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Submissions

Judicial Notice accepts articles submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors.

Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

From the Executive Director

Dear Members,

This, our 11th issue, continues the high standards of scholarship and engaging topics in a beautiful publication; a tradition begun by our Founder, **Judith S. Kaye**. Her passing this year makes the issue very personally poignant. To my recollection, every issue bears her stamp in some fashion. For instance, when our extremely gifted and diligent editors finished their review and the final proofs were sent to Judge Kaye, she always found another edit as she donned her journalist hat...often buried in a footnote that was one of dozens! She has contributed regularly to this publication as a writer. A particular interest for her was John Jay. We published her article *Kay on Jay* in Issue 8. There, she focused on Jay the Family Man. In this issue, Judge Kaye reports on an event she attended at John Jay College of Criminal Justice where a bronze statue of John Jay was unveiled. **Kaye on Jay: Revisited** follows up on her theme of Jay the Family Man. The event brought together Jay progeny, and you will enjoy the photos accompanying the piece.

We were privileged to host in December, 2014 a program presented by **Denny Chin**, U.S. Circuit Judge, 2nd Circuit, and his wife **Kathy Hirata Chin**, a partner at Cadwalader, Wickersham & Taft LLP. The program, **Asian-Americans and the Law: New York Pioneers in the Judiciary**, explored the legal history of Asian-Americans in this country and how the Rule of Law and concepts of justice, equality and fairness were subverted. The program appears on our website as a webcast under *Past Events*. It is our good fortune that Judge Chin and Kathy agreed to reformat their talk as an article for this issue entitled **Asian-Americans and the Law**. It contains many wonderful images, some from the program and some new. We are indeed fortunate to have had the opportunity to explore this too much invisible piece of our history.

Another program that resulted in an article was the product of **Susan N. Herman**, Centennial Professor of Law, Brooklyn Law School; and President of ACLU. In May, 2014 Prof. Herman presented a talk on *People v. Gillette and An American Tragedy*, comparing and contrasting fact and fiction as she explored law and the arts and discussed the social mores of the time. A webcast of this program also appears on our website. Prof. Herman has rewarded us with her article based on her talk for this issue. **People v. Gillette and Theodore Dreiser's An American Tragedy: Law v. Literature** refines her most interesting lecture into a wonderfully readable piece which is fully footnoted with the addition of special images.

Craig A. Landy is a partner at Peckar & Abramson, PC in Manhattan. He is the author of a recent article about Thomas Addis Emmet. For us, he presents "**Jacobin Winds**": **Chief Justice James Kent and the Origins of the Citizenship Prerequisite for Admission to the New York Bar**. He looks back on the history of the citizenship requirement as a prerequisite to the practice of law. Intriguing especially in light of the recent Appellate Division, 2nd Dept. ruling permitting an undocumented immigrant (under the facts of the case) to be eligible for admission to practice law in NY. Craig's particular focus on the application of Emmet, an Irish immigrant seeking bar admission, and the fears and prejudices of that time, is apt given our present political scene.

Mark H. Alcott of Paul, Weiss, Rifkind, Wharton & Garrison, LLP in New York City, is an arbitrator, mediator and litigator who concentrates on commercial cases. He was intimately involved with the evolution of the Commercial Division Courts. We are fortunate indeed to have his look back on the formation and history of the Commercial Division in the form of his personal reminiscences. His article, **The Formation of New York's Commercial Division – A History & Memoir**, takes us behind the scenes to better understand the personalities and forces at play that brought about this new and highly successful innovation of the Commercial Division Courts.

We have a rich and overflowing issue that exceeds our general length. The extra length may have extended the publication date, but I'm sure you'll agree that its richness and varied subjects was well worth the wait.

- Marilyn Marcus, Executive Director

KAYE on JAY

REVISITED

by Judith S. Kaye

"We thought our readers would enjoy a delightful piece that Judge Kaye wrote about John Jay, concerning his family. It strikes us as especially fitting, considering that she has been and will always be thought of as the head of our family, here at the Historical Society."

– Albert M. Rosenblatt, President



Special thanks to my Legal Assistant Grace Haidar at Skadden, Arps, Slate, Meagher & Flom, for assisting me in the preparation of this article.

In the 8th issue of *Judicial Notice*, I had the privilege of writing about New York's first Chief, John Jay, as "The Family Man." The importance of family to John Jay was nowhere better underscored than on December 8, 2014, when John

Jay College of Criminal Justice unveiled a magnificent life-sized bronze statue of him. That was a family ceremony in every sense, starting with its situs at the great college that bears his name, and a large audience including many of his biological descendants (pictured here).

As I previously noted, the demanding nature of the many crucial positions held by John Jay – including the first Chief Justice of both New York's high court and the Supreme Court of the United States – required him to spend considerable time away, but Jay's family always held a high place in his choice of where to be and where not to be. Notable among those choices were his absence from the final days of drafting the United States Constitution to be beside his father after the passing of his mother, as well as his choice not to be present at the signing of the Declaration of Independence in order to be at home with his family following the birth of his child. When he couldn't physically be there, Jay remained present through thoughtful letters exemplified by a note to his son, Peter, in October 1791: "One little Letter a week can require but little Time."

On December 8, 2014, one of John Jay's descendants, Pierre Jay de Vegh (a long-time investment manager), spoke of how being classified as a "successful" descendant of John Jay remains a high hurdle of "Great Expectations." Jay's distinction on a personal level is perhaps an easier, but still challenging, precedent for his descendants to follow.

As de Vegh noted, at the core of Jay's unique skill as a great negotiator, whether in the heated negotiations of the Treaty of Paris, ultimately ending the Revolution, or in the difficult task of ratifying the Constitution amid divided parties, was his utterly trustworthy nature as a human being. Pierre Jay de Vegh closed his speech by expressing a sincere personal wish that "in this time and in this country, which is so divided both racially and politically, that someone or some few in John Jay College's student body or from the John Jay community will develop the negotiating skills and the sense of being trusted that will put this country back together again."

Hopefully, as we today stand alongside John Jay in books and in bronze, we will reaffirm his words and belief – implemented throughout his life – that a "single united nation would be better able to demand respect from other nations." John Jay continues to stand as an inspiration for unity, a dedication to justice, and a symbol of commitment to the family he fathered, whether his biological family, his State or his nation. ~



Bottom, Left to Right: Sharon DuBois, Henri Gignoux, Marguerite Jay "Peggy" Gignoux, Philippa Rizopoulos, Jane Hughes Gignoux, Ellen de Vegh, Pierre Jay de Vegh, Benjamin Iselin, Alison Jay Iselin Russell
Top, Left to Right: Daphne Jay Bell, Diana de Vegh, John Jay DuBois, Nonie Reich, Alexandra Bell "Sandra" Witten, David Frackman



Bottom, Left to Right: Diana de Vegh, Ellen de Vegh, Pierre Jay de Vegh, Jane Hughes Gignoux, Sharon DuBois
Top, Left to Right: Benjamin Iselin, Judge Judith S. Kaye, Alison Jay Iselin Russell, Alexandra Bell "Sandra" Witten, David Frackman, Philippa Rizopoulos, Amanda Jay Burden, Marguerite Jay "Peggy" Gignoux, Henri Gignoux, John Jay DuBois, Daphne Jay Bell, Jeremy Travis





Asian Americans AND THE LAW

by Denny Chin & Kathy Hirata Chin



Denny Chin is a United States Circuit Judge for the Second Circuit. Kathy Hirata Chin is a partner at Cadwalader, Wickersham & Taft LLP. This article is based on a presentation given by the authors at the New York City Bar Association on December 15, 2014, as part of the Stephen R. Kaye Memorial Program. The presentation was followed by a conversation among the first three Asian American judges in New York: Randall T. Eng, who was appointed to the New York City Criminal Court in 1983 and is now Presiding Justice of the Second Department; Peter Tom, who was appointed to the New York City Civil Court in 1985 and is now Acting Presiding Justice of the First Department; and Dorothy Chin-Brandt, who was elected to the New York City Civil Court in 1987 and is now an Acting Justice of the New York State Supreme Court, Queens County.

In 1750, a small group of Filipino sailors landed in what would later become Louisiana. Scholars believe these were the first Asians to settle in the United States.¹ The first Chinese, principally merchants, seamen, and students, arrived in the United States in 1820. By 1848, there were only approximately 325 Chinese—all men—in the United States. Within just a few years, their numbers jumped, with some 20,000 Chinese arriving in San Francisco in 1852 alone. The numbers continued to grow. Some came to escape the Taiping Rebellion in China, some dreamed of making a fortune in the California Gold Rush, and others came to work on the First Transcontinental Railroad or on southern plantations after the Civil War.² The Japanese first started immigrating to Hawaii in the mid-to-late 1800s, to work as laborers on sugar plantations.³

Over the years, people of Asian descent continued to make up only a small fraction of the American population. By 2010, although they were the fastest growing racial group in the United States, Asian Americans still were only 5.6% of the U.S. population.⁴ In New York in 2010, Asians were 8.2% of the population.⁵

Despite these small numbers, Asian Americans have played a prominent role in America's legal history. They have been at the center of many legal controversies, including important Supreme Court cases involving:

- Exclusionary immigration laws: The Chinese Exclusion Act of 1882 and subsequent laws barred virtually all Chinese from entering this country, and the Immigration Act of 1924 essentially excluded all Japanese. The Supreme Court upheld these discriminatory laws in decisions such as *Chae Chan Ping*⁶ and *Fong Yue Ting*.⁷
- City ordinances restricting the operation of laundries in wooden buildings: *Yick Wo v. Hopkins*⁸ was a rare win for the Chinese, as the Supreme Court overturned such a law and held that the Equal Protection Clause applied to even the Chinese.
- Limitations on the privilege of being naturalized as a U.S. citizen: A federal statute provided that only free white persons and individuals

◀ The Mochida Family Awaiting Evacuation, NARA, ID# 537505

Asian Americans and the Law



The Wasp, "San Francisco, A.D. 1900" Courtesy The Bancroft Library

of African descent could be naturalized as U.S. citizens. The "African descent" element was added after the Civil War because so many slaves fought for the North. But where did that leave Asians? And what about individuals of mixed blood, who were both white and Asian? In a pair of cases decided by the Supreme Court in the 1920s, *Ozawa* and *Thind*, the Supreme Court held that a Japanese man and a South Asian man were not white and therefore not eligible to be naturalized.⁹

- Laws segregating public schools based on race: In *Gong Lum v. Rice*, a 9-year-old Chinese girl in Mississippi was prohibited from attending public school because she was not white; in 1927, the Supreme Court held that the law was constitutional because the little girl could attend a "colored school" or private schools.¹⁰
- Alien land laws: These were laws prohibiting aliens, and in particular Japanese Americans, from owning land. These statutes were upheld by the Supreme Court in *Terrace v. Thompson*¹¹ in 1923.

- And perhaps most notoriously, the orders subjecting Japanese Americans, even those who were born in this country, to curfews, exclusion, and internment, without any due process of law and based solely on their Japanese ancestry: In *Korematsu*, *Hirabayashi*, and *Yasui*, the Supreme Court upheld these orders based on the concept of military necessity.¹² But in *Ex parte Endo*, without addressing the constitutionality of the exclusion order, the Supreme Court held that the Government could not continue to detain a U.S. citizen who was "concededly loyal" to the United States.¹³

The issues presented by these cases continue to confront us today: questions about race, civil and human rights, due process, national security, federalism, how our courts respond to public pressure, and how judges handle high profile cases. These issues and the principles they implicate continue to be important, not just for Asian Americans, but for all Americans.



Chinese Bagnio, Chinatown, San Francisco. Courtesy The Bancroft Library

For the past nine years, the Asian American Bar Association of New York has been presenting reenactments of important cases involving Asian Americans. Each program has had its debut at the annual conference of the National Asian Pacific American Bar Association. The reenactment team takes excerpts from transcripts of court proceedings and other historic documents and stitches them together with original narration to develop hour-long scripts, accompanied by historic photographs.¹⁴

Our scripts have been performed all over the country, including by the American Bar Association, the New York City Bar Association, local Asian-American bar associations, the Department of Justice, and many student organizations at colleges and law schools. We have presented nine programs, focusing on:

- the trial of Minoru Yasui in 1942 in Portland, Oregon¹⁵;
- the murder of Vincent Chin in 1982 in Detroit¹⁶;
- the Massie trials—one a rape case and one a murder trial—in Hawaii in the 1930s¹⁷;
- the trial of Iva Toguri, otherwise known as Tokyo Rose, in 1949 in San Francisco¹⁸;
- the Supreme Court arguments in the naturalization cases, *Ozawa* and *Thind*, in the 1920s¹⁹;
- the Heart Mountain draft resisters, who were tried for draft evasion in the 1940s²⁰;
- 22 Lewd Chinese Women, which involved a trial in 1874 in San Francisco²¹;
- *Wards Cove*, a Title VII case that began in the early 1970s involving Filipino and other Asian workers in the salmon canneries in Alaska²²; and
- a civil suit by the Vietnamese Fisherman against the Klu Klux Klan in Houston in 1981.²³

In this article, we will discuss four of these cases: 22 Lewd Chinese Women, Tokyo Rose, the Heart Mountain Draft Resisters, and the murder of Vincent Chin.²⁴

22 Lewd Chinese Women

This case, also known as *Chy Lung v. Freeman*, may be the first decided by the Supreme Court of the United States involving a Chinese litigant.²⁵ The story unfolded at a time when regulation of immigration was left largely to the states. In the mid-19th century, California state legislators began passing measures designed to “check the tide of Asiatic immigration.” These measures included a special foreign-miners tax, a tax on vessels carrying persons who were ineligible to be US citizens, and a statute that simply excluded all persons of “the Chinese or Mongolian races” from entering the state.

When the Chinese kept coming, California legislators passed a statute in 1870 that prohibited Chinese passengers from disembarking until the State Commissioner of Immigration had determined that they had come voluntarily and were of good moral character. The statute was later modified to apply to prostitutes of all national origins, although in practice the principal target remained Chinese women. The legislators thus addressed two problems at once: the increase in prostitution in San Francisco and the continuing influx of Chinese. It is this statute that the State sought to apply to the 22 Lewd Chinese Women.

The story begins on Monday, August 24, 1874, when the steamship *Japan* arrived in the port of San Francisco. On board were some 600 Chinese passengers, including 89 women, 22 of whom were travelling alone. As soon as the ship docked, the Immigration Commissioner came aboard, examined the 89 women, decided that the 22 who were travelling alone were prostitutes, and demanded that a \$500 bond be posted for each. By the next morning, the ship’s owner had refused to pay the bonds, but a Chinese man named Ah Lung, described by some as a local merchant and by others as a trafficker in Chinese prostitutes, hired a lawyer to file a petition for a writ of *habeas corpus* on behalf of the women.

The next day, testimony began in the Fourth District Court of San Francisco before Judge Robert Morrison. The proceedings were largely transcribed, and there was daily extensive newspaper coverage. The question of fact that was presented to the court was whether these women were prostitutes, and the women and their lawyer were clearly determined

to put up a good fight. When one witness called the women prostitutes, the newspapers reported that they screeched at the top of their lungs, forcing the Judge to cover his ears and retire to his chambers. Their lawyer, Leander Quint, was a well-known attorney in San Francisco, formerly a judge. On the other side was the District Attorney of San Francisco.

As the testimony unfolded, the question of whether these women were prostitutes was treated from several angles. The District Attorney called to the stand as an “expert” on Chinese prostitution a Methodist minister, the Reverend Otis Gibson, who had served as a missionary in China and had established a Missionary Society in California to elevate and save the souls of heathen women. Gibson testified as to the customs of the Chinese in China and the manner in which prostitutes generally dressed. His description of typical prostitute dress led to a scene where the Judge approved of the lawyers peering up the sleeves of the various witnesses to see if the gaudy colors of a courtesan lurked beneath the plainer garments the women were wearing.

Another witness was a police officer, a member of the so-called Chinatown Squad, who testified as to the habits of Chinese he had observed on his beat. In addition to the dress of the women, Officer Woodruff spoke about the number of marriage licenses found in the County Clerk’s office and the fact that some Chinese had second wives.

When the women testified, they all told essentially the same story: they were either married or about to be married and had come to California either to join their husbands or to meet and marry their husbands. Indeed, their stories were so similar that after nine women had testified, the parties stipulated that the remaining women would all swear to essentially the same facts.

On Saturday morning, August 29, 1874, the Judge announced his ruling to a packed courtroom. He rejected the argument that the California law was unconstitutional, concluding that the State had the power to exclude lewd and immoral individuals, and then further ruled on the factual question. He determined that the women were all prostitutes and sent them back to the steamship *Japan*, with instructions to the Captain to take them back to China.

Before the ship could sail, counsel for the women arrived with another writ of *habeas corpus*, issued by the California Supreme Court. A week later, that court also ruled against the women.²⁶ The women then moved on to federal court, where the case was heard by a three-judge panel that included U.S. Supreme Court Justice Stephen Field, who was riding circuit in San Francisco.²⁷ On September 21, 1874, Justice Field held for the panel that the California statute was unconstitutional, ruling that Congress, not the states, had authority to regulate immigration. In this opinion, for the first time, a court explicitly held that the Fourteenth Amendment applied to aliens (such as the Chinese) as well as citizens, ruling that no state may deprive “any person” (not just “any citizen”) of life, liberty or property without due process of the laws.²⁸ All the women were released except one, Chy Lung, who remained in custody so that she would continue to have standing to challenge the California statute. On March 20, 1876, the United States Supreme Court unanimously ruled the California statute unconstitutional in a decision based not on equal protection, but on the Commerce Clause and the federal government’s power to regulate immigration.²⁹

The final decision looked like a victory for the women, but what did it really mean? The decision did not result in any less-restrictive policy towards Chinese immigrants. To the contrary, by effectively putting an end to state-based immigration legislation, the Supreme Court decision helped pave the way for federal immigration policy and ultimately the first Federal Chinese Exclusion Act, which remained in effect until 1943.³⁰ As for the 22 women themselves, all we know is that they won their freedom; but that may have meant only lives of misery for them, as they probably *were* prostitutes. In the 1870s the more fortunate prostitutes were purchased by wealthy Chinese in San Francisco to serve as concubines or mistresses; most, however, were sold as slaves to brothels, relegated to shacks where they served a racially mixed, poorer clientele.

As for the questions raised by the case, our society continues to struggle with issues of race, gender, sexuality, stereotyping, and profiling. Human trafficking and the exploitation of women persist. State versus federal control of immigration continues to be an issue; we saw shadows of that issue as recently

as 2014, when states reacted to the Ebola outbreak, and in 2012, the Supreme Court cited *Chy Lung* when holding unconstitutional a large part of an Arizona statute expanding state law enforcement’s authority to stop and detain individuals suspected of being in the country illegally.³¹

On June 18, 2012, just a few days after the Supreme Court decision in the Arizona case, the House of Representatives passed a resolution expressing regret for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act. The House resolution was sponsored by Judy Chu, the first Chinese American woman elected to Congress. She stated as follows:

[This] expression of regret . . . is for my grandfather and for all Chinese Americans . . . who were told for six decades by the U.S. Government that the land of the free wasn’t open to them. We must finally and formally acknowledge these ugly laws that were incompatible with America’s founding principles.

*We must express the sincere regret that Chinese Americans deserve. By doing so, we will acknowledge that discrimination has no place in our society, and we will reaffirm our strong commitment to preserving the civil rights and constitutional protections for all people of every color, every race, and from every background.*³²

Tokyo Rose

During World War II, Allied servicemen in the Pacific heard the sultry, seductive voice of a woman speaking English on Japanese radio.³³ She was a siren. She would draw them to her broadcast by playing American music, and then she would taunt and torment and tease them, asking them, for example, “Do you know where your wife is tonight?” The servicemen called her “Tokyo Rose.”

In fact, Tokyo Rose was a myth; there was no Tokyo Rose. The U.S. government would later acknowledge that Tokyo Rose was “strictly a G.I. invention.” While the Japanese government did use

English-speaking women to broadcast shows—some 20 of them—none used the name Tokyo Rose.

One of the women was Iva Toguri. She was born in Los Angeles, the daughter of Japanese immigrants. She was raised a Methodist, joined the Girl Scouts, played varsity tennis, and graduated from UCLA with a degree in zoology. She spoke no Japanese and did not like Japanese food.

In July 1941, she was sent to Japan to help a sick aunt. When Pearl Harbor was attacked and war broke out, she was stranded. Many Japanese-Americans in similar circumstances at the time were pressured into renouncing their U.S. citizenship, but Iva refused. She had to support herself, and she found work as a typist at Radio Tokyo, a Japanese government radio station. Her family in the United States could not help her—her relatives were sent to internment camps; her mother would die in one of the camps.

At Radio Tokyo, three Allied prisoners of war—two American and one Australian—had been forced to produce radio shows targeted at Allied servicemen. This was supposed to be propaganda, but the POWs did their best to undermine the intended purpose.

Iva was pressed into service as a disk jockey. After all, she spoke perfect English. She read scripts written by Major Cousens and Captain Ince, two of the POWs, and she followed their instructions. She also smuggled food and medicine and blankets to Allied POWs at great personal risk.

Iva performed under the name Orphan Ann and appeared on a show called Zero Hour. She participated in 340 broadcasts, the last in August 1945, two days before the Japanese surrendered.

Some recordings of her broadcasts have survived, but they are of poor quality. She typically opened her show with the following:

*Hello there, Enemies – how's tricks? This is Ann of Radio Tokyo, and we're just going to begin the Zero Hour for our Friends – I mean our Enemies! – in Australia and the South Pacific. So be on your guard, and mind the children don't hear! All set? O.K., here's the first blow at your morale – the Boston Pops playing "Strike Up the Band!"*³⁴

Iva would then play the Boston Pops doing "Strike Up the Band!" Of course, this was patriotic

marching music, and it was hardly demoralizing to the Allied servicemen.

