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Hon. Gerald W. Heaney

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JACOB TRIEBER: LAWYER, POLITICIAN, JUDGE

*Hon. Gerald W. Heaney**

PROLOGUE

On July 26, 1900, President William McKinley appointed Jacob Trieber of Helena, Arkansas, to be the United States District Judge for the Eastern District of Arkansas. That he deserved the appointment was conceded by Republicans and Democrats alike. He was a man of intelligence, compassion, and integrity, a brilliant lawyer with a reputation for hard work, an active, committed Republican with an unequalled record of service to the party and, most of all, an Arkansan who worked on every worthwhile civic project at the state and local level. The appointment was, however, a miracle of no small proportions: he was a Prussian immigrant of modest means, with no college or law school training, a member of a two-man law firm in a small Arkansas town, and a Jew aspiring to a position that no Jew in the history of the United States had held and in a state where the Jewish voting population was minuscule. But appointed he was, and the appointment

* Judge, United States Court of Appeals for the Eighth Circuit. The author gratefully acknowledges the Adler-Rosecan Foundation which made possible the research efforts of Melanie R. Carlson and Henry G. Watkins III, students at the University of Arkansas at Little Rock School of Law. He also acknowledges J. Marshall Trieber, Carolyn LeMaster, and the Arkansas Historical Commission for the valuable information they provided; his secretaries, Elda E. Ignatius and Mary L. Bibbey; and his law clerks Gary R. Ostos-Irwin, Colleen V. Short, Ann L. Iijima, and Dean A. Rindy, for their assistance in research and writing.

brought credit to President McKinley and to the political and bar leaders who supported him. The appointment was particularly well received by the general populace, who were pleased that for the first time since the Civil War, one of their own, rather than a northerner, had been named to this important position.

Jacob Trieber served as judge for twenty-seven years and became one of the nation's most distinguished jurists and renowned constitutional scholars. Perhaps his most significant opinion came in 1903 in the infamous *Whitecapping* (Ku Klux Klan) case in which he became the first judge to squarely hold that federal law protects blacks from racial discrimination in employment. The Supreme Court reversed him, paving the way for decades of discrimination by holding that federal law provides blacks with no such protection. Judge Trieber's view was vindicated sixty-five years later, in 1968, when the Supreme Court overruled its *Whitecapping* opinion. The article that follows highlights Jacob Trieber's career as a lawyer, a politician, and a judge, and examines some of his more important opinions.

RASCHKOW TO HELENA (1853-1876)

Morris and Blume Trieber found conditions improving in the tiny village of Raschkow, Prussia (now Germany), by 1868. Nevertheless, it was in that year that they decided to leave. Immigration to America would not be easy, but after months of talking, praying, and worrying, they were firm in their resolve: their youngest son Jacob would grow up as an American.

The decision was a difficult one. Morris and Blume had strong and long-standing ties to their community and country. They had a good home in the village of Raschkow. Blume's father, David Brodeck, and his father before him had been respected rabbis and community leaders. The Trieber family's religious roots and exemplary living brought them the friendship and respect of their neighbors. Their wholesale linen business in nearby Breslau provided a modest living. More importantly, the two middle children, Conrad and Johanna, were unwilling to leave Prussia.¹

Powerful forces, however, drew Morris and Blume to America. They longed to be with their eldest son, David, who had immigrated a few years earlier and settled in St. Louis, Missouri, where he operated

1. Conrad, a student at the University of Frankfurt, remained as a professor of Latin dialects at that institution until his death. Johanna subsequently immigrated to St. Louis, Missouri, and married Charles Punch. She resided there until her death.

a retail business. Their principal concern, however, was their thirteen-year-old son Jacob. He was an exceptional child. Born on October 6, 1853, he was an intelligent and conscientious student who had done better in the gymnasium (high school) than any of their other children. Although in good health, he was small of stature. Morris and Blume dreaded the day that he would be drafted into the Prussian Army and assigned to an infantry company, the fate of most Jewish conscripts.

Further, even though life for Prussian Jews had improved considerably since the liberalizing revolutions that took place in Western Europe beginning in 1848, employment opportunities for Jewish youths from middle-class families were still very limited.² In all probability, Jacob would be restricted to his family's mercantile business or to teaching. Moreover, Jews were excluded from judicial, administrative, and other offices which were connected with the Christian character of the state.

Conrad and Johanna argued that conditions would continue to improve for Prussian Jews, but Morris and Blume would not be convinced. Prussia was in a constant state of political flux. The Chancellor, Otto von Bismarck, governed Prussia with little regard for its constitution. A militaristic Germany did not offer the future that the Triebers hoped for.³ On the other hand, America was the land of opportunity. Lincoln had freed the slaves and proclaimed the principle of equal opportunity for all. Certainly, Jacob would be able to develop his talents to the fullest in the United States. With these thoughts in mind, the Triebers sold their business, gathered their belongings, and immigrated to America. They were reunited with their son, David, in St. Louis on June 1, 1866. Eleven years later, on March 15, 1887, Jacob Trieber became a United States citizen.

The Triebers stayed in St. Louis for two years and worked with David in his retail business.⁴ Jacob enrolled in high school. He quickly realized that he was ahead of his schoolmates in all subjects except English. He struck a bargain with one of his teachers: German lessons in exchange for English lessons. To help support his family, he worked evenings and weekends as a newsboy and a theater usher.

2. See I. ELBOGEN, *A CENTURY OF JEWISH LIFE* 3-17 (1944); H. SACHAR, *THE COURSE OF MODERN JEWISH HISTORY* 107-16 (1958).

3. The realm of Prussia was greatly increased by the war of 1866 which extended the Prussian constitution over the regions of Schleswig-Holstein, Hanover, and Hesse-Kassel. ELBOGEN, *supra* note 2, at 16. By 1870, Bismarck had created the German Empire "out of the blood and iron of the Franco-Prussian War" by uniting Germany's principalities against "the bogey of a common French enemy." SACHAR, *supra* note 2, at 221.

4. David Trieber died in 1886, Blume in 1895, and Morris in 1898.

In 1868, the Trieber family moved to Helena, Arkansas. Helena promised more opportunities for immigrants than St. Louis. It was a growing Mississippi rivertown, and many believed that it would soon rival Memphis as a center for trade. Moreover, there was a small but growing Jewish population in that community, and it was important to the Triebers that they continue to participate in the religious life of their people.⁵

In Helena, Morris and David Trieber opened a dry goods store. Jacob helped support himself by keeping the store's books. He wanted to be a lawyer, however, and eventually a judge. The opportunity came in 1873 when, at the age of twenty, he made an arrangement to "read the law" with Marshall L. Stephenson of Helena, a former justice of the Arkansas Supreme Court. He worked in Stephenson's office during the day and during nights as an assistant to the Clerk of the Circuit Court. Typewriters were unknown at that time so Jacob became an expert scrivener, preparing copies of legal papers. Eventually, he mastered the English language and the law. In 1876, he was admitted to the Arkansas Bar and soon thereafter formed a partnership with L.C. Stephenson, Marshall's brother. In 1878, L.C. Stephenson moved to Colorado, and Marshall returned to Helena and resumed the practice of law with Jacob Trieber. It was from this platform that Jacob Trieber launched his career as lawyer, banker, businessman, politician, and judge.

