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## Gene E. Franchini: Reflections on a Man of Justice

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GENE E. FRANCHINI:  
REFLECTIONS ON A MAN OF JUSTICE  
JUSTICE RICHARD C. BOSSON\*

INTRODUCTION

“D’baha.”

Chief Justice of the New Mexico Supreme Court, Gene Franchini, taught a new word to judges and lawyers who traveled from across the country to judge the 1998 National Mock Trial Competition in Albuquerque, New Mexico. The competition focused on Indian law that year, so Justice Franchini coined a Native American term to assist the members of his audience as they interacted with the teen-aged competitors. Translation? The word was an acronym: “Don’t Be A Horse’s Ass.”<sup>1</sup>

This and countless other stories about Justice Franchini have been told and retold; now that he is gone, they are well on their way to legend. These stories endure because they are emblematic of an individual who rose to the top of a demanding profession, but who never lost his connection to real people. Gene was a man who stood apart from the rest of us because he knew who he was in a way that few of us do, and because he gave himself the permission—the freedom—to be himself: a man who demanded integrity in all things professional and personal, and who never wavered in his belief that the essential role of a judge must be the uncompromising pursuit of justice.

Gene’s unabashed freedom to be himself gave him license to say and do things that few others could get away with, especially by today’s standards. In conversation, he had a lubricated way with profanity. He jokingly told me that the only exercise he ever got was when he had to get up to pour himself another glass of wine. He was also once a chain smoker. But he embraced his vices in a way that, instead of being offensive, left one thinking, “I can trust that guy—he’s just telling it like he sees it.”

In the pages that follow, I have tried to capture some of who Gene was through his speeches and opinions and from my personal recollections. In an effort at staying focused, I have narrowed the discussion to two parts, based on the themes alluded to above: Gene’s sense of integrity and his unwavering commitment to justice. For those of you who knew him, I hope that my efforts will spark a few of your own special memories. For those of you who never met him, I hope this article leaves you wishing that you had gotten that chance.

I. PROFESSIONAL AND PERSONAL INTEGRITY

Gene’s greatest passion—other than his devotion to his beloved Glynnie—was his love of the legal profession. He was fanatic in his view that practicing law is an *honor* that cannot be taken lightly. To him, lawyers play a vital role in safeguarding a society’s freedoms. In a 1999 speech to attorneys and judges he described his views about the importance of lawyers:

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\* Justice, New Mexico Supreme Court. Special thanks is acknowledged to my two law clerks for their help on this article—Neil Bell for synthesizing the complex and numerous source materials, as well as for assisting with innumerable drafts; and Stefan Chacón for tireless spadework in investigation and research.

1. See George H. Carley, Justice, Ga. Supreme Court, *Cherished Memories of a Fascinating Man*, TRIBUTE TO JUSTICE FRANCHINI, N.M. B. BULL. (State Bar of N.M.), Jan. 11, 2010, at 7.

When one thinks about it, it is not the words of the Declaration of Independence or the Constitution that make us free. It is the men and women of this country, who daily and in a real way, protect and defend the principles that the words of those documents describe and establish—those men and women of the legal profession who daily put up the fight by practicing their profession. They do it to protect and defend not only the idea, but the fact of freedom.<sup>2</sup>

Without attorneys to stand up for the rights of individuals, Justice Franchini argued, a society can quickly devolve into an authoritarian regime.

In that same speech, Gene attributed the rise of Nazism in pre-World War II Germany in part to the elimination of the freedom and independence of lawyers. He quoted Adolf Hitler as saying, “I shall not rest until every German sees that it is a shameful thing to be a lawyer.”<sup>3</sup> As a result of Hitler’s imposed constraints on lawyers, Justice Franchini concluded, “Since [the Germans] had no defenders, they had no defenses.”<sup>4</sup>

Because of the crucial role attorneys play in safeguarding freedom, Gene took personal offense when he heard of anyone undermining the public’s faith in the legal profession.

Just listen closely to the lawyer’s jokes with vicious, not funny, punch lines. Just read the endless articles and listen to the host of TV commentators about disreputable, dishonorable, cheating, stealing, dishonest, manipulative, and unethical lawyers. Listen to the attacks on the judicial process, the attacks on jury trials, and all the rights of our citizens given them by God and recognized by our Constitution and in the Bill of Rights. Listen *especially* to the attacks upon the independence of the judiciary. Don’t think that it cannot happen here or that it cannot happen again—it can.<sup>5</sup>

His response to what he viewed as the “low public regard for lawyers and the legal system”<sup>6</sup> was to travel the state and the country giving lectures describing his solutions for restoring faith in his beloved profession.

One particular trip stands out. In 2001, Justice Franchini agreed to address the Wyoming Bar Association on professionalism and ethics at their annual meeting in Cheyenne, Wyoming. The meeting was slated to begin on Tuesday, September 11th, and to continue throughout the week with Justice Franchini scheduled to speak on Friday. However, after the horrific events of that Tuesday morning, Justice Franchini’s flight was grounded, along with most every other flight in the country. Instead of canceling his engagement, Gene got in his car and drove all of the way to Cheyenne to share his thoughts with the members of the Wyoming Bar on

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2. Gene E. Franchini, Justice, N.M. Supreme Court, Remarks on Law Day 1 (1999) (transcript on file with author). Some minor alterations were made to the speeches quoted in this article for readability purposes. No changes in substance were made.

3. *Id.* at 3 (quoting Adolf Hitler, Speech Before the Reichstag (Apr. 26, 1942)).

4. *Id.* at 5.