When the war ended, there was a clamor to bring "Tokyo Rose" to justice. Hundreds of journalists descended on Japan, intent on finding the infamous Tokyo Rose. Two reporters for Cosmopolitan magazine found Iva. They promised her \$2,000, an enormous sum under the circumstances, and she agreed to give them an exclusive interview. Perhaps for the money, perhaps for the attention, Iva represented to them that she was "the one and original Tokyo Rose."

When word got out that Tokyo Rose had been located, Iva found herself at a press conference attended by scores of correspondents. Shortly thereafter, she was arrested and charged with treason, for giving aid and comfort to the enemy, and imprisoned pending trial. Because of her notoriety, the prison guards asked for her autograph. She complied, signing as "Iva Toguri – Tokyo Rose."

After a year, she was released. The Department of Justice attorney who eventually became the lead prosecutor in the case against her, Thomas DeWolfe, initially concluded that there was insufficient evidence to make out a prima facie case. DeWolfe's memo was sent up the chain of command at the Department of Justice, all the way to Attorney General Tom Clark. The Assistant Attorney General noted "all the publicity given to the case," and the Attorney General wrote back the next day, May 28, 1948: "prosecute it – vigorously."

And so the Government did. She was arrested again and brought back to the United States. She was tried in San Francisco, starting on July 6, 1949 and continuing for two and a half months. The trial transcript is 6,000 pages long. Iva wore the same gray outfit every day of the trial; she washed it on Fridays.

The indictment charged only one count of treason, but eight overt acts. Iva was found not guilty on seven of the overt acts. The jury, however, convicted her on overt act number 6, which charged that during one broadcast Iva spoke about the loss of ships.

Iva was sentenced to ten years' imprisonment and a \$10,000 fine. She was also stripped of her U.S. citizenship.³⁵ Major Cousens and Captain Ince, whose scripts she read and instructions she followed, were never charged.



Correspondents Interview "Toyko Rose," Iva Toguri. NARA, ID# 520994

Asian Americans and the Law

TOKYO ROSE TALKS, M. P.'S ARREST HER

Purveyor of Enemy Words and
Varied Music to Our Troops
Is Picked Up in Yokohama

YOKOHAMA, Japan, Sept. 5 (AP)—Military police of the United States Eighth Army plucked Tokyo Rose from Yokohama's Bund Hotel today and took her into custody. The M. P.'s tapped 29-year-old, pig-tailed Iva Togori, California-born Nisei who during the war had regaled United States troops with honey-voiced chit-chat over the Tokyo radio, immediately after she had finished a press conference in the hotel dining room. It was uncertain whether charges would be filed against her for broadcasting sweet music and sour propaganda on the enemy radio. First it must be determined if she still is a United States citizen.

'TOKYO ROSE' HELD



Iva Togori
Associated Press Wirephoto

Miss Togori, who said she was one of four Tokyo Roses, had just explained to correspondents she had been broadcasting "for the experience" and did not consider herself disloyal to the United States.

[The National Broadcasting Company in San Francisco reported that Miss Togori had broadcast again Wednesday, using her customary opening line, "Hello, everyone, this is Orphan Annie speaking from Tokyo." She was quoted as saying that she was not sure she was glad she had retained her United States citizenship, since she had just undergone questioning by the military police.]

"Just Sitting on the Fence" "I was just sitting on the fence as far as the war was concerned," Miss Togori told correspondents. "I didn't think I was doing anything disloyal to America."

She said many Allied service men were inclined to agree with her. Her voice merely announced record programs from Bach to jive. She never, never broadcast any propaganda, she insisted.

She also said she had not been in the Tokyo radio studios when others filled her place.

A correspondent confronted her with a familiar Tokyo radio sign-on:

"This is your Orphan Annie speaking to all the forgotten men of the Pacific."

Miss Togori stuck by her guns. She said she had never mentioned wayward wives or sweethearts, and she had never used the phrase "forgotten men." She remembered hearing it only in the 1932 Presidential campaign, she said.

When the attack was made on Pearl Harbor Miss Togori was at the home of her uncle.

"I couldn't believe it," she said. "I was dazed for many days. Then I was arrested as an enemy alien, but later released."

Her work for the Tokyo radio never paid her more than a bare living wage, she complained.

"My first salary was 100 yen, which isn't enough to live on," she said. "They later raised it to 147 yen after deductions. I could live on that much if I had to, but it was pretty hard."

Miss Togori said her parents, two younger sisters and an elder brother were living in Chicago at last report.

She said that last April she married Philip d'Aquino, a Portuguese employe of the Dome News Agency, which gives her Portuguese as well as United States citizenship.

She was born in Los Angeles and attended grammar school at Calexico, Calif. She said she received a degree in zoological research at the University of California at Los Angeles.

Every three or four weeks during the summer of 1941, when war seemed approaching, she said, she tried to get back to America.

Other Tokyo Roses included Ruth Hayakawa, another Nisei, and June Suyama, who was born in Canada, she said.

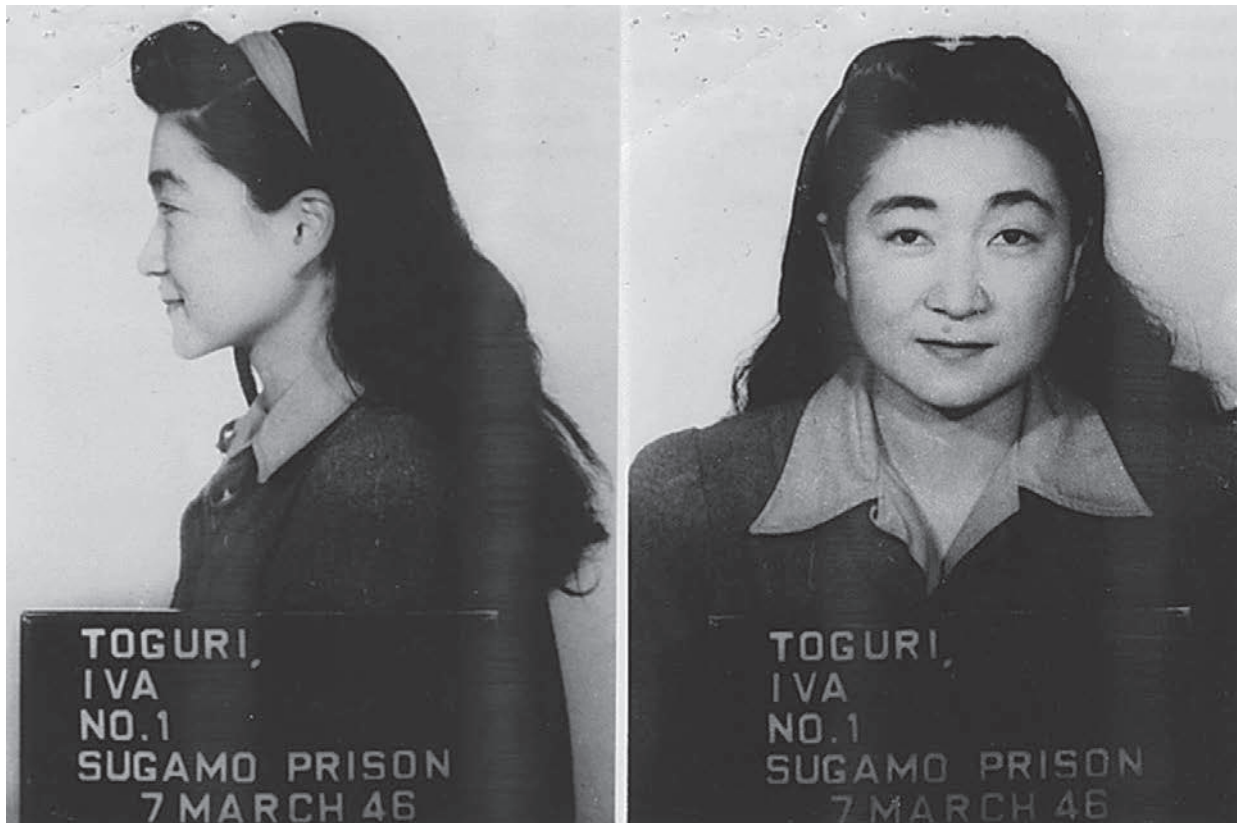
Family in Chicago Surprised
Special to THE NEW YORK TIMES
CHICAGO, Sept. 5—The family of Iva Togori expressed "surprise" tonight that she was Tokyo Rose and maintained that she "must not have done it of her own accord."

Interviewed in a combination fish market and grocery on the north side, her brother Fred, 35 years old, and sister Inez, 20, said that they had last heard from their sister in a Red Cross message sent early in 1944.

The family has operated the store more than a year and has lived in Chicago for two years. Another sister, June, 25, is visiting in Los Angeles.

The New York Times
Published: September 6, 1945
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The New York Times, September 6, 1945. Copyright The New York Times



Mug Shots of Iva Toguri taken at Sugamo Prison. March 7, 1946, NARA, ID# 296677

After serving some six and a half years, Iva was released for good behavior. She had been a model prisoner. She learned to take x-rays, prescribe glasses, and draw blood, and she even scrubbed up and assisted in surgery. She became a pharmacist's assistant and volunteered in the dental clinic. In her spare time she made leather goods that won her ribbons at local county fairs. When she left prison, it took four people to replace her in all her jobs.

In the mid-1970s, the media took up her cause. A reporter tracked down two of the principal witnesses against her at trial, who confessed that they had committed perjury under pressure from the U.S. government; in fact, Iva never said anything treasonous. In January 1977, when President Ford granted her executive clemency and restored her U.S. citizenship, she became the only American ever pardoned for treason.

Iva died in Chicago in 2006, from natural causes, at the age of 90, still a U.S. citizen, but still identified in her obituary as the notorious Tokyo Rose.³⁶

Heart Mountain

The story of the Heart Mountain draft resisters begins, as did the story of Tokyo Rose, with the attack on Pearl Harbor.³⁷ In the next three days, the FBI arrested nearly 1,300 Issei, first generation Japanese immigrants who could not be naturalized as U.S. citizens because of their race.³⁸ Their children, the Nisei, had been born in this country, and they at first believed that as citizens, they would be treated differently from their parents. They were mistaken.

On February 19, 1942, President Roosevelt signed Executive Order 9066, and shortly thereafter a proclamation was issued forbidding any person of Japanese ancestry in the Western halves of California, Oregon, and Washington and the Southern half of Arizona to leave these areas without military permission. By the end of March 1942, Japanese American families were being told to prepare for removal from the designated areas, and that they could bring with them only what they could carry. The exodus was well chronicled, including in wrenching photographs taken by the great Dorothy Lange and Ansel Adams.

These families were housed temporarily at assembly centers, which included horse stables at race tracks.

Some 120,000 people, nearly two-thirds of them U.S. citizens, spent the summer of 1942 in these centers as the Federal government built ten concentration camps in more remote areas. They were shipped to the camps in the late summer and fall of 1942.

Japanese Americans reacted in different ways to this treatment by the U.S. Government. To prove their loyalty, some pressed the government for the right to fight for the United States and in 1943, President Roosevelt announced approval of a new all-Nisei unit, the 442nd Regimental Combat Team. Some Japanese Americans were disappointed by the creation of this segregated volunteer unit, and pressed for reinstatement of the draft. On January 20, 1944, the War Department announced that the Nisei would be reclassified by their Selective Service Boards and called for induction if physically qualified. Many volunteered, including many interned in the camps.

But at the Heart Mountain camp, one detainee started writing about the injustices of Japanese Americans being drafted to fight while they and their families were detained, and he created the Fair Play Committee, a collective effort to openly resist the draft. The FPC was careful to limit its membership to Japanese American citizens who were willing to serve in the military once their civil rights were restored. The FPC message was spread beyond the camp by the *Rocky Shimpō*, a newspaper based in Denver, Colorado. Jimmie Omura, the *Shimpō's* English language editor, printed editorials that questioned the lawfulness and propriety of the draft. In March 1944, young men at Heart Mountain began to refuse to get on the bus for the pre-induction physicals. By the end of that month, 41 were in Wyoming county jails and Jimmie Omura was forced to resign as his newspaper was told that it would be closed unless Omura was removed as English language editor.

Two indictments were filed with respect to the Heart Mountain draft resisters, resulting in two trials. The first was *United States v. Fujii*, also known as the mass trial, where 63 draft resisters were tried together on the charge of evading the draft. The second was *United States v. Okamoto*, also known as the conspiracy trial, where seven of the FPC leaders were tried together with Jimmie Omura, who was indicted solely on the basis of his newspaper columns.

Asian Americans and the Law



Heart Mountain Relocation Center. NARA, ID# 538782

The mass trial took place from June 12 to June 17, 1944. On the first day of trial, Judge Blake Kennedy addressed the 63 defendants in open court as “you Jap boys.”³⁹ The government was represented by Carl Sackett, the U.S. Attorney for the District of Wyoming, while the FPC hired a prominent civil rights lawyer from Denver to represent all 63 defendants. The government’s task was straightforward: it only had to prove that the defendants received notices but failed to report for a pre-induction physical exam, facts that were not contested. On the other side, the defendants’ counsel sought to paint a picture of injustice and unfairness by eliciting testimony as to the defendants’ loyalty to the United States, their loss of freedom, and their willingness to serve in the Army once their rights had been restored. On June 26, 1944, the Judge found each defendant guilty as charged and sentenced each to prison for a term of three years.

At the conspiracy trial, a civil rights attorney from Los Angeles, A.L. Wirin, represented the defendants. During that trial, Wirin requested a so-called “test

case” jury instruction, recognizing that the Supreme Court would soon hear a case determining whether the desire to test the legality of laws could operate as a defense to charges of draft evasion. The proposed jury instruction was denied, and the jury returned a verdict convicting all seven leaders of the FPC. Only Jimmie Omura was acquitted. The Judge sentenced the four defendants he saw as the most culpable to four years’ imprisonment; the others were sentenced to two years.

The draft resistance movement at Heart Mountain has been described as the most articulate of the ten concentration camps’ movements.⁴⁰ Other cases were brought, with results that varied little from the Heart Mountain experience, with one remarkable exception. The Honorable Louis E. Goodman of the Northern District of California was a brand new judge when he travelled to Eureka, California to hear the case of the draft resisters from the Tule Lake camp. Eureka had been well known for its anti-Asian sentiment since 1885, when all Chinese were expelled from the county and banned forever. Fearing a lynching, with

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Trial of the Heart Mountain Draft Resisters. (ddr-densho-122-1), Densho, Frank Abe Collection

his car idling outside the courtroom, Judge Goodman read his opinion from the bench on Saturday, July 22, 1944. He found that it was shocking to the conscience that an American citizen could be confined on the ground of disloyalty and then, while under duress and restraint, be compelled to serve in the armed forces or be prosecuted for not yielding to that compulsion. Citing due process, he dismissed the proceeding with respect to all 26 defendants before him.

Judge Goodman's decision was not appealed by the Government. As for the Heart Mountain resisters, the 10th Circuit affirmed the convictions of all 63 resisters in the mass trial.⁴¹ The FPC leaders fared better. By the time their appeal was argued, the Supreme Court had upheld the test case defense,⁴² and, based on the Supreme Court decision, the 10th Circuit reversed as the trial judge had declined to give an instruction on the test case defense.⁴³

On April 29, 1945, the Fighting 442nd freed prisoners at the Dachau concentration camp. Shortly thereafter, Germany and then Japan surrendered.

The Heart Mountain camp closed on November 10, 1945, but the draft resisters continued to serve their sentences. On Christmas Eve 1947, President Truman granted them full Presidential pardons. Many went on to fight in the Korean War.

For Japanese Americans and for Americans generally, it was the heroism of the Fighting 442nd that inspired, not the principles of the draft resisters. Only recently did the resisters begin to tell their stories. Now, even the heroes of the 442nd, including the late Senator Daniel Inouye, have acknowledged their contributions. Senator Inouye described the draft resisters as follows:

*In this climate of hate, I believe that it took just as much courage and valor and patriotism to stand up to our government and say you are wrong. I am glad there were some who had the courage to express some of the feelings that we who volunteered harbored deep in our souls.*⁴⁴

Heart Mountain is a difficult tale to tell, for it surely suggests that our system of justice does not always work as it should, despite the best efforts of dedicated individuals. Perhaps the only true lesson is the need for vigilance, and the need to remember. In times of war, it is all too easy to trample on individual rights.

Vincent Chin

On June 19, 1982, Vincent Chin and two friends were at a strip joint, the Fancy Pants Lounge, just outside Detroit.⁴⁵ Vincent was 27 years old, an American citizen of Chinese descent. He was to be married the following week.

Two men, Ronald Ebens and Michael Nitz, were sitting across the bar. They were auto workers; one was out-of-work. The U.S. auto industry had been under pressure from Japanese imports, and in Detroit there was much hostility against the Japanese. Words were exchanged, and witnesses in the bar heard Ebens and Nitz call Vincent and his friend Jimmy Choi “Nips.”

Things got out of hand. The altercation spilled out onto the street. Ebens and Nitz ran to their car and retrieved a bat. Vincent and Jimmy Choi ran off. Ebens and Nitz got into their car and drove around looking for Vincent. They found him a few blocks away, outside a McDonald’s.

Ebens and Nitz caught Vincent, and beat him with the bat. They split his head open. Vincent died four days later.

Ebens and Nitz were prosecuted for murder in the Wayne County Circuit Court. They were permitted to plead guilty to manslaughter. The prosecutors did not come to the sentencing, and Vincent’s family was given no notice of the sentencing hearing. This was not uncommon in Wayne County at the time. Judge Charles Kaufman sentenced Ebens and Nitz each to three years’ probation, a \$3,000 fine, and court costs.

Outraged by the murder and sentence, Asian Americans joined together to seek justice for Vincent Chin. There were protests and demonstrations, and Vincent’s mother—an immigrant from China who spoke very little English—was suddenly a reluctant but effective civil rights activist.

A coalition of Asian Americans persuaded the United States Department of Justice to bring a federal

criminal civil rights case against Ebens and Nitz. The key question was race: the Government would have to prove that race was a motivating factor. There was no dispute that the two men had killed Vincent, but the Government would be required to prove that they did so because of Vincent’s race.

The case was tried before Judge Anna Diggs Taylor, one of the first African-American women to be appointed a federal judge in the country. Nitz was acquitted, but Ebens was convicted. Judge Taylor sentenced Ebens to 25 years in prison.

On appeal, Ebens argued that the civil laws only protected blacks. Citing *Yick Wo v. Hopkins*, the Chinese laundry case in which the Supreme Court held that the Equal Protection Clause applied to the Chinese, the Sixth Circuit ruled otherwise, holding that the civil rights laws indeed applied to “Orientals.”⁴⁶ Nevertheless, the Sixth Circuit reversed the conviction, holding that Ebens was denied due process because the prosecutor made inflammatory remarks during summations and because the trial judge made certain erroneous evidentiary rulings. On remand, because of all the publicity that had been generated, the case was moved to Cincinnati for retrial.⁴⁷ The change in venue was significant, as the case was moved from Detroit, a city with a black majority and a history of civil rights, to Cincinnati, a city known for its Southern sensibilities.⁴⁸ In voir dire, the vast majority of the prospective jurors answered that they had never met an Asian American person. This time, Ebens was acquitted, as the jury was not persuaded that race was a motivating factor.

Vincent’s mother was so disheartened by the verdict she moved back to China. She remained there for 13 years, until she became ill and returned to the United States for medical treatment. In 2002, she died in Farmington Hills, Michigan, at the age of 82.

Despite the disappointment of many in the final verdict, the Vincent Chin case was important for all Americans. It sparked a public discourse on the practice of Wayne County prosecutors not to appear for sentencings. The case showed how critical it was for victims of crimes and their families to be given notice of court proceedings and an opportunity to be heard. In the years following the Vincent Chin case, plea-bargaining and sentencing procedures were altered, laws

were enacted giving crime victims more rights, and hate crime laws were passed.⁴⁹

As for Asian Americans, the Sixth Circuit's holding that Asian Americans are protected by this country's civil rights laws was significant, and the murder of Vincent Chin and its aftermath galvanized Asian Americans and brought them together as a community to seek social justice.⁵⁰

Conclusion

We conclude with a few observations, with respect to both the past and the future.

As for the past, surely there are lessons to be drawn from these cases.

First, unfortunately, the arc of justice does seem to bend under the pressure of national crisis. War certainly creates such pressure, as it did in the Japanese curfew and internment cases, as well as in the cases of Iva Toguri and the Heart Mountain draft resisters. In the Vincent Chin case, it was a different kind of pressure: economic pressure, due to the financial crisis in Detroit in the 1970s. While we must always be vigilant when it comes to protecting civil rights, we must recognize the particular challenges presented when we are subjected to such pressures.

Second, a double standard has been applied to Asian Americans. Iva Toguri was prosecuted for treason, but not Major Cousens or Captain Ince, whose orders she followed. The California statute that restricted immigration in 1870 seemingly applied to prostitutes of all national origins, but in practice the principal target was Chinese women. And while the military orders during World War II did not subject U.S. citizens of German and Italian descent to curfews, exclusion, and internment, they applied to all persons of Japanese descent, including U.S. citizens.

Third, we see the importance of lawyering. The lawyers played such a critical role in these cases. Lawyers have a duty to help to right injustices, to see that justice is done. Lawyers can make a difference.

Fourth, we see the power of the media, good and bad. In the case of Tokyo Rose, public pressure led the Government to bring the case against Iva, but in the end media recognition of her innocence led to her par-

don. We saw the impact of the media in the Vincent Chin and 22 Lewd Chinese Women cases as well.