THE HELENA YEARS (1876-1897)

The law firm of Stephenson & Trieber was successful from the start. The firm not only had a good commercial practice, but the partners were kindred souls—both loved the law, business, and politics.⁶

Involving himself in business ventures, Jacob bought and sold real estate, lent small sums of money, and undertook, with his friend Harry Tappan, the construction of the Tappan Building on the main street of Helena. His most important venture came in 1885 when he and several friends organized the First National Bank of Helena. In 1893, he be-

5. The Beth El Congregation of Helena was founded in 1870. By 1900, it had twelve pew owners and fourteen contributing members. *AMERICAN JEWISH YEARBOOK*, 5660, at 108 (C. Adler ed. 1899). Jacob and Ida Trieber were members of this congregation until they moved to Little Rock in 1897, at which time they joined the B'nai Israel Congregation. This latter congregation was founded in 1867, and in 1900 had a membership of 170. *Id.* at 109.

6. Jacob Trieber married Ida Schradski on January 10, 1882, in Peoria, Illinois. They had two children, Harry and Bess. Harry became a lawyer and practiced in Little Rock, and Bess married Charles H. Newton and resided in Scarsdale, New York.

came its first president.

From the beginning, Jacob Trieber's ambition was to be a federal judge. He recognized that he could only realize that goal if he established himself as a good lawyer, an active participant in community and fraternal affairs, and a committed Republican. His partner supported him in that ambition by sponsoring him for the Masons, encouraging him to participate in civic activities, and supporting his extensive political activities.

Jacob Trieber joined the Masons in 1874, and participated actively in the affairs of that organization until his death. In 1906, he was elected Grand Master and served in that position for two years. He was involved in most community projects undertaken in the City of Helena and in civic projects on a state-wide level. Indeed, between his busy law practice, his Masonic responsibilities, and his civic activities, it is a wonder that he had any time for Republican politics. However, convinced it was his only route to fulfill his ambitions, he gave the party his greatest effort and energy.

He joined the Republican Party in 1874. A Republican by choice rather than by inheritance or environment, he admired Abraham Lincoln and Ulysses S. Grant, and revered Theodore Roosevelt to the point of fashioning his appearance after him. He believed in the policies of the Republican Party of his day: a strong union, the primacy of the United States Constitution, a high protective tariff, and greater opportunities for blacks. He was also at home with the Republican Party's pro-business policies.

Referred to by newspapers as "the perpetual candidate,"⁷ Jacob Trieber was a hard-working, plainspoken, highly partisan grass-roots Republican, who was willing to serve in any party position, to campaign for any Republican candidate, and to run for any elective office. In 1882, he was elected to the Helena City Council and quickly gained a reputation as "alert and careful, and always on the side of economy in public expenditures."⁸ Ten years later, he was elected Treasurer of Phillips County. He served in both offices until 1897 when he became the United States District Attorney for the Eastern District of Arkansas.

His first venture into national politics came in 1880, when his party efforts earned him a seat as a delegate to the Republican Na-

7. Helena World, July 8, 1896. (The newspaper clippings furnished to the author did not always reveal the information necessary for a full citation. All clippings, however, are on file with the Arkansas Historical Commission as part of its "Trieber Collection.")

8. Helena World. (Full citation unavailable. See parenthetical, *supra* note 7.)

tional Convention in Chicago, Illinois. His political mentor and the leader of the Republican Party in the state, General Powell Clayton,⁹ supported him for the position. He went to Chicago hoping that Ulysses S. Grant, who had already served two terms as President of the United States, would be re-nominated.

There was little or no debate on the three and one-half page platform which extolled the Republican Party for having ended slavery, built railroads, and increased foreign trade. There was even less debate over the sections of the platform which declared that constitutional questions were to be decided by federal rather than state courts, which carved out a role for the federal government in public education, and which called for a constitutional amendment to prohibit state aid to sectarian schools.¹⁰ The closing paragraph of the platform mirrored Jacob Trieber's political beliefs:

The equal, steady and complete enforcement of laws, and the protection of all our citizens in the enjoyment of all privileges and immunities guaranteed by the Constitution, are the first duties of the Nation. The dangers of a solid South can only be averted by a faithful performance of every promise which the Nation had made to the citizen. The execution of the laws, and the punishment of all those who violate them, are the only safe methods by which an enduring peace can be secured and genuine prosperity established throughout the South. Whatever promises the Nation makes the Nation must perform. A Nation cannot safely relegate this duty to the States. The solid South must be divided by the peaceful agencies of the ballot, and all honest opinions must there find free expression. To this end the honest voter must be protected against terrorism, violence or fraud.¹¹

At the convention, Jacob Trieber and the Arkansas delegation cast their twelve votes on every ballot for Grant. After thirty-six ballots, however, the convention nominated James A. Garfield and Chester A.

9. Powell Clayton (1833-1914) was born in Pennsylvania. He moved to Kansas in 1855, volunteered for the Union Army in 1861, and eventually achieved the rank of General. He served in Missouri and Arkansas and was assigned the command of Pine Bluff after the capture of Little Rock in 1863. Remaining in Arkansas after the war, he became active in Republican Reconstruction politics. When the new Arkansas Constitution was drawn up under the Congressional Plan of Reconstruction (1868), he campaigned for its adoption and was elected Governor of Arkansas. He subsequently became Republican boss of Arkansas, a position he held for the remainder of his active life. He was a member of the Republican National Committee nearly every year from 1872 until his death. In 1871, he was elected U.S. Senator. He was appointed Ambassador to Mexico in 1897, and served in that position until 1905. II A. JOHNSON & P. MALONE, *DICTIONARY OF AMERICAN BIOGRAPHY* (pt. 2) 187 (1958).

10. *Official Proceedings of the Republican National Convention*, 161-62 (1880).

11. *Id.* at 162-63.

Arthur for President and Vice-President. By voting for Grant on every ballot, Jacob Trieber, at age twenty-seven, the youngest delegate at the convention, became identified as one of the "Old Guard."¹²

Jacob Trieber was again elected as a delegate to the Republican National Convention in 1884, where James G. Blaine was nominated for President. Blaine was narrowly defeated, however, by Democrat Grover Cleveland in the November election. In that same election year, Trieber ran for Attorney General of Arkansas and was badly defeated. He was not a delegate to the Republican National Convention in 1888, but he campaigned in Arkansas for Benjamin Harrison, who was subsequently elected President. He was rewarded in 1890 by being named Supervisor of the Census for the First Congressional District. In 1891, he was the unsuccessful Republican caucus nominee for the United States Senate.