5. *Id.*

6. Bruce Daniels, “We Must Change,” *Justice Says*, ALBUQUERQUE J., Sept. 27, 1997, at A1.

how members of his profession had acquired a reputation for being “dishonest, unethical, selfish, unprofessional, unscrupulous, and uncaring.”<sup>7</sup>

A. “*The Truly Damnable Idea of Billable Hours*”

In his speech to the Wyoming Bar, Gene argued that lawyers made several “big mistakes” over time that undermined their integrity in the eyes of the people.<sup>8</sup> For example, attorneys “became more concerned about our financial welfare than our clients’ welfare—both financial and personal.”<sup>9</sup> This self-centered approach to the practice of the law resulted in lawyers who are “[m]ore concerned about financial results and doing *business* than about justice.”<sup>10</sup>

In Gene’s view, one of the biggest mistakes lawyers made was yielding to the demands of large corporate clients by adopting “the truly damnable idea of billable hours.”<sup>11</sup> Gene railed against the billable hour, saying that it caused attorneys to “become bean counters rather than counselors . . . [to trade] an hourly rate for quality of our service, our talent, and our reputations as lawyers regardless of the complexity of the case, regardless of whether we have succeeded or failed, regardless of the financial status of our clients.”<sup>12</sup>

Interestingly, one of the first opinions Gene wrote as a justice dealt with a dispute over attorney’s fees. In *Lenz v. Chalamidas*, the court was ultimately faced with a challenge to a \$15,000 award of attorney’s fees in a relatively simple lien case worth only \$13,000.<sup>13</sup> Even though the trial court made extensive findings in support of the award, Justice Franchini was having none of it.<sup>14</sup> The statute that allowed for fee shifting in the case called for “reasonable” fees.<sup>15</sup> Obviously, Gene thought that the trial judge placed too much emphasis on the number of hours submitted by the plaintiff’s attorney.<sup>16</sup> In a move consistent with his views on attorney’s fees but surprising for an appellate judge, Gene observed that the record was adequately developed for the court to determine a reasonable fee.<sup>17</sup> He wrote that, because of the “relatively straightforward proceedings below,” the attorney was only entitled to \$8,000 and reduced the award accordingly.<sup>18</sup>

While this type of judicial fact-finding is generally frowned upon on appeal, Gene’s opinion won the support of Justice Baca and Justice Montgomery, resulting in a unanimous decision.<sup>19</sup> I can almost hear Gene in conference with the other two justices ranting about how run-away fees are destroying the profession, and arguing for the need to send a clear message with this opinion.

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7. Gene E. Franchini, Justice, N.M. Supreme Court, Address to Wyoming Bar Association on Professionalism and Ethics 1 (Sept. 14, 2001) (transcript on file with author).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 113 N.M. 17, 18, 821 P.2d 355, 356 (1991).

14. *See id.*

15. *Id.*

16. *Id.* at 18–19, 821 P.2d at 356–57.

17. *Id.* at 19, 821 P.2d at 357.

18. *Id.*

19. *Id.*

### B. Prosecutorial Misconduct

*State v. Breit*—another unanimous opinion—also provided Justice Franchini with an opportunity to send a message to members of the New Mexico Bar concerning ethics and professionalism.<sup>20</sup> This time, the focus was on the courtroom behavior of a prosecutor in southwestern New Mexico who had clearly overstepped the bounds of zealous advocacy. In that case, after the defendant was convicted of assault with a deadly weapon and first-degree murder, the trial judge took the unusual step of granting the defendant's motion for a new trial based on "extreme prosecutorial misconduct."<sup>21</sup> The question on appeal was whether the defendant's new trial was barred on double jeopardy grounds.<sup>22</sup>

Gene's opinion recognized greater double jeopardy protections under the New Mexico Constitution than under its federal counterpart.<sup>23</sup> Beyond that, however, he carefully memorialized the trial proceedings in a way that continues to provide an example for prosecutors, trial judges, and appellate judges alike. The opinion lays out the litany of the prosecutor's misdeeds, and in so doing, serves as a sort of counter-manual for how to behave in a courtroom.<sup>24</sup>

Gene also made a positive example of the trial judge whose written opinion conceded that she had lost control of the trial and that she should have granted a mistrial early on.<sup>25</sup> Gene acknowledged the trial judge's mistake and the courage that it took to admit it, and then proceeded to rely on her opinion, which he attached to the supreme court's, as justification for ruling in the defendant's favor.<sup>26</sup>

Perhaps most impressively, however, was the restraint Gene displayed towards the prosecutor, given his abhorrence of those who make the legal profession look bad. Instead of engaging in an *ad hominem* attack, Gene focused on the prosecutor's actions, and even went so far as to search for reasons that could justify his behavior.<sup>27</sup> By taking such an even-handed approach toward an issue that he felt passionately about, Gene demonstrated that professionalism is important for appellate judges too.

### C. Conscientious Objector

Gene wrote in the *Journal of Appellate Practice and Process*, that if a trial judge "simply cannot in good conscience apply a law, that judge can always resign—in fact, that may be the only alternative."<sup>28</sup> Easier said than done? Not for Gene.

In another episode that has taken on the veneer of legend, then-Judge Franchini resigned from his position as a district judge rather than sentencing a criminal defendant to a mandatory prison term as required by the state's sentencing laws. The

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20. 1996-NMSC-067, 930 P.2d 792.

21. *Id.* ¶ 1, 930 P.2d at 795.

22. *See id.*

23. *See id.* ¶ 32, 930 P.2d at 803 (holding that the New Mexico Constitution bars re prosecution when the state "acts in willful disregard of a resulting mistrial, retrial, or reversal").

24. *See id.* ¶¶ 41–43, 930 P.2d at 805.

25. *See id.* ¶ 47, 930 P.2d at 806.

26. *Id.* at ¶¶ 47–48, 930 P.2d at 806–07.

27. *See id.* ¶ 46, 930 P.2d at 806.

28. Gene E. Franchini, *Conscience, Judging, and Conscientious Judging*, 2 J. APP. PRAC. & PROCESS 19, 23 (2000).

story has been recounted many times, so I will not go into the details here.<sup>29</sup> Suffice it to say, Gene steadfastly believed that a judge should have the discretion to sentence a criminal defendant according to the circumstances of each particular case because such discretion was the essence of a judge's role.<sup>30</sup> So when the sentencing act required Gene to impose a one-year prison sentence on a military veteran and first-time offender who was responsible for caring for his widowed mother, Gene held the law unconstitutional and placed the defendant on probation instead.<sup>31</sup> The court of appeals reversed and ordered Gene to comply with the sentencing act.<sup>32</sup> Rather than obey the order, Gene resigned. He stated from the bench,

So much for the concept of due process. So much for the duty to consider all circumstances surrounding the offense and all circumstances surrounding the offender before imposing a prison sentence. So much, finally, for a judge's duty, obligation, and responsibility to judge.