Finally, we see the importance of community. This was perhaps most evident in the Vincent Chin case, where the injustice of the sentences given to his killers brought the community together. We continue to see the importance of community in cases today, whether on a street in Ferguson, Missouri, or a sidewalk in Staten Island, New York, or in a parking lot in Chapel Hill, North Carolina.⁵¹

What about going forward?

We live in a different time and the world is a different place from what it was when these cases took place. Progress has been made with respect to the civil rights of Asian Americans and others. We would like to think that today *Korematsu* would be decided differently, although there are many who still believe it is good law.⁵² The Department of Justice surely operates differently today, and defendants have more protections.

Economically, things have changed for Asian Americans as well. For many years, Asians in America were unskilled laborers, paid low wages to work on the railroads or in laundries and restaurants. Recent studies show, however, that Asian Americans have become, as a group, the highest-earning, best-educated, and fastest-growing racial group in the United States. Statistics show that, as of 2010, the median household income was substantially higher for Asian Americans than for all other racial groups, including whites.⁵³

Despite this progress, there are still important issues to address. There is much disparity in income among Asian Americans, as with other groups, and in particular the immigrant poor continue to encounter barriers. There are still double standards, and discrimination has not been eradicated. In many work places, including in the law, there are still glass—or bamboo—ceilings to crack. There are still acts of violence directed at individuals solely because of their race or religion.

And there will always be crises that challenge us, that test us, and when they do, we must do better than we have done in the past, not just for Asian Americans, but for all Americans.

ENDNOTES

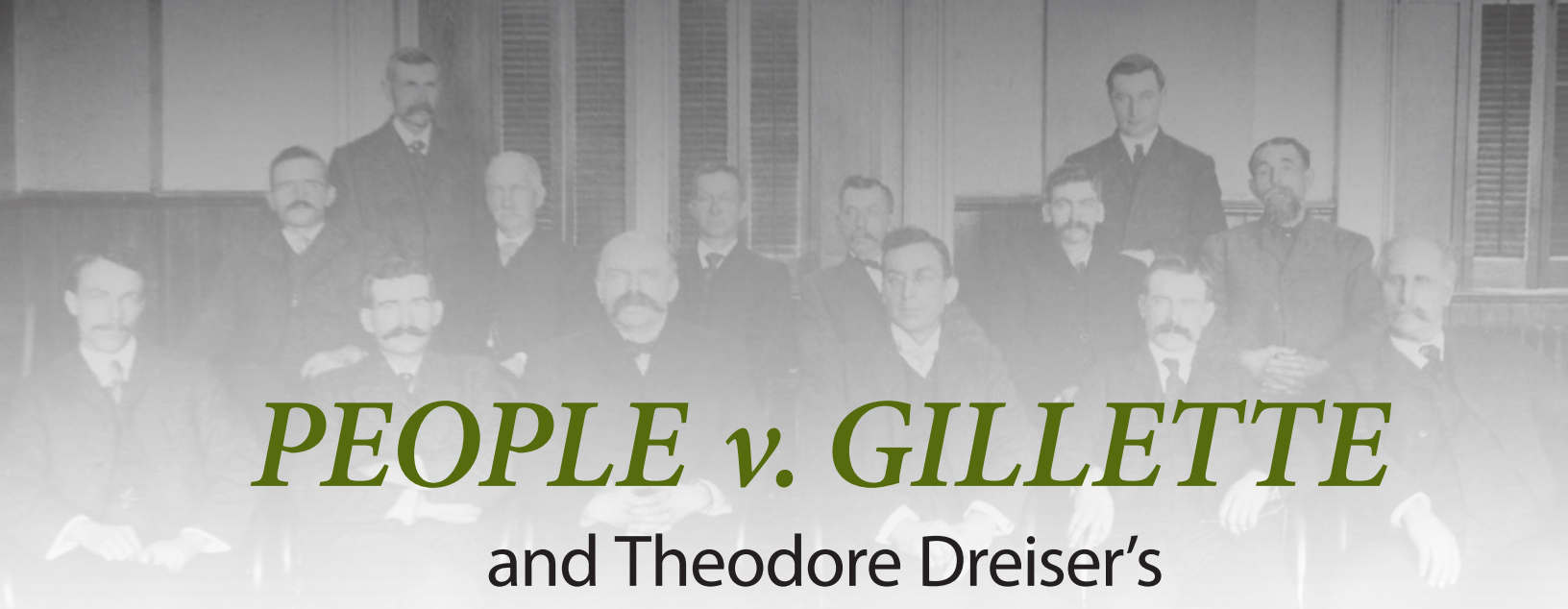
1. Sucheng Chan, *Asian Americans: An Interpretative History* 25 (1991); Gary Y. Okihiro, *The Columbia Guide to Asian American History* xv, 178 (2001); Asian Nation, *The First Asian Americans*, <http://www.asian-nation.org/first.shtml> (last visited Mar. 18, 2015).
2. Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth Century America* 1–2 (1994); Okihiro, *supra* note 1, at xiii–xiv (2001); George Anthony Pepper, *If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion* 121 (1999).
3. Library of Congress, Immigration: Japanese, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/japanese.html> (last visited Apr. 13, 2015).
4. This is the figure for “Asian alone or in combination.” U.S. Census Bureau, C2010BR-11, *The Asian Population: 2010*, at 4 tbl.1 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf>.
5. *Id.* at 7 tbl.2.
6. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
7. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
8. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
9. *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).
10. *Gong Lum v. Rice*, 275 U.S. 78 (1927).
11. *Terrace v. Thompson*, 263 U.S. 197 (1923).
12. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).
13. *Ex parte Endo*, 323 U.S. 283 (1944).
14. Over the years our teams have included: Vincent Chang, Hon. Kiyo Matsumoto, Janicelynn Asamoto, John B. Bajit, Ben Chan, Christopher W. Chan, Yang Chen, Theodore Cheng, Francis H. Chin, James Chou, John Flock, Andrew Hahn, Reiko Kaji, Jane Kim, Jenny Kim, Jean Lee, Lauren U.Y. Lee, Vinny Lee, Robert W. Leung, Linda S. Lin, Anna Mercado, Concepcion A. Montoya, Susan Moon, Esther Nguonly, Clara Ohr, Justin Ruaysamran, Yasuhiro Saito, Liza Sohn, Betsy Tsai, Vinoo P. Varghese, Ona T. Wang, Jessica C. Wong, David Weinberg, and Michael Yap. For the *Ozawa/Thind* presentation, one part was played by a special guest: Mr. Ozawa's granddaughter, Carol Ing Leonard.
15. *Yasui v. United States*, 320 U.S. 115 (1943).
16. *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986); *United States v. Ebens*, 654 F. Supp. 144 (E.D. Mich. 1987).
17. See David E. Stannard, *Honor Killing: How the Infamous “Massie Affair” Transformed Hawaii* (2005); Peter Van Slingerland, *Something Terrible Has Happened* (1966).
18. *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 945 (1952).
19. *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).
20. *Okamoto v. United States*, 152 F.2d 905 (10th Cir. 1946); *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *United States v. Fujii*, 55 F. Supp. 928 (D. Wyo. 1944).
21. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).
22. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).
23. *Vietnamese Fisherman Ass'n v. Knights of Klu Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981).
24. The summaries are drawn in part from the scripts, which were developed with other members of the Asian American Bar Association of New York. Frank H. Wu, now Dean of the Hastings College of the Law, was a co-author of the Vincent Chin script and in general has been enormously helpful in the development of these programs.
25. The facts in this section are drawn primarily from the trial transcript and newspaper articles published in *The Daily Alta* and *San Francisco Chronicle* in August and September 1874, as well as the following sources: *Chy Lung v. Freeman*, 92 U.S. 275 (1876); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (1994); Lucy E. Salter, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995); Kelly Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 651 (2005); Sucheng Chan, *The Exclusion of Chinese Women, 1870–1943, in Entry Denied: Exclusion and the Chinese Community in America* (Sucheng Chan ed., 1991); Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 Signs 3 (Autumn 1979).
26. *Ex parte Ah Fook*, 49 Cal. 402 (1874). The writ had the effect of staying Judge Morrison's decision, and permitting the women to remain, until the California Supreme Court could rule.
27. The court was the United States Circuit Court for the District of California, one of the original federal intermediate courts established by the Judiciary Act of 1789. The circuit courts had both trial and appellate jurisdiction. The appellate jurisdiction was transferred to the United States Courts of Appeals when they were created by the Judiciary Act of 1891.
28. *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874).
29. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).
30. See Chinese Exclusion Act of 1882; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
31. *Arizona v. United States*, 132 S. Ct. 2492 (2012).
32. 158 Cong. Rec. H3715-02 (daily ed. June 18, 2012) (statement of Rep. Judy Chu), available at <https://www.congress.gov/crec/2012/06/18/CREC-2012-06-18-pt1-PgH3715-2.pdf> (last visited May 25, 2015).
33. The facts in this section are drawn largely from the trial transcript as well as the following: Frederic P. Close, *Tokyo Rose/An American Patriot: A Dual Biography* (2010); Rex B. Gunn, *They Called Her Tokyo Rose* (2d ed. 2008); Russell W. Howe, *The Hunt for Tokyo Rose* (2008); Eric L. Muller, *Betrayal on Trial: Japanese-American “Treason” In World War II*, 82 N.C. L. Rev. 1759 (2004).



34. See Hans Sherrer, *Iva Toguri Is Innocent!*, 28 Justice Denied 22 (Spring 2005), http://justicedenied.org/issue/issue_28/toguri_jd28.pdf (last visited Apr. 9, 2015).
35. The conviction was affirmed by the Ninth Circuit. *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 945 (1952).
36. See Richard Goldstein, *Iva Toguri D'Aquino, Known as Tokyo Rose and Later Convicted of Treason, Dies at 90*, N.Y. Times, Sept. 28, 2006.
37. Heart Mountain is another re-enactment that we have performed several times. In June 2014, we travelled to Cody, Wyoming for a performance that took place only a few miles from the site of the actual Heart Mountain concentration camp. We went at the invitation of the National Consortium on Racial and Ethnic Fairness in the Courts and more specifically of Professor Eric Muller, who wrote the book *Free to Die for Their Country: The Story of the Japanese American Draft Resisters in World War II* (2001). He put together a cast that included two of the draft resisters themselves, both in their 90s, one of whom played himself. It was a great honor to work with them and with, indeed, a whole new cast drawn from Consortium participants.
38. The facts in this section are drawn from the transcripts of the trial and hearings as well as from the following: *Okamoto v. United States*, 152 F.2d 905 (10th Cir. 1946); *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *United States v. Fujii*, 55 F. Supp. 928 (D. Wyo. 1944); Mike Mackey, *Heart Mountain: Life in Wyoming's Concentration Camp* (2000); Muller, *supra* note 37; Michi Nishiura Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (2008 ed.); Frank Seishi Emi, *Draft Resisters at Heart Mountain*, in *Only What We Could Carry: The Japanese American Internment Experience* (Lawson Inada ed., 2000).
39. Muller, *supra* note 37, at 104.
40. See Muller, *supra* note 37, at 76 ("Heart Mountain quickly gave birth to the best-organized and most articulate resistance movement that ever took shape on any issue at any of the ten WRA camps.").
41. *Fujii*, 148 F.2d at 299-300.
42. *Keegan v. United States*, 325 U.S. 478 (1945).
43. *Okamoto*, 152 F.2d at 907.
44. See Muller, *supra* note 37, at xi.
45. The facts in this section are drawn largely from the transcripts of court proceedings as well as: *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986); *United States v. Ebens*, 654 F. Supp. 144 (E.D. Mich. 1987); Stewart Kwoh, *Building Bridges to Justice*, 9 Asian L.J. 201 (2002); Frank H. Wu, *Embracing Mistaken Identity: How the Vincent Chin Case Unified Asian Americans*, 19 Harv. Kennedy Sch. Asian Am. Pol'y Rev. 17 (2010).
46. *Ebens*, 800 F.2d at 1422.
47. *Ebens*, 654 F. Supp. at 146.
48. See Helen Zia, *Asian American Dreams: The Emergence of an American People* 79 (2001) ("Located across the Ohio River from Kentucky, Cincinnati is known as a conservative city with Southern sensibilities.").
49. Michael Chang, *Bridging the Gap: The Role of Asian American Public Interest Organizations in the Pursuit of Legal and Social Remedies to Anti-Asian Hate Crimes*, 7 Asian L.J. 139 (2000); Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, Cheating, and Who Killed Vincent Chin?*, 5 Asian L.J. 41 (1998); Frank H. Wu, *Why Vincent Chin Matters*, N.Y. Times, June 22, 2012.
50. See Frank Wu, *Yellow: Race in America Beyond Black and White* (2002); Zia, *supra* note 48; Sheila A. Bedi, *The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 Harv. Blackletter L.J. 181 (2003); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 Mich. J. Race & L. 347 (1996); Stewart Kwoh, *Building Bridges to Justice*, 9 Asian L.J. 201 (2002); Jeehoo Lee, *One Step Closer: Understanding the Past and Potential Work and Influence of Asian American Interest Groups in Claiming A Space for Asian Americans in America's Democracy*, 14 Asian L.J. 123 (2007).
51. Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. Times, Aug. 10, 2014; Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. Times, July 18, 2014; Jonathan M. Katz & Richard Perez-Pena, *In Chapel Hill Shooting of 3 Muslims, a Question of Motive*, N.Y. Times, Feb. 11, 2015.
52. The Supreme Court has never overruled *Korematsu* or the other internment cases. See generally William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 203-09, 211 (1998) (arguing that judicial review is inappropriate to determine "military necessity" and that there was a real fear of Japanese attack on West Coast); William H. Rehnquist, *When the Laws Were Silent*, 49 Am. Heritage (1998); see also Alfred C. Yen, *Praising with Faint Damnation: The Troubling Rehabilitation of Korematsu*, 40 B.C. L. Rev. 1, 2 (1998).
53. See generally Pew Research Center, *The Rise of Asian Americans* (Apr. 4, 2013 ed.), <http://www.pewsocialtrends.org/files/2013/04/Asian-Americans-new-full-report-04-2013.pdf> (last visited Apr. 9, 2015).







PEOPLE v. GILLETTE

and Theodore Dreiser's *An American Tragedy*: Law v. Literature

by Susan N. Herman



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Photo credit: Richard Corman

The New York trial of Chester Gillette, who was the principal model for protagonist Clyde Griffiths in Theodore Dreiser's great 1925 novel, *An American Tragedy*, recently had its hundredth anniversary.¹ In connection with this anniversary, I have given talks on the relationship between the actual trial and the novel, first at the New York Court of Appeals² and then for the Historical Society of the New York Courts at the Association of the Bar of the City of New York,³ both focusing on connections between law and the arts—in this case, literature. This article is an adaptation of those talks.

Dreiser's choices as a novelist show a great deal about the potential connections as well as the different capabilities of law and literature. In his fiction, Dreiser used many elements of Chester Gillette's trial and personal history unmodified; other facts he changed, often to sharpen questions he wanted to raise about the American dream and the American legal system. The differences are provocative, inviting readers to ask more questions than the Gillette jury would have, and perhaps to formulate different answers.

The central narrative in both reality and the novel is the story of a poor boy desperate to achieve the American dream of upward mobility. The romantic triangle at the base of the story is essentially the same in the Gillette trial, in the novel, and in the popular film based on the novel (*A Place in the Sun*): poor boy, poor girl, rich girl. One tragedy is that the poor boy is executed for murdering the poor girl who got in the way of his dream, a tragedy with an additional dimension if he did not actually kill her; another tragedy is that the poor girl dies young, whether by murder or accident, because she becomes pregnant.

◀An unusual feature of the trial was the use of the rowboat where Grace Brown died as an exhibit. *Utica Saturday Globe*. Courtroom sketches and jury photograph depicting the trial of Chester Gillette originally appeared in the *Utica Saturday Globe*. These images were provided by Craig Brandon and will appear in the revised and expanded edition of his history of the trial: *Murder in the Adirondacks*, which will be published by North Country Books in early 2016.

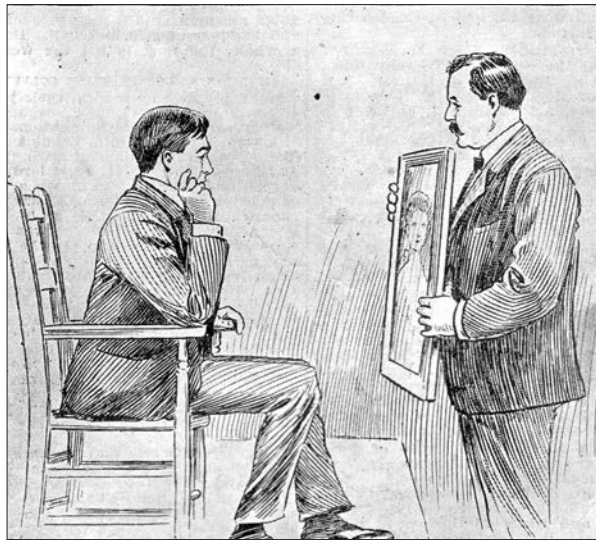
The Gillette Trial⁴

Much like Dreiser's protagonist, the identically initialed Clyde Griffiths, Chester Gillette grew up as a poor boy. Chester's deeply religious parents had given up financial stability to work with the Salvation Army. Chester, who was not inclined to the religious life, had a rich uncle, Noah Gillette, who gave him a job at his factory in upstate New York: a skirt factory in Cortland. Having been to prep school, Chester was better educated than Dreiser's Clyde. Associating with his wealthy uncle and family in Cortland must have seemed a promising path for ascension to greater wealth and a higher class. Chester was something of a playboy and seems to have been quite attractive to rich and poor women alike.

Just as Chester evidently was hoping to rise above his present station in life through association with his uncle, Grace Brown, a farmer's daughter whom he met working at the factory, may have seen Chester—who although not rich himself, was the wealthy boss's nephew—as her ticket to upward mobility. Chester and Grace had an affair. When Grace became pregnant, she was extremely eager to have Chester marry her.

But Chester was reluctant to marry Grace and evidently regretted their involvement. It seems that he would have preferred to associate with the more affluent people whom he had gotten to know around Cortland. After a considerable amount of pleading and nagging, Grace evidently thought that she had persuaded Chester to do the right thing. The two went on a trip that Grace apparently believed to be their wedding trip. But instead, Grace's journey ended in a rowboat on Big Moose Lake, where Grace, who did not know how to swim, either drowned or was hit with an object that killed her before she hit the water.

Chester was tried for murdering Grace. But even though he was convicted and his conviction was upheld on appeal, we still do not know whether Chester actually did murder Grace. The evidence at trial was purely circumstantial. They were in the rowboat together, she did end up at the bottom of the lake, and the prosecution assembled enough evidence of different kinds to convince the jury that Chester had thought about killing Grace. But looking back at the trial, it is not at all clear whether what actually happened was an intentional murder, an accident, or—a third, distant possibility—a suicide.

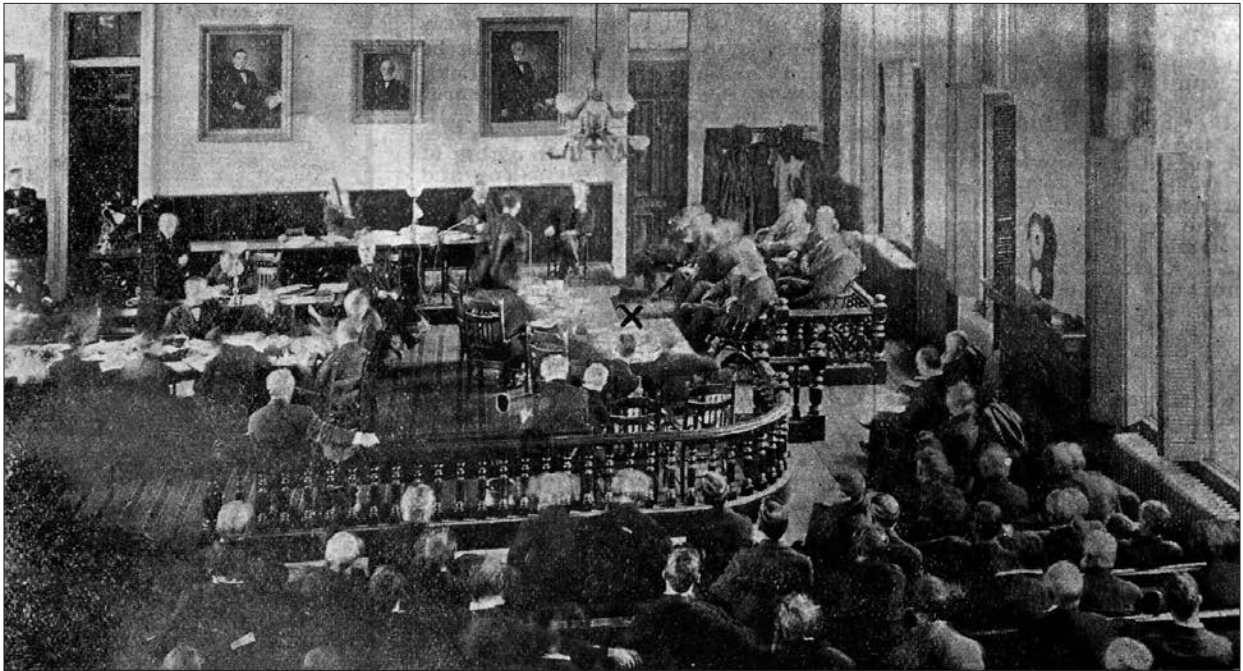


Gillette displayed little emotion throughout his trial. *Utica Saturday Globe*

In many respects, when confronted with the criminal justice system, Chester Gillette became his own worst enemy. When suspicion focused on him after Grace's death, he started to lie and kept on lying. When he was first asked whether he been in the rowboat on the lake with Grace, he denied having been there at all. As witnesses came forward and identified him as having indeed been in the rowboat, he adopted a different defense: that the whole thing had been an

accident. But Chester's stories became increasingly incredible and inconsistent. When Chester and Grace had checked into a lodge near the lake, he had used a false name, Carl Grahm. Why? It seemed that Chester had made a date with some wealthy people for a time shortly after he went off with Grace in the rowboat. Was this why he had his tennis racket with him? What happened to the tennis racket? Why would he have taken his suitcase with him into the rowboat? Chester provided unconvincing and contradictory answers to questions like these. It was easy for the prosecution to persuade the jury that Chester was a liar, because he was. It is far less clear whether he lied about his legal innocence.