In the fall of 1892, Jacob Trieber ran for Congress against P.D. McCulloch. The two candidates debated in every county and major city in the district. The major issues were the use of federal troops to supervise elections in the state (the "Force Bill"), the treatment of blacks, the tariff, and "free silver".¹³ On November 6th, the *Forrest City Times*, a Democratic newspaper, reported one of the debates:

Although the weather was very inclement, rain pouring and mud slushing, there came together a large number of citizens of all shades of political opinions, yesterday afternoon at the court house to hear the great McCulloch, and Hon. Jacob Trieber . . . Mr. Trieber . . . made a very excellent speech the striking feature of which was that he admitted that he was not in sympathy with his

12. On December 28, 1926, the *Arkansas Gazette* reported an interview with then Judge Trieber, noting that the only two pictures in his chambers were those of Grant and Theodore Roosevelt. It quoted an earlier story about Grant and his supporters:

Meanwhile, sat the grim old soldier in his home about whose head the political storm raged—stern, unperturbed, the man who had molded Lincoln's broken armies into a thunderbolt to launch against the South and with whose flags the eagles finally rode to victory. His Old Guard at Chicago like the Old Guard at Waterloo, was prepared to die, but not to surrender.

(Full citation unavailable. See parenthetical, *supra* note 7.)

13. Congress ended the coinage of silver and put the country on the gold standard in 1872. This demonetization of silver became known as the "Crime of 1873." Liberal inflationists, those who wanted the value of money to decrease, took up the cry to restore free coinage of silver at the ratio of sixteen to one (sixteen times as much silver in a silver dollar as gold in a gold dollar). They saw the coinage of silver as a means of getting cheaper money, raising crop prices, and securing debtor relief. Those of the conservative, gold standard persuasion, wanted to preserve the gold standard in the hopes of maintaining the value of the dollar. J. BLUM, E. MORGAN, W. ROSE, A. SCHLESINGER, JR., K. STAMPP, C. VANN WOODWARD, *THE NATIONAL EXPERIENCE. A HISTORY OF THE UNITED STATES 468-70* (3rd ed. 1973).

party on the National bank and Force bill issues, and appealed to the people to lay aside prejudices and vote as patriots. . . . Mr. Trieber stole much of the usual democratic thunder. He paid the people of Arkansas many nice compliments, and in a large measure surprised the writer by the absence of the usual republican outcropping of venom. It is true he accused the Democratic party of a good many ugly things, but he seemed to do so simply for the reason that it was usual and expected of him and not that there was "anything in it" or that he had any interest in his thrusts. When his time expired Hon. G. P. Taylor introduced "Hon. P. D. McCulloch our next congressman." Little Mac's first words stirred the hearts of every white man present and reawakened the old love which the people have for him. He spoke of the grand old Democratic party's age and of the adversities which it had conquered, and made plain the fact that it is the greatest of all parties and one that can never die. . . . [T]he little giant in a thirty minutes talk uttered the most beautiful and at the same time the most scathing denunciation of the infamous Force bill¹⁴ and its authors and advocates to which it has ever been our pleasure to listen. . . . The fact is that Trieber is no match for McCulloch in debate, and the latter's flow of beautiful language comes as natural as the bubbling water from the woodland spring; such words could only emanate from the pure in heart.¹⁵

Trieber predictably lost the election, 16,679 to 9,541, but carried Helena and Phillips, his home county, by virtue of a large black vote.

In 1896, the Republican State Convention was held in Little Rock, Arkansas, and Jacob Trieber played a dominant role. He was a member of the committee on resolutions and the State Central Committee. The resolutions were moderate in tone for Arkansas Republicans: "No mention of ballot-box stuffing, free bills or bloody shirts. . . . Powell Clayton had the entire aggregation in the hollow of his hand and directed its every movement."¹⁶ Trieber was elected as a McKinley dele-

14. The Force Bill, sponsored by Senator Lodge of Massachusetts, would have kept federal troops in the southern states to insure the fairness of the ballot and to make sure that blacks were permitted to vote. The Osceola paper of October 27, 1892, in discussing the debate in that city, reported that McCulloch:

With gifted eloquence . . . showed up the iniquity of the tariff, and with sledge hammer blows . . . struck the force bill. His tribute to the soldiers who wore the blue and the gray brought a ringing response from the audience, and many an old soldier's eye was dimmed with tears over the picture presented.

(Full citation unavailable. See parenthetical, *supra* note 7.)

15. Forrest City Times, November 6, 1892 (Full citation unavailable. See parenthetical, *supra* note 7.)

16. Helena World, March 11, 1896. (Full citation unavailable. See parenthetical, *supra* note 7).

gate to the national convention at St. Louis. Additionally, for the second time, he was rumored to be the congressional candidate for the First District:

With his "well-known weakness for politics, his popularity with his Democratic friends, his absolute control of the colored contingent and his recently developed weakness for the downtrodden white metal, Mr. Trieber is the only Republican in the district who could make the slightest showing against the candidate of the Democratic party."¹⁷

The unexpected happened when Mr. T.O. Tucker of Clover Bend, Lawrence County, was nominated instead of Trieber.

The big issue at the national convention in St. Louis was free silver. Although Jacob Trieber was a free silverite, he voted for the gold platform after he saw there was no hope for the silver platform. In the 1896 elections, Trieber ran for Chief Justice of the Arkansas Supreme Court but used that forum primarily to campaign for William McKinley. Both Trieber and McKinley lost the state, but McKinley won the presidency, and Trieber's hard work put him in line for a position in the McKinley administration.

TRIEBER AS UNITED STATES DISTRICT ATTORNEY

Jacob Trieber's reward was not long in coming. On April 6, 1897, he was named United States Attorney for the Eastern District of Arkansas. Republicans agreed that Jacob Trieber was the best man for the job. The Democrats, for the most part, also gave him their endorsement. In newspaper accounts he was praised as "one of the very ablest and most conservative Republicans of the state and has at all times labored for the true principles of Republicanism,"¹⁸ and as "an astute and successful Republican politician, and socially one of the most urbane gentlemen in the world. . . . A better selection could not have been made. Mr. Trieber is a lawyer of ability, a financier of recognized prominence and a clever gentlemen socially and otherwise. *The World* rejoices in his good luck and hopes he will make his way to the front as rapidly as his merits justify."¹⁹

As United States Attorney, Jacob Trieber was responsible for the enforcement of federal law and was obligated to represent the govern-

17. Helena World, June 12, 1895. (Full citation unavailable. See parenthetical, *supra* note 7.)

18. Unidentified newspaper article. (Full citation unavailable. See parenthetical, *supra* note 7.)

19. Helena World, April 17, 1897, at 1, col. 1.

ment in civil cases. The civil calendar was light, being limited, for the most part, to Indian land disputes, railroad matters, and land condemnation cases. But the criminal calendar was an active one. The "moonshining" district lay in the Eastern District of Arkansas, and Jacob Trieber was responsible for controlling the illicit distilling of "mountain dew." Indeed, he spent much more of his time in this endeavor than he would have liked.