The law and administration of justice has always been one of the great loves of my life. I cannot and therefore will not now prostitute it or myself.<sup>33</sup>

The move attracted widespread media attention both at the state and national levels.<sup>34</sup>

#### D. Fear Leads to Bad Public Policy

Gene maintained that the mandatory sentencing laws which were sweeping the nation at that time were a knee-jerk reaction to fears that were being exploited by politicians and the media.<sup>35</sup> He believed that fear was the great motivator for convincing a society to give up its basic rights. "[F]ear is the most devastating of all human emotions. Because a fearful person will believe or disbelieve anything. Do or not do anything. Accept or reject anything just to feel more secure, even if it does not make the person more secure in fact."<sup>36</sup> This last point was especially galling to him.

It really doesn't seem to make a difference anymore if there is a connection between a new law and the actual reduction or elimination of our fear.

29. See, e.g., *id.* at 19–21.

30. *Id.* at 20–21.

31. See *id.* at 19.

32. See *id.* at 19–20.

33. *Id.* at 21.

34. See, e.g., Susanne Burks, *Judge Franchini Resigns over Sentence Mandates*, ALBUQUERQUE J., Sept. 29, 1981, at F1; Colman McCarthy, *Prisons, Just Who Is Punished?*, BOSTON GLOBE, Nov. 15, 1981, Editorial Page (discussing a growing national trend of mandatory sentencing laws).

35. After Gene resigned from the district court, the *Albuquerque Journal* ran a political cartoon lampooning his decision. See ALBUQUERQUE J., Sept. 30, 1981, at A5. The cartoon features two older gentlemen, wearing black robes emblazoned with the term "liberal judges," walking away from a jail. One of the judges has the keys to the cell block in his hand and is saying to the other, "Mandatory sentencing?! Dear me—what could have possessed the legislature to infringe upon our constitutional prerogatives like that?" Behind them, the jail door is wide open, and fiendish looking prisoners are pouring forth, with guns and knives raised, as citizens clamber for safety. *Id.*

36. Gene E. Franchini, Justice, N.M. Supreme Court, *Bill of Rights v. Bill of Wrongs*, Address Before the New Mexico Chapter of the ACLU (Dec. 12, 2002) (transcript on file with author).

Today, it's okay if we are in fact fearful, and this new law makes us feel better about ourselves and more secure—even if it reduces our freedom.<sup>37</sup>

Gene's biggest objection to passing a law that trades freedom for a sense of security is that it will often have consequences that are unexpected and counter-productive. In a typically candid interview, Gene explained his objection to mandatory sentencing laws to a reporter.

I've been at this business a long time. . . . The one thing that I know does not reduce crime is increasing . . . time in prison for an offense. . . . Now, would you rather that [a] person [approaching you in a dark parking lot] be a guy who has just got out of prison and has been raped by everybody and everything and is meaner than snake shit, or would you rather have somebody who has been on probation supervised by a probation officer and in some kind of a program for six months or a year or two years?<sup>38</sup>

Thus, a law intended to make society safer by getting “criminals” off of the streets, arguably leads to the opposite result—reducing public safety by exposing more people to the dangerous environment of our prison system.

Another example of what Gene believed to be bad public policy motivated by fear was New Mexico's adoption of the death penalty. He was on the New Mexico Supreme Court when it decided *State v. Clark*, in which the defendant unsuccessfully argued that New Mexico's Capital Sentencing Act was unconstitutional.<sup>39</sup> Justice Franchini joined the majority opinion but wrote a special concurrence to state his personal views regarding the death penalty, which he opposed on policy grounds.

I write specially to state that I am opposed philosophically and practically to the death penalty. I personally believe it to be a bad public policy. However, public policy is solely within the legislature's domain and this court is powerless to change it unless the statutory law underlying the policy is declared unconstitutional.

For the reasons set out in the opinion, the arguments advanced by the defendant do not convince me or the court that the death penalty statute in New Mexico is unconstitutional. However, those same arguments firmly convince me personally how truly flawed such a public policy is.

Since it is the duty and responsibility of a judge to interpret and apply the law to the facts of a case free of any personal or philosophical leanings or beliefs, I specially concur.<sup>40</sup>

In a later interview, Gene explained one of his complaints about the death penalty.

[T]he death penalty doesn't de[t]er murder. . . . The only kind of a penalty that would deter crime is if you could get the death penalty for a meter

37. Franchini, *supra* note 2, at 2.

38. Nancy Plevin, *Ruling from the Heart*, SANTA FE NEW MEXICAN, Dec. 27, 1998, at F1.

39. 1999-NMSC-035, 990 P.2d 793.

40. *Id.* ¶¶ 94–96, 990 P.2d at 821. Justice Franchini renewed his objections to the death penalty in *State v. Allen*, 2000-NMSC-002, ¶ 121, 994 P.2d 728, 766 (Franchini, J., specially concurring in part and dissenting in part).

violation—that would cut down on meter violations. It may cut down on speeding as well. But other than that, it’s very questionable. . . .<sup>41</sup>

Terry Clark went on to become the only person to be executed in New Mexico since 1976.<sup>42</sup> Gene went on to lobby the legislature for the repeal of the death penalty after he retired from the bench in 2002. In 2009, just months before Gene died, Governor Bill Richardson signed a bill abolishing the death penalty in New Mexico.<sup>43</sup>

Gene believed that education is the key to making us safer. He lamented our society’s resistance to such a solution.

