter attentiveness and knowledge, it would provide a media and electoral spotlight on a single race and, thereby, give voters the opportunity to become better acquainted with the candidates, their qualifications, and their personalities than would a more crowded election sequence. At the very least, a fourteen-year term would do no harm in this regard given the unlikelihood that it would result in lower voter participation than at present.

Again, one could alternatively argue for life tenure for justices, the merit system and its noncompetitive retention elections, or other options that would eliminate or substantially reduce competitive judicial elections. However, voters who have twice rejected the merit system are unlikely to adopt such "radical" reforms as these.

More Extensive Judicial Records. Although a less important point, justices serving a fourteen-year term will have an opportunity to build a more extensive record of judicial decisions than will justices serving six-year terms. This would be a positive development for both the voters and the justices. Voters would have a longer record to examine when evaluating an incumbent for re-election and could form a more accurate appraisal of the justice's ideologies and demeanor on the bench. Justices, on the other hand, would have such an exten-



Justice John Mowbray. (Nevada Historical Society)



Noel E. Manoukian. (*Nevada Historical Society*)

sive record of decisions that they would, theoretically, be less likely to be successfully targeted by single-issue interest groups for one or two decisions out of the hundreds or thousands rendered during this longer period.

ACCOUNTABILITY AND INDEPENDENCE

The debate between judicial accountability and judicial independence is a long and contentious one. On the one hand are those who argue that judges should be as free of political accountability as possible within a system of checks and balances (e.g., the federal judicial system in which judges serve life tenure for “good behavior”) and, on the other, those who argue that judges should be amenable to the popular will (e.g., those states, such as Nevada, that utilize judicial elections). It is probably the case that most Americans, when pressed, would support a pragmatic middle position that “minimizes politics but maximizes public participation in the selection process.”²⁵

The double defeat of the merit system in the state suggests that for the voters of Nevada—and the editorial writers of the *Las Vegas Review-Journal*—any system, such as the merit system, that does not provide for competitive judicial elections falls short of their desired balance. Thus, as noted at the beginning of this article, major reform proposals that decrease this accountability are likely to fail.

Although the fourteen-year term proposed here is likely also to draw criticism for reducing judicial accountability, the modesty of the proposal mitigates against that charge. Unlike proposals for a merit system, an appointive system, or even life tenure, the fourteen-year reform continues to provide for competitive, nonpartisan elections on a regular basis. Supreme court justices would continue to be elected in competitive elections and would continue to be accountable to the voters in exactly the same way as they have always been; in that very important sense, nothing would change.

The importance of judicial accountability is that it provides the voters a periodic opportunity to examine members of the judiciary and determine whether they are suitable to continue in office or should be replaced. In fact, as prior research has shown, incumbent judges and justices in Nevada seldom even draw an opponent and are rarely defeated at election time in those few instances when they are challenged.²⁶

Since Nevada adopted nonpartisan elections in 1915, this pattern has particularly held true. Between the elections of 1916 and 1998, there have been sixty-three general elections for supreme court justice positions; fifty-three of them included an incumbent (84.1 percent). In elections involving incumbents, the challenger won in only three instances (5.7 percent). Similarly during this period, thirty-eight of these sixty-three races featured only one candidate running (60.3 percent); twenty-four had two candidates (38.1%); and one included

three candidates (1.6 percent).²⁷

What these data suggest is that: (1) supreme court elections in Nevada are competitive only about 40 percent of the time;²⁸ and (2) incumbent supreme court justices, whether they draw an opponent or not, are re-elected almost 95 percent of the time. Thus, with these high re-election rates, justices in Nevada are essentially able to serve for as long as they choose to serve. Indeed, excluding the justices currently serving on the Court, the eight most recent justices have had an average service of 15.88 years on the high bench. Only one of these eight, Noel Manoukian, who served eight years, was defeated for re-election; the others simply chose to resign or not run for re-election after terms of service ranging from a minimum of twelve years (David Zenoff) to a maximum of twenty-six (John Mowbray, Sr.).²⁹

The fourteen-year term proposed here, then, is certainly well within the norm of service by justices on the Nevada Supreme Court. Consequently, voters would in effect have the same chances of turning out incumbents under this modest reform as they do now. In either case, justices will serve about fourteen years before voters have a realistic opportunity to turn them out.