Unlike some Arkansans who considered moonshiners to be as foul a breed as murderers, Jacob Trieber felt compassion for them: "The moonshiners as a rule are good citizens in every way except that they will break the law in making whiskey. In this they do not believe that they are committing any wrong and they are otherwise honest."²⁰ His attitude prompted some moonshiners to voluntarily comply with the law. One day, twenty-six moonshiners from Cleburne County and forty from Pope County simply walked into his office at Little Rock, and surrendered. The *Helena World* praised Trieber: "Our Jake must be as persuasive with the mountain-dew folks as he was wont to be with all manner of people before he went away from us. This district has never had a more efficient, industrious and painstaking official."²¹

During the years that Jacob Trieber served as United States Attorney, he also held the office of Vice-Chairman of the Republican State Committee. In that position, he became the principal spokesman for the party,²² and the eyes and ears of General Clayton who, although he was serving as Ambassador to Mexico, remained the behind-the-scenes leader of Arkansas' Republican Party.²³

Jacob Trieber played a key role in the 1898 campaign. He was a

20. Unidentified newspaper article. (Full citation unavailable. See parenthetical, *supra* note 7.)

21. *Helena World*, March 23, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

22. It was not uncommon, at that time, for United States District Attorneys to take an active role in party affairs.

23. Jacob Trieber wrote to Clayton on a regular basis. On November 1, 1899, he wrote:

Now as to the state of affairs here, I shall write more fully, than I did before, so that you may understand the situation fully. Ever since you went to Mexico, I have considered it the solemn duty of every man, who claims to be a friend of yours, to see to it, that your interests are as fully protected, as if you were here in person, and that you had a right to expect from your friends, that the harmony which prevailed when you left, should be fully maintained.

Letter from Jacob Trieber to Powell Clayton (November 1, 1899).

In another letter, he wrote that "[Republicans] must pursue a more aggressive policy in state politics. This policy of apology for [the Democrats'] charges of abuse keeps us on the defensive continually and that is not good politics." Letter from Jacob Trieber to Powell Clayton (October 7, 1898). (Copies of all letters are on file with the Arkansas Historical Commission.)

speaker of marked ability, with a charming, engaging style. Because of his command of facts, he was described as "that walking encyclopedia of Republicanism from Helena."²⁴ He was a Republican of enormous popularity. Wherever he went, Republicans gathered, interrupting his speeches with applause. In fact, when mentioned as a potential candidate for governor of Arkansas in 1898, one newspaper account acclaimed: "Should the republican party see fit to name him as the standard-bearer, he would poll a vote which would be so great as to be a matter of astonishment. He is the ablest Republican in Arkansas."²⁵ Every day for two months, he met a Democrat in debate on the political issues. Such able Democrats as ex-Governor James P. Clarke and Joseph T. Robinson (later to become United States Senator and candidate for Vice-President on the Alfred E. Smith ticket in 1928) were, according to some, outdone by the grand oratorical skills of Jacob Trieber.

In the campaign of 1898, Jacob Trieber spoke of the Democratic Party as a party of the past with a dismal record. He stated that there had been eighteen months of prosperity under the McKinley regime, but declared that "Arkansas has not been able to participate in this prosperity, . . . simply because the democratic party is in control."²⁶ He questioned: "[W]hat in its twenty-four years of power has the democratic party done to justify its continuance?"²⁷ The state had not been developed as it should have been—"the curse of the democratic legislation was responsible for keeping Arkansas back."²⁸ He was charismatic, possessed by the idea that Republicanism was the answer to Arkansas' ailments.

He attacked the state election laws because he believed they disenfranchised black voters. This, he argued, was disastrous for Republican candidates because many Republican voters in Arkansas at that time were black. He complained that "[t]oo many [white voters] are prone to vote the Democratic ticket regardless of who were its nominees because of that party's anti-black policies."²⁹ He questioned: "Are you free men under this election law? Can you expect good government

24. Arkansas Gazette, August 24, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

25. Unidentified newspaper article. (Full citation unavailable. See parenthetical, *supra* note 7.)

26. Arkansas Gazette, August 29, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

27. *Id.*

28. *Id.*

29. *Id.*

unless the sanctity of the ballot is maintained?"³⁰

Trieber's opponents spent much of their time defending themselves against his attacks. In one debate, Democratic ex-Governor J.P. Clarke supported the state election laws:

[T]hey were intended, among other things, to break up the practice in eastern Arkansas and elsewhere of political tycoons and negro preachers standing around the polls and handing blue and red tickets to voters. . . . It puts every voter on his own responsibility and puts a stop to one man controlling 500 votes.³¹

Clarke also attacked Trieber, stating that he did not "think it surprising to hear Trieber boast of [national] prosperity since he is enjoying a nice cozy \$4,000 job. A few are doing well, but they are not down here raising cotton."³²

Jacob Trieber had a sharp tongue and pen when it came to the Democratic Party. He wrote that the Democratic Party could be subdivided into four groups, some being more palatable than others:

[T]here are so many different branches of "Democracy" that a fellow, if he is a democrat, must be careful and not be taken for some other kind of a democrat.

Now there are the "Randall Democrats," quite respectable and sound on the tariff issue, but rotten to the core on every other issue.

Then there are the "Sound Money Democrats," patriotic on the subject of finance and bitterly opposed to any repudiation or depreciation of the money, yet on other subjects all wrong. Then we have among us the "Yellow dog Democrat" who votes anything labeled democratic regardless of men or principles. As you are not one of those . . . I feel safe that you'll not attempt to convert me into that kind of a thing. And last is the swamp Democrat, whose sole platform is "D- - the Nigger." I am sorry we have so much of the latter in Arkansas, but I honestly believe, it is the most popular platform for a Democrat, and carries more of them into office, than any other, silver not excepted.³³

As sharp as his attacks on the Democratic Party were, he did not attack his Democratic opponents personally. As a result, he was respected by the Democrats, and when the time came, many of them supported him for the judicial appointment.