Americans want to have quick answers to very difficult problems, and they want them today. . . . We know what causes crime, but we really make an effort to avoid recognizing it. And we would rather spend 150,000 times more money on this superficial ‘We’re going to be tough-on-crime crap’ than on doing what we have to do.<sup>44</sup>

In Gene’s view, a desire for instant gratification coupled with an easily manipulated sense of vulnerability make the perfect recipe for unwise policy choices that result in the loss of freedoms. “The problem is that once you give up a freedom—any freedom—you *never ever* get it back.”<sup>45</sup>

As Chief Justice,<sup>46</sup> Gene proudly reported to the New Mexico Legislature during his State of the Judiciary Address about a grant from the U.S. Department of Justice to create a drug court program in New Mexico.<sup>47</sup> He explained that, instead of having to sentence non-violent drug offenders to mandatory prison terms, the drug courts would be able to order treatment and rehabilitation.<sup>48</sup> Other states that had enacted similar programs had shown that they result in “reducing further criminal behavior . . . and . . . helping offenders escape their drug dependence.”<sup>49</sup> Furthermore, instead of paying \$28,000 per year, per offender, to incarcerate non-violent drug offenders, the cost of a treatment program through the drug court would be only \$1,000 per defendant.<sup>50</sup> Gene called the grant “really good news.”<sup>51</sup>

The drug court model has flourished for exactly the reasons Gene predicted it would—it provides a welcome alternative to mandatory incarceration, and it is

41. Plevin, *supra* note 38, at F3.

42. See Trip Jennings, *Richardson Abolishes N.M. Death Penalty*, N.M. INDEP., Mar. 18, 2009, <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>.

43. See *id.*

44. Plevin, *supra* note 38, at F3.

45. Franchini, *supra* note 2, at 2.

46. Among Gene’s accomplishments as Chief Justice was “establish[ing] a unified state judiciary budget for the \$50 million court system so districts with more talented and connected lobbyists—such as those including Santa Fe and Albuquerque—wouldn’t benefit at the expense of others. . . .” Plevin, *supra* note 38, at F3.

47. Gene E. Franchini, Chief Justice, N.M. Supreme Court, State of the Judiciary Address to the 43rd New Mexico Legislature (1997) (transcript on file with author).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*



more effective at combating recidivism than the traditional approach.<sup>52</sup> As an interesting aside, the drug court model likely enjoys much of its success because it returns to a judge the discretion that Gene argued was taken away by New Mexico's Mandatory Sentencing Act.<sup>53</sup>

### *E. Sensitivity and Empathy*

One of the reasons Gene was so well-loved was that despite his position and influence, he never lost that sense of who he was and where he came from. A person could meet him and come away with the impression of an ordinary guy trying to make a difference. This "everyman" quality inspired trust, confidence, and admiration in most everyone who met him. Gene deserved it.

A key element of the trust he engendered was his enormous sense of empathy with others around him. This ability to put himself in the shoes of others made him a more sensitive judge.<sup>54</sup> For example, in *Kennedy v. Dexter Consolidated Schools*,<sup>55</sup> Gene handled a delicate situation with a sense of dignity that a few other, higher profile, jurists failed to show recently when faced with a similar set of circumstances. In *Kennedy*, several high school officials forced two students—a girl and a boy—to submit to strip searches because one of their peers claimed her diamond ring was stolen during class time.<sup>56</sup> The students successfully sued the district and the school officials.<sup>57</sup> On appeal, the court of appeals affirmed the school district's liability, but reversed the judgments against the officials, holding that they were entitled to qualified immunity because their actions did not violate law that was clearly established at the time of the search.<sup>58</sup>

Writing for the court, Gene flatly disagreed:

We now reverse the Court of Appeals and hold that, in 1992, the search of Randy Ford violated . . . his clearly established right to be free from strip searches conducted without individualized suspicion. . . .

. . . .  
The same common sense that compels the conclusion that a school official cannot strip a child naked without having some individualized basis to

52. Compare Problem-Solving Courts, The Judicial Branch of New Mexico, Frequently Asked Questions, <http://joo.nmcourts.gov/joomla/pscourts/index.php/faq> (last visited Mar. 28, 2010) (claiming a 9.5 percent recidivism rate among participants within the first three years of graduation from a drug court program) with Trip Jennings, *Quarter of State Prison Education Jobs Are Vacant*, N.M. INDEP., Sept. 23, 2009, <http://newmexicoindependent.com/37004/quarter-of-state-prison-education-jobs-are-vacant> ("Currently, New Mexico's 47 percent recidivism rate is lower than the national average of 52 percent. . . .").

53. See DAN CATHEY, N.M. SENTENCING COMM'N REPORT, OFFENDER REHABILITATION AND RECIDIVISM REDUCTION: A RESPONSE TO HOUSE MEMORIAL 68 at 3 (2007), available at [http://nmssc.unm.edu/nmssc\\_reports/](http://nmssc.unm.edu/nmssc_reports/) ("In its simplest form, a drug court uses the power of a judge to keep a drug offender in treatment, providing rewards for successes, and sanctions for failures.").

54. In an interview, Gene said that he was most proud of his opinion in *Romero v. Byers*, 117 N.M. 422, 427–28, 872 P.2d 840, 845–46 (1994), in which the court held that statutory beneficiaries could recover damages in a wrongful death action for the deceased's loss of life, even if the beneficiaries had not suffered any pecuniary loss. See Donna Olmstead, *Long Arm of the Law*, ALBUQUERQUE J., Apr. 17, 2005, at A8. *Romero* was also the case in which New Mexico became the last state to recognize a claim for loss of consortium. 117 N.M. at 426–27, 872 P.2d at 844–45.

55. 2000-NMSC-025, 10 P.3d 115.

56. *Id.* ¶¶ 1–3, 10 P.3d at 117–18.

57. *Id.* ¶ 1, 10 P.3d at 117.

58. *Id.*

suspect that child of wrongdoing, also mandates that a child cannot be stripped to his boxer shorts by officials who have no reason to suspect him individually. . . . While forcing the exposure of a child's genitals is more invasive than forcing the exposure of a child's chest, midriff, thighs, and underwear, we cannot accept that this distinction marked the outer boundary of the breadth of clearly established Fourth Amendment rights in 1992. . . .