There will, of course, be justices in the future who may need to be removed from office prior to the expiration of the fourteen-year term. Under the current system, these justices can be removed by the voters at an earlier time (e.g., Manoukian), whereas under the reform proposal the voters could not vote them out for fourteen years. However, there is still substantial public accountability built into the constitutional structure of the state's judicial system. The voters may remove judges through recall elections³⁰; the legislature may remove them through impeachment³¹ or legislative removal³², and they may be removed by the Commission on Judicial Discipline.³³ In addition to regularly scheduled elections, judges and justices in Nevada may be held accountable by the voters and their elected representatives by four other methods. The rare case of a justice who should be removed can therefore be dealt with through these constitutional structures and processes.

CONCLUSION

The fourteen-year term proposal advanced by this article is a modest one. Unlike the merit system or other proposals for major reform, it will not eliminate competitive, nonpartisan elections for positions on the Nevada Supreme Court; nor would it be likely to lengthen the time that justices remain on the bench, given that they already average more than the fourteen years proposed here. It also will not diminish the other four constitutional structures of judicial accountability.

What this proposal will do is reduce the number of elections for justices and, thereby reduce the number of campaigns. In turn, this will reduce the number

of occasions in which candidates run negative campaigns, tap the well of campaign contributions, and skirt issues of conflict of interest. Concomitantly, it will increase opportunities for voter attentiveness to these important elections and provide a more substantial record upon which voters may base their selections for justices to the state's highest court.

NOTES

¹Michael W. Bowers and Larry D. Strate, "Judicial Selection in Nevada: An Historical, Empirical, and Normative Evaluation," *Nevada Historical Society Quarterly*, 36 (Winter 1993), 227-45.

²*Ibid.*, 237.

³Michael W. Bowers, "The Impact of Judicial Selection Methods in Nevada: Some Empirical Observations," *Nevada Public Affairs Review*, no. 2 (1990), 4-5.

⁴Bowers and Strate, "Judicial Selection in Nevada," 241-43.

⁵Philip M. Simpson, "The Modernization and Reform of the Oklahoma Judiciary," *Oklahoma Politics*, 3 (October 1994), 1-14.

⁶The 1998 elections to the Supreme Court were, for example, quiet affairs with little bickering or competition. These races stand in marked contrast to the bitter election in 1992 between Charles Thompson and Miriam Shearing. Likewise, the rancor of John Mowbray's departure in 1992 and the ugliness of the Jerry Whitehead matter seem to have faded in most voters' minds. For a discussion of these contretemps, see Bowers and Strate, "Judicial Selection in Nevada," 238-40. See also Michael W. Bowers, "Personality and Judicial Politics in Nevada," *State Constitutional Commentaries and Notes*, 2: 4 (Summer 1991), 7-10.

⁷Michael W. Bowers, "Judicial Selection in Nevada: Choosing the Judges," *Halcyon: A Journal of the Humanities*, 11 (1989), 100-101.

⁸Harry P. Stumpf, *American Judicial Politics*, 2d ed. (Upper Saddle River, New Jersey: Prentice-Hall, 1998), 147.

⁹Traci V. Reid, "The Politicization of Retention Elections: Lessons Learned from the Defeat of Justices Lanphier and White," *Judicature*, 83: 2 (September-October 1999), 68.

¹⁰*Ibid.*, 68-69.

¹¹Harry P. Stumpf and John Culver, *The Politics of State Courts* (New York: Longman, 1991), 46.

¹²R. Darcy, "The New Era of Oklahoma Judicial Elections," paper presented at the Summer Judicial Conference, Oklahoma City, 13 July 1999.

¹³Bowers and Strate, "Judicial Selection in Nevada."

¹⁴It is unnecessary in this article to repeat the cases in which these issues have arisen. Readers interested in this background information are advised to examine Bowers and Strate, "Judicial Selection in Nevada," for an in-depth discussion of negative campaigning, ethical lapses, and conflicts of interest in Nevada judicial campaigns.

¹⁵In fact, if there has been a midterm vacancy to which the governor has appointed a justice, that person would also be on the ballot running to complete the previous justice's remaining term. Conceivably, any number of justice positions (up to seven, of course) could appear on a given general election ballot. For example, in the 1998 general election, the creation of two new seats on the court led to four of the court's seven positions being on the ballot at the same time, two for normal six-year terms and two for truncated two-year terms.

¹⁶The four-year cycle may seem illogical given that justices serve six-year terms. However, the reader should note that three justices will be elected in November 2000, two justices in November 2002, and two in November 2004, a period of four years.

¹⁷Since this proposal does not suggest changing the method for selecting justices to fill midterm vacancies, it is again possible that additional seats could be listed on the ballot in a given general election so that the voters may decide whether a gubernatorial appointee finishes out his or her predecessor's term.

¹⁸Stumpf and Culver, *Politics of State Courts*, 43.

¹⁹Bowers and Strate, "Judicial Selection in Nevada," 239.