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The trial took place in the Herkimer County Courthouse, an 1873 building now on the National Register of Historic Places. *Utica Saturday Globe*

From our modern day post-*Miranda*⁵ perspective, Chester did one of the most foolish things a criminal suspect can do: he tried to talk his way out of a threatening situation by saying anything that might deflect the investigators' focus on him, regardless of its truth. In those pre-*Miranda* days, no one had advised Chester that he had a right to remain silent and would probably be better off saying nothing. But the fact that Chester gave false exculpatory statements to the police does not necessarily mean that he was guilty. It might, as *Miranda* teaches, just show that he was foolishly trying to tell the police whatever he thought most likely to cause them to stop suspecting him because he was afraid, even if not actually guilty.

At trial, Chester raised a new defense, testifying that Grace had committed suicide. There was some evidence supporting this theory. In her letters, which were admitted into evidence, Grace wrote things like, "It would be better if I were dead." In all likelihood, this was not Chester's best choice of defenses. But in any event, Chester was shown to have lied about too many things for the jury to believe any defense he raised or might have raised at trial.

The Gillette trial was extraordinarily lengthy, with 83 witnesses plus additional evidence. The

prosecution seems to have called almost everyone whom Chester Gillette and Grace Brown had ever met. Although every witness called had something to say about their relationship, all of the testimony was circumstantial, tending to reconfirm 1) that Chester Gillette had a motive to kill Grace Brown—that he did not want to marry her because he wanted to be free to travel in different social circles. Numerous witnesses also established 2) that Chester had the opportunity to kill Grace. He was there in the rowboat when she drowned—or was clubbed. And some evidence, like the fact that Chester had checked into the lodge under a false name, suggested 3) that Chester had premeditated killing Grace. But no witness was able to testify about what had actually caused Grace's death.⁶

The prosecution's forensic evidence was also inconclusive. The prosecutor's theory was that Chester Gillette had hit Grace Brown in the head with his tennis racket, hard enough to kill her, and that she then fell overboard because of this blow. Evidence of injuries consistent with a blow to Grace's head, presented by five doctors, rebutted the theory that Grace had drowned by accident or that she had committed suicide. But there were reasons to question the reliability of the autopsy results. Grace's body had been

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embalmed before the autopsy was performed, significantly compromising the accuracy of the results. In addition, on cross-examination, Chester Gillette's lawyers brought out the fact that there was physical evidence tending to show that Grace Brown had died by drowning rather than from a blow to the head. They also established that the doctors had agreed before trial

not to mention the possibility that Grace had actually died by drowning, so as not to undermine the effect of their testimony that she had been hit. The jurors therefore were given a potential source of a reasonable doubt that Chester had murdered Grace by clubbing her, and no evidence that her drowning was anything other than accidental. But these considerations seem to have been outweighed in the minds of the jurors by the prosecution's other evidence, by Chester's lies, and probably by empathy for Grace and her family.

One of the most powerful influences on the jury must have been Grace Brown's letters to Chester, many of which were introduced into evidence. Grace's letters revealed a sympathetic picture of the thoughts of an emotional and anxious young woman:

I know that you don't care for me any more like you did and that you are wishing things could be different. And yet, what am I to do? I know you'll say that it has all been as much my fault as yours. And the world, if it knew, might think so too. But how often did I beg you not to make me do what I did not want to do, and which I was afraid even then I would regret, although I loved you too much to let you go, if you still insisted on having your way.

Oh, please, please, I beg of you, not to torture me with any more delays now.⁷



Grace Brown's life and family presented a largely sympathetic picture to the jury. *Utica Saturday Globe*

The trial judge, Irving R. Devendorf, who had only been on the bench for a year, decided to admit the letters, prejudicial though they might have been. He admitted the letters on the curious theory that they would show how the decedent felt about the defendant, ruling that they would not be admissible for any other reason. He instructed the jury not to consider the letters as evidence of the truth of

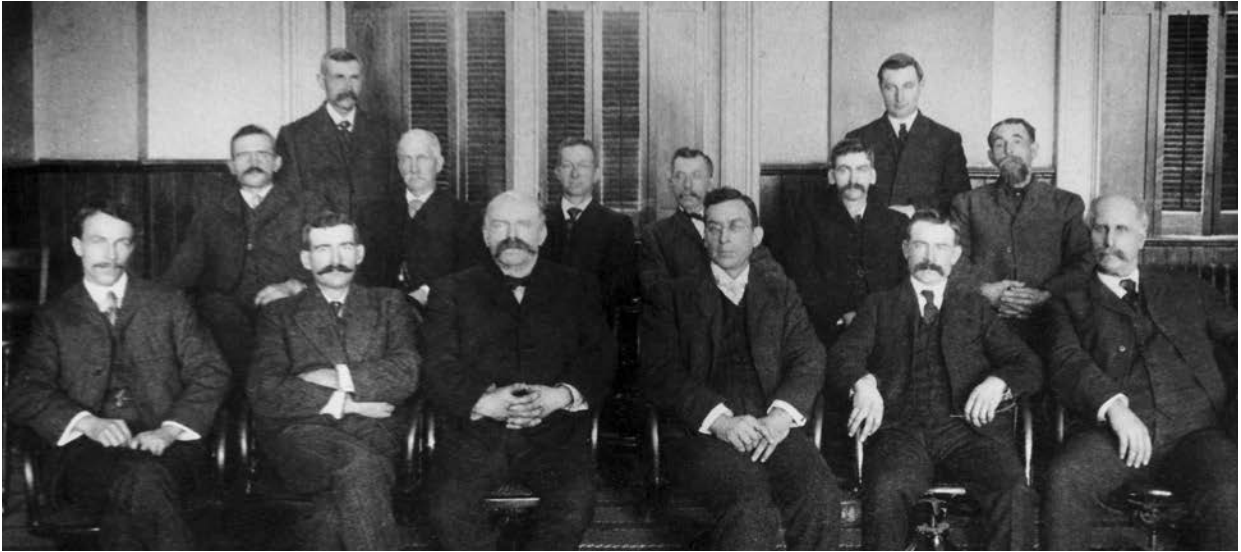
anything they contained.

Not only were many of Grace's letters read at trial, leading many spectators to sob as they listened, but copies were also sold on the street outside the courtroom so that spectators could take them home and read them at leisure.⁸ The trial was an enormous media event, even in those pre-CNN days, with an estimated 1,000 spectators. Adding to the circus atmosphere, Chester Gillette sold photographs of himself to the crowd, to raise a little money.

In law, as in literature, narrative plays a central role. Every trial offers the jury competing stories from which to choose. The jury's choice was between Chester's version of the events in question and that of Grace Brown, a sympathetic figure whose story was told in letters written in her own voice and read by the prosecution to dramatic effect. What did the jury get to know about Chester Gillette? That he lied, persistently. In a lengthy cross-examination, the prosecutor did quite a good job of establishing the number as well as the flagrancy of Chester's lies. Once the jury had concluded that Chester had been shown to be a liar about many things, why not conclude that he was lying about everything and that despite his protestations he did kill Grace?

Yet another mistake Chester Gillette made was to sit through the whole trial stone-faced, without showing any emotion at all. Witnesses established that after Grace Brown's death by drowning in his presence, however it happened—accident, suicide, murder—Chester just went on with his life, showing

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The jury at Gillette's murder trial. *Utica Saturday Globe*

no sign that he felt anything significant had occurred. Chester later said that he was in fact feeling a great deal of emotion but he was hiding it because he thought that that was the right thing to do. Showing no grief, no remorse, no emotion at all could not have endeared him to the jury.

In addition to the fact that the jury got to know Grace's own story much better than they got to know Chester's, the jurors had another reason to identify with Grace. Like Grace's family, members of the jury were local farmers. And to them, as to Grace, Chester probably seemed like a member of the entitled upper class, because of his rich uncle.

One point the defense attorney raised in summation was that at least Chester and Grace had not sought the aid of "a criminal." We don't actually know whether or not Chester or Grace ever explored the possibility of an abortion. Abortion, at that point, was against the law in New York State, although available on the black market. So the defense attorney tried to score a point by telling the jury that Gillette had not sought an illegal abortion, even though that would have been a solution to an unwanted pregnancy.

At the end of this lengthy trial, it took the jury only about five hours to convict Chester Gillette.

But because the conviction was based on circumstantial evidence, the public continued to entertain doubts about whether or not Chester had actually murdered Grace. One popular post-trial song

proclaimed that only "God—and Gillette—know all." A publisher's contest offered an award of \$500 to the person who submitted the best analysis of whether or not Chester Gillette was truly guilty.⁹

Fair Trial?

A separate question is whether Chester Gillette received a fair trial. His defense attorneys seemed competent enough. There was not much that they could do with a client who had already destroyed his own credibility.

The New York Court of Appeals upheld Gillette's conviction.¹⁰ The court thought that the most difficult legal question was whether or not Grace Brown's letters were properly admitted. The court concluded that it was not appropriate for the judge to admit the letters as relating to the issue of the relationship of the decedent and the defendant, but that it would have been appropriate to admit them as going to motive. The prosecution had read out many parts of the letters, however, that had nothing to do with motive. Nevertheless, said the court, the jury would not have been likely to have been affected by the letters' contents: "girlish gossip," expressions of endearment and Grace Brown's thoughts. In any event, the Court of Appeals said, the defense didn't object to the reading of those other parts of the letters. This analysis seems

odd. Why, in light of the trial court's negative ruling on their general objection, should the defense have to object to the reading of those particular parts of the letters? Why shouldn't the prosecution have to justify reading the parts of the letters that were read?

A second issue on appeal was that in his opening statement, the District Attorney tried to portray Grace as a complete innocent. Fearing that the jurors might lose sympathy for Grace because she was a fallen woman—she had engaged in extramarital sex with Chester and was carrying his child—the prosecutor tried to rehabilitate Grace's reputation by maintaining that Chester Gillette had raped her. Because there was no evidence at all supporting the charge of rape, the judge instructed the jury not to consider that assertion. This prejudicial statement was not found to have constituted grounds for reversal of the conviction.

There were several other forms of potential prejudice that did not become issues on appeal because the trial court had acted to safeguard the fairness of the trial. For example, the prosecution thought that because Grace had been pregnant, it would be a good idea to allow the jury to see the fetus. The fetus was actually brought into the courtroom but the judge, to his credit, recognized the attempt to engage the jurors' emotions and ruled that it could not properly be labeled as an exhibit.

There was a tremendous amount of pretrial publicity surrounding the Gillette trial, and much of the information circulating was utterly untrue. I give Judge Devendorf, who had only one year of experience as a judge, a lot of credit for his thoughtful handling of the problem of pretrial publicity; it was, after all, 1906, well before the development of Supreme Court case law in the area. He questioned the jurors, instructed them not to read anything about the trial, and made sure that they didn't get news reports about the trial while they were sitting. Thus the impact of prejudicial pretrial publicity did not become a significant issue on appeal.

There is one more piece of evidence that arose after the trial that would have been highly pertinent to the issue of Chester's guilt. In later years, Roy Higby, who had been thirteen years old at the time, liked to tell about his role in the search for Grace Brown's body.¹¹ From his uncle's boat, he claimed to have spotted something white (which turned out to be

the body) in the lake, and then to observe the boat's engineer using a long pole to poke at the object repeatedly, trying to establish whether or not it was a body. According to Higby, that pole could have explained the marks on Grace Brown's face, which the prosecution had offered as (the only) proof that Chester Gillette had hit Grace with his tennis racket. If there was reasonable doubt about whether Chester had hit Grace at all, the jury would have had to assume that Grace actually died by drowning rather than from a blow. And the prosecution had no significant evidence to prove that the drowning had been a consequence of murder rather than accident or suicide.

Higby did not testify at the trial. He reported that when his father later told George Ward, the District Attorney on the case, about this new piece of evidence, Ward remarked, "If the defense had got this boy on the stand we would never have convicted Chester Gillette."¹²

Law v. Literature

One essential difference between law and literature is that absolute truth exists in literature in a way that is often unattainable in an actual trial. How do we know what the facts are in a homicide trial? Unless there is an eyewitness or some other form of conclusive evidence, there are only two people who know what happened: the decedent, who can no longer speak, and the defendant, who has a Fifth Amendment privilege not to speak—and a powerful incentive for offering a self-serving account. In homicide cases, a key element of the crime is what was going on inside the defendant's head: was the homicide intentional? Purposeful? Reckless? How can we hope to accurately discern what was in a defendant's mind if the defendant does not wish to tell us? We say that juries "find" facts. But the facts of a case do not come prepackaged. Jurors have to decide what the relevant facts are. And jurors, being human, can be wrong about what was going on inside a rowboat, or inside a defendant's head.

Within a novel, on the other hand, readers can be served objective truth. The author can put us at the scene of the crime and even inside the defendant's mind so that we can observe first-hand what is hap-

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pening. In real trials, the jurors, the appellate judges, the reporters, and the public do not actually know what the truth is. We may search for truth, but it is sometimes hard to be certain whether or not we've found it, even after a conviction, even

after an appeal. We accept decisions of jurors and judges because we must have a resolution, to the best of our system's ability. But in literature, if the author tells you this is what the defendant was thinking, then you know what the defendant was thinking and you know the truth, within the world of the novel. And then you can judge the justice system accordingly, by whether it yielded an accurate result.

Dreiser's Literary Version

Dreiser had been telling his friends for some time before he wrote *An American Tragedy* that he wanted to get inside the mind of a murderer. And he particularly thought that the triangle—a poor boy who murders a poor girl because he wants to be with a rich girl—was a quintessentially American plot which, he said, has it all. Politics, society, religion, business, sex. So he looked for cases fitting this pattern. He claimed at one point that he had found as many as a dozen such cases around the country, although some critics think that may have been an exaggeration. Dreiser said that he was creating a composite of these cases and was not just reproducing the *Gillette* case. However, *Gillette* was clearly the main case he used.¹³

Dreiser renamed his main character Clyde Griffiths, keeping the initials C.G. Grace Brown became Roberta Alden. But Dreiser used excerpts from Grace Brown's actual letters, which would have been hard to improve, word-for-word in his novel.



The Post-Standard, December 5, 1906. Courtesy Old Fulton Postcards, fultonhistory.com.

Dreiser also sharpened the triangle by creating Sondra Finchley, a rich girl who loved Clyde. In the *Gillette* trial, there was talk of a "Miss X" and talk about whether or not this Miss X was in fact somebody Chester Gillette planned to marry. This mysterious figure never testified at trial, but the woman said to be "Miss X," Harriet Benedict, issued a press release announcing that she most definitely had not been engaged to Chester Gillette. Chester's "Miss X" represented the upper class girls he craved even if they might have been unattainable; Dreiser's Sondra was a particular woman who seemed, before the events on the lake, to be within Clyde's reach.

With the power to show the reader whether Clyde is guilty or innocent of murder, what choice did Dreiser make? I think that Dreiser, like Shakespeare, like Melville, intended to leave that judgment to the reader. He gives the reader enough information so that the reader can form an opinion about Clyde's moral or legal guilt. Dreiser tips the scales a bit to give Clyde a greater chance to convince the reader of his innocence than Chester Gillette ever had with his jury. He prompts us to think about Clyde's guilt in context, not just of the trial, but of American society.

In Dreiser's account, what happens to Chester/Clyde is an American tragedy because it is spawned by the American dream. All of Book One recounts Clyde's early life, giving much more context for the dramatic events that follow than a trial ever would or could. We see Clyde as a poor child and then as a young man, working in a hotel frequented by rich people, coveting their fancy motor cars and envying their lives. Clyde wants the beautiful cars for himself and he wants to be rich because in America rich is better. *An American Tragedy* fills 850 pages; some critics

have described the plot's trajectory as inexorable. Inexorability here may be a synonym for determinism. Clyde is a product of the society in which he is raised. Although Clyde Griffiths is not exactly Chester Gillette, Dreiser offers an argument that Clyde (and therefore perhaps Chester) may himself have been a victim of the American dream—regardless of whether or not he actually committed murder.

Interestingly enough, Dreiser gave Clyde Griffiths aspects of his own history. Dreiser had a religious fanatic for a mother; he gave Clyde a religious fanatic parent. When he became famous, Theodore Dreiser left his small-town wife in order to live a bohemian life in Greenwich Village. There is an account in the book of a pretty woman who is seduced and abandoned by an upper-class cad. That story belonged to one of Dreiser's sisters.¹⁴

Dreiser's Clyde is less well-educated than Chester Gillette and finds himself placed in an ambiguous situation with a rich uncle who does not wholly welcome him. Dreiser changes the business of the uncle's factory to sharpen the class contrasts he wants to explore. Chester's uncle's skirt factory becomes Clyde's uncle's collar factory. Poor people could buy a fresh collar to put on their frayed shirts to keep up a front of presentability. But it is only a front. Underneath, the shirt may still be shabby. Clyde may have appeared to be connected with wealth, but his uncle treated him like a poor relation.

One significant invention in the novel is a scene where Clyde and Roberta do seek the help of an abortionist. (We don't know, as mentioned earlier, whether Chester and Grace ever did so in real life.) In Dreiser's version, Clyde pressures Roberta to explore the possibility of an abortion. But the doctor whose name Clyde has obtained (with considerable difficulty) lectures the pair about the illegality of abortion in New York and declines to help them. Dreiser's point here again seems to be about the determinism of class. Rich people will be able to buy abortions even if they are illegal; poor people will get hypocritical lectures.¹⁵ Because Clyde and Roberta lack money and status, they have fewer options in the situation created by Roberta's pregnancy, leaving Clyde increasingly desperate.

(A couple I know went to see the Tobias Picker version of *An American Tragedy* when it was playing

at the Metropolitan Opera. Afterwards, the woman said to her husband, "This is really a story about the availability of abortion, isn't it?" And he replied, "No, it isn't." Perspectives on the abortion question may vary with gender as with class.)

Another way that Dreiser prompts us to consider whether Clyde/Chester is innocent is to furnish Clyde with suitable explanations, first of all for his lies. He tells us that Clyde was simply terrified upon being accused, and he panicked. Dreiser's description of what was going on in Clyde's mind and Clyde's compulsion to tell lies to save himself seems like an early recognition of the perceptions underlying the *Miranda* decision. We tell suspects that they have a right to remain silent not just so that guilty people won't be coerced into confessing, but so that innocent people won't make things up in the hope of talking their way out of a frightening situation and end up by ensnaring themselves.

Dreiser's account also describes in detail what Chester's jury could not know: what actually happened in the rowboat. Yes, Clyde had the motive, yes, he had the opportunity, yes, he had thought about killing Roberta before he was in the rowboat. But in Dreiser's description, Clyde's thoughts in the rowboat are not as simple as intent, yes or no:

At this cataclysmic moment, and in the face of the utmost, the most urgent need of action, a sudden palsy of the will—of courage—of hate or rage sufficient; and with Roberta from her seat in the stern of the boat gazing at his troubled and then suddenly distorted and fulgurous, yet weak and even unbalanced face—a face of a sudden, instead of angry, ferocious, demoniac—confused and all but meaningless in its registration of a balanced combat between fear (a chemic revulsion against death or murderous brutality that would bring death) and a harried and restless and yet self-repressed desire to do—to do—to do—yet temporarily unbreakable here and now—a static between a powerful compulsion to do and yet not to do.¹⁶

And so a Hamlet-like Clyde is struggling in his own mind and it is not clear what he will do, or even what he did do. At that point, Roberta, noticing

Clyde's odd expression, stands up and comes toward him, meaning to take his hand. And, we're told, Clyde reacts reflexively:

[A]s she drew near him, seeking to take his hand in hers and the camera [the object Clyde has in the boat, as opposed to Chester's tennis racket] from him in order to put it in the boat, he flinging out at her, but not even then with any intention to do other than free himself of her—her touch—her pleading—consoling sympathy—her presence forever—God.

Yet (the camera still unconsciously held tight) pushing at her with so much vehemence as not only to strike her lips and nose and chin with it, but to throw her back sidewise toward the left wale which caused the boat to careen to the very water's edge.¹⁷

The boat capsizes; she's in the water; he's in the water. Clyde does not—at least at this point—think that he has killed Grace. As he is swimming, he is consciously thinking that he did not intend to kill her. The next question with which Clyde wrestles is whether or not he is going to try to save Roberta who, like Grace, cannot swim. Dreiser establishes quite clearly that Roberta drowned, rather than having died from the blow to her head, by having her call out to Clyde while in the water, pleading with him to save her. Once again, Clyde has complex thoughts: if I go to her, maybe she'll drown me; maybe she'll pull me down. If she drowns, isn't that the result that I desired but was too weak to bring about? In the end, he does not rescue her.

The judge in the Chester Gillette trial accurately charged the jury that if/when Grace Brown was in that same situation, Chester had no legal duty to rescue Grace. In the absence of a legal duty to rescue Grace, Chester could not properly be found guilty of homicide for his omission. Chester Gillette's legal guilt hinged only on whether he committed an intentional act causing her death.

The question of whether Clyde Griffiths is guilty of homicide similarly does not hinge on whether or not he failed to rescue Roberta. It depends on resolving all the complicated thoughts roiling in his

mind. Did he subconsciously intend to hit her hard with the camera because he wanted her to die? Clyde thinks about this a great deal over time, but he can't tell. Even if he had this thought subconsciously, would that be sufficient to establish either his moral or legal culpability for her death?¹⁸

According to the post-trial song, only God and Gillette knew whether Gillette was guilty. In Dreiser's telling, it seems that not even Gillette/Griffiths would have known whether or not he was legally guilty of homicide.