. . . .  
Regardless of the degree of the student's physical exposure, subjecting a student to any strip search under these circumstances constitutes a violation of his clearly established rights.<sup>59</sup>

Gene's choice of language makes it clear that he was sensitive to the potential effect of a search like this on a teenager. And he interpreted the law as any concerned parent would hope he would.

Interestingly, in *Safford Unified School District v. Redding*, the U.S. Supreme Court recently came to the opposite conclusion on the issue of qualified immunity, holding that the strip search of a student in that case was not a violation of clearly established law.<sup>60</sup> I have no doubt that Gene was appalled by that decision. I am just as certain that he was pleased by Justice Ginsburg's reproach of her colleagues for their lack of sensitivity.<sup>61</sup> As Gene explained in *Kennedy*, putting legal technicalities aside, the issue was a no-brainer. Sometimes common sense has to prevail.<sup>62</sup>

Gene brought his sense of empathy to his professional interactions as well. He recognized his own faults, and as a result, he had a tremendous sense of understanding when someone made a boneheaded decision or needed to be taken down a few pegs. He once told me a story about a run-in that he had as a trial judge with a prominent local attorney, Charlie Driscoll. Driscoll was legendary throughout the state as a brilliant, passionate, and aggressive defense attorney who routinely pushed the limits of courtroom practice and conventional decorum. Driscoll was defending a client in Judge Franchini's courtroom and had begun to carry on, eventually crossing the line. Not wanting to embarrass his old friend publicly (or provoke him) Gene recessed the proceedings and ordered Driscoll to his chambers—without the district attorney and without his client(!). Gene told Driscoll, "Charlie, I just want you to know you're doing a hell of a job with this case. But if you pull a stunt like that again, I'll hold you in contempt and throw your ass in jail so fast,

59. *Id.* ¶¶ 11, 15, 19, 10 P.3d at 120, 121, 122.

60. 129 S. Ct. 2633 (2009).

61. In the oral arguments for *Safford Unified School District v. Redding*, several U.S. Supreme Court justices drew attention for their somewhat flippant remarks concerning the strip search of a thirteen-year old girl who was accused of distributing ibuprofen at school. Joan Biskupic wrote in a piece for *USA Today*,

During oral arguments, some other justices minimized the girl's lasting humiliation, but Ginsburg stood out in her concern for the teenager.

"They have never been a 13-year-old girl," she told USA TODAY later when asked about her colleagues' comments during the arguments. "It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."

Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009, [http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm); see also Dahlia Lithwick, *Search Me*, SLATE, Apr. 21, 2009, <http://www.slate.com/id/2216608/pagenum/all/#p2>.

62. *Kennedy*, 2000-NMSC-025, ¶ 15, 10 P.3d at 120–21.

you won't know what hit you." The two men returned to the courtroom, and the trial proceeded to its conclusion with everyone behaving amicably.

In a similar vein, I was once on the receiving end of one of Gene's "little talks." While I was a judge on the court of appeals, I was assigned authorship of a case that presented an issue of first impression for New Mexico's appellate courts. We were asked to decide whether a party can recover damages for the loss of a chance of recovery due to a physician's negligence, where the chance of recovery was less than fifty percent.<sup>63</sup> I knew that this issue was pending before the New Mexico Supreme Court in another case,<sup>64</sup> but in one of my more impatient moments, I convinced my colleagues that we should decide our case and issue an opinion anyway. After all, who knew how long it would take those pedantic justices to get their act together? As it turns out, I finished my opinion first and filed it with the clerk.

Shortly thereafter, I got a knock on my door and looked up to see Gene waving a copy of my opinion in the air. "Goddammit, Dick, what the hell were you thinking?" He told me that his chambers had been hard at work writing a very strong opinion, an opinion that he was proud of, and that they were nearly ready to file it. However, since my opinion came out first, "when we file ours, we're gonna' look like a bunch of idiots—like the left hand doesn't know what the right hand is doing." Of course he was right, and all that I could do was sit there and take it in shamed silence. But after he had spoken his mind, he simply said, "Okay," and left.

We never spoke about it again, but when I later read his opinion, I was humbled by the grace with which he handled the situation:

Prior to our publication of this opinion, the Court of Appeals, on its own initiative, issued *Baer v. Regents of the Univ. of Cal.*, in which it expressly adopted the lost-chance concept that we were asked to evaluate in this opinion. Because we find the Court of Appeals' thoughtful analysis in *Baer* to be persuasive, we now affirm the adoption of the lost-chance theory in New Mexico.<sup>65</sup>

The way Gene handled Driscoll, and me, shows that he was a man who was comfortable with his position of authority and that he was unafraid of exercising his power, but that he did not have to make a show of either. More remarkably, though, Gene could put you in your place bluntly and forcefully without making you resent him. No humiliating. No belittling. And he did not hold a grudge once he spoke his peace. He could have berated Charlie Driscoll and gotten into a shouting match in front of the entire courtroom. But he didn't. He could have rebuked me publicly in his lost-chance opinion for being an upstart court of appeals judge. But he didn't. He treated Driscoll and me exactly the way he would have wanted if our positions were reversed.

## II. "INJUSTICE IS ALMOST ALWAYS RECOGNIZABLE."

For Gene, the role of a judge was all about justice. For a court to allow an unjust result at the expense of an abstract legal principle could only undermine the faith

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63. See *Baer v. Regents of the Univ. of Cal.*, 1999-NMCA-005, ¶ 1, 972 P.2d 9, 10.

64. See *Alberts v. Schultz*, 1999-NMSC-015, ¶ 9, 975 P.2d 1279, 1282.

65. *Id.* (internal citations omitted).

of the public in the legal system.<sup>66</sup> He wrote, “We cannot always recognize justice but injustice is almost always recognizable. It happens mostly to those people who we as lawyers pledge to protect: the poor, the disenfranchised, the young, the ignorant, the angry, the misinformed, the misguided, and the despised—those without much help, if any, from anybody.”<sup>67</sup> Gene authored several opinions that reflected his unwavering commitment to justice.