²⁰Stumpf and Culver, *Politics of State Courts*, 44.

²¹*Ibid.*

²²*Ibid.*

²³Percentages calculated by the author based on raw data from the secretary of state's office. Those voting for "None of These Candidates" after 1976 are included as having voted in the supreme court race. Were these individuals not counted, the drop-off rates would be significantly higher.

²⁴John P. MacKenzie, *The Appearance of Justice* (New York: Charles Scribner's, 1974), 243.

²⁵John M. Roll, "Merit Selection: The Arizona Experience," *Arizona State Law Journal*, 22 (Winter 1990), 837.

²⁶Bowers, "Impact of Judicial Selection Methods in Nevada," 5-6.

²⁷Raw numbers and percentages calculated by the author based on data provided by the secretary of state.

²⁸Actually, the 40 percent figure is high given that, in many of these so-called competitive races, the opponent is a poorly funded individual with little name recognition and no real campaign. The chances of winning are virtually nonexistent.

²⁹Years of service and average computed by the author based on information provided by the secretary of state. The eight justices and their years of service are: Thomas L. Steffen (fifteen years), Charles E. Springer (eighteen years), John C. Mowbray (twenty-six years), Cameron M. Batjer (fourteen years), Elmer "Al" Gunderson (eighteen years), Noel Manoukian (eight years), Gordon R. Thompson (sixteen years), and David Zenoff (twelve years).

³⁰Nevada State Constitution, art. 2, sec. 9.

³¹*Ibid.*, art. 7, sec. 1, 2.

³²*Ibid.*, art. 7, sec. 3.

³³*Ibid.*, art. 6, sec. 21.

BOOK REVIEWS

Transcontinental America, 1850-1915, Vol. III, The Shaping of America: A Geographical Perspective on 500 Years of American History. By D. W. Meinig (New Haven and London: Yale University Press, 1998, 457 pages, 84 illustrations, bibliography, index).

For most of the twentieth century, major universities across the United States boasted substantial departments of geography. The academic world commonly recognized the crucial role played by mountains, rivers, plains, oceans, and other natural features in supporting ecosystems, influencing the weather, and, most important shaping the course of human history. In the last half century, however, many elite institutions such as the University of Chicago have eliminated their geography departments to concentrate their resources in a geology or geoscience department, usually staffed with only one or two full-time geographers.

In few disciplines has this trend been more detrimental than in history. For Frederick Jackson Turner and the legions of scholars inspired by his frontier thesis, the mountains, rivers, and deserts beyond the wide Missouri were critical factors affecting the region's growth. In the East, other historians considered geography equally important in accounting for the development of the thirteen original colonies, the Ohio Valley, and the Piedmont, as well as the rise of England, France, Germany, and their empires in the Third World.

Over the past forty years, D. W. Meinig, America's foremost historical geographer, has kept this great tradition alive with a series of engaging books and articles. Meinig's *Imperial Texas* (Austin: University of Texas Press, 1969) and *The Columbia River Plain* (Seattle: University of Washington Press, 1965) clearly demonstrated the value of a geographical approach to history. Now, nearing the end of his illustrious career, Meinig has distinguished himself once again by penning a truly magisterial work, his four-volume geographical interpretation of American history. This book, the third volume in the series, contains Meinig's major chapters on the West. Indeed, he devotes 187 of 457 pages to this section before turning his attention back to the rest of the nation.

This review will emphasize our section of the country. It should be mentioned at the outset that Nevadans will be disappointed with the coverage allotted their state, hardly one page. Meinig has privately informed me that space constraints barely allowed him to scratch the surface in his treatment of Nevada, Wyoming, and other sparsely-populated states. This is understandable and should not detract from what is really an illuminating treatise on the West.

The work begins with a comprehensive discussion of the various transcontinental railroad routes that Congress wrangled over in the turbulent years immediately before and during the Civil War. Here, "geopolitical realities" (15) exerted major pressures. For instance, despite Brigham Young's determination to route the Union and Central Pacific railroads through his capital, the unpredictable levels of the Great Salt Lake diverted the trunklines northward to Ogden and Promontory Point. Despite the obvious logic of building a line from Kansas City through the burgeoning city of Denver to California, the railroads had to veer north through the Wyoming Basin and create Cheyenne, because there was no feasible pass through the Snowy Range of the Rockies. Finally, despite the staggering cost and expected lack of traffic, Congress had to build the line as a means of discouraging separatist movements in California. Given the Texas Revolution in 1836 and the Confederates' intentions of extending their republic to the Pacific and, along with the British, thwarting the designs of Manifest Destiny, Congress could take no chances.

