

FOREWORD: PURSUING EQUAL JUSTICE IN THE WEST

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On February 20 and 21 of 2004, the William S. Boyd School of Law hosted a conference on “Pursuing Equal Justice in the West,” inspired by the fiftieth anniversary of *Brown v. Board of Education (I)*¹ and the fortieth anniversary of the Civil Rights Act of 1964. We were privileged to have outstanding scholars in both history and law deliver wonderful papers and participate in two days’ conversations about racial, ethnic, and gender justice in the West. The conference also included an oral history panel comprised of some of the courageous fighters for civil rights in Nevada during the 1950s through the 1970s.² Many of the papers presented appear in this Symposium issue of the *Nevada Law Journal*; all of them cast new and illuminating perspectives on issues arising from the rich and complex history of the struggle for equal justice in the western United States.

The traditional stories of the struggle for racial justice in the United States have tended to omit the history and present day realities of the West, instead having focused on North/South and urban/rural issues. With its legacy of conquest³ and settlement, of constant motion and migration, immigration from

* Professor of Law, William S. Boyd School of Law and chair of the organizing committee for the Pursuing Equal Justice in the West conference. My thanks to all who made the conference a success. Thanks to the wonderful presenters: Dr. Quintard Taylor, Prof. Margalynne Armstrong, Prof. John Valery White, Prof. Gerald Torres, Prof. Bill Ong Hing, Prof. Sylvia Lazos, Prof. Spencer Overton, Dr. Willard Rollings, Prof. David Cruz, Dean Joan Howarth, Prof. Adrienne Davis, Prof. Annette Appell, and Dean Kevin Johnson. Thanks also to Dean Richard Morgan and former Associate Dean Mary LaFrance for suggesting we hold a conference in honor of civil rights and those who worked so hard to make it a success: Dean Joan Howarth, Professors Ann McGinley, Christopher Blakesley, Ngai Pindell, Bruce Markell, David Tanenhaus, Jennifer Gross, Raquel Aldana, and Kay Kindred, as well as Dr. Ina Dornan and Dr. Michael Green. Thanks also are due the tireless efforts of the law school staff in running the conference: Ms. Kim VanGeel, Ms. Judy Canter, Ms. Dianne Fouret, Ms. Arleta Young, Mr. Shawn Zobrack, and many others. Finally, special thanks to the staff and editors of the *Nevada Law Journal* for their work in preparing this issue of the *Journal*.

¹ 347 U.S. 483 (1954).

² The members of the panel were: The Rev. Donald Clark, community activist and several times president of the local NAACP chapter; Mr. Ralph Denton, an attorney who served several governors, was active in Democratic politics, and a tireless worker for civil rights; Ms. Ruby Duncan, who led a 6,000 person march on the Strip and fought for welfare rights and low-wage working women; and the Hon. Joe Neal, seven-time State Senator, who has served as chair of the Clark County Economic Opportunity Board. The panel was moderated by the Hon. Michael Douglas, a District Court judge who, later in 2004, became the first African American to be appointed to the Nevada Supreme Court.

³ “Legacy of conquest” is a term borrowed from the extraordinary analysis and insights on western U.S. history developed by Professor Patricia Limerick at the Center for the West at

Asia and Latin America, and forced relocation of Native Americans, the West poses particularly important questions and examples of struggles for justice and challenges to our conventional wisdom about the civil rights struggle. For example, traditional United States history speaks of westward migration⁴ and the role of the frontier in developing the United States. While for many white people, the story of migration is one of opportunity, egalitarianism, and escape from the social hierarchies of the East,⁵ the story of other peoples in the West is substantially different.

Chinese Americans and Japanese Americans migrated from the far East, only to encounter sometimes virulent discrimination on the West coast and from the United States Congress.⁶ Indians were forced to move from the eastern United States under the Indian Relocation Act, and then were relocated again and again. In addition, Indian tribes, who had originally settled the West and had faced conquest by Spain, lost more of their lands and lives as white settlers moved West. Much of the Western United States had been held by Spain as a colony until the Mexican-American War and the Treaty of Guadalupe-Hidalgo of 1848,⁷ and discrimination, in law and in fact, against Hispanics was not long in coming in the West. Furthermore, women of all races and ethnicities struggled for equality and voting rights throughout the West.