#### A. *Delgado v. Phelps Dodge*

One of Gene’s highest profile opinions, *Delgado v. Phelps Dodge Chino, Inc.*, avoided injustice by deviating from widely accepted principles of workers compensation law.<sup>68</sup> *Delgado’s* facts were truly horrific. The defendant employed Delgado at its copper smelting plant in southwestern New Mexico.<sup>69</sup> The main work done at the plant was extracting copper ore from unuseable rock, or “slag,” by superheating it in a furnace to over 2000 degrees and skimming the ore off of the top.<sup>70</sup> The molten slag drained down a chute to a fifteen-foot-tall cauldron that workers emptied by sealing off the chute and retrieving the cauldron from the end of a tunnel with a special machine called a “kress-haul.”<sup>71</sup>

On the day in question, the cauldron began to overflow because the workers were unable to stop the flow of slag.<sup>72</sup> Instead of shutting down the furnace, however, the plant managers ordered Delgado to drive the kress-haul down the tunnel and retrieve the cauldron as slag continued to flow from the furnace.<sup>73</sup> Delgado protested that he had never operated a kress-haul under those types of conditions, but his bosses insisted.<sup>74</sup> Delgado obeyed, and shortly after driving into the tunnel, other workers observed black smoke billow out, and Delgado came running out of the tunnel, “fully engulfed in flames.”<sup>75</sup> He received third-degree burns all over his body and died several weeks later.<sup>76</sup>

Delgado’s wife sued Phelps Dodge for the wrongful death of her husband and various other common law claims, but the trial court dismissed her suit because the Workers’ Compensation Act (WCA) provides that it shall be the exclusive remedy for injuries occurring on the job that are “accidental.”<sup>77</sup> Our court of appeals affirmed that the WCA was Delgado’s exclusive remedy, citing our prior case law

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66. Gene was devoted to the law as an institution, and he worked tirelessly to maintain confidence in the courts and the legal profession in general. During his term as chief justice, he commissioned a survey to measure public sentiment regarding lawyers and the courts. See Plevin, *supra* note 38, at F3. He was dismayed to learn that approximately two-thirds of New Mexicans believed that the legal system was too slow, too expensive, and did not treat them well. See Gene E. Franchini, Chief Justice, New Mexico Supreme Court, State of the Judiciary Address (1998) (transcript on file with author). He responded by enacting several new programs aimed at restoring faith in the New Mexico judiciary. See Plevin, *supra* note 38, at F3. He also traveled the state and put a face on the legal profession that people could relate to.

67. Franchini, *supra* note 7, at 3.

68. 2001-NMSC-034, ¶ 1, 34 P.3d 1148, 1150.

69. *Id.* ¶ 3, 34 P.3d at 1150–51.

70. *Id.*

71. *Id.*

72. *Id.* ¶ 4, 34 P.3d at 1151.

73. *Id.*, ¶¶ 4–5, 34 P.3d at 1151.

74. *Id.* ¶ 5, 34 P.3d at 1151

75. *Id.*

76. *Id.*

77. See *id.* ¶¶ 7–8, 34 P.3d at 1151.

and *Larson's*, a widely respected treatise on workers' compensation law which advocates for the "actual intent" standard.<sup>78</sup>

Gene wrote an opinion in which the court unanimously overruled its prior case law and rejected the "actual intent" standard, despite the "near unanimity with which it has been accepted nationwide."<sup>79</sup> Gene noted first that the "actual intent" standard is not explicitly stated in the WCA.<sup>80</sup> However, the WCA contains a provision that requires courts to construe it in a manner that does not favor employers or employees.<sup>81</sup> Looking to the WCA, Gene noted that it relieves an employer from its obligation to pay out benefits to an injured worker if the injury was the result of the worker's intentional *or willful* behavior.<sup>82</sup> By contrast, the actual intent standard provides an employer with immunity from suit unless the injured worker can demonstrate intentional behavior.<sup>83</sup> Gene reasoned that the actual intent standard, therefore, unfairly favors the employer, because it sets a lower standard for employers to deny benefits to employees (intentional *or willful*), than it does for employees to seek compensation beyond the protections of the WCA (intentional only).<sup>84</sup> Put another way, the actual intent standard virtually guarantees an employer immunity from suit—an intent to cause harm is virtually impossible to prove—while preserving the employer's ability to deny benefits if it can prove the employee's behavior was willful—a much more forgiving standard. The court held that this disparity violated the WCA's command to be construed impartially.<sup>85</sup>

Gene reminded employers that their actions would thereafter be evaluated under the same standards that employers use to deny benefits to their workers under the WCA.<sup>86</sup> He also responded to a "flood gates" argument that abandoning the "actual intent" standard would "wreak havoc" on the workers' compensation system: "The greater the impact this opinion has on the workers' compensation system, the more profound will have been its need."<sup>87</sup>

A colleague of mine on the New Mexico Supreme Court related to me that Gene was the driving force behind the *Delgado* decision. Gene came up with the idea that the actual intent standard was inconsistent with the WCA's requirement that it be construed even-handedly. Remarkably, he wrote an opinion that broke new ground in a settled area of law, and he convinced his colleagues to join him without drawing a dissent—an accomplishment that I can attest is no easy feat.

78. *Id.* ¶ 8, 34 P.3d at 1151–52 (citing 6 ARTHUR LARSON & LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.03 (2000) (allowing a common law suit only in the rare circumstance where the employer actually intends to injure the employee)).

79. *Id.* ¶18, 34 P.3d at 1153.

80. *See id.* ¶ 1, 34 P.3d at 1150.

81. *Id.* ¶ 17, 34 P.3d at 1154.

82. *See id.* ¶ 14, 34 P.3d at 1153 (citing NMSA 1978, § 52-1-11 (1989)).

83. *Id.* ¶ 16, 34 P.3d at 1153.

84. *Id.* ¶¶ 20–23, 34 P.3d at 1154–55.