Meinig follows this clever introduction to the subject of western expansion with insightful sections on Northern and Southern California, Oregon-Washington, Utah, "the Colorado Complex," and Arizona-New Mexico. As usual, his statements are bold: California in 1860 was "a vigorous diversifying nucleus of 400,000 people . . . not an isolated outpost . . . desperate for subsidy and nurture from a distant government." (26) Written from the standpoint of the "new western history," the book places the American occupation of California and the West itself firmly in the context of imperial conquest. Meinig, for instance, argues that part of the American genius in conquering and developing the Golden State was in not forcing eastern farming and mining techniques upon this strange new land, but in adapting Spanish, Mexican, and Indian approaches, as well as engaging in extensive experimentation in the cultivation of olives, grapes, cherries, and various subtropical species of fruit not grown in the East.

Of particular value is Meinig's reminder that the West was more than a helpless periphery dependent upon some Eastern core for capital and manufactured goods. While recognizing some dependency, he emphasizes the West's independence, "especially the pull of another ocean—hardly discernible perhaps in Colorado, minor in New Mexico, but palpable in Mormonland and powerful upon all within the real Pacific Slope." The importance of the sea lay not just in its role as a highway between the Pacific Rim and North America, but in "the strong lure of vigorously developing American societies on that coast with their widely heralded resources and potential." (178)

Meinig's treatment of Utah is masterful in describing how the Wasatch Front and the grassy benchlands and watered valleys branching off its foothills shaped the "human geography" of Deseret. (99) Given Brigham Young's curious opposition to settling the frosty lands north of the Idaho border and the Mormon penchant for clustering rather than dispersing pioneer farmers, Meinig offers

an excellent geographical framework for explaining the Mormon migration southward beyond the Colorado Plateau into the Little Colorado country, fine points of cultural theory, Meinig offers one of the best accounts of how Mormonism both supported American values while also deviating from them enough to convince Washington's "imperial agent" of the need to call in troops and block Utah's for nearly half a century. (113) Particularly compelling is his comparison of the Mormons' 1846-47 march westward to escape American control with the Boers' 1837 trek inland following the British occupation of coastal South Africa.

One of Meinig's signature contributions to western history remains his suggestion, developed years ago in a relatively obscure article, that this section's development differed markedly from its counterparts in the East. In Transappalachia "local clusters and salients in the vanguard were soon engulfed and integrated into a generally contiguous pattern of advance." (35) In the Far West, however, there was no frontier line of population oozing across the plains. Instead this zone was settled "chiefly by expansion and extension outward from the several primary nuclei already implanted." (35) Hence the development of towns and farms was outward from San Francisco, Los Angeles, Portland, Seattle, Salt Lake, Denver, and smaller nuclei such as Boise, Santa Fe, Butte-Helena, and Virginia City. This urban interpretation allows him to engage in penetrating comparative analyses of the development of such rivals as Portland and Seattle as well as Walla Walla and Spokane. Particularly appealing is his discussion of how the relationship between Portland and Walla Walla compared with the relationship between San Francisco and its inland supply centers at Sacramento and Stockton.

As with all ambitious works, there are statements with which one might quibble. For example, Meinig suggests that in creating ten western states so quickly Congress gave citizens in this sparsely-settled section an inordinate power in the Senate. One might also make the opposite argument: In creating its progeny, the East, by fashioning such enormous western states guaranteed that the western half of North America would forever be outvoted on sectional issues by the Delawares, the Vermonts, and Rhode Islands who would, for instance later balk at being taxed for dams, irrigation projects, and other western needs. While one could certainly agree with his conclusion that Wyoming "remained a vast, thinly populated expanse anchored upon its Union Pacific axis," one might quibble with his notion that even after the railroad's arrival, the territory was "still focused on its southeastern corner." (151) Cheyenne was Wyoming's political and business center, but the significant coal deposits and subsequent mining operations near Rock Springs and Evanston cannot be overlooked.

Time does not permit a full discussion of all the contributions this book makes to our understanding of other western territories, and to native peoples and other minorities, much less to our understanding of eastern concerns, World

War I, and other themes in American history. Certainly Meinig's chapters covering "Mexico and an American Mediterranean" in the Caribbean and "Hawaii and an American Pacific" are required reading for anyone interested in geography and the pursuit of empire.

As a contribution to the history of our region, Meinig's book offers a thought-provoking interpretation of the West during the crucial period when America was undergoing, in the words of Walt Rostow, its "economic takeoff" and becoming a major industrial power. The conquest, settlement, and exploitation of this frontier and its resources were crucial to the rising American empire as this formidable volume confirms.