Several of the articles, essays and commentaries that follow this Foreword examine the African American experience in the West and in Nevada. Professor John Valery White, in *The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality*, examines the history of Black migration from the South to the West against the backdrop of criticisms that African Americans, unlike "other" immigrants, have failed to succeed and assimilate successfully. Examining the barriers of segregation thrown up against African Americans who migrated to the San Francisco Bay area during World War II, White underscores the continuing obstacles to Black success created by the dominant society while illustrating that the "immigrant success model" simply cannot be applied in these circumstances.

Two articles specifically address discrimination in Las Vegas and Nevada. In *The Mississippi of the West?*, Nevada and Las Vegas historian Dr. Michael Green recounts the history of discrimination against African Americans in Nevada up to 1954, noting the different forms and sources of discrimination over time. The title is borrowed from the appellation given Las Vegas, and not without reason: de facto and at times de jure racial segregation of Blacks existed in housing, schools and jobs, and the effects remain today. Ms. Claytee White's *The March that Never Happened: Desegregating the Las Vegas Strip*,

the University of Colorado-Boulder. See, e.g., Patricia Nelson Limerick, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

⁴ This traditional line of historical inquiry discusses migration by mainly non-Hispanic whites as the frontier expanded over time, and by African Americans during and after World War II.

⁵ Or, as in the case of Mormons, white migration was to escape religious persecution.

⁶ See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Cases), 130 U.S. 581 (1889).

⁷ Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., 9 Stat. 923, TS No. 207.

tells the history of struggles against racial discrimination by successive waves of Black immigrants. In a fascinating discussion of the effects of migration in the African American community, White demonstrates how each new group of African Americans arriving in Las Vegas faced and interpreted racism, bringing with them experiences of struggle from elsewhere as well as new approaches to racial exclusion and discrimination.

Dr. Quintard Taylor describes the history of racial struggles in the West more broadly. His article, "*Justice is Slow But Sure: The Civil Rights Movement in the West: 1950-1970*," explores the intersections and differences between African American civil rights struggles and the struggles of Latina/os, Native Americans, and Asian Americans over time. In general, voting, education, and jobs were the focus of civil rights efforts from the nineteenth century forward in western states. Dr. Taylor makes clear that the Black/White civil rights narrative is not the single narrative for western civil rights struggles. Nor does the narrative capture the direct-action campaigns of other groups and inter-group tensions, although it remains an essential story in western history.

"*Perfect Good Faith*," by Erin Ruble and Professor Gerald Torres, examines the anomalies created by the "Indian trilogy" cases,⁸ which designated Indian tribes as "dependent domestic" nations. As a result of these cases, the status of tribes has never been clear in our constitutional structure. Ruble and Torres demonstrate the continuing status problems through a discussion of two land disputes, one between the Danns, two Indian sisters, and the Western Shoshone tribe, the other a dispute between the Navajo and Hopi. After describing the inability of standard U.S. legal assumptions to address these disputes, the authors suggest that international legal norms and law should be considered in adjudicating and deciding Indian land disputes given our constitutional equivocations about the status of indigenous peoples.

Dr. Willard Rollings' *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West 1830-1965* recounts the routine denial of citizenship to Native Americans under law, including the Supreme Court's decision in *Elk v. Wilkins*⁹ denying citizenship on the basis of Section 1 of the Fourteenth Amendment, and the denial of suffrage to Indians even after citizenship was conferred in 1924.¹⁰ Rollings traces the continued maneuvers by states to deprive Indians of voting rights, noting that as late as the 1980's, states still occasionally tried to deny Indians the vote.

Another set of laws and practices that injured Indians was federal law placing Indian children in boarding schools and allowing adoptions of Indian children by white parents without scrutiny. Congress finally responded to these abuses by enacting the Indian Child Welfare Act of 1978 (ICWA).¹¹ *Uneasy Tensions Between Children's Rights and Civil Rights* by Professor Annette Appell discusses the conflicts created under ICWA when children's welfare issues are viewed first under a civil rights approach and then under a children's rights approach. Appell uses the ICWA as a lens through which to view the

⁸ *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁹ 112 U.S. 94 (1884).

¹⁰ *Id.* At 106-07.