85. *Id.*, ¶ 23, 34 P.3d at 1155.

86. *Id.* ¶ 31, 34 P.3d at 1156–57.

87. *Id.*

### B. *Reed v. State ex rel. Ortiz*

Gene's most notable stand against injustice as a jurist came in *Reed v. State ex rel. Ortiz*.<sup>88</sup> Timothy "Little Rock" Reed, an Ohio convict who fled to New Mexico while on probation, petitioned for a writ of habeas corpus after he was arrested in Taos and faced with extradition.<sup>89</sup> At the habeas hearing, Reed testified that before being released on probation, he was an outspoken critic of the Ohio Corrections Department, having published several articles from his prison cell and written numerous letters related to the religious rights of Native American inmates.<sup>90</sup> He continued his advocacy while on probation, drawing the ire of prison officials and threats from guards who claimed that they would hurt or kill him if he ever returned to prison.<sup>91</sup> Shortly before Reed's probation was up, his probation officer informed him that he would be sent back to prison because of a new criminal charge—a charge that Reed could prove was fabricated if given the chance to do so, as required by due process.<sup>92</sup> His probation officer insisted that Reed first surrender himself to the Ohio authorities. Rather than comply, Reed fled.<sup>93</sup> After a three-day hearing, the New Mexico District Court granted the writ, holding that "Reed was not a fugitive from justice because the uncontroverted evidence show[ed] that he left Ohio 'under duress and under a reasonable fear for his safety and his life.'"<sup>94</sup>

On appeal, the New Mexico Supreme Court was confronted with a body of law that is well-established and straightforward. The U.S. Supreme Court's decision in *Michigan v. Doran* severely limits the discretion of a court in the asylum state by establishing a strong presumption in favor of extradition.<sup>95</sup> However, writing for the majority, Gene reasoned that because *Doran* held that the presumption can be overcome, "[s]ome cases may present circumstances so unusual and egregious that the asylum state has no choice but to deny the extradition warrant and grant habeas corpus to the defendant."<sup>96</sup> As a result, the judge in the asylum state must have some discretion to determine whether the facts of a particular case can demonstrate that the petitioner is not a fugitive from justice.<sup>97</sup>

After making this small chink in *Doran*'s armor, Gene framed the issue in a way that allowed him to rule in Reed's favor.

The focus of our analysis is whether Reed is a "fugitive from justice"; in other words, whether he seeks to avoid the maintenance and administration of what is just. The facts demonstrate conclusively that Ohio's conduct toward Reed was not just. Reed is thus not a fugitive from justice. Rather, he is a refugee from injustice.<sup>98</sup>

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88. 1997-NMSC-055, 947 P.2d 86, *rev'd*, 524 U.S. 151 (1998).

89. *See id.* ¶¶ 1, 34–35, 947 P.2d at 88, 93–94.

90. *See id.* ¶¶ 3–4, 947 P.2d at 89.

91. *See id.* ¶¶ 10–12, 16, 947 P.2d at 89–90.

92. *See id.* ¶ 22, 947 P.2d at 91.

93. *See id.* ¶ 23, 947 P.2d at 92.

94. *Id.* ¶ 42, 947 P.2d at 95.

95. *See id.* ¶ 48, 947 P.2d at 96 (citing *Michigan v. Doran*, 439 U.S. 282, 289 (1978)).

96. *Id.* ¶ 71, 947 P.2d at 100.

97. *Id.* ¶ 69, 947 P.2d at 100.

98. *Id.* ¶ 86, 947 P.2d at 103.

The opinion goes on to explain that the Ohio Parole Authority's decision to deny Reed due process placed him in the untenable position of either violating his parole, or facing death or great bodily harm when he returned to Lucasville.<sup>99</sup> Refusing to allow Ohio to extradite Reed, Gene concluded,

Extradition laws are intended to bring offenders to justice. They are not intended to be—and we cannot suffer them to be—a vehicle for the suppression of constitutional rights. Courts in this nation have always been empowered to prevent injustice. See [*In re*] *Hampton*, 2 Ohio Dec. [579, 579 (Hamilton County C.P. 1895)] (refusing to extradite defendant who was in proven danger of being lynched). Habeas extradition proceedings are not exempted from the exercise of this power.<sup>100</sup>

After losing at the New Mexico Supreme Court, the State appealed to the U.S. Supreme Court, and in Gene's words, "[i]t didn't take long for them to nail us on that one."<sup>101</sup> In a per curiam opinion reversing the New Mexico Supreme Court and remanding the case, the Supreme Court held that our state supreme court went beyond the bounds of the permissible inquiry in an extradition proceeding.

We accept, of course, the determination of the Supreme Court of New Mexico that respondent's testimony was credible, but this is simply not the kind of issue that may be tried in the asylum State. *In case after case* we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State.<sup>102</sup>

Gene's opinion in *Reed* is—to say the least—controversial. It drew both a dissent and a special concurrence from two of his colleagues that correctly identified where the opinion stretched the limit of existing precedent.<sup>103</sup> Additionally, the U.S. Supreme Court's language that "*in case after case*" it had clearly defined the limits to which an asylum state could go in reviewing a warrant of extradition, reveals the unorthodoxy of Gene's approach.

Gene's sense of right and wrong, however, compelled him to bend over backwards to find a way to protect Reed from what he saw as oppressive governmental action. Because of the combined efforts of the New Mexico courts, Reed was able to avoid extradition for almost four years. A good case can be made that the national press Gene's opinion drew may have led the Ohio Parole Authority to re-

99. *Id.* ¶ 87, 947 P.2d at 103.

100. *Id.* ¶ 126, 947 P.2d at 112.