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References: D. W. Meinig, *Imperial Texas; An Interpretive Essay in Cultural Geography* (Austin: University of Texas Press, 1969) and *The Columbia River Plain: A Historical Geography, 1805-1910* (Seattle: University of Washington Press, 1968.)

The Frontier Army in the Settlement of the West. By Michael L. Tate (Norman: University of Oklahoma Press, 1999, xx + 454 pages, illustrations, maps, notes, bibliography, index).

"It is this generosity and this kind care and order and discipline that make me like the care of the army for my people." So wrote Sarah Winnemucca in *Life Among the Piutes* (1883). "Can you wonder," she asks the reader "that I like to have my people taken care of by the army? . . . They know more about the Indians than any citizens do, and are always friendly." The statement probably comes as a surprise to countless Americans who have seen the nineteenth century regular army as an oppressor of the Indians and a practitioner of genocide. Michael L. Tate makes it clear in this excellent book that the army was more often than not the protector and benefactor of the Indians of western America. Generals George Crook and O. O. Howard, along with a host of other lesser-known officers, became outspoken champions of Indians rights, and repeatedly, denounced ill-treatment by white settlers and wrong-headed federal policies.

Tate emphasizes that Indian affairs accounted for only a small fraction of the time and energies of the "frontiersman in blue." His main message is that America's small, underfunded, and put-upon army played a constructive and beneficial role in the shaping of the West. "It was truly a multipurpose army

that made far greater contributions to the western landscape than as a mere campaigner against hostile Indian." (316)

The exploration and surveying of the lands beyond the Mississippi was primarily a function of the army, yet we too often forget that the Lewis and Clark expedition and the journeys of John C. Frémont were military undertakings. So too were the Pacific Railroad Surveys of the 1850s, the laying out of western wagon roads in the same decade, and the Wheeler Survey of the 1860s and 1870s. These and many other army explorations vastly increased knowledge of the geology, terrain, natural history, ethnology, and climatology of western North America. The Signal Corps built much of the West's telegraphic network. From 1870 to 1890 this branch operated as the nation's weather bureau. For example, in Nevada, enlisted men of the corps in Pioche and Winnemucca daily recorded and transmitted a mass of meteorological data. Greatly benefiting travel and commerce were the improvements of western harbors and rivers. Dredging, bank stabilization, and snag removal were all undertaken by the Corps of Engineers.

At a remote garrison, soldiers planted vegetable gardens, thereby not only improving their diet but also showing the agricultural possibilities of lands previously thought to be unfit for cultivation. A more obvious benefit of the presence of the soldiery was the infusion of federal money into the local economies in the form of contracts for supplies and provisions for nearby posts. Army chaplains and surgeons often served the spiritual and physical needs of the civilian population as well as those of the troops. Likewise, some post libraries and schools were open to citizens of nearby communities. Thousands of overland emigrants received food, medical care, vehicle repairs, and other services—mostly free—from posts along the routes to the West. The paintings of Lieutenant Colonel Eastman and the novels of Captain Charles King are examples of how soldiers helped to shape images of the West.

The army served as a law enforcement agency in trouble-spots such as New Mexico during the Lincoln County War and Wyoming during the Johnson County War. It administered and policed the embryonic national park system. In the later nineteenth century, soldiers were saddled with the thankless duty of maintaining order and protecting property during labor disturbances. When disasters such as floods and fires struck, the army was on hand to feed and house destitute civilians and to prevent looting. Such aid was particularly conspicuous and welcome after the San Francisco earthquake and fire of 1906.

In detailing these and other army accomplishments the author has performed a notable service. Earlier studies have treated most of the topics discussed here, but Professor Tate's volume is the first to bring it all together. It is an essential work that gives us a much-needed overview of the military's vital role in the development of the western United States.

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Hoover Dam: The Photographs of Ben Glaha. By Barbara Vilander (Tucson: The University of Arizona Press, 1999, xvi + 169 pages, illustrations, notes).

Since construction began on Hoover Dam in 1931, the number of professional photographers who have used the dam as their subject probably rivals the number of scholars who have used the project as a focal point for studying water in the West. Few accomplish what Barbara Vilander has in her study of images of the dam made by its first official photographer, Bureau of Reclamation employee Ben Glaha. Between 1931 and 1936, Glaha blended his draftsman's knowledge of the dam's construction with a keen compositional eye to produce images that were documentary enough to please the Bureau and artistic enough to hang in galleries. Utilizing fifty of his images, including many never before attributed to him, Vilander analyzes Glaha's photographs to show how he not only documented the dam's construction but taught both photographers and the general public how to *see* Hoover Dam.