An article in the *Tennessee Law Review*¹⁹ argues that Dreiser intended to critique American law and its focus on intentionalism. American law makes the critical decisions about guilt and innocence depend on a simplified account of the defendant's state of mind, but how can we find out the defendant's state of mind at the time of the alleged crime, and how can we reduce complex thoughts to a simplified yes or no on the question of intent? If Clyde Griffiths himself was not able to figure out what he intended, how is a jury supposed to characterize what was happening in his mind? And even if the jury could know exactly what Clyde was thinking—that he believed that he did not consciously intend to kill Roberta—should the decision about his guilt or innocence depend on the distinction between his conscious and subconscious thoughts?

Dreiser is not trying to make any of this simple for us, in terms of legal guilt. For Dreiser and for his characters—as for Chester Gillette after the trial—the question of moral guilt may have seemed more important than the question of legal guilt.

While he was in Auburn Prison, Chester Gillette underwent a religious conversion and subsequently confessed to killing Grace. But it's not clear even then, especially in Dreiser's retelling—when Clyde Griffiths has his parallel moment of religious clarity and confesses, taking ownership of what he did—whether he's correct in accepting legal guilt. Chester/Clyde's conscience may have been gnawing at him because he thought seriously about committing a murder. But the law might not ascribe guilt where his conscience did if his murderous intent and his intentional acts did not coincide.

Dreiser does not tell us whether or not Clyde is either morally or legally guilty; he turns his readers into jurors and leaves us to decide. But we are a differ-

ent kind of jury because we are a jury of literature as opposed to a jury of law.

Another way in which Dreiser stacked the deck, encouraging us to consider Clyde Griffiths's and Chester Gillette's side of the story, was to make the trial blatantly unfair. In Dreiser's telling, for example, a member of the prosecution team intentionally falsifies evidence, taking a hair from Roberta's corpse and putting it on the camera with which Clyde presumably struck Roberta. Without this critical piece of evidence, it would have been mere speculation for the prosecution to argue that Clyde had hit Roberta in the head with the camera. We have no reason to believe that the prosecution in the Gillette trial falsified any evidence at all.

Another fact that Dreiser changed about the trial—again raising class issues—had to do with the quality of the defense. In the novel, Clyde Griffiths can't afford to hire a lawyer to represent him so his rich uncle hires a lawyer for him. But he who hires the lawyer calls the shots, according to Dreiser. The rich uncle gives the lawyer ground rules:

1) No Plea of Insanity—that would be too embarrassing to Clyde's family.

2) Clyde's mother, the poor relation and religious fanatic, should not be allowed in the courtroom because she is an embarrassment. (Chester Gillette's mother, like Clyde Griffiths's mother, worked for a newspaper covering the trial of her son. It might have seemed unbelievable for Dreiser to invent a mother who got to attend the trial of her son as a reporter, but he had no need to make up such a bizarre fact as this had actually happened in the Gillette case.)

3) Harriet Benedict ("Miss X"), the wealthy woman who might have light to shed on the situation, was not to be called as a witness or involved in any way because she came from a good family which should not be embarrassed by being connected with such a sordid story.

4) The uncle would pay for Clyde's representation at trial but if Clyde were to be convicted, he would not pay for an appeal. In Dreiser's version, the wealthy uncle had the power to prioritize factors like embarrassment to upper class sensibilities more highly than his impoverished nephew's fate.

The real Chester Gillette's uncle declined to pay for Chester's representation at all. But New York, very

early on, offered a right to counsel to people who could not afford to pay a lawyer. Chester Gillette had lawyers assigned by the court, very prominent lawyers who were both independent and competent. Dreiser gave his readers more reason than existed in the Gillette case to believe that the system was unfair in this respect.

Dreiser also made much of the fact that his District Attorney, as in the Gillette case, held an elected position. In Dreiser's version of the story, partisan politics were centrally involved as his district attorney was about to run for reelection and thus was basing his trial strategy on what was likely to be most popular with voters. But in the real Gillette case, D.A. Ward had already been reelected a week before the trial started.

All of these modifications seem designed to cause us to step back and recognize the tragic elements being played out in this story.

What is American about this tragedy? We know that Chester Gillette, while he was in prison, was reading a rags-to-riches fantasy called *Ishmael*. Dreiser changes that fact, too. What Clyde Griffiths reads while he's in prison is *The Arabian Nights*. An Arabian Nights motif runs throughout the book, suggesting that the American dream is no more than a fable.²⁰ Dreiser seems to be telling us that Clyde Griffiths did not realize, any more than Chester Gillette did, that it wasn't going to happen, that the class barrier is actually very hard to jump, that the American dream has a dark side. Clyde was conditioned to want the motor cars and the high life. Having a rich uncle put him in an untenable position. He could get close, but never quite grasp, that dream. Therefore he was at least tempted to commit murder in order to try to keep his dream alive, perhaps never realizing that the dream was only that.

Dreiser made one more significant name change. The actual town in upstate New York where the Gillette factory was located was named Cortland. But in upstate New York there are many towns with classical names, like Troy, Ithaca, and Rome. Dreiser changed the name of the novel's town to Lycurgus—a classical reference but not a very familiar one. According to Plutarch,²¹ Lycurgus, a descendant of Hercules, was a member of one of two royal families of Sparta. His father and then his older brother

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preceded him in the succession to the throne. When his father and brother both died, Lycurgus had an opportunity to become king. But his brother had left a widow who was pregnant and her baby, if male, would be the rightful heir to the throne, ahead of Lycurgus. The widow proposed to Lycurgus that she would have an abortion if he agreed to marry her, and then he would inherit the throne and the two of them could rule together. Lycurgus did not approve of abortion or the plan in general, but he pretended to play along. He told his sister-in-law that an abortion might be harmful to her health and proposed instead that they let the baby be born and then he would take care of disposing of it. But Lycurgus actually gave secret orders that the baby should be brought to him immediately so that he could keep it safe. The baby, a male and therefore heir to the throne, was named Charilaus, meaning "joy of the people." When Lycurgus received the baby, he publicly announced that Charilaus was now king. He agreed to serve as regent.

The sister-in-law was not happy with this result, so she started spreading rumors that Lycurgus had been plotting to kill Charilaus. Although this was untrue, Lycurgus realized that he could not fight public opinion. This rumor had become so prevalent that if anything ever happened to the baby king, he would be blamed and branded a murderer. So he decided to leave town.

Lycurgus traveled to Crete and many other places, studying enlightened political theory and learning how to run a good government. Eventually, the people

of Sparta decided that the baby and whoever was really in charge were not doing a good job as king. So they invited Lycurgus to return.

Lycurgus came back and on his return he set out to address the inequality in Spartan society. He was very troubled by the fact that so much of the land was

owned by so few of the people. He knew that he couldn't change too much too abruptly, so first he required everybody to eat their meals together in a mess hall. With everyone eating the same food, he thought that money might begin to seem less important. Gradually he worked up to banning gold and silver, thus creating a more equitable society.

Why did Dreiser name his factory town Lycurgus? It is almost uncanny how many of his themes are lodged in that name. The uncle and the nephew. The abortion that didn't happen. The woman trying to force an unwilling

man to marry her. The murder that didn't happen. The uninformed but adamant public opinion. The class issues. It is remarkable that Dreiser found this name for the physical setting of his American tragedy.



Gillette is read the guilty verdict
Utica Saturday Globe

Law and Literature Sequels

There were several litigation sequels to Dreiser's book, both involving different intersections of law and literature. The first case, a criminal prosecution, occurred after the book was banned in Boston on the ground that it was obscene, indecent, and impure. As the appellate opinion in *Commonwealth v. Friede*²² recounts, the prosecutor read some excerpts from the book to the jury—parts alleged to be indecent and

obscene.²³ The defense counsel then wanted to read the jury other sections of the book to give them some context to understand the whole story. The trial judge prohibited the defense attorney from reading sections of the book on the theory that the book was far too long for the attorney to be able to read all of it, but if the attorney selected some sections to read and not others, that selection would be too subjective. Shades of Grace Brown's letters?

It is quite ironic that the judge ruled that the context of the book was not relevant in this trial, because the chief reason that Dreiser wrote the book was to provide context to the Gillette prosecution.

Several films have been based on this tale, each with a story of its own. Paramount bought the rights to make a film based on a play version of *An American Tragedy*. To write the script, they engaged the great Russian filmmaker, Sergei Eisenstein. What Eisenstein decided to do with this story in 1930, not surprisingly, was to craft an indictment of American materialism and capitalism. Paramount did not like Eisenstein's script, so they buried it. They then hired Josef von Sternberg, who directed the 1931 film called *An American Tragedy*, based on a new script. In light of Paramount's displeasure with Eisenstein, this script pulled in the other direction, emphasizing courtroom drama rather than social critique.

Dreiser disliked the film's message and sued Paramount, asking to have release of the film enjoined.²⁴ When Dreiser accused Paramount of changing his story, Paramount's defense was that *An American Tragedy* was not actually Dreiser's story but merely a plagiarism of the Gillette case, right down to Grace Brown's letters. Dreiser lost the suit and



1951 Promotional Poster © Paramount Pictures

the film was released. Minerva Brown, Grace Brown's mother, saw the film and was offended by the portrayal of the Brown family as dirty, illiterate, and unattractive people. So she sued Paramount for libel. (Her lawsuit actually confused what was in the book and what was in the movie.) Paramount's defense to the libel suit was that the script was not based on the Brown family but was just fiction. This defense may not have been consistent, but the studio settled with Minerva Brown.²⁵

This episode explains why, in 1951, when Paramount came out with a second film version of this story, called *A Place in the Sun*, the script changed all the names. The triangle remained, but Montgomery Clift became not C.G., but George Eastman. The Grace-Roberta character, played by Shelley Winters, was named Alice. Dreiser's Sondra Finchley,

roughly based on the wealthy Miss X, was played by a young Elizabeth Taylor and renamed Angela—the angel. The title *An American Tragedy* was also rejected, for sounding too un-American.²⁶ And replacing Cortland's skirt factory and the book's collar factory, the 1950s factory in this film manufactured bathing suits, providing a touch of Hollywood glamor.

In this 1951 Hollywood version, the American dream of social mobility seems very plausible, rebutting Dreiser's view that it was only an *Arabian Nights* fantasy that Clyde Griffiths was ever going to join the upper class. The film's rich people, including Elizabeth Taylor's family, are much nicer to Montgomery Clift than anyone of their class ever was to Clyde. Elizabeth Taylor is angelically above class distinctions and truly loves him. "George Eastman" seems to be within reach of his dream of wealth and beauty, and the tragedy seems to be that he was so close when "Alice" got in his way by becoming pregnant.

In a more recent version of the *American Tragedy* triangle, Woody Allen's 2005 film *Match Point*, the poor girl who becomes pregnant—and whom we

People v. Gillette

actually see brutally murdered by a poor boy who wants to protect his marriage to the rich girl he has won—is played by Scarlett Johansson. In this version, there is no question about whether the tennis-playing Chester Gillette avatar is legally guilty of murder most foul, and no question that he will suffer emotionally for his crime even if he escapes legal punishment. The twist is that unlike Clyde’s unwanted Roberta, the poor girl here is more beautiful and more beloved than the rich girl. Losing her and paying for his crime with what promises to be a guilty and unhappy future is the price this version of Chester Gillette pays for keeping hold of what he thinks he wants. The tragedy

here is that the American dream of wealth and status, even if attainable, turns out to be a tawdry one, and certainly not worth the price.

Comparing these different versions of Chester Gillette’s story in law and in literature provides many provocative examples of the different ways in which law and literature can interact. One of the most interesting questions posed is whether, in some respects, the arts offer a better setting than reality for examining serious questions about legality, morality, philosophy, and sociology. Truth in literature is more dependable than truth in law.

ENDNOTES

1. The trial ended in 1906; the appeal was decided in 1908. *People v. Gillette*, 191 N.Y. 107 (1908). Gillette was executed in March 1908.
2. Susan Herman, Dreiser’s “American Tragedy” The Law and the Arts (June 26, 2006), <http://www.nycourts.gov/ctapps/asx/Dreiser.asx>.
3. See Historical Society of the New York Courts, Past Programs, <http://www.nycourts.gov/history/programs-events/society-events-past.html> (last visited September 3, 2015).
4. My principal sources are the trial transcript, appellate opinion, and Craig Brandon’s *Murder in the Adirondacks* (2006).
5. *Miranda v. Arizona*, 384 U.S. 436 (1966).
6. This is an abbreviated and selective account of the trial proceedings. The actual record on appeal comprised about 3,000 pages.
7. Reproduced in Theodore Dreiser, *An American Tragedy* 695 (Signet Classic 2000) (1925).
8. Grace’s letters are still in print. Craig Brandon’s *Grace Brown’s Love Letters* (2d. ed. 2008) is available at www.amazon.com/Grace-Browns-Letters-Second-Edition/dp/0979506735.
9. See Jerome Loving, *The Last Titan: A Life of Theodore Dreiser* 315 (2005). The writer concluded that Gillette was morally but not legally guilty.
10. *People v. Gillette*, 191 N.Y. 107, 122 (1908).
11. Jane A. Barlow et al., *Big Moose Lake in the Adirondacks: The Story of the Lake, the Land, and the People* 202 (2004).
12. *Id.* at 203. It should be noted that some critics, including members of Higby’s family, doubted that Higby, who relished his role as a raconteur, had actually been on the boat. See *id.* at 202.
13. See Brandon, *supra* note 4, at 333-37 for a description of the research process leading Dreiser to focus on the Gillette case.
14. Brandon, *supra* note 4, at 338; see Loving, *supra* note 9, at 192-93, 297, 312-14 (2005).
15. Dreiser is said have been a supporter of Margaret Sanger and her crusade for family planning. See Loving, *supra* note 9, at 299-300.
16. Dreiser, *supra* note 7, at 512-13.
17. *Id.* at 513.
18. One of Dreiser’s biographers claims that Dreiser had given enough of his characteristics to Clyde that he would not have believed that Clyde would actually decide to murder Grace, as Dreiser was a chronic procrastinator. See Richard R. Lingeman, *Theodore Dreiser: An American Journey* 385 (1993).
19. Vanessa Laird, *Dueling Narratives in An American Tragedy and Criminal Law*, 59 Tenn. L. Rev. 131 (1991).
20. Lingeman reports that Dreiser was impressed by a psychology book he had read arguing that fairy tales can render believers unfit for the real world. Lingeman, *supra* note 18, at 383-411. Dreiser had considered calling his book *Icarus*, the story of a fall.
21. Plutarch, *Lycurgus*, <http://classics.mit.edu/Plutarch/lycurgus.html>.
22. 171 N.E. 472 (1930).
23. See Loving, *supra* note 9, at 335.
24. See Lingeman, *supra* note 18, at 461-66.
25. See Brandon, *supra* note 4, at 354-56.
26. *Id.* at 360.





"JACOBIN WINDS"

Chief Justice James Kent and the Origins of the Citizenship Prerequisite for Admission to the New York Bar

by Craig A. Landy



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As the traditional gatekeepers for admission to the state bars, courts across the nation have been asked recently to decide whether undocumented immigrants, who are present in the United States without lawful authorization, are eligible for admission to practice law in their jurisdictions. In a case of first impression in New York, and in some respects nationwide, the Appellate Division, Second Department ruled in June 2015 that an undocumented immigrant who is authorized to be present in the United States under the auspices of the federal Deferred Action for Childhood Arrivals ("DACA") policy, was eligible for admission to practice law in New York.¹ This question is but the latest entry in the long and intriguing relationship in the United States – and New York in particular – among citizenship, immigration status, and the authorized practice of law. In fact, except for a brief eighteen-month period at the beginning of the nineteenth century, citizenship was a prerequisite for admission to practice law in New York for the almost 200 years between New York's founding as an independent state in 1777 and the United States Supreme Court's declaration in the 1973 landmark case *In re Griffiths*.² Justice Lewis Powell's decision for the Court in *Griffiths* held that a similar citizenship requirement from Connecticut, preventing non-citizens (including resident aliens) from sitting for the state's bar exam, was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, after which bar membership in New York was open to both citizens and authorized non-citizens alike.

This article focuses on that lengthy period before *Griffiths* and, in particular, the eighteen-month window where citizenship ceased to be a concern. The circumstances that ushered in the lone period of time when both citizens and non-naturalized immigrants were held qualified for admission to the practice of law in New York involved two of the more notable immigrant lawyers to reach the United States at the dawn of the nineteenth

◀James Kent. Courtesy New York Court of Appeals



End of the Irish Invasion or The Destruction of the French Armada

by James Gillray, 1797, Library of Congress, Prints & Photographs Division, LC-USZC4-8758

century, Thomas Addis Emmet and William Sampson. In seeking admission to the bar, these two immigrants became part of the factionalist disputes of post-Revolutionary New York, which pitted the state's Republicans against Federalist members of the legislature and judiciary. At the center of this struggle over admission was the arch-Federalist, Chief Justice James Kent of the New York State Supreme Court.

Thomas Addis Emmet

Thomas Emmet was born in Cork, Ireland on April 24, 1764. A doctor's son, he studied medicine in Edinburgh, Scotland after graduating from Trinity College in Dublin. But his professional interest switched to law after the death of his older brother,

Christopher Temple Emmet, a leading Irish barrister. Called to the Irish bar in 1790, Emmet joined the cause of Catholic equality – although he was a Protestant – and defended members of the revolutionary Society of United Irishmen, which sought to establish an Irish republic. Emmet sympathized with their cause – as did his younger brother, Robert, an Irish patriot and martyr to liberty – even taking their oath in open court. In 1797, he became a leader of the United Irishmen, holding that position until he was arrested in March 1798 on the betrayal of an informant. For this, and for participating in the failed Irish uprising of 1798, Emmet spent over four years in British prisons and was disbarred and banished from Ireland. When he was released from prison, Emmet renewed his involvement in negotiations to secure French military help to free Ireland.³ When those

“Jacobin Winds”



The United Irish Patriots of 1798. Thomas Addis Emmet is the fourth figure from right
Unknown artist, colored lithograph, 1798 or after
© National Portrait Gallery, London

efforts fell short, he decided to sail for the new world, departing from Bordeaux and arriving in New York on November 11, 1804.⁴

From his first arrival in America, Emmet desired to settle and set up his law practice in New York. To do this, he needed to be admitted as an attorney in the state. Thus, barely a week after landing in New York, he sought the support of Elbridge Gerry, an anti-Federalist statesman from Marblehead, Massachusetts and a signer of the Declaration of Independence, in obtaining admission to the New York bar, writing: “[M]y wishes are strongly fixed upon settling professionally [in New York], if I can surmount the obstacles principally arising from my alienage.”⁵

In late January 1805, Emmet traveled to Albany with the intention of seeking a special act of the legislature enabling him to be admitted to practice law in New York.⁶ This plan was devised by Governor (and Vice President-Elect) George Clinton and his nephew, DeWitt Clinton, Mayor of New York City – both of whom were of Irish descent – who saw in Emmet an opportunity to win over the growing Irish-immigrant vote. The plan changed, however, once Emmet arrived in Albany. Instead, it was agreed by the Clintons that Emmet would first apply for admission to practice law before the individual state courts, and failing admission, special legislation would be sought.



Thomas Addis Emmet

Memoir of Thomas Addis and Robert Emmet, with their ancestors and immediate family (New York: The Emmet Press, 1915), frontispiece. Courtesy HathiTrust

The first court Emmet applied to was the Supreme Court of Judicature of New York, the State's highest court of general jurisdiction, at its February 1805 Term. To the surprise of many, Emmet's application for admission met with express opposition. Those opposed were members of the Albany bar with Federalist leanings who viewed Emmet as a "fugitive Jacobin" and who opposed his admission out of fear that he would transplant his French-influenced revolutionary ideas to his adopted country.⁷

Prior to Emmet's application, no statute or court rule explicitly required citizenship for bar admission. However, as a prerequisite for admission, candidates took two statutory oaths: an oath of office and an oath of abjuration and allegiance. When Emmet applied, applicants seeking admission to practice before the New York Supreme Court recited the following counsellor's oath:

I do solemnly and without mental reservation or equivocation whatsoever swear and declare that I renounce and abjure all allegiance and subjection to all and every foreign King, Prince, Potentate and State in all matters Ecclesiastical, as well as Civil, and that I will bear faith and true allegiance to the State of New York as a free and Independent State. I do swear that I will and truly demean myself in the practice of a Counsellor at Law according to the best of my knowledge and ability.⁸

Since Emmet was a non-naturalized immigrant, his opponents argued, he was unable to take the required oaths of abjuration and allegiance and was therefore ineligible for admission to the New York bar.