30. *Id.*

31. *Id.*

32. *Id.*

33. Letter from Jacob Trieber to Major Charles Gordon Newman, Pine Bluff, Arkansas (November 2, 1898).

Trieber was often asked to give speeches outside the political arena. One memorable oration was delivered on Memorial Day, May 30, 1898, in Little Rock. In that address, Trieber gave his view as to the meaning of the Civil War, views that paralleled those of the admired Teddy Roosevelt:

It was a war of necessity. It might have been postponed, but it could not have been averted. The antagonisms existing could never be finally settled short of an arbitrament of blood. Political compromises could delay, but compromises stand no longer than the interests of those making them dictate.

The seeds for that late war were sown and began sprouting with the adoption of the Constitution. Are we a nation composed of sovereign states, indissoluble and indivisible, or a mere confederacy, with the right of withdrawal from the Union reserved to each state? . . . The election of Abraham Lincoln, the grandest figure of the nineteenth century as president, although in the manner prescribed by the constitution, precipitated this crisis. . . . The god of war, the tribunal from whose decision no appeal lies, has determined that this Union cannot and never will be dissolved. That this flag, emblematic of the union of states shall never cease to waive triumphantly where it was once planted; that the stars on it are as indestructible as those on the firmament of heaven itself; that as it does this day it shall forever and ever float as a beacon light, and a haven of refuge to the oppressed of the world and a protector of every nation on the Western hemisphere whose liberty or independence is threatened by foreign foe or foreign interference.

Disunion is a thing of the past; to prevent it no loss of life could be too great and no sacrifice too large.³⁴

On July 3, 1900, John A. Williams, the United States District Judge for the Eastern District of Arkansas, died. Speculation among politicians as to his successor was rife. The names being tossed around included John McClure, W.G. Whipple, and, of course, Jacob Trieber. "No formal scramble will be engaged in until after the burial of Judge Williams," reported the *Arkansas Gazette* on July 8. "No matter how much any of the prospective candidates may deprecate an unseemly struggle for such an exalted place, there will nevertheless be no little diligence exercised by their respective friends."³⁵

While saddened by Judge Williams' death, Jacob Trieber turned

34. Speech given at Memorial Day Exercises at National Cemetery, Little Rock (quoted in unidentified newspaper article). (Full citation unavailable. See parenthetical, *supra* note 7).

35. *Arkansas Gazette*, July 8, 1900. (Full citation unavailable. See parenthetical, *supra* note 7.)

all his energies toward securing this prize.³⁶ He wrote letters to everyone he thought could help him secure the appointment. Trieber was humble, yet confident, in his persistent requests for support:

My friends and the bar generally have honored me by presenting my name for appointment to this high position, and while I am not unmindful of my inability to come up to that standard, which such judges as Caldwell and Williams have established in this District, I have been persuaded, that perhaps I am the best that can be obtained from the material on hand.³⁷

Trieber received countless endorsements—some solicited, some unsolicited—some written immediately upon the news of Judge Williams' death. Five Democratic justices of the Arkansas Supreme Court wrote endorsement letters to the President. He was endorsed by the local bar association and by prominent Democrats who wanted the President to know that the appointment was satisfactory to them.³⁸ Meanwhile, at the July 8, 1900, Republican State Convention, Trieber nominated his old friend, Colonel H.L. Rimmel, to be the Republican candidate for governor.

Upon learning of Judge Williams' death, General Clayton left Mexico City for Washington to take up the question of successorship. After holding several conferences in that city, he left for Little Rock, arriving on July 14, 1900. He immediately went into conference with Republican leaders to assert his authority over the appointment. The *Arkansas Gazette* reported on the 15th that:

[I]t is understood that he favors Judge Jacob Trieber and has used his

36. On July 10, 1900, Jacob Trieber wrote to Powell Clayton stating that he would abide by Clayton's desires in the matter of the appointment. Nevertheless, he gently prodded Clayton: "The unanimity of the sentiment in my favor, among the Republicans, and the members of the bar I cannot help but appreciate. Your friendship for me in the past and my fidelity to you, makes me confident of your support." Letter from Jacob Trieber to Powell Clayton (July 10, 1900).

In 1890, Jacob Trieber had made an unsuccessful attempt to secure an appointment as the federal judge for the Eastern District of Arkansas when H.C. Caldwell was elevated from that position to the United States Court of Appeals for the Eighth Circuit. Prior to his appointment as district judge, Caldwell had served as a general in the Union Army and was regarded by many Democrats as a carpetbagger. Many of Trieber's supporters wrote endorsement letters to President Benjamin Harrison, including Judge M.C. Sanders, J.H. Carr, L.P. Featherstone, J. Donohoo, and the Helena Bar Association.

37. Letter from Jacob Trieber to Hon. Charles F. Amider, United States District Judge, Fargo, North Dakota (July 11, 1900).

38. The Democrats included Governor Dan W. Jones, and United States Senators James K. Jones and William H. Berry. On July 9th, he received the following telegram from J.C. Cage Rember: "If your democratic friends of Phillips County who have known you since boyhood can be of any service to you call on us without hesitation." Telegram from J.C. Cage Rember to Jacob Trieber (July 9, 1900).

influence with President McKinley for his appointment. His approval is deemed so strong toward appointment to any position in the gift of the president that a local Republican leader who is in a position to know what transpired during the day said last night: "We expect the appointment of Judge Trieber Monday."³⁹

On the 16th, the Republican State Committee met and recommended Jacob Trieber for the judgeship.

On July 21, 1900, Colonel Rimmel met with President McKinley in Canton, Ohio. Also present were Senator Mark Hanna of Ohio, who had engineered the President's nomination in 1896, and Judge William R. Day, Circuit Judge for the Sixth Circuit (appointed by President Roosevelt to the Supreme Court on February 23, 1903). Rimmel wrote to Trieber later that night:

The President greeted me by saying—How are you Rimmel and who do you want for Judge? This gave me my opportunity in the presence of all these gentlemen and I used it, I assure you, with I think their hearty approbation. I then gave the President the brief of your endorsements and he read them aloud. I then took up your religious faith. He referred to his recent action in appointing a [Jewish] Judge for Puerto Rico. I assured him your appointment would be appreciated as the very highest compliment to your people.

He is especially solicitous regarding your ability as a lawyer, your integrity, and your private life all of which of course I enlarged upon.

Senator Hanna . . . said further your age was just right. I impressed the President of the importance of prompt action, the Receiverships to be named and that I would like appointment made before the 30th. He said I will wire Griggs at once. What is done will be done before the 30th. Of course, I could not press him for a promise as I would not have gotten it.⁴⁰

The letter indicated that Rimmel expected Trieber to serve as an active advisor for the remainder of the 1900 campaign.⁴¹ He concluded by writing: "This was a most satisfying visit. The result is certain."⁴² Five days later, the president signed an order giving Jacob Trieber an interim appointment as United States District Judge. Jacob Trieber received the notice in the early afternoon of August 1, 1900. He immedi-

39. Arkansas Gazette, July 14, 1900. (Full citation unavailable. See parenthetical, *supra* note 7.)

40. Letter from H. L. Rimmel to Jacob Trieber, July 21, 1900.

41. Jacob Trieber resigned from the Republican State Committee on August 2, 1900. His correspondence, however, indicates that he continued to advise the Republican leadership for the next few years.