After providing a general overview of the history of western reclamation and the Hoover Dam project in the first chapter, Vilander provides a short biography of Ben Glaha. We learn that he took up photography while serving in the army in World War I. He worked for a short time as a journalist before joining the Bureau of Reclamation as a draftsman in the mid-twenties. In 1931, Glaha began working on the dam and was given part-time duties as a photographer documenting its construction. Although Glaha met the bureau's expectations by producing positive images for good publicity, he also placed his work into the evolving cultural form of the Machine Aesthetic.

The meat of the book analyzes Glaha's photographs and their use by the Bureau of Reclamation as social documentation, art, and publicity. As social documentation, Glaha's photos were used to show the public that the dam's construction would improve the quality of life in the Southwest by controlling floods and providing electricity. Although all negatives and prints were sent to Washington, Glaha was not given shooting scripts but instead relied upon a tacit understanding of what kinds of shots were required to foster the bureau's public image. In this vein, Glaha produced images showing the rising of the dam from Black Canyon, technical construction details, work routines, support equipment, Boulder City, and just about everyone who worked on or visited the dam during its construction.

While documenting these actions, Vilander argues that Glaha's images are also examples of the popular Machine Aesthetic style of the time. Most closely associated with Margaret Bourke-White, Charles Sheeler, and Lewis Hine, the Machine Aesthetic sought to "stylistically reduce whatever they depicted to the essence of its function." Photos of dam construction became not only visual records but also formalist abstract compositions. The Bureau recognized

this merging of art and documentation and allowed Glaha's work to appear in a special album and then in a successful traveling fine arts exhibition.

Glaha's ability to make images that used a documentary style and aesthetic beauty to capture the viewer's attention served the bureau's publicity needs. The photos become very popular with critics and the government, and the public. In addition to the album and exhibition, Glaha's images were distributed to newspapers, popular books and magazines, art magazines, bureau leaflets, and even tourist pamphlets and booklets. Magic lantern slide sets were created and loaned to schools for public lectures and exhibitions. In her analysis, the author shows how the same popular image of a nighttime construction view (indeed the book's cover photo), was utilized by various publications to show different themes.

Vilander concludes her study of Glaha's images by showing how his compositions became *the* way for photographers to see Hoover Dam. Through comparison and analysis, Vilander argues that Glaha's work influenced Margaret Bourke-White's classic *Life* cover photo of Fort Peck dam, the sketches and illustrations of artist William Woollett, and even the Hoover Dam photos of Ansel Adams. The book's final chapter expands on this notion by examining how current photographers depict the dam, water, and the West today.

This is a much needed book in the history of photography of the American West. By analyzing one photographer's subject matter and then placing that work into the broader historical and artistic contexts, Vilander provides a nice jumping-off point for similar studies of the modern West. The only drawback in the work, and it is a small one at that, is the uneven quality of some of the half-tone reproductions. Nevertheless, this book should be viewed, *and ready*, by all those interested in the history of photography and the modern American West.

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Glen Canyon Dammed: Inventing Lake Powell and the Canyon Country. By Jared Farmer (Tucson: The University of Arizona Press, 1999, 288 pages, illustrations, index).

"There are those who exalt Lake Powell as creation, and those who damn it as destruction," Jared Farmer writes in *Glen Canyon Dammed* (xxvi). But the author reminds us that understanding southern Utah's canyonlands cannot be reduced to a simple dualism that depicts the region as either a wilderness Eden or an ecological disaster. He offers instead a more complicated account, sug-

gesting that perhaps Glen Canyon "may not have been everything we imagine, and that the reservoir could be more than we've let ourselves admit" (xxvii). Using this framework, Farmer assesses recent tourism, recreation, and development as he seeks to elaborate the theme of Lake Powell and the surrounding canyonlands.

Farmer places the region within the context of twentieth-century growth, discussing the development of the system of roads that connected the parks and monuments of southern Utah and facilitated modern industrial tourism. The majority of the tourists between 1909 and 1968, he notes, were Euro-Americans, who found in the canyonlands "what seemed to be a new world—or at least a throwback to a simple and somehow superior, American places" (63), like Glen Canyon, tourists acted out frontier narratives long after the frontier had passed. At the same time, though, they regretted the transformation of the West, even as they took advantage of its accessibility. Many early visitors, according to Farmer, anticipated forms of loss at Glen Canyon, and by the late 1950s their premonitions had a name—Glen Canyon Dam.