At the turn of the nineteenth century, the idea of a loyalty or test oath for lawyers in New York was familiar, having its origin in the prevailing bitter antipathy towards the loyalist members of the profession following the outbreak of the American Revolution. On October 9, 1779, the State of New York enacted legislation requiring all attorneys, counsellors, and solicitors to provide upon demand certificates or other evidence "of their attachment to the Liberties and Independence of America," under penalty of permanent suspension from the practice of law. The statute further suspended all licenses to practice law issued prior to April 21, 1777, subject to restoration provided the attorney could produce satisfactory evidence that he had "conducted himself as a good and zealous friend to the American cause."⁹ A further act passed in 1781 provided for the administration of a loyalty oath or test; those who refused to take this oath were barred from the practice of law.¹⁰ Because so many New York lawyers during the War of Independence were Tories, and therefore unable to pass the loyalty test, these laws reduced the bar of the New York Supreme Court to a handful of practitioners.¹¹ These stringent loyalty restrictions, which were often subject to abuse, were finally lifted in April 1786, three years after the formal end of the Revolutionary War, but the practice of requiring two statutory oaths continued.¹²

Citizenship Not a Prerequisite

Emmet's application for admission came before the Supreme Court on February 6, 1805 in Albany. That same day, a divided Court granted his application, ordering that he “be admitted to the degree of Counsel in this Court.”¹³ In a brief opinion, the Court declared that lack of citizenship was no obstacle to admission to the practice of law before the Supreme Court:

In the case of Thomas Addis Emmet, Esq., who was admitted, in this term, to the degree of counsellor, the court determined that alienism was no bar to admission, our statute not requiring the oaths of abjuration and allegiance, to be administered either to counsel or attorneys, and this court having, therefore, no power so to do. That the only oath requisite was that of office; nor could they conceive how the practice of admitting the others had crept in, unless from the old colonial practice, under the statute of 13 Wm. III, c. 6, made to secure the crown against the Pretender, by the provisions of which counsellors and attorneys are enjoined to take the oaths of allegiance and abjuration. But by those of 4 Hen. IV, c. 18, from whence our act is borrowed, the oath of office only is prescribed, upon taking of which Mr. Emmet received his license.¹⁴

At the same time, the Court also issued the following General Rule, applicable to all future applicants seeking bar admission before that court:¹⁵

Ordered, that in future only the oath of office be administered to persons admitted as counsel or attorney in this court.¹⁶

Puisne (Associate) Justices Ambrose Spencer, Daniel D. Tompkins and Smith Thompson, all members of the New York Republican Party, voted in favor of Emmet's admission, with Justices Spencer and Tompkins coming out strongly in Emmet's favor. The Court minutes indicate that Justice Brockholst Livingston was present, but there is no record of his vote on Emmet's application.

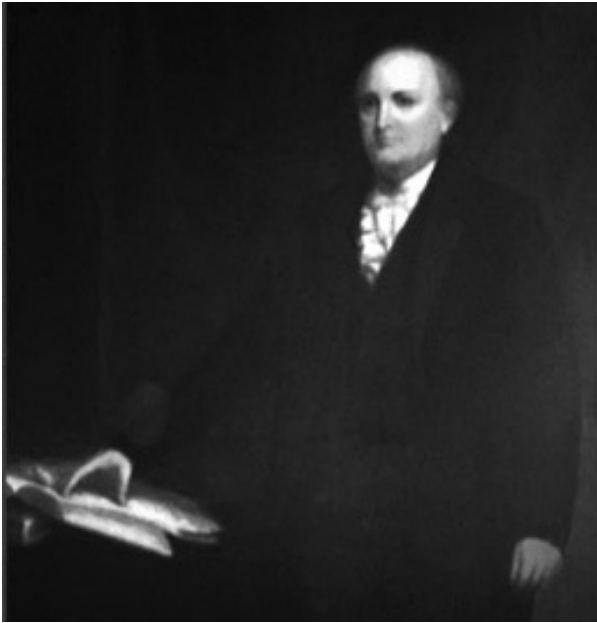
Chief Justice Kent, Factionalism, and Opposition

Chief Justice Kent, the Court's sole Federalist, was particularly hostile to Emmet's application, and his opposition was based in the complex factionalism then roiling New York State.¹⁷ Charles G. Haines, a New York lawyer and colleague of Emmet, summed up the basis for Kent's opposition:

Chancellor [then Chief Justice] Kent was ... a violent federalist. He execrated all republican principles in Europe, and was the disciple of Edmund Burke as to the French Revolution. He looked on Mr. Emmet with an unkind eye, and raised his voice against his appearing in the forums of our state. To the honour of the Chancellor, however, let it now be said, that he has more than once expressed joy to Mr. Emmet, that the other judges over-ruled his illiberal objections.¹⁸

Chief Justice Kent, later Chancellor of New York State, holds the distinction of helping “the fledgling justice system of New York and the United States become the guardian of freedom that it is today.”¹⁹ He also presented a case study of the factionalism at play in post-colonial New York. Prior to his appointment to the Supreme Court – first in 1798 as an Associate Justice, and then in 1804 as Chief Justice – Kent had forged personal and political bonds with the celebrated leaders of the Federalist Party in New York, including John Jay and Alexander Hamilton, all of whom found themselves at the opposite end of the political spectrum from the Clintons, the sponsors of Emmet's application for admission.²⁰

While he left no record of why he opposed Emmet's application,²¹ Chief Justice Kent publicly and privately harbored grave concerns about the surge of political and social unrest that he believed was sweeping America under the banner of the Republican Party.²² For nearly ten years prior to Emmet's appearance in Albany, Kent, an ardent conservative, had been anxiously watching the political convulsions which had Europe in turmoil at the hands of the French; extolling the example of England, whose survival Kent saw as Europe's sole hope; and branding as Jacobins all those who followed the pathway of France, from



Abraham Van Vechten
Courtesy New York Court of Appeals

which the Republicans appeared to draw their inspiration.²³ “Jacobin,” as a term of derogation, was commonly used in its many forms among the Federalists. An entry in one of Kent’s journals illustrates the point: one stormy afternoon, Gouverneur Morris – a fervent Federalist – was scheduled to dine with Justice Kent and Alexander Hamilton at the latter’s home, but sent an apology that “the Jacobin winds” had prevented his coming.²⁴

Writing to his brother Moss in 1796, Kent lamented:

*The foreign news is very interesting. The rapid progress of the French arms, their obstinate battles, and the terrible havoc on both sides, in the armies of the Rhine, are enough to arouse the attention of all mankind. Europe is now more seriously threatened with universal conquest and domination than any time before since the date of the Roman Empire. The French Republic has become a military one, and their mighty hordes of veteran and enthusiastic troops, under the guidance of consummate generals and resolute, imperious, and ambitious councils, threaten to lay prostrate all the nations around them.*²⁵

As tensions rose in anticipation of a French invasion of England and Ireland in 1804, Kent wrote to his wife:

*There is no decided news from Europe. Private letters from high and well informed characters assert that Bonaparte was certainly serious in invasion, because his preparations have been immense and beyond all precedent and calculation. On the other hand, the means of resistance by Great Britain have multiplied equally, and their fleets have rode out the winter storms, and kept up a strict blockade of the French coast during all the rigors of the season. It is believed that Bonaparte must see the success of the invasion impracticable, and it is concluded he will attempt it soon, or he will (which is more probable) discharge his mighty forces like a torrent on the North of Europe, and carry conquest and desolation over Denmark, Sweden, and Prussia. No doubt some event of mighty impression and awful results is impending. However, we shall be safe, and I regard Albany as desirable a retreat as any part of the world.*²⁶

When Thomas Emmet stood before the state Supreme Court in February 1805, it must have seemed to Chief Justice Kent that the incarnation of his fears of Europe’s impending collapse had washed up on New York’s very shores. Emmet’s reputation as a leader of what the Federalists considered a treasonous rebellion in Ireland against the British could scarcely have sat well with Kent. Indeed, upon Emmet’s arrival in New York, it had been widely reported in the Albany and New York City Federalist newspapers that Emmet had recently represented the United Irishmen’s interests in Paris, in an effort to secure from Napoleon a French military invasion to liberate Ireland from English control – the very scenario that Kent had discussed in his 1804 letter to his wife.²⁷ It is therefore little surprise that when Emmet sought admission to the New York bar, Chief Justice Kent vehemently, albeit unsuccessfully, opposed the application.

Not all Federalists embraced Kent’s ultra-conservatism. Among those who supported Emmet’s application for admission was Abraham Van Vechten, a well-known Albany lawyer who earned the sobriquet “Father of the Bar of the State of New York” for being the first lawyer

admitted to practice in the newly independent State of New York. Van Vechten refuted the objection that a non-citizen could not be a counsellor or attorney by showing that neither an oath of adjuration nor an oath of allegiance was required to be administered to counsel or attorneys and that the only oath statutorily required for bar admission was the one requiring them to act within the best of their ability and knowledge.²⁸ As one of the pillars of the Albany Federalist community, Van Vechten’s support of Emmet’s application for admission was all the more powerful at a time when the Federalists rarely agreed with the Clintonians on any issue.

After successfully being admitted to the bar, Emmet returned to New York City, where he settled and began raising his family. On April 15, 1805, he opened a law office on Nassau Street with his first partner, Adrian Van Slyck, launching what would turn out to be a brilliant career in the law, including serving as Attorney General of the State of New York. The firm he founded is still practicing law today on lower Broadway as Emmet, Marvin & Martin.²⁹

William Sampson

William Sampson was a prominent Irish lawyer whose courtroom defense of the United Irishmen during the turbulent 1790’s resembled Emmet’s. Like Emmet, he took the oath of the United Irishmen in open court, which raised him to notable leadership within that revolutionary movement and ultimately resulted in his imprisonment shortly before the outbreak of the failed 1798 Irish Rebellion and, later, disbarment and banishment from Ireland. Following a prolonged period of political exile in Europe, Sampson arrived in New York City from England on July 4, 1806.³⁰

Anxious to start his new life in America, Sampson traveled from Ball’s Town (now Ballston) Springs in Saratoga County, where he was staying, to Albany, where he sought admission to practice before the state Supreme Court on Saturday, August 16, 1806.³¹ The Court minutes of that day reflect that the Chief Justice and Justices Thompson, Spencer, and Tompkins were on the bench and that Sampson’s application was the second item on the calendar.³² Sampson’s application was granted and he was admitted to the bar as counsellor.



William Sampson

Memoirs of William Sampson: an Irish exile (London: Whittaker, Treacher and Arnot, 1832), frontispiece
Courtesy HathiTrust

Reversal of the Rule

Sampson’s admission to the bar, eighteen months after Emmet’s similar admission, presaged a sudden return for the state Supreme Court. With Emmet’s application, the Court had decided that citizenship was not a prerequisite for admission. But after admitting Sampson, and after entertaining three more cases on its calendar that morning, the Court interrupted the balance of its work and issued an order in the form of a General Rule declaring that, in the future, no person would be admitted as an attorney or counsellor of that court unless he was a citizen of the United States.³³

*hereafter no person not being a natural born or naturalized Citizen of the United States shall be admitted as an Attorney or Counsellor of this Court.*³⁴

The Court left no explanation of this change in policy and legal historians have not fully examined this judicial volte-face. Sampson took a measure of credit for achieving his own admission. As he jubilantly described it, “[t]he Court after admitting me

made a rule to admit no more strangers under similar circumstances. The door however was not shut till I had contrived to walk in.”³⁵ One writer has suggested that the Court’s reversal of policy was a reaction to renewed fears of the resident members of the Albany bar “that they were to be overrun by Irish barristers.”³⁶ While the members of the Albany bar may have believed they were witnessing a surge of Irish lawyers, the Court surely would have known that was not the case. A survey of the fifty men who were admitted to practice before the New York Supreme Court as counsellors from February 1805 to August 1806 reveals that all of the newly admitted counsellors were United States-born citizens, with two exceptions: Thomas Emmet in 1805 and William Sampson in 1806.³⁷

While it is conceivable that the Chief Justice and Justices Thompson, Spencer, and Tompkins each independently arrived at the conclusion on August 16, 1806 that two radical Irish lawyers in the New York Supreme Court bar were more than sufficient, it is more probable that the swiftness with which such a sweeping policy reversal occurred following Sampson’s admission reflected a pre-ordained arrangement by the Court. The New York State Constitution of 1777 had placed in the hands of the Supreme Court almost complete control over the admission of lawyers to practice law before it.³⁸ Sampson was admitted without dissent and the new General Rule requiring citizenship in the future was promptly adopted, the context and timing of which suggest that the Court may have reached a decision as to future admissions prior to its issuing the order granting Sampson’s application for admission.

Explaining why the General Rule was adopted is a much more challenging task. Many years after he left the Supreme Court, Chief Justice Kent reported that he had assumed gradual dominance over his colleagues on the Supreme Court, which could explain the policy reversal reflected in the 1806 General Rule. More recently, the late Chief Judge Judith S. Kaye would describe Kent’s influence over his brethren as one of the “unintended consequences” of Kent’s skill at writing opinions on significant legal matters, filled with citations and rationale supporting the decision – a practice generally unknown in New York before

Kent came to the Supreme Court.³⁹ Here is how Kent described it:

*I gradually acquired preponderating influence with my brethren, & the volumes in Johnson, after I became Ch. J. in 1804 show it. The first practice was for each judge to give his portion of opinions when we all agreed, but that gradually fell off, but for the two or three years before I left the bench, I gave the most of them. I remember that in 8th Johnson all the opinions for one Term are per curiam. The fact is I wrote them all, & proposed that course to avoid exciting jealousy & many a per curiam opinion was so inserted for that reason.*⁴⁰

Kent’s strong leadership of the Court and growing influence over its members shortly after he became Chief Justice was confirmed by contemporaneous observers. Joseph Story, later a United States Supreme Court Justice, attended the New York Supreme Court’s session during the May Term of 1807, nine months after the August 1806 rule change. Story described Kent’s manner of disposing of the Court’s business “with promptitude,” if not with “[a] little too much haste and a disposition to interrupt” counsel. As to the other sitting members on that day, Justices Thompson and Tompkins, Story dismissed them as interfering “very little in the business of the court.”⁴¹

But it would be overstating the point to conclude that by August 1806 Kent had achieved the dominance over the Court he later maintained.⁴² At that time, his associates were fully participating in the adjudication of the cases before the Court. During that term, Kent’s colleagues together authored thirteen of the Court’s fifteen signed opinions, with Kent authoring only two. Whatever control over the Court the Chief Justice may have exercised in mid-1806, it was probably not alone enough to explain the reversal in policy governing the citizenship requirement for bar admission.



Albany in 1805

East Side Market Street from Maiden Lane South, Albany, 1805 by James Eights (1798-1882)

Courtesy Albany Institute of History & Art

Politics and the New York Judiciary

As part of examining the cause of that reversal, it is useful to briefly survey the unstable political alliances of early nineteenth century New York. In 1800, a coalition of the New York Republican Party was formed by the supporters of Aaron Burr, the Livingstons, and the Clintons to advance Thomas Jefferson's presidential bid. This consortium was fractured in the election of 1804 when the Clintonians joined with the Livingstons to elect as governor then-Chief Justice Morgan Lewis, who was Chancellor Robert R. Livingston's brother-in-law, over Aaron Burr. When the Clintons advanced Thomas Emmet for admission to the bar in February 1805, the coalition of Clintonians and Livingstons was firmly in control of the party.

However, in March 1805, the Republican Party split again when the Clintonians and Livingstons, or the Lewisites as they were called, fell out over a bill

that was passed to charter the Federalist-sponsored Merchant Bank of New York, which had been founded in competition to the Republican-backed Bank of the Manhattan Company. When the law appeared before the New York State Council of Revision, Chief Justice Kent, Justice Thompson and Governor Lewis voted to sustain the charter against the vehement objection of the Clintonian leader Justice Spencer.⁴³ The granting of the charter soon led to a further branching of the Republican Party into the Lewisites and Clintonians, following which Justices Thompson and Livingston likely found themselves more politically re-aligned with the Federalists, including the Chief Justice.

In all probability, these political changes unwittingly influenced the Court's adoption of the August 1806 General Rule. New York Supreme Court Justices appointed at the turn of the nineteenth century were politically active before joining the Court and usually remained politically active while on the bench, to an extent that would be considered unacceptable under modern judicial ethics rules.⁴⁴ Donald M. Roper, the

noted scholar of the Court for this period, speaking of Justice Thompson but with words applicable to the entire Court, observed that as a member of the New York Supreme Court during this era, Thompson “could hardly help being involved in politics.”⁴⁵ Under the state constitution, each justice, as a member of the Council of Revision, had a role in reviewing all bills passed by the state legislature and were obliged to veto any which it found “inconsistent with the spirit of this constitution, or with the public good.”⁴⁶

Such a sweeping quasi-legislative function led, as Justice Tompkins later admitted in 1821, to the unconscious mingling of “political considerations with the proceedings of [the Council].”⁴⁷ Justice Kent would confide to his wife, on the eve of the 1804 gubernatorial election won by New York Supreme Court Chief Justice Morgan Lewis, that each justice on the Court (except him) “seems to be occupied with politics and engaging themselves with the two polluted factions.”⁴⁸

By August 1806, the political loyalties of the justices of the state Supreme Court had dramatically changed since Emmet’s admission in February 1805. Those same justices who enthusiastically welcomed Emmet to the bar in 1805, cooled to the admission of other non-citizen lawyers. Justice Thompson became more politically aligned with the Chief Justice, which may have made him more inclined towards Kent’s administrative interpretation that lawyers practicing before the Court should be citizens.⁴⁹ Justices Spencer and Tompkins may not have vehemently objected to the citizenship requirement in 1806 in view of the fall-off in support among Republicans for Emmet resulting from his role in the William Smith trial.⁵⁰ Emmet, a well-known friend of the Republican Party,



Map of Lower Manhattan
Plan of the City of New-York, drawn from actual survey. 1803.
The New York Public Library, The Miriam and Ira D. Wallach Division of
Art, Prints and Photographs.

was at that time under vicious attack by the Republican newspapers for his role as part of the defense team that led to the recent acquittal in the celebrated trial of William Smith and Samuel Ogden, both ardent Federalists, for raising a military expedition against Spanish rule in South America that involved mercenaries, a potential war and one of the first exercises by a president of executive privilege in not allowing federal officials to testify in court.⁵¹ Spencer and Tompkins likely saw little use for any additional

immigrant lawyers who could not be counted on to advance the Republican cause or worse, whose courtroom skills could serve to embarrass the party.

If Sampson’s admission and the August 1806 General Rule reflected the broader political realignment of New York State and were the product of an advance agreement among the members of the Court that Sampson be admitted, but that he be the final non-citizen attorney, this would explain why Sampson was admitted without dissent and why the reversal of the citizenship requirement occurred virtually simultaneously with Sampson’s admission. But without solid evidence of the rationale behind the 1806 General Rule, it is not possible to know with certitude why it came to be adopted.

Epilogue

While constitutional provisions, statutory enactments and their implementing court rules changed over the years, the citizenship prerequisite for admission to the New York bar remained in place until the *Griffiths* decision rendered the requirement

unconstitutional.⁵² Following *Griffiths*, “neither the statutes enacted by the legislature nor the rules promulgated by the judiciary governing the admission of attorneys and counselors to practice in the state limit that privilege to citizens, those with lawful immigration status, or those aliens who are not immigrants but are lawfully in this country for a limited period of time pursuant to a visa,”⁵³ but admission to the bar, de facto, has been limited to those individuals. After *Vargas*, undocumented immigrants authorized to be present in the United States under the DACA policy may also be admitted to practice law in New York.

It is difficult to know whether any former United Irishmen barristers were discouraged from immigrating to New York after the citizenship requirement was adopted in August 1806, although it is likely the number, if any, was small.⁵⁴ In the end, Chief

Justice Kent’s fears about those few exiled and radical members of the Irish bar who were admitted to the New York bar never came to pass. As Professor Roper observed, “Emmet never did begin to realize the potential for political mischief that a deported Irish revolutionary must have had in Kent’s imagination.”⁵⁵ By 1825, even Sampson had won over the Chief Justice’s “constant respect and esteem,” and in a public letter, Kent expressed his “unfeigned regret at the loss of [Sampson’s] society” when the latter moved to Washington, D.C. in 1825.⁵⁶ However, after Sampson’s death, Kent would describe him in less glowing, but still endearing terms: “He was gentle & amiable & had wit & Genius, but his Notions of law & Government were utopian, & wild, & radical.”⁵⁷ One gets the sense that James Kent took comfort in having done his part in clearing the Jacobins from the gates. ☞

ENDNOTES

1. *In re Vargas*, 13 N.Y.S.3d 4, (2nd Dept. 2015). Compare *In re Garcia*, 315 P.3d 117 (Cal. 2014) (undocumented immigrant status no bar to practice law in California), with Fla. Bd. of Bar Exam’rs Re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar, 134 So. 3d 432 (Fla. 2014) (Florida Supreme Court advisory opinion declaring unauthorized immigrants ineligible for admission to the Florida bar unless the state legislature passed a measure overriding a federal prohibition). On May 12, 2014, the Governor of Florida signed a law by which a non-citizen can be admitted to the Florida bar if he or she was brought to the United States as a minor, has been a resident for at least ten years and has fulfilled other administrative requirements. Fla. Stat. § 454.021 (2014).
2. 413 U.S. 717 (1973).
3. For a discussion of Emmet’s negotiations with the French, see Marianne Elliott, *Partners in Revolution: The United Irishmen and France* 323–64 (1982).
4. Nat’l Intelligencer (Wash., D.C.), Nov. 16, 1804, at 2.
5. Letter from Thomas Addis Emmet to E[bridge] Gerry (Nov. 20, 1804) (on file with New York Public Library, Manuscripts and Archives Division, Miscellaneous Papers).
6. Letter from Thomas Addis Emmet to E[bridge] Gerry (Jan. 14, 1805) (on file with New York Public Library, Manuscripts and Archives Division, Miscellaneous Papers).
7. L.B. Proctor, *Abraham Van Vechten, The Father of the Bar of the State of New York*, 58 Albany L.J. 69, 75 (1899); Charles G. Haines, *Memoir of Thomas Addis Emmet* 89 (1829); Charles Warren, *A History of the American Bar* 302–03 (1911).
8. *Rolls of Attornies and Counsellors, 1805–1810*, New York County Clerk’s Office, Hall of Records, Parchment Roll No. 8. This oath had its origin in two statutory sources. N.Y. Laws 1801, ch. 113, § 1 required every person appointed to any office and or military to take the oaths of abjuration and allegiance before assuming office. A separate chapter of N.Y. Laws 1801, ch. 32, § 4 required attorneys, counsellors or solicitors to swear to execute their office to the best of their ability and knowledge. Earlier iterations of these oaths were first enacted by N.Y. Laws 1787, ch. 35 (oath of office) and N.Y. Laws 1788, ch. 28 (oaths of abjuration and allegiance).
9. 2 Anton-Hermann Chroust, *The Rise of the Legal Profession in America* 7 (1965); Charles H. Truax, *Judicial Organization and Legal Administration from 1776 to the Constitution of 1846*, in 1 *History of the Bench and Bar of New York* 94, 99–100 (David McAdams, et al. eds., 1897).
10. Chroust, *supra* note 9, at 7.
11. The only attorneys still practicing before that court in 1779 were John Bay, Egbert Benson, John Sloss Hobart, John Jay, John Lansing, John McKesson, John Strang, Peter W. Yates and Robert Yates. *Id.* at 10.
12. *Id.* at 7. See generally 2 J. Hampden Dougherty, *Legal and Judicial History of New York* 39–40 (1911).
13. 2 *New York Supreme Court of Judicature, General and Special Term Minute Books (Albany)*, 1797–1847, Feb. 6, 1805, at 3 (New York State Archives, Albany) [hereafter *Minute Book*].
14. *In re Emmet*, 2 Cai. 386 (N.Y. Sup. Ct. 1805).