¹¹ 25 U.S.C. §§ 1901-1963 (2000).

concerns and understandings of the two different approaches to children's welfare, noting the conflicts built in to the purposes of both as well as the purposes of the ICWA.

Professor Bill Ong Hing reminds us of the racism against Japanese Americans on the West Coast. He examines a 2002 case arising from alien land laws and the internment of Japanese people during World War II in *Rebellious Lawyering, Settlement, and Reconciliation: Soto Bukai v. YWCA*. The case was complex and involved lost history: Because Japanese Americans could not own real property, in the 1920s, the Japanese American community asked the YWCA in San Francisco to hold some property, for which they would pay, in trust for them. The Japanese American community paid for the property and used it as a community resource while the YWCA held it; with the internment of Japanese Americans in World War II, the link to the community was broken. Eventually, in 1996, the YWCA sought to sell the property. When members of the Japanese American community asked to purchase the property for less than the YWCA was asking or have the property returned to them, the YWCA strongly resisted. Hing examines the lawyering strategies and work within the Japanese American and wider communities to reach a resolution in the case and addresses possible criticisms of the lawyering in producing the ultimate outcome.

Discrimination against Latina/os is closely tied to discrimination against immigrants, although the civil rights model has failed to account for the close relationship of immigration to discrimination against Latina/os, as Dean Kevin Johnson demonstrates in *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law*. Until the 1990s and the growing anti-immigrant backlash of the early nineties, undocumented immigrants could obtain driver's licenses in many states. California led the way in ending the issuance of driver's licenses in 1993, enacting legislation prohibiting the issuance of driver's licenses to undocumented people. Johnson argues that "undocumented" or "illegal" status serves as a proxy for discriminating against Latina/os in California and elsewhere, since the communities of immigrants and undocumented persons are closely related. That is, the denial of driver's licenses both disproportionately affects Latino/as and serves as a means of relegating Mexican immigrants and others to low-paying jobs, segregation, and lack of membership in society. Johnson calls for a new approach to Equal Protection law in light of this different model of discrimination.

Gender discrimination takes many forms, and two of the papers explore the forms that have taken hold in Nevada. *Making Up Women: Casinos, Cosmetics, and Title VII* by Professor David Cruz explores the case of Darlene Jespersen, a bartender at Harrah's Casino who was dismissed for refusing to wear make-up. He engages in a careful critique of Title VII's failure to recognize that requiring women to conform to an image of "femininity" in appearance in jobs which do not require men to conform to images is employment discrimination.

In *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, Dean Joan Howarth explores the irony of the state of Nevada's emphasis on heterosexuality and heterosexual pleasure, as well as its hostility to LGBT people, while at the same time celebrating Liberace, a flamboyant

character who deployed defamation law to have himself “declared” heterosexual under law. While Liberace resisted the label of homosexual, four anonymous plaintiffs sued to have the Nevada sodomy law¹² struck down.¹³ The arguments in the case and the text of the Nevada Supreme Court opinion, demonstrate how difficult the struggle against heterosexism and homophobia has been;¹⁴ Howarth provides a counterpoint to the arguments over repeal of the statute in the legislature and the Nevada Supreme Court’s opinion with the decision in *Lawrence v. Texas*¹⁵ to illustrate the struggles of LGBT persons against discriminatory law and practice.

The law has played a large role in maintaining racial, ethnic, and gender subordination in the West, just as it had in the North, South, and mid-West, as the fascinating papers in this Symposium point out. Because the West just *is* diverse, and has always been, questions about the search for equal justice in the West will continue to challenge our existing categories and provide invaluable tools from history and the present. As the United States enters the twenty-first century, and the populations of the Southwest continue to grow through immigration and migration, we must continue to work to include all in this increasingly multi-cultural and multi-ethnic country. This Symposium should provide us with a valuable resource, telling us of our history and our current dilemmas. It is with great pleasure and honor that I introduce this *Nevada Law Journal* Symposium, in hopes that the papers will inform and guide us towards truly achieving equal justice throughout the United States.

¹² 1977 Nev. Stat. 1632; 1993 Nev. Stat. 518 (repealing NEV. REV. STAT. 201.193).

¹³ *Doe v. Bryan*, 728 P.2d 443 (Nev. 1986).

¹⁴ See *id.*

¹⁵ 539 U.S. 558 (2003).