For those, like Jared Farmer, who never knew Glen Canyon, it is hard to feel bad about Lake Powell. After all, the lake is a boater's paradise set within a spectacular wilderness are at least as modern tourists describe it. Farmer's narrative reflects the ambiguities that Americans express about Lake Powell. The increasing awareness of ecological issues over the past few decades has led many to lament the damage caused by the dam; others have never acquiesced the loss of Glen Canyon's inherent beauty and the disappearance of one of the last wilderness areas in the Southwest. Farmer acknowledges that Lake Powell, for all of its beauty and recreational opportunity, "cannot make up for Glen Canyon, very simply because it's not an equivalent place." (178) Yet there remains the powerful counter argument that balances the loss of the canyon's beauty against Lake Powell's own spectacular scenery and its recreational opportunities. "Can millions of happy boaters be wrong?" Farmer ask. (129) He describes himself as being somewhere in the middle of this debate, but clearly his feelings are with the lake as it exists. Glen Canyon should not have been dammed, he admits at one point, but like many of his contemporaries he confesses that it is impossible to dislike Lake Powell.

Having accommodated himself to the reality of this immense reservoir, Farmer acknowledges its role as a remarkable recreational area. His short chapter on recent proposals to drain Lake Powell discusses both sides of the issue but ultimately sides with the 2.5 million people who visit the place every year. For those who spend annual vacations there, Lake Powell is the setting for "some of life's best moments." (188) As a Utah native and a supporter of wilderness, Farmer has sought to balance both sides of the argument about the place, and in the end has written a thoughtful, even compassionate book. Like environmental historian William Cronon, whose essay, "The Trouble with Wilderness" has prompted us to rethink some of our standard values, Farmer also questions the

singular focus of wilderness adherents. There are, he points out, non-wilderness areas where people live and work, the places they call home. He wonders whether westerners can cherish what they have as much as what they have lost. The implications of this argument are important for this study, but unfortunately the author does not develop this insight.

Despite Farmer's effort to provide a comprehensive view of the modern canyonlands, *Glen Canyon Dammed*, remains an uneven work, the result of Farmer's neutral position which ultimately limits his ability to construct a convincing argument either for or against Glen Canyon Dam and Lake Powell. Too often, his sincere laments for the loss of the canyon are followed with praises for the new lake or the excuse that his generation of Utahans, having never seen Glen Canyon, really cannot appreciate it. The author's ambivalence coincides with the mixed feelings that many Americans express about Lake Powell as they try to balance the loss of the Glen Canyon's unique environment against the recreation demands of today's consumer culture.

Jared Farmer has produced a thoughtful and insightful book in many respects. Clearly written, well illustrated, and carefully researched, this study will appeal to a wide variety of readers from local residents and vacationers to scholars interested in the history and environment of the Southwest.

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Not By Politics Alone: The Enduring Influence of the Christian Right. By Sarah Diamond; (New York: Guilford Press, 1998, xi + 280 pages).

This is an unusual book for review by the *Nevada Historical Society Quarterly*. The book is not in any way focused on Nevada, indeed, Nevada is not even listed in the index. The book is not particularly historical in nature, tracing the continuing influence of the Christian Right over the past twenty years. Rather it is far more focused on recent political activities. The book, as promised on its cover jacket, traces the efforts of the Christian Right "to reshape moral priorities through both cultural and legislative means."

In chapter one, Diamond provides a brief overview of the current political state of the Christian Right. She uses the social movements literature to frame her argument emphasizing that hers is a book on the "Christian Right, not evangelicalism in general." (10) However, she argues that the "culture of evangelicalism encourages people to take political action." (10) Furthermore, unlike more elitist groups such as People for the American Way on the left or the Heritage Foundation on the right, Christian Right organizations "enjoy genuinely large constituencies" which rely on relatively "modest donations from

hundreds and thousands of people." (12) In Diamond's view, this mass constituency base makes the Christian Right a formidable force with enduring qualities in American political debate.

Chapters two and three examine the real lifeline of the Christian Right movement mass media communication. Chapter two is a concise and well-documented review of Christian broadcasting, especially the television and radio ministries of Pat Robertson and James Dobson. Diamond shows the evolution of both ministries, noting how Robertson was "the first to deviate from standard pulpit preaching on TV by launching the original Christian news-and-interview show." (4) After establishing a solid viewer and listener base, both ministries are shown as increasingly more political to the point where, "in the 1980s, Robertson largely abandoned talk of the end-times and instead used the *700 Club* to air propaganda on behalf of Reagan Administration policy in Central America." (27) While much of chapter two is ground covered in her previous works, chapter three builds on the theme of expanded substantive reach in the Christian Right's use of the media by examining the growth of Christian periodicals, music and books. While the impact of direct political appeals in Christian broadcasting is "undeniable," (42) what Diamond calls "the evangelical media culture" also "crafts messages about human relations: about authority and obedience, good and evil, success and failure, violence, gender roles, racial distinctions—in other words, everything that matters." (43) While often not thought of as being overtly political, Diamond argues that such acculturation directly ties the individual salvation found in Christian messages to a call for social and political action.