42. Letter from Rimmel to Trieber (February 23, 1903).

ately called his wife and a few close friends and asked them to come to the courthouse for the swearing in ceremony.

The *Arkansas Gazette* deemed him a good choice, even though a Republican:

Judge Trieber is a republican, but not an offensive one. He is a man of broad-gauged ideas, cool and level-headed, an able lawyer, an untiring student, and one who is capable of filling the position of a federal judgeship to the supreme satisfaction of all lovers of justice. Judge Trieber is as thoroughly identified with the best interests of Arkansas as any man born and reared in the state. His appointment will be a deserving one. He is well equipped for the position. There is no member of his party in this state more worthy of being the successor of Judge John A. Williams. The selection of Judge Trieber will meet with no objection from any democratic source in Arkansas.⁴³

Jacob Trieber was flooded with congratulatory letters from his friends and admirers. The one he relished most came from his former law partner, L.C. Stephenson, who wrote on August 2, 1900:

Dear Jake:

I just saw in the paper that you had knocked the persimmon—got the Dist. Judgeship, and I hasten to extend the congratulations of both Harriet and myself.

We both feel glad, because it is "Jake's" good fortune, and we both are confident that the mantle will fall in graceful folds upon you. Outside of a purely financial view of the matter, it must be a satisfactory reflection that one is "out of the cold, the sleet and the reach of the winds of adversity" for life.

You are the right man for the place. . . .⁴⁴

JACOB TRIEBER — THE JUDGE

Jacob Trieber went right to work. The docket in the Eastern District of Arkansas was not current and, to him, that was a grievous sin. He immediately scheduled cases for trial and by the time he came up for confirmation in January of 1901, he had brought his docket up to date. In the twenty-seven years that followed, Jacob Trieber not only kept his docket current but often found time to serve as a district judge in the Western District of Arkansas, the Eastern and Western Districts of Missouri, and the Southern District of New York.

43. Helena World, July 19, 1900 (quoting *Arkansas Gazette*, July 17, 1900). (Full citation unavailable. See parenthetical *supra* note 7.)

44. Letter from L.C. Stephenson to Jacob Trieber (August 2, 1900).

He also sat by special designation on the United States Court of Appeals for the Eighth Circuit on a regular basis from 1913 until his death.⁴⁵ In that period, he heard more than 350 Eighth Circuit cases and wrote the opinions in more than two-thirds of them. Indeed, his appellate work load matched that of some of the less active members of the court.⁴⁶ Notwithstanding Judge Trieber's busy court schedule, he still found time to teach at the Arkansas Law School, to write several articles on law and banking,⁴⁷ to promote his ideas on constitutional

45. Jacob Trieber made three unsuccessful efforts to secure appointment to that court. The first came in 1905 when Judge Amos M. Thayer died. Within two weeks, the Arkansas Bar, the "colored" Republicans of Arkansas, and the press, Democratic and Republican alike, recommended to President Roosevelt that Jacob Trieber be appointed. On April 28th, the Democrat-controlled state senate unanimously adopted a resolution: "We recognize in Jacob Trieber one of the foremost citizens of our state, an honest, upright, fearless and capable judge, an eminent and learned lawyer and a judge well qualified to fill the vacancy." *Helena World*, April 29, 1905. (Full citation unavailable. See parenthetical, *supra* note 7.) The Arkansas General Assembly followed suit. The press reported the endorsement "is a compliment few republicans have ever received in the south." *Arkansas Gazette*, May 5, 1905. (Full citation unavailable. See parenthetical, *supra* note 7.)

The "colored" Republicans of Arkansas met and adopted a resolution recommending Trieber for:

his soundness and patriotism in enforcing the amendments to one Constitution of the United States designed to protect all American citizens as illustrated by his able and comprehensive decisions, and charges respecting white-capping and peonage by means of which those crying evils are already well-suppressed in the State of Arkansas.

Resolution of the "colored Republicans of Arkansas" (May 1, 1905). They also wrote to Booker T. Washington, requesting him to use his influence on Roosevelt.

Judge Trieber's second effort to obtain an appointment to the Court of Appeals was made in 1910, when Judge Willis Van Devanter of the Eighth Circuit was elevated to the United States Supreme Court, and the third attempt occurred in 1912, when Eighth Circuit Judge William C. Hook of Kansas died. The results were the same: political and geographical considerations combined to deny the appointment to Judge Trieber. In 1910, Judge Trieber also sought an appointment to the newly-created Court of Commerce.

46. Through his work on the Eighth Circuit, Trieber won widespread respect within the court. Judge Kimbrough Stone referred to Trieber as "one of the very ablest, fairest and most learned judges I have ever known." Letter from Kimbrough Stone to Mrs. Jacob Trieber (September 19, 1927). Judge Walter H. Sanborn "esteem[ed] him very highly." Letter from Walter H. Sanborn to Ida Trieber (September 8, 1927). Judge William Kenyon wrote to Trieber, stating that the most pleasing experience of his brief judicial life had been the acquaintance he formed with Trieber. Letter from William Kenyon to Jacob Trieber (July 24, 1923). Judge Charles B. Faris, a district court judge for the Eastern District of Missouri, commented that "[t]here was not among all the judges of the 8th Circuit any man who was his par in legal knowledge and ability." Letter from Charles B. Faris to Ida Trieber (September 19, 1927).

47. See, e.g., Trieber, *Injunctions and the Judiciary*, *New York Independent*; Trieber, *The Jurisdiction of Federal Courts in Actions in Which Corporations are Parties*, 8 *REP. PROC. B.A. ARK.* 35 (1905); Trieber, *Legal Status of Negroes in Arkansas Before the Civil War*, 3 *ARK. HIST. A.* 175 (1911); Trieber, *The New Judicial Code*, 15 *REP. PROC. B.A. ARK.* 103 (1912); *The Relationship of the State and National Courts*, 11 *PROC. B.A. ARK.* 86 (1908); Trieber, *A Review of the Act of Congress of February 13, 1925, Defining the Jurisdiction of the Circuit Courts of Appeals and of the Supreme Court*, 28 *REP. PROC. B.A. ARK.* 101 (1925); Trieber, *The Rights*

and judicial reform (the most important being that proposed amendments to the Constitution should be submitted directly to the people),⁴⁸ and to serve as president of the Arkansas Bar Association.