15. Article 27 of the original New York State Constitution of 1777 provided that, in the future, “all attorneys, solicitors, and counsellors at law ... be appointed by the court ... and be regulated by the rules and orders of said courts.” For subsequent statutes and rules governing admission to practice law in the New York courts, see Chroust, *supra* note 9, at 36–37, 164, 245–52; Frank S. Smith, *Admission to the Bar of New York*, 16 Yale L.J. 514, 515–16 (1907).
16. 2 Cai. 387 (N.Y. Sup. Ct. 1805).
17. Haines, *supra* note 7, at 86–87.
18. *Id.*
19. Hon. Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 Chi.-Kent L. Rev. 11, 29 (1998). For a discussion of Kent’s primary contributions as a Supreme Court Justice, including introducing to New York the practice of writing opinions on cases and compiling them in official reporters, see *id.* at 16–19.
20. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum. L. Rev. 547, 556–57 (1993).
21. Chief Justice Kent customarily made hand-written notes in the margins and flyleaves of the books in his non-legal and law libraries, including in his copies of the New York Supreme Court official reports containing both General Rules addressing the citizenship requirement for bar admission. However, no marginalia appear in the two volumes in the possession of the New York State Library on the pages where these General Rules appear. New York State Library, Albany Manuscripts and Special Collections, James Kent Law Book Collection.
22. John Theodore Horton, *James Kent, A Study in Conservatism, 1763–1847*, at 193–94 (1969).
23. William Kent, *Memoirs and Letters of James Kent* 170–77 (1898). For a discussion of what one admiring biographer described as Kent’s “perfervid admiration for the English” and his Francophobia, see Horton, *supra* note 22, at 193–96.
24. Letter from James Kent to Elizabeth Kent (Apr. 26, 1804), in 3 The Papers of James Kent (on file with Library of Congress) (microfilmed copies held at Columbia University Law Library); “Ride to Grange,” James Kent’s Journal (Sept. 11, 1833), in 11 *id.*; Letter from James Kent to Elizabeth Hamilton (Dec. 10, 1832), reprinted in Kent, *supra* note 23, at 327.
25. Letter from James Kent to Moss Kent (Sept. 19, 1796), in Kent, *supra* note 23, at 174. Some of Kent’s letters on the French threat are collected in *id.* at 171–77.
26. Letter from James Kent to Elizabeth Kent (Apr. 26, 1804), in Kent, *id.* at 175–176. Later, Kent left no doubt about his feelings about Bonaparte: “I shall not be satisfied until Napoleon is dead and buried, or at least immured for life in the castle of Schlüsselburg.” Letter from James Kent to Moss Kent (Mar. 31, 1814), *id.* at 177.
27. *American Government Supported by Foreign Influence*, Com. Advertiser (N.Y.), Nov. 26, 1804, at 2–3, reprinted in Spectator (N.Y.), Nov. 28, 1804, at 2 and Albany Centinel, Dec. 7, 1804, at 3.
28. Proctor, *supra* note 7, at 75. Emmet used similar arguments in his subsequent application for admission to practice before the Mayor’s Court in New York City. Letter from Thomas Addis Emmet to Mayor DeWitt Clinton (Apr. 7, 1805), in 1 Thomas Addis Emmet, *Memoir of Thomas Addis and Robert Emmet* 395–400 (1915).
29. For the first case Emmet received in New York, see Craig A. Landy, *Society of United Irishmen Revolutionary and New-York Manumission Society Lawyer: Thomas Addis Emmet and the Irish Contributions to the Antislavery Movement in New York*, 95 N.Y. Hist. 193 (2014).
30. For background on Sampson, see 2 Richard R. Madden, *The United Irishmen, Their Lives and Times* 335–88 (1843); Walter J. Walsh, *Rights, Revolution, Republics, 1750–1850, The Work and Works of William Sampson (1764–1836): A Chronology*, 11 Am. J.L. Ir. Stud. 41 (2014).
31. Letter from William Sampson to Grace Sampson (Aug. 17, 1806) (privately held; microfilmed copies held at Library of Congress, Manuscript Division, William Sampson Papers).
32. *Minute Book*, Aug. 16, 1806, at 49. Justice Livingston was absent.
33. *Id.* at 50.
34. *Id.*; see 1 Johns. R. 528 (1806). After 1806, citizenship was a requirement to practice before the other courts of statewide jurisdiction. Chancery Court practice was limited to attorneys or counsellors of the Supreme Court (and hence citizens) and to those who had served a prolonged clerkship with a solicitor. Rules and Orders of the Court of Chancery, 85th Rule (1815); Truax, *supra* note 9, at 99. The Court for the Trial of Impeachments and the Correction of Errors – a predecessor of the Court of Appeals – did not have its own rules governing admission to practice before it. Rather, the attorneys and solicitors who handled the cases before the Supreme or Chancery Court below were deemed the attorneys and solicitors in that court, thus perpetuating the citizenship prerequisite. Rules of the Court for the Trial of Impeachments and the Correction of Errors, Rule 13 (1827).
35. Letter from William Sampson to Grace Sampson (Oct. 15, 1806), *supra* note 31.
36. Charles Edwards, *Pleasantries about Courts and Lawyers of the State of New York* 495–96 (1867). The citizenship requirement meant that an immigrant lawyer had to reside in the United States for at least five years before he could apply for admission to practice law. Naturalization Act, ch. 28, 2 Stat. 153 (1802).
37. The list of the fifty individuals admitted as counsellors during this period was compiled by the author from the Supreme Court Minute Books maintained in Albany and New York City (the latter in the possession of the New York County Clerk) and cross-referenced against public records, family histories and other available sources to determine the place of birth of those admitted. This survey was limited to counsellors since any foreign-trained lawyer would have been admitted in New York to the degree of counsellor, as both Emmet and Sampson were.

38. In November 1803, the Court adopted a rule allowing admission as counsellor to any person who was “admitted to the degree of counsellor at law in any other of the United States, and practiced as such for four years in such state,” but no similar rule existed for counsel trained outside of the United States. Cole. & Cai. Cas. 17 (1808).
39. Kaye, *supra* note 19, at 19.
40. Letter from James Kent to Thomas Washington (Oct. 6, 1828), reprinted in James Kent, *An American Law Student of a Hundred Years Ago*, 1 Association of American Law Schools, *Select Essays in Anglo-American Legal History* 837, 843–44 (1907). For Kent’s gradual dominance over his colleagues on the Supreme Court after becoming Chief Justice in 1804, see Horton, *supra* note 22, at 139–52; Kaye, *supra* note 19, at 16–19; Langbein, *supra* note 20, at 572.
41. Letter from Joseph Story to Samuel P.P. Fay (May 18, 1807), in 1 *Life and Letters of Joseph Story* 144–145 (William W. Story ed., 1851).
42. For a discussion questioning Kent’s broad claim of dominion over his brethren, see Donald M. Roper, *Mr. Justice Thompson and the Constitution* 88–89 (1987).
43. Alfred Billings Street, *The Council of Revision* 427–29 (1859). Justices Tompkins and Livingston and Chancellor John Lansing, the other Council members, were absent.
44. Donald Roper, *James Kent and the Emergence of New York’s Libel Law*, 17 Am. J. Legal Hist. 223, 223–24 (1973).
45. Roper, *supra* note 42, at 10. In August 1806, Justice Spencer, together with his future brother-in-law DeWitt Clinton, led the Republican Party’s Clintonian faction, who would six months later nominate Justice Tompkins for Governor of New York. Jabez D. Hammond, 1 *The History of Political Parties in the State of New York* 238–40, 422–24 (1846).
46. N.Y. Const. of 1777, art III. The Governor and Chancellor also sat on the Council.
47. Nathaniel H. Carter & William L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821*, at 79 (1821). The Council of Revision was abolished by the Constitution of 1821.
48. Letter from James Kent to Elizabeth Kent (Apr. 20, 1804), in Kent, *supra* note 23, at 130.
49. The alliance of Federalists and Lewisites was still strong in mid-1806, as witnessed by their narrow success in the April 1806 state elections over the Clintonians. 1 DeAlva S. Alexander, *A Political History of the State of New York* 151–55 (1906). The election further divided the factions within the Republican Party and rekindled expressions of nativism aimed at the Irish. Days before the election, the *American Citizen*, the main Clintonian paper, reported that Governor Lewis, in the presence of Justice Thompson, had described the Hibernian Provident Society as a “JACOBIN CLUB, composed of the REFUSE and OUTCASTS of Europe, but particularly from IRELAND.” *Adopted Republicans*, Am. Citizen (N.Y.), Apr. 26, 1806, at 2. The *Morning Chronicle*, the leading voice of the Livingston family, tapped into anti-Irish nativism among its readers by charging that the election nearly went Clinton’s way because of the growing influence of Clinton’s Irish supporters, who were described as “eight or nine hundred newly imported American patriots.” *The Election in this City*, Morning Chron. (N.Y.), May 3, 1806, at 2.
50. For a discussion of the “very intimate terms” DeWitt Clinton and Tompkins were on during 1803–1808, see Ray W. Irwin, *Daniel D. Tompkins, Governor of New York and Vice President of the United States* 52–53 (1968).
51. *United States vs. Col. Smith*, Am. Citizen (N.Y.), July 18, 1806, at 2; *United States vs. Col. Smith – (continued)*, Republican Watch-Tower (N.Y.), July 22, 1806, at 3; *Mr. Emmett*, Am. Citizen (N.Y.), Aug. 11, 1806, at 2–3, reprinted in Republican Watch-Tower (N.Y.), Aug. 12, 1806, at 4.
52. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 169 (1971) (New York bar applicant must be United States citizen under N.Y. C.P.L.R. 9406). New York was not alone at the time of the *Griffiths* decision; 38 states and the District of Columbia required citizenship for bar admission and 12 states permitted a resident alien to practice provided he or she filed a declaration of intent to become a U.S. citizen as soon as eligible under federal law. See Volker Knoppke-Wetzel, *Employment Restrictions and The Practice of Law By Aliens In The United States And Abroad*, 1974 Duke L.J. 871, 890–91.
53. *Vargas*, 131 A.D.3d at 11.
54. Some former United Irish lawyers who did not come to America included William Todd Jones, who died in Ireland in 1818, and Edward Lewins, who died in France in 1828.
55. Donald M. Roper, *The Elite of the New York Bar As Seen from the Bench, James Kent’s Necrologies*, 56 N.Y. Hist. Soc. Q. 199, 205 (1972).
56. Letter from James Kent to William Sampson (Nov. 9, 1825), in *Statesman* (N.Y.), Nov. 22, 1825, at 1.
57. Roper, *supra* note 55, at 225.





Governor Mario M. Cuomo

MESSAGE TO THE LEGISLATURE

January 5, 1994

THE FORMATION OF NEW YORK'S COMMERCIAL DIVISION

A HISTORY & MEMOIR

by Mark H. Alcott



Mark H. Alcott, of Paul, Weiss, Rifkind, Wharton & Garrison, LLP in New York City, is an arbitrator, mediator and litigator who concentrates on commercial cases. A former President of the New York State Bar Association and Chair of its Commercial and Federal Litigation Section, he created and chaired the Section's Task Force that made the initial proposal for – and led to the establishment of – the Commercial Division of the New York State Supreme Court.

Ever since America emerged as an industrial power, and even before that, New York has been at the center of world commerce, the crossroads of international trade, and the hub of global business and finance. New York law has played a primary role in shaping domestic and cross-border transactions. New York has been home to the leading banks, investors, merchants, insurers, capital markets and other major enterprises in the national and international business community.

And so, it was inevitable that New York courts would become the leading forum for adjudicating commercial disputes. Through the first half of the twentieth century and beyond, that was certainly true. Indeed, when I began practicing law in the mid-1960's, New York State's court system was the venue of choice for business litigation, most of which arose out of transaction documents mandating the application of New York law. New York State forum selection clauses were routine boiler plate in major deals. And New York's great judges – Cardozo, Lehman, Fuld, Breitel, Botein et al. – took the lead in the development of business law.

But that began to change in the latter part of the century, for several reasons.

First, New York's courts became swamped with personal injury, matrimonial, criminal, medical malpractice and other such cases, leaving little time for the sophisticated motion practice and heavy paperwork involved in the modern business lawsuit. Second, as a result of the expanding scope of federal regulatory laws, and the concomitant increase in flexibility of federal procedural rules, claims by stockholders, consumers, employees and financial watchdog agencies were ever more frequently brought in the Southern District of New York and its sister courts in the federal system. Third, Delaware's corporate-friendly statutes and business-savvy judges made its court system increasingly attractive. Fourth, arbitration – with its confidentiality, reputed efficiency, and restrictions on discovery – came to be viewed by many as a less burdensome alternative to courtroom litigation.

Commercial Division

That was the context in which, in the late 1980's, the New York State Bar Association created its Commercial and Federal Litigation Section. Of course, the State Bar always included a large number of litigators within its ranks, and its Trial Lawyers; Tort, Insurance and Compensation Law ("TICL"); Criminal Justice; and Family Law Sections put heavy emphasis on courtroom issues. But these sections, as their names suggest, concentrated on tort, family and criminal cases and paid little heed to commercial disputes. "Comm/Fed", as it is sometimes called, was established to correct this imbalance.

I was one of the early Chairs of the Section. Taking office in 1994, I followed in the footsteps of two chairs who went on to become federal judges, Shira A. Scheindlin and P. Kevin Castel; the Section's founder, Robert L. Haig; and two well-known commercial litigators, Michael A. Cooper and Harry P. Truehart, III.

From the outset, the Section was concerned about the declining role of New York's state courts in the adjudication of commercial disputes, as outlined above. We were not troubled by the existence of alternative forums; competition is inevitable, and options can be healthy. But we were troubled that, while these alternatives flourished, New York's state courts were largely being abandoned by major commercial litigants.

We wanted to see New York in general, and the state courts of New York in particular, re-established as the paramount center for commercial litigation. We believed that: such a development would help to solidify New York's leading role in the nation's economy; it would improve the business climate within the state; and in general, it would enhance the economic well-being of the state.

In addition, we believed it was important for the state court system to have the business community as one of its many constituents. To put it another way, we believed it was unhealthy for commercial litigants, in increasing numbers, to bypass the New York state courts, and therefore to have little interest in the strength and vitality of those courts.

Moreover, it was our view that New York commerce should be governed by New York law, and that New York law should be determined, interpreted and applied by the New York courts.

It seemed to me and to the other leaders of our Section that the way to meet these objectives was to establish a specialized branch of the state court system to handle commercial cases. Other states were considering such a step, and Delaware, through its Chancery Court, had effectively already done so.

The climate was right for such a step in New York, as shown by several developments.

In January of 1993, the Supreme Court, New York County, had established four Commercial Parts,

COMMERCIAL DIVISIONS ACROSS THE STATE



1995

Monroe & New York Counties

1998

Erie, Nassau & Westchester Counties

2002

Albany & Suffolk Counties

2003

Kings Counties

2005

Queens County; Monroe County expands to 7th JD

2007

Onondaga County; Erie County expands to 8th JD

Commercial Division

on an experimental basis.¹ These were Individual Assignment Parts dedicated to commercial litigation and staffed by judges experienced in the genre. The initial results were favorable.

In his State of the State Addresses in 1993 and 1994, Governor Mario Cuomo called for creating a commercial court in New York.² So did Chief Judge Kaye – herself a former commercial litigator – in her 1993 State of the Judiciary address.³ Judge Kaye's remarks were squarely in synch with our concerns:

"[W]e were faced with the reality that the business community and the commercial bar preferred to litigate in federal court or alternative private forums, where they expected to escape the delays too often encountered in our overburdened State Courts.

*This state of affairs was intolerable."*⁴

The Commercial and Federal Litigation Section followed with great interest the evolution of the Commercial Parts. When the concept initially was being developed, we met with Hon. Stanley S. Ostrau, Administrative Judge of the Supreme Court Civil Branch, to offer our suggestions and support. During the early phases of operation of the Commercial Parts, we met with two of its judges – Hon. Beatrice Shainswit and Hon. Myriam J. Altman – to exchange ideas. And we devoted our Section's Annual Meeting to a full afternoon session with all four justices of the Commercial Parts – which attracted an overflow crowd.

The progress of the New York County Commercial Parts experiment led us to consider the feasibility of something more substantial – i.e., a permanent, statewide commercial court, with appropriate procedures and facilities.

I made this a priority of my tenure as Chair of the Section. Early on, I appointed a task force to study and analyze this concept and make appropriate recommendations. The task force, which I chaired, included six past/present/future Section chairs.

For more than a year, we researched the relevant legal issues, surveyed the views of major commercial litigants, studied existing and proposed comparable courts in other jurisdictions, and intensely analyzed



Hon. Judith S. Kaye, Chief Judge of the State of New York, 1993-2008



Robert L. Haig

Commercial Division

the issues relating to the creation and operation of a statewide commercial court in New York.

We confronted two major issues.

First, there was the fear that a commercial court would be perceived as an elitist, Manhattan-centric entity that would divert needed resources from other parts of the judicial system. As practitioners specializing in commercial cases, we were naturally receptive to a proposal to enhance the judicial environment in which we worked and pursued our clients' interests. But we recognized that other segments of the Bar – and advocates of other constituencies – could also lay claim to special treatment for different types of cases. Was there a justification for singling out commercial cases?

We built a thorough and powerful case for an affirmative answer to that question.

To begin, we argued that, as noted above, a specialized court for commercial cases would enhance New York's role as the center of commerce and would foster a more favorable environment for establishing or – equally important – maintaining business activities within our borders. We made the point that Delaware's Chancery Court was one element that draws corporations to that state. We noted that Delaware itself was considering the creation of a commercial court to provide relief in addition to the equitable relief then available from Chancery Court, and studies were underway in at least California and Pennsylvania to establish separate courts that would make those states more attractive to business. New York, we said, should lead, not follow, other jurisdictions.

The proposition that a commercial court would be viewed positively by the business community and improve the state's economic climate was supported by considerable anecdotal evidence from our own experience, but we did not rely solely on that. Instead, we conducted a survey of in-house litigation counsel at major corporations, which generated significant empirical support for our argument.

Collectively, the responding companies litigated some 5,000 cases a year, both in and out of New York, and thus were major consumers of court resources. A substantial majority of respondents said they were either somewhat dissatisfied or very dissatisfied with the handling of business disputes in New York



Mario Cuomo delivers the 1994 State of the State address

State courts. The length of time required to resolve a business dispute and the costs to reach a resolution were the areas of most significant dissatisfaction. Respondents said it required more time to resolve commercial disputes in New York's State courts than in federal courts located in New York or state courts located outside of New York. On the other hand, a substantial number of respondents said that New York's substantive law was much better developed than the law in other jurisdictions, which suggested that New York's courts were a natural candidate for a leadership role in commercial litigation.

The majority of the respondents said that the creation of a commercial court would likely result in the more efficient adjudication of business disputes, improve the business climate in New York, and lead to more predictable decisions. It was clear that major commercial litigants answering our survey believed that the creation of a specialized commercial court could help to improve the resolution of commercial disputes in New York. Overall, the respondents supported the creation of a specialized business court in the hope that it would foster the more efficient resolution of business disputes, with obvious benefits to the state's business climate.

A further justification that we offered for a commercial court was that commercial cases have unique attributes that warrant specialized judicial treatment.



NEW YORK STATE BAR ASSOCIATION

Commercial and Federal Litigation Section

Mark Davies, *Editor*

December 1994 Vol. 2, No. 2

A Message From The Chair

By Mark H. Alcott



I write this in late December, at the conclusion of an extraordinary week for our Section. On Monday, our Executive Committee met for dinner with Chief Judge Jon O. Newman of the Second Circuit. We discussed the Judicial Conference's long-range plan for the federal courts and debated the future of diversity

jurisdiction. On Friday, our Commercial Court Task Force had a lengthy meeting with Chief Judge Judith S. Kaye of the Court of Appeals, Chief Administrative Judge E. Leo Milonas, and his Chief Deputy Jonathan Lippman. We discussed the future of commercial litigation in the state courts and our ideas about a state-wide commercial court.

In between these two major events, we:

- proposed a significant change in the CPLR to ease the process of adding new parties to a case (see the report reprinted in full at page 9 of this Newsletter);
- called for an end to the application of Section 14(a) of the 1934 Securities Exchange Act to accountants and other secondary participants;
- approved a lengthy report analyzing redress for economic crime victims under New York's forfeiture law;
- discussed and debated other major proposals on professional liability, complex litigation (including a new CPLR article drafted by one of our committees), intellectual property, and alternative dispute resolution;
- added judicial and other participants to our Annual Meeting program, invited the new Attorney General to speak to our Spring Meeting, and approved design changes for *The New York Litigator*, our new Journal; and
- put together an outstanding slate of officers for next year, to assure the continuity and vitality, through the 90's,

of NYSBA's youngest and most prolific section.