The expanding role of Christian Right political activities is covered in Chapter four. Diamond notes how several issues that arose in the 1970's—the Equal Rights Amendment, abortion, gay rights—brought emerging Christian Right political groups together into a more focused political coalition. The candidacy and then presidency of Ronald Reagan further solidified the coalition. While Reagan did provide a rallying point for the coalition, Diamond is less convincing when she addresses the results of the coalition's efforts. She discusses various lobbying, legal and political campaigns, for example the attempt by supporters of Pat Robertson to capture state Republican parties through grassroots precinct activities and the nomination of Clarence Thomas to the Supreme Court, but doesn't give an account of how these campaigns turned out or how much influence the Christian Right actually exerted. In the case of precinct organizing efforts, any Christian Right gains were very temporal, and the Christian Right was just one of many voices claiming a key role in the Thomas nomination.

Chapters six through nine discuss the Christian Right in action on specific issues, parental rights, gays, obscenity and feminism among others. The treatment here is uneven. Diamond is strongest when showing how these issues are tied together in a general package labeled "family values" and how the Chris-

tian Right works to insinuate itself into the agenda of the Republican Party. There are also numerous examples of local action by Christian Right groups. Her analysis of Christian Right efforts to ban textbooks is chillingly matter-of-fact, detailing various inconsistencies and outright fabrications of various points of fact by Christian Right activists, but the summation in each chapter generally credits the Christian Right with more power than the actual results of their effort support. For example, she notes that "with most of its efforts the Christian Right fails to eliminate objectionable books outright." (196) Yet she goes on to vaguely warn of the how the Christian Right has altered outcomes through publishers' preemptively self-censoring themselves and school districts avoiding hassles with Christian Right groups. Similar types of infinite regress arguments are made for other issues. However, while the Christian Right has injected itself into debates, little concrete evidence supports an argument of wide-scale victory or even of continuing influence. The persistence of Christian Right influence in Republican precincts is at best uneven across the states and in almost all cases on the decline. Similarly, the Christian Right has spent considerable resources attacking President Bill Clinton, but as his administration draws to a close there is little evidence of lasting impact of the Christian Right derailing his presidency or policy goals.

The mixed results of Christian Right political action are of particular relevance for Nevada. Within the state it is hard to show any significant, long-lasting or widespread influence. Even among the state's Republican Party, few politicians align with the Christian Right agenda. The Robertson revolution aimed at capturing the Republican Party had some short term disruptive effects, but the state's Republican leadership is no more consistently identified with Christian Right policies than state Democrats could be called clones in the liberal Ted Kennedy-Jesse Jackson mode. Voters rejected any change or reversal of state abortion policies and the state's primary industry—casino gaming—as much to fear from liberal critics as from the Christian Right.

While Nevada's internal politics has resisted the Christian Right, what of the Christian Right's influence on national politics as it relates to Nevada issues? Again, Diamond's description of how the Christian Right operates is instructive, but her further conclusions of Christian Right influence may be overdrawn. Gambling continues to expand across the country and legislation designed to reign in the state's leading industry, such as current proposals to outlaw betting on amateur sports, is just as likely to be sponsored by liberals (e.g., Democrat Patrick Leahy) as Christian Right supporters. Even national Republicans, with whom the Christian Right has attempted to cultivate its power, have cautiously backed away from such litmus test issues as constitutional bans on abortion. Indeed the resounding crash of Christian Right presidential candidate Gary Bauer, as well as Reform Party candidate Pat Buchanan, may show the true breadth, or lack thereof, of the Christian Right's political might.

Diamond concludes that while the Christian Right has not accomplished much of their agenda, "conservative evangelicals are in the process of creating for 'themselves a new kind of social movement.'" (241) Considerable time is spent discussing the rise of the Promise Keepers and Diamond concludes that the emergence of this group comes "at a particularly disadvantageous time for progressives." (241. Ironically, Diamond seems to have written her analysis at the zenith of the Promise Keepers movement. Two more recent books by Dane Claussen describe that movement as disintegrating and of temporal, but not long-lasting, political consequence. Liberals may never be comfortable with the Christian Right agenda, but this agenda is a part of American political debate. The Christian Right falls far short of being any more dominant in politics than are their liberal counterparts, and Diamond's analysis ultimately overstates its continuing influence.

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