Judge Trieber's case load reflected the times in which he lived. The large number of bankruptcy cases evidenced the hard economic times suffered by the nation during much of his tenure.⁴⁹ The frequent litigation of Indian land disputes mirrored the opening of Indian Territory to white settlers,⁵⁰ and the numerous cases concerning violation of liquor laws on Indian reservations were a measure of the evil that liquor brought to the tribes.⁵¹ The labor cases grew out of the increased industrialization and the concomitant growth of the labor movement in the southwest.⁵²

and Liabilities of Banks at Law, (pt. 1) 11 ARKANSAS BANKER 5 (1927), (pt. 2) 11 ARKANSAS BANKER 21 (1927); Trieber, *Shall Statutes in Derogation of the Common Law Be Strictly Construed?*, ARK. STATE B. A. 13 (1889).

48. On February 22, 1912, Judge Trieber wrote to Theodore Roosevelt, who was then Governor of New York, and commented on Roosevelt's idea that when the Supreme Court of the United States declared an act unconstitutional, the people should have a right to vote on the issue. He gave his suggestions on implementations:

But in order to obtain such a result now, if the decision holds that a statute is in conflict with the Constitution of the United States, the most important change to be made in that instrument is to simplify the manner of amending it, which, at the present time, is practically impossible. In my opinion, the Constitution ought to be amended by providing that a majority of all members elected to each house of Congress be sufficient for the submission thereof to the people; it should then be submitted to the vote of the people in each state at the time Presidential electors are chosen, and if at such election a number of states constituting a majority of the electoral colleges votes in favor of such an amendment it should be declared adopted, or, if it is feared that such a vote might lead to too many changes in the Constitution, and result in hasty or ill considered action, there might be added a provision requiring in addition to a majority of the electoral college a majority of the states.

If such an amendment is adopted then the people will have an opportunity to make such changes in the Constitution as the changed conditions of our vast country and the great progress of our times may require.

Letter from Jacob Trieber to Theodore Roosevelt (February 22, 1912).

49. See, e.g., *Jenkinson v. First National Bank of Sheldon*, 295 F. 778 (8th Cir. 1924); *In re Weedman Stave Co.*, 199 F. 948 (E.D. Ark. 1912) (federal bankruptcy law supercedes state insolvency law); *Gould v. New York Life Ins. Co.*, 132 F. 927 (E.D. Ark. 1904); *In re Stone*, 116 F. 35 (E.D. Ark. 1902), *aff'd*, 120 F. 733 (8th Cir. 1903); *In re Meriwether*, 107 F. 102 (W. D. Ark. 1901).

50. See, e.g., *Vezina v. United States*, 284 F. 695 (8th Cir. 1922); *Chase v. United States*, 272 F. 684 (8th Cir. 1921); *United States v. Whitmire*, 236 F. 474 (8th Cir. 1916); *Taylor v. United States*, 230 F. 580 (8th Cir. 1916); *Conway v. United States*, 149 F. 261 (D. Neb. 1907).

51. See, e.g., *Murray v. United States*, 284 F. 573 (8th Cir. 1922); *Feeley v. United States*, 236 F. 903 (8th Cir. 1916); *Ammerman v. United States*, 216 F. 326 (8th Cir. 1914).

52. See, e.g., *McCourtney v. United States*, 291 F. 497 (8th Cir. 1923), *cert. denied*, 263 U.S. 714 (1923) (court can hold defendant guilty of contempt for violating injunction even if defendant was not a striker, if defendant aided strikers to violate injunction with full knowledge of

Although many of Judge Trieber's opinions deserve further study, this article focuses on a select few cases which best reflect his fundamental beliefs, and which have had the greatest impact on the development of the law. In the area of civil rights, Judge Trieber announced several innovative interpretations of law, including the first decision to hold that blacks are entitled to equal employment opportunities. The two migratory bird cases provided a unique opportunity to explore the boundaries of the federal government's legislative power. The railroad cases reveal Trieber the capitalist who believed that Arkansas's full potential lay with enlightened industrialization. The United Shoe Machinery Company cases established several foundational principles of antitrust law. Finally, his criminal law opinions demonstrate his belief that although laws should be promptly and strictly enforced, justice also requires that sentences be short and that prisoners be treated humanely.

DISCRIMINATION AGAINST BLACKS IN EMPLOYMENT AND VOTING

The first significant cases to come before Judge Trieber concerned discrimination against blacks in employment and voting. On October 6, 1903, Judge Trieber impaneled a grand jury to investigate the infamous "whitecappers" (Ku Klux Klan) who had for so long terrorized blacks and their white sympathizers throughout Arkansas.⁵³ The whitecappers had been a blight on the state since he had arrived there as a young boy. In 1892, the year he ran for Congress, the whitecappers

injunction); *Silverstein v. Local No. 280*, 284 F. 833 (8th Cir. 1923) (garment workers' strike not an intentional interference with interstate commerce); *United Mine Workers of America v. Coronado Coal Co.*, 258 F. 829 (8th Cir. 1919), *rev'd*, 259 U.S. 344 (1922) (Trieber, writing for the Eighth Circuit, held that defendant miners' organization and its members had violated the Sherman Act by destroying mining companies' property. The Supreme Court reversed, holding that there is no violation of the Sherman Act where intent to injure, obstruct, or restrain interstate commerce did not appear as an obvious consequence of what was done); *Kroger Grocery & Baking Co. v. Retail Clerks' International Protective Ass'n*, 250 F. 890 (E.D. Mo. 1918) (strike which would result in the closing of retail grocery stores and loss of perishable foodstuffs, and which involved threatening and insulting customers, held violation of Clayton Act § 20 and Food Conservation Act); *Huttig Sash & Door Co. v. Fuelle*, 143 F. 363 (E.D. Mo. 1906) (violation of injunction forbidding secondary boycott subjected both parties to the injunction and non-party aiders and assistants to punishment for contempt).

53. The Ku Klux Klan was officially disbanded in 1869, and was not officially reorganized until 1915. W. RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* i-x (1974). Shortly after the Civil War, Governor Powell Clayton instituted martial law and hired black militia at a cost of over \$330,000 to hunt down the Klan. II *DICTIONARY OF AMERICAN BIOGRAPHY*, (pt. 2) *supra* note 9 at 187. Although Clayton claimed to have eradicated the Klan, *id.*, it continued to thrive under the name "whitecappers."

orchestrated a "race war between the whites and blacks" in Calhoun County, Arkansas.⁵⁴ An article in his "hometown" newspaper, the *Helena World*, reported that "this county . . . is afflicted with a gang of irresponsible men who have been terrorizing the defenseless negroes of that vicinity until they have actually succeeded in driving the majority of them out of the neighborhood."⁵⁵

That same day, as reported in the *Arkansas Gazette*, "Ed McCollum, a negro, was taken from the county jail . . . by a masked mob and tied to a tree in the courtyard and his body riddled with bullets."⁵⁶ Judge Trieber had long believed that these all-too-common lynchings were not only a tragedy for blacks, but a tragedy for the whites of Arkansas as well. He lamented in one letter that, "people wouldn't know there is anything in Arkansas except murders and demagoguery This country is growing by leaps and bounds . . . while Arkansas is asleep . . . despite her great natural resources."⁵⁷ He recalled his childhood in Prussia and how discrimination against Jews consumed that country; he feared for the future of any country which permitted discrimination, and hoped that, somehow, Arkansas could steer a different course.