101. Plevin, *supra* note 38, at F3.

102. *State ex rel. Ortiz v. Reed*, 524 U.S. 151, 153 (1998) (emphasis added). After the U.S. Supreme Court's reversal, Reed went into hiding for several months until he was arrested in Albuquerque and sent back to Ohio. See Rodd Aubrey, *Indian-Prison Activist Released from Prison*, ASSOCIATED PRESS, Dec. 17, 1998. Then, just two weeks later, the Ohio Parole Authority released Reed to serve out the remaining six weeks of his parole. See *id.* After completing his sentence, Reed returned to New Mexico, this time settling in the Jemez Pueblo, and resumed his career as a paralegal. See Letter from Deborah Hare, available at <http://www.tahtonka.com/news.html>. Tragically, just a year later, Reed died in a car accident near Cuba, New Mexico, at the age of thirty-nine. See *id.*

103. See *Reed*, 1997-NMSC-055, ¶¶ 128–50, 947 P.2d at 112–20 (Minzner, J., specially concurring); *id.* ¶¶ 151–59, 947 P.2d at 120–21 (Baca, J., dissenting).

lease Reed on parole rather than send him back to prison after his extradition.<sup>104</sup> At the risk of hyperbole, Gene likely played a role in saving Reed's life.<sup>105</sup>

Gene explained his reasons for the *Reed* decision in an interview. "The extradition clause and the way it's been interpreted by the U.S. Supreme Court is so austere. They sent people back to the South knowing they were going to be lynched—and they sent them back anyway."<sup>106</sup> This comment reveals the magnitude of what Gene believed was at stake. This was his *Dred Scott*<sup>107</sup> or *Plessy v. Ferguson*,<sup>108</sup> and like the dissenters in those cases, he was not going to sit by and watch as others took what he saw as a near-sighted, though seemingly inevitable, view of the law. That the U.S. Supreme Court later reversed him misses the point.<sup>109</sup> Gene's opinion was more concerned with what he viewed as the fundamental goal of the legal system—justice for all. Remarkably, as in *Delgado*, he was able to persuade a majority of his colleagues to accept this viewpoint and interpretation of the law.<sup>110</sup>

This last point perhaps best sums up Gene's efficacy as a judge. He was unquestionably bright, but by his own admission, he may not have been the smartest or the most articulate guy on the bench. He was creative and persuasive, and most importantly, he knew what was right. And you could always count on him to *do* what he believed was right. That is what made him eminently qualified to sit in judgment of others. Few people ever develop such a clear sense of themselves *and* have the integrity to follow it.

#### AFTERWORD

In the Academy Award-winning movie, *Judgment at Nuremberg*, American Judge Dan Haywood, a humble, somewhat ruffled, small-town trial judge played by Spencer Tracey, presides over the trial of accused Nazi war criminals.<sup>111</sup> Among those before Judge Haywood is Herr Ernst Janning, a brilliant and distinguished

104. See Aubrey, *supra* note 102.

105. As an aside, this was not the first time that Gene defied extradition law to protect a fugitive from an oppressive situation waiting for him back in his home state. As a trial judge, Gene dismissed a writ of extradition of a Mexican National who had agreed to pay a Mexican mafia boss sixty-five percent of his salary in return for a U.S. green card. See Plevin, *supra* note 38, at F3. After realizing that he couldn't survive on so little income, the man fled to Albuquerque, where he was arrested and served with extradition papers. See *id.* According to Gene, the mafia boss had the San Antonio District Attorney "in his hip pocket" and convinced him to charge the man with larceny for refusing to pay the boss his cut of the man's wages. See *id.* After Gene dismissed the writ, he contacted the man and told him, "You better get your ass out of here cause this thing isn't going to hold up." *Id.* The State appealed to the New Mexico Supreme Court, and again, in Gene's words, "they reversed me *como pronto*." *Id.*

106. *Id.*

107. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that slaves are property that must be returned to their owners when they so demand), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

108. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a Louisiana law that segregated train passengers by race did not violate the Thirteenth Amendment or Fourteenth Amendment), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

109. Gene probably knew he would be reversed, but he was not intimidated by the U.S. Supreme Court or the federal government. He wrote the *State v. Cardenas-Alvarez* opinion, in which the court held that evidence obtained by federal border patrol agents in accordance with the Federal Constitution is nonetheless inadmissible in New Mexico's state courts if it was obtained in violation of New Mexico's more protective state constitutional requirements. See 2001-NMSC-017, 25 P.3d 225.

110. Justice Serna and Justice McKinnon joined Justice Franchini in the majority opinion. See *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 127, 947 P.2d 86, 112, *rev'd*, 524 U.S. 151 (1998).

111. See *JUDGMENT AT NUREMBERG* (United Artists 1961).



German jurist, played by Bert Lancaster, who admits to having sentenced innocent parties to death under pressure from the German government. Judge Haywood himself is under intense pressure to go lightly on Herr Janning and the others for all the usual reasons of convenience: no one could have known of the horrors of Nazism; people were following orders and just doing their duty; there are even questions of *realpolitik* urging leniency so as not to inflame the post-war German public in the imminent Cold War between East and West. The judge agonizes over the age-old conflict between the strict letter of the law and overarching principles of justice.

Acknowledging the logic of such arguments for leniency, Judge Haywood reaches deep into his sense of conviction: "It is logical in view of the times in which we live. But to be logical, is not to be right. And nothing on God's earth could ever make it right."<sup>112</sup> The defendants are found guilty; Herr Janning faces life in prison.

As the judge is about to return home to America, he is asked to visit Herr Janning in prison and does so. Herr Janning again acknowledges his crime and the courage it took for Judge Haywood to find him guilty:

I know the pressures that have been brought upon you. You will be criticized greatly. Your decision will not be a popular one. But if it means anything to you, you have the respect of at least one of the men you convicted. By all that is right in this world, your verdict was a just one.<sup>113</sup>

And then in perhaps the most gripping moment in the film, Herr Janning turns to the judge, almost pleading for understanding on Judge Haywood's part: "Those people—those millions of people—I never knew it would come to that. You must believe it."<sup>114</sup> Judge Haywood's response, simple and direct, says it all: "Herr Janning—it came to that the first time you sentenced a man to death you knew to be innocent."<sup>115</sup>

Try as I might, I cannot get that image out of my mind. Gene Franchini had what it takes, as few of us do, to be a Judge Haywood when we needed one.

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*