While not every week is so heady or so jam-packed with Section activities (we are, after all, simultaneously engaged in trying cases, arguing motions, and the like), this is a fair representation of the exceptional range, importance, and impact of the Section's work.

The meeting with Chief Judge Kaye was particularly important, because it dealt with one of the Section's major thematic issues of the year: a commercial court for New York. There was a time when New York – center of the world's commerce – was on the cutting edge of commercial law, and our state's courts took the lead in adjudicating business disputes. We will recall those glory years at our Annual Meeting Luncheon, when Chief Judge Kaye presents the Section's first annual award for excellence in commercial law and litigation to former Chief Judge Stanley Fuld. Henceforth, the award will be known as the Stanley Fuld Award.

But today, New York parties are far more likely to take their major commercial cases to federal court, the Delaware Chancery Court or arbitration panels, or other ADR providers. We would like to see New York's state courts re-established as the leading forum for commercial litigation.

And so we have watched with great interest the evolution of the Commercial Parts in Supreme Court, New York County. Almost two years ago, shortly after this innovative

A MESSAGE FROM THE CHAIR (cont'd. on page 2)

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Commercial Division

NEWS

New York State
Unified Court System

E. Leo Milonas
Chief Administrative Judge

Further Information:

Mai Yee, Communications Officer
(212) 417-5900

Release: Immediate

Commercial Division of NY State Supreme Court To Begin Operations

NEW YORK, Tuesday, October 10, 1995—Chief Judge Judith S. Kaye and Chief Administrative Judge E. Leo Milonas announced today that a division of the New York State Supreme Court dedicated to commercial litigation will commence operation in New York County and Rochester on November 6, 1995.

At a news conference held today in the New York County State Supreme Court building at

Press release announcing start of Commercial Division operations

These included the complexity of procedural and substantive law; the volume of discovery; the fact that such cases are “paper driven” and “motion driven”; and the need for proactive judicial management of the cases throughout the pretrial stage.

For these reasons, we argued, there was ample justification for a commercial court in New York. We emphasized that large corporations would not be the only parties litigating in such a court; on the contrary, individual stockholders, consumers, small businesses, employee pension plans and the like would also invoke its jurisdiction where appropriate. And we pointed out that it would not be extraordinary or unprecedented to create a separate forum within the state court system for a particular kind of litigation; on the contrary, certain family matters, probate disputes, small claims, certain criminal cases and landlord-tenant cases, among others, had long since been given such treatment. Since, in this instance, the state as whole would benefit from such a distinct forum, we said the case for a commercial court had been made.

Clearly, most of the relevant stakeholders agreed with us.

But there was another issue of considerable magnitude that confronted us: How could a commercial court be established in New York?

We identified and explored three possible mechanisms for doing so: (1) constitutional amendment; (2) legislative enactment; and (3) court rule.

After extensive research and analysis, we concluded that the creation of a totally independent commercial court would require a constitutional amendment to add it to the unified court system. Moreover, any such newly created commercial court would have had only concurrent jurisdiction with the Supreme Court, unless the Constitution were also amended to divest the Supreme Court of its inherent and continuing jurisdiction over all matters “in law and equity” – that is, carving out commercial cases from the general jurisdiction of the Supreme Court. Such a constitutional amendment was not politically feasible and perhaps not even desirable.

As an alternative to amending the Constitution, the Legislature could have created a special branch of the existing Supreme Court and allocated commercial cases to it. But this too would encounter political obstacles.

Our most significant contribution to the legal dialogue on this subject was the argument that a commercial branch of the Supreme Court could be created without constitutional or legislative action. Under existing law, we noted, the Chief Administrator of the courts was statutorily authorized to establish court parts, assign judges and justices to them,

Commercial Division

and make necessary rules therefor.⁵ The existing Uniform Civil Rules of the Supreme Court, in turn, provided that “[t]here shall be such parts of court as may be authorized from time to time by the Chief Administrator of the Courts.”⁶ Of course, creation of the Commercial Parts had already been done on a limited experimental basis, in the Supreme Court, New York County. Thus, we said, there was existing statutory and regulatory authority for broader implementation of such an approach.

On this basis, we recommended the creation of a new entity within the Supreme Court to adjudicate commercial cases. For this entity, I coined the name “Supreme Court, Commercial Division”. The name stuck, and so did the idea.

In January 1995, we issued a comprehensive report setting forth our recommendations and rationale.⁷

Our proposal was an interesting idea that looked good on paper, but where should we go from there? How could we advance this proposal? Well, we had a secret weapon – Bob Haig, the legendary founder of our Section, a man who knows how to get things done. Bob loved our idea and our report, and he guided us to Chief Judge Kaye and Chief Administrative Judge E. Leo Milonas.

I remember vividly my first meeting on the subject with Judge Kaye. She peppered me with questions

and then said: “I’m going to appoint a special task force on this matter.” “Terrific,” I said: “a task force to study our proposal.” “Not to study it,” she said, “to implement it.”

Few would have been bold enough to act so quickly and decisively. But Judge Kaye was an innovator, a reformer, and an activist. True to her word, she promptly created such a Commercial Courts Task Force, chaired by Judge Milonas and Bob Haig, on which I and many other experienced commercial litigators served.⁸ The task force went to work, and in less than a year, the Commercial Division was up and running.⁹ The rest, as they say, is history.

As this background demonstrates, the formation of the Commercial Division is the epitome of bench-bar cooperation, the quintessential example of what can be accomplished when lawyers and judges work together. It is understandable that practitioners sometimes focus on what troubles them and what separates them from their judicial colleagues. The history of the creation of the Commercial Division reminds all to climb to higher ground, and see the possibilities that are out there when bench and bar are united. Now, twenty years after its formation, the Commercial Division is an enormous success thanks to this bench-bar collaboration. ∞

ENDNOTES

1. Mitchell L. Bach and Lee Appelbaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade* 60 Bus. Law. 147, at 152 (2004).
2. See Governor Mario Cuomo, Message to the Legislature, at 66 (January 6, 1993) (announcing that the “Task Force on Commercial Courts is studying the feasibility of establishing specialized courts for commercial litigation”); Governor Mario Cuomo, Message to the Legislature, at 138 (January 5, 1994) (declaring that “[t]his year we will detail our plans for a new court to handle complex commercial and corporate litigation”).
3. Chief Judge Judith Kaye, *The State of the Judiciary 1993*, at 12-13 (January 1994).
4. *Id.* at 12.
5. Rules of the Chief Judge § 1.1.
6. Unif. Civ. R. § 202.2(b); see also Unif. Civ. R. 202.3(c)(2) (“[t]he Chief Administrator may authorize the establishment in any court of special categories of actions and proceedings . . . for assignment to judges specially assigned to hear such actions or proceedings.”)
7. See *A Commercial Court for New York*, Report of The Commercial and Federal Litigation Section New York State Bar Association (January 19, 1995).
8. See *A Brief History of the Commercial Division*, Com. Div. N.Y. Sup. Ct. (April 1, 2014) available at <https://www.nycourts.gov/courts/comdiv/history.shtml>.
9. *Id.*

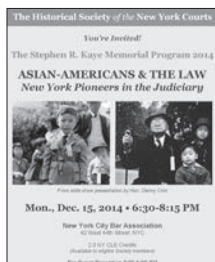


A Look Back... and Forward

It has been an exciting year at the Society! Not only did we host U.S. Chief Justice John Roberts with the Supreme Court Historical Society for a discussion on Charles Evans Hughes, we also launched new initiatives that engage students and educators one-on-one in teaching and learning legal history. It is through this dual approach, large events and focused initiatives, that we strive to achieve our mission at the Society. Check out these pages for an overview of these accomplishments, we also took a look at Asian-American legal history, ongoing efforts to combat human trafficking, pioneering women attorneys in Western New York, and so much more! As always videos from these events are available on the Society's website.

What's Happened... Recent Events

ASIAN-AMERICANS & THE LAW: NEW YORK PIONEERS IN THE JUDICIARY



December 15, 2014 • New York City Bar Association

The first part of the program featured a presentation of significant cases in Asian-American legal history by **Hon. Denny Chin**, United States Court of Appeals for the 2nd Circuit, and by **Kathy Hirata Chin**, Partner, Cadwalader, Wickersham & Taft LLP.

Judge Chin moderated the second part of this event which included a conversation covering the lives

and careers of pioneering New York Asian-American judges: **Hon. Randall T. Eng**, Presiding Justice, Appellate Division, 2nd Dept.; **Hon. Peter Tom**, Justice, Appellate Division, 1st Dept.; and **Hon. Dorothy Chin-Brandt**, NYS Supreme Court, Queens County Criminal Court.

Photo (L-R): Kathy Hirata Chin, Hon. Denny Chin, Hon. Judith S. Kaye, Hon. Peter Tom, Hon. Randal T. Eng, Chief Judge Jonathan Lippman, and Hon. Albert M. Rosenblatt. (Photo by Rick Kopstein, Photographer, New York Law Journal)

THE LEGENDARY LEARNED HAND UP CLOSE AND PERSONAL: 15 YEARS ON THE DISTRICT COURT AND BEYOND



Presented In Association with the Southern District of New York & the Supreme Court Historical Society

April 30, 2015 • Thurgood Marshall Courthouse

The Society was pleased to co-sponsor with the Supreme Court Historical Society a special event in honor of the 225th Anniversary of the Court of the Southern District of New York (SDNY), the first federal court to commence operation in 1789.

For this program we celebrated the life, career and jurisprudence of Judge Learned Hand, including a talk by **Hon. John M. Walker, Jr.**, and through recollections from Judge Hand's colleagues, clerks, friends and his granddaughter **Prof. Constance Jordan**. At the event Judge Hand's family donated a rarely seen portrait, which was unveiled and presented to the court.

Presentation of Learned Hand's portrait to the SDNY by the Hand family. (Photo by Lasting Impressions Photography; Property of U.S. Courts, SDNY)

FIGHTING HUMAN TRAFFICKING ON THE FRONT LINES: N.Y.S. COURTS AND THEIR LAW ENFORCEMENT PARTNERS



June 17, 2015 • New York City Bar Association

The development and support of the nation's first Human Trafficking Intervention Courts in New York by then **Chief Judge Jonathan Lippman** was a focus of this program hosted by the Society. Judge Lippman led a discussion with **John Miller**, NYPD, and **Cyrus Vance, Jr.**, NY County DA. It was a thought provoking discussion on how these branches can work together to stop the

practice of trafficking and protect its victims. Anne Milgram provided an overview of the history and current status of human trafficking in New York and the laws designed to combat it. **Hon. Judy Harris Kluger** followed this with a presentation on some of the victims of human trafficking and how they have struggled to escape.

Photo (L-R): Cyrus Vance, Jr., Hon. Judith S. Kaye, Hon. Jonathan Lippman, Hon. Judy Harris Kluger, John Miller. (Photo by Rick Kopstein, Photographer, New York Law Journal)

WESTERN NEW YORK WOMEN PIONEERS IN THE LAW: A CELEBRATION



Program II in the series "New York State Law Schools Present" Presented In Association with SUNY Buffalo Law School and Phillips Lytle LLP

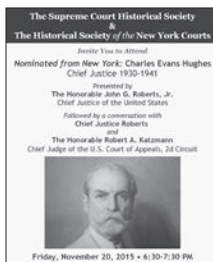
November 5, 2015 • SUNY Buffalo Law School

Thanks to our partnership with SUNY Buffalo Law School, and through the substantial efforts of our Trustee **Michael B. Powers** and his staff at Phillips Lytle, we traveled to Buffalo to look at Western New York

women who made legal history. It was a formidable group of presenters who came together to present (see program below). The cumulative telling of the stories of these women was powerful. We were delighted that Mike Powers, who had interviewed Charlotte Smallwood-Cook, the first woman DA elected in NY, for our Oral History project, used film clips from the oral history to bring Charlotte to life for us all. The program also featured introductory remarks by **Hon. Eugene F. Pigott, Jr.**, Associate Judge, Court of Appeals, **Hon. Paula L. Feroletto**, Administrative Judge of the 8th Judicial District and **James A. Gardner**, Interim Dean, SUNY Buffalo Law School.

Photo (L-R): Hon. Albert M. Rosenblatt, Hon. Eugene F. Pigott Jr., Interim Dean James B. Gardner, Hon. Paula L. Feroletto, Michael B. Powers, Bernadette Gargano, Hon. Erin M. Peradotto, Michelle Henry.

NOMINATED FROM NEW YORK: CHARLES EVANS HUGHES, CHIEF JUSTICE 1930-1941



Presented by The Honorable John G. Roberts, Jr., Chief Justice of the United States. Presented In Association with the Supreme Court Historical Society

November 20, 2015 • NYU Law School

The culmination of our impressive roster of public programming took place this past November. We were honored and privileged to work with our partner, the Supreme Court Historical Society, to bring The

Honorable John G. Roberts, Jr., Chief Justice of the United States, to New York for a program at NYU Law School. This event was part of an on-going series sponsored by the two Historical Societies. The Chief Justice discussed the life and career of Charles Evans Hughes, who served as Chief Justice of the United States from 1930 to 1941. An interesting conversation between Chief Justice Roberts and **Hon. Robert A. Katzmann**, Chief Judge of the U.S. Court of Appeals, 2nd Circuit, followed the initial remarks. The **Honorable Jonathan Lippman**, then Chief Judge of the State of New York, introduced the evening's program and recognized former Chief Judge Judith S. Kaye.

Photo (L-R): Chief Judge John G. Roberts, Jr., and Chief Judge Robert A. Katzmann during second part of the evening's program. (Photo by Rick Kopstein, Photographer, New York Law Journal)

LITIGATION & LITERATURE IN THE N.Y. COURTS: SHAW, SHAKESPEARE, AND SHERLOCK



February 17, 2016 • New York City Bar Association

Law and literature really do intersect in more ways than we might anticipate! This program explored litigation arising from some of the most famous plays and movies in entertainment history. The focus was on Shaw, Shakespeare and Sherlock, with lively presentations that were supplemented with film clips, some rarely seen, from the works that were subject to litigation. Running throughout the program, we were privileged to have the esteemed actor, **Paxton**

Whitehead, read from the works. What a delightful evening it was! **Carol Kaplan** began the event with an examination of Shaw's *Pygmalion*. **Daniel Kornstein** followed with a discussion of Shakespeare, both in his plays (focusing on the *Merchant of Venice*) and in the battle over Shakespeare in the Park. **Hon. Albert M. Rosenblatt** closed the evening with a look at Sherlock, whose long life as a character has led to many battles over who controls the rights to his portrayal on the stage and screen.

Photo (L-R): Daniel J. Kornstein, Carol M. Kaplan, Hon. Albert M. Rosenblatt, Paxton Whitehead.

What's Ahead... Upcoming Events

The Society's public programs are always unique and entertaining. Here is a preview of what we have in the works. Details will be announced in the coming weeks and months. Our events are CLE-accredited.

JUDITH S. KAYE PROGRAM: CONVERSATIONS ON WOMEN AND THE LAW

Through the generous support of **Skadden Arps**, we have established this important opportunity for programming focusing on women and the law. We feel this is an especially fitting tribute to our Founder, Judith S. Kaye, because she herself stood as a seminal figure among women and the law, and she devoted her time and heart to mentoring and supporting women as they moved into the legal system, and as they moved through life needing the support of our courts. We have begun discussion on an inaugural program that will be a fitting tribute to her.

MOBSTERS & THE LAW

New York is home to some of the most notable and notorious crime trials in American history. Our Young Lawyers Committee is putting together a program that will interest, educate, and entertain our audience.

PARTNERING WITH THE U.S. COURT OF APPEALS, 2nd CIRCUIT

We have begun discussions with our friends on the federal bench to plan a program that will look behind the scenes at the process by which NY federal courts examine novel issues of State law, with representatives from both the State and federal benches. This program will be part of the events planned for the Second Circuit's 125th anniversary celebrations taking place in 2017.

What We're Working On... Education Initiatives

EDUCATING NYS HIGH SCHOOL & MIDDLE SCHOOL STUDENTS



Bard High School Early College (BHSEC) has been a long-standing partner of the Society in bringing concepts of justice and the Rule of Law as well as an understanding of our courts to students throughout NYS. Under the guidance of their excellent staff of teachers, we have developed outstanding units of study looking back at moments in NY history when the court's role was pivotal in establishing and preserving rights of citizens. Through these studies, students at the high school and middle school levels have explored topics like slavery seen through the Lemmon Slave Case. (We have captured a day in the classroom and interviews with students on webcasts available on our website.) other

topics include the Red Scare, equality and democracy.

In Spring, 2016 we established the **Judith S. Kaye Teaching Fellow** in recognition of Judge Kaye's long and abiding concern for educating children. Our current Fellow, Julia Rose Kraut, is teaching a course to high school students on *Civil Rights & Civil Liberties*.

Beginning in 2015, the Society partnered with Bard College *Institute of Writing & Thinking* to teach teachers across the State in various workshops how to teach legal history. We discovered that teachers don't feel equipped to examine cases and the courts that without a law degree. The workshops are designed to provide guidance to teachers so that these topics will be taught in a wide variety of settings. The first workshops occurred in summer, 2015, and will continue in the coming years.

Photo: Bard High School Early College students at work on the theme of justice. (Photo by photographer Editha Mesina & BHSEC)

DAVID A. GARFINKEL ESSAY SCHOLARSHIP



Now in its 9th year, this essay contest is designed exclusively for NYS two-year community college students. We visit campuses, meet with students and professors, and thereby promote an interest in the courts and our legal system to this underserved pool of students. Some of the campuses we visited include Guttman, Queensborough, Broom and Westchester. With topics such as this year's *You, The Juror: What role does jury service play in our democracy?* students have the opportunity to learn, challenge themselves to write, and then to receive cash prizes delivered to them on Law Day at the NYS Court of Appeals in Albany. The winners, faculty and family are invited to the Court in Albany for Law Day and enjoy a luncheon in their honor.

To learn more about the winners of this year's contest, please visit our website at:
<http://www.nycourts.gov/history/garfinkel.html>

The Society thanks Gloria and Barry Garfinkel for their generous support of the Scholarship.

Photo: SUNY Broome's Prof. Irene Byrnes helping students at Institute for Race, Gender and the Jury System.

What We're Working On...

SOCIETY WEBSITE



The Society has continued to develop its website, focused on increasing its usability as a resource for researchers worldwide working on any topic of New York's legal history. We currently receive about 18,000 visits per month and the numbers keep growing. It is now home to hundreds of judicial biographies and official portraits, court histories and other historical publications and archives of past Society activities.

It also hosts the Society's ambitious Legal History by Era project, which seeks to link the courts, cases, attorneys, judges and other figures from a single time period so that our readers can understand how and why the law developed as it did during those years. The section now covers the years

1674-1846 with many more decades currently in the works. As always, you can find all of this and more at our site www.nycourts.gov/history

SOCIETY BLOG



The Society launched on October 7th, 2015 a legal history blog, where we feature authors' takes on everything from the first written laws of England to the importance of legal history in the classroom. All are welcome to submit posts. Some highlights include:

The 100th Anniversary of Judge Matthew J. Jasen's Birth: A Commemoration

Born in 1915, Matthew Jasen is one of the New York Court of Appeal's most respected jurists. So much so, that upon his retirement, the Court granted a rare glimpse behind the scenes at the court to WHMT for an episode of "Inside Albany."

Judge Matthew J. Jasen (front center) with law clerks at Testimonial Dinner and Reception of the Bar Association of Erie County in honor of Judge Jasen, Buffalo, NY (Dec. 11, 1985)

Garfinkel Essay Scholarship: It's About the Journey

One of the Society's longstanding projects is the David A. Garfinkel Essay Scholarship, which offers community college students in New York State the opportunity to write an essay on a legal topic. Through this we have engaged with students and educators across the State and were happy to have Prof. Christine Mooney of Queensborough Community College write this inspiring article about what the contest means for her and her students.

Emergence of the Common Law, The Anglo-Saxon Dooms

Our legal tradition dates back centuries to England, where it was first recorded in the laws of the Anglo-Saxon kings, a history detailed here by the Society's Trustee Frances Murray. Her ongoing series of articles on this topic illustrates where, how and why the earliest legal systems that still impact us today developed.

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~ Email us your questions at history@nycourts.gov.



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Hon. Judith S. Kaye

In Memoriam

Chief Judge of the State of New York

1938-2016

The following is a tribute from the Society to Judge Kaye which originally appeared in the New York Times In Memoriam section on Sunday, January 10, 2016

The Historical Society of the New York Courts mourns the loss of our founder and guiding spirit, Judith S. Kaye. We recognize and celebrate that no one has had a more profound, positive impact on our court system. She was New York's first female, and longest serving, Chief Judge, and used her matchless energy and wisdom, heart and soul, to reshape the courts to improve the lives of countless people. She pioneered court innovations based on the premise that the legal system exists to serve the people with fairness and sensitivity. For this she was beloved, nationally and internationally. She neither sought nor basked in the accolades, acknowledging them with a shy smile and a handwritten note combining modesty and gratitude. She could be hilariously funny, but never at anyone else's expense. It is fitting that her memorial service will be held at Lincoln Center as the arts were important in her life, and she could be heard singing in the courthouse corridors. Judith once said she has a 5 to 9 job, arriving at 5am (often with grandmother photos to exchange with maintenance staff) leaving at 9pm, and yet she was always able to be there, undistracted, for her family and friends. Though as a historical society we focus on figures from the past, we were so fortunate to have had one of the nation's leading lights in our midst. She battled her illness with courage and dignity. It seemed to us that the day of her passing would somehow never come. But she was, after all, human.

-The Historical Society of the New York Courts