Although Judge Trieber had never really been an outspoken advocate for civil rights, he had often espoused his view "that the demagogue is the worst foe of our free institutions Let us try to enthrone reason and eradicate prejudice and follow the precepts laid down in that divinely inspired instrument, the Declaration of Independence."⁵⁸ As one of the quintessential self-made men of his generation, he was deeply confident in the power of good example. He sought to communicate—through his own life and deeds and his commitment to equal justice—that racism was detrimental to the people of Arkansas, and that only when the race problem was laid to rest would that state's great potential be achieved. In a June, 1900, letter, he wrote:

Of course the prejudice which is still to be found among many people is not easily overcome, and in my opinion, instead of attempting to

54. *Arkansas Gazette*, October 21, 1892. (Full citation unavailable. See parenthetical, *supra* note 7.)

55. *Helena World*, February 23, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

56. *Arkansas Gazette*, October 7, 1903. (Full citation unavailable. See parenthetical, *supra* note 7.)

57. Letter from Jacob Trieber to Colonel H.L. Rammel, by then President of the Board of Trade of Arkansas (1901).

58. *Memphis Commercial Appeal*, September 19, 1901. (Full citation unavailable. See parenthetical, *supra* note 7.)

overcome it by force or abuse, it is the better part of wisdom to act along conservative lines and remove the prejudice by acts of wisdom. Of course, it takes a longer time to accomplish a great deal along that line; at the same time, we are more sure of success Free discussion without bitterness of feeling, appealing to the justice of the people instead of trying to arouse their prejudices and passions, are bound to succeed in the end, and my efforts shall always be along that line.⁵⁹

The whitecapping cases presented a critical opportunity for justice and reason to prevail over prejudice. Because of his widespread identification with the best interests of Arkansas and his unquestioned integrity and ability, Judge Trieber was uniquely well-positioned to ameliorate racial tensions through the southern strategy of gradual persuasion. The Arkansas press had described him as a "staunch friend of equal and exact justice,"⁶⁰ and stated that "Mr. Trieber . . . impresse[s] all his hearers with a feeling of fairness seldom exhibited."⁶¹ Ultimately, after twenty-five years on the bench, he would describe his judicial philosophy as follows:

All courts are established for the same object . . . the protection of the rights of the people, for the protection of the lives, property and those rights, either guaranteed by the constitution and laws of the nation and the state, [or] are inherent in every free man under a democratic republican government such as ours.⁶²

The *Arkansas Democrat* commented that:

Proclaimed by many jurists of the land, such facts would have seemed platitudinous, almost hollow, but voiced by Judge Trieber, they became a code of ethics, a system of jurisprudence in which he believed with the passion of a man whose sincerity at no time in all his distinguished career had been questioned. . . . Judge Trieber declared that certain rights are inherent in every free man and the records of his court gave evidence that the man ruled as he believed . . . [his] knowledge and his vast learning in the law made his court a truly American institution where men could come to ask justice but could find no preference.⁶³

59. Letter from Jacob Trieber to W.A. Webber (June 12, 1901).

60. *Helena World*, April 6, 1897. (Full citation unavailable. See parenthetical, *supra* note 7.)

61. *Osceola Press*, October 27, 1892. (Full citation unavailable. See parenthetical, *supra* note 7.)

62. *Arkansas Democrat*, September 20, 1925. (Full citation unavailable. See parenthetical, *supra* note 7.)

63. *Id.*

Now that the whitecappers had finally been brought into court, Judge Trieber was required to apply a lifetime of learning to ensure that equal justice was meted out. The whitecapping cases had captured great public notoriety all year. The cases began in the spring of 1903 when the whitecappers posted notices on farms throughout Poinsett County warning all blacks to leave the county "or else." The whitecappers had been burning down homes and crops and lynching blacks in an attempt to ensure total white supremacy. They were enraged by a number of blacks who had purchased or leased farms in Poinsett County and were achieving economic success rivaling or exceeding that of the white farmers in the county. Many of the prominent white planters, however, were opposed to the whitecappers' mob rule and were fearful of losing the black laborers they depended upon. Moreover, the whitecappers had warned white planters against selling land to blacks, thus preventing the planters from disposing of their property as they saw fit. In February of 1903, the planters hired several detectives from Memphis, Tennessee, to investigate and, they hoped, "capture" the whitecappers. In March of 1903, however, the whitecappers murdered detective J.F. Brown while he was investigating a recent whitecapper attack at the home of a black family.

Meanwhile, a new sawmill opened in nearby White Hall, Arkansas. Davis & Hodges Co. had hired eight black workers to help operate the mill. On August 17, 1903, at least fifteen whitecappers, with torches and firearms, converged on the mill and demanded that all blacks be fired and replaced by whites. Davis went to Justice of the Peace John Harrington, but Harrington "not only refused to help keep the peace, but joined the mob."⁶⁴ Davis then discharged all of his black workers.

In the fall of 1903, the United States Attorney sought conspiracy indictments under the Civil Rights Act of 1866,⁶⁵ and the Civil Rights Act of 1870,⁶⁶ against fifteen of the whitecappers involved in the Davis & Hodges mill incident (*United States v. Hodges*)⁶⁷ and against twelve

64. Arkansas Gazette, March 17, 1904. (Full citation unavailable. See parenthetical, *supra* note 7.)

65. The whitecappers were indicted under Rev. Stat. § 5508, reprinted in 3 U. S. COMP. ST. § 5508 (1901) (currently codified as revised at 18 U.S.C. § 241 (1985)) for conspiring to prevent blacks from exercising the right to contract, a right secured by 42 U.S.C. § 1981 (formerly Revised Statutes § 1977, derived from section 1 of the Civil Rights Act of 1866). For a detailed history of 18 U.S.C. § 241, see *United States v. Williams*, 341 U.S. 70, 72-82 (1951).

66. Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as revised at 18 U.S.C. § 241 (1985)).

67. See *infra* note 68.

of the whitecappers involved in the Cross County terrorism (*United States v. Morris*).⁶⁸ The cases posed difficulties from both a practical and legal standpoint. Practically, as the *Helena World* commented, "It is difficult to secure proof against [the whitecappers]. When a gang of hoodlums circle around the back end of large plantations at the hour of midnight and fire into negro cabins and then disappear, it is difficult to swear who did the nefarious work."⁶⁹ The *Arkansas Gazette* noted that the whitecappers' victims give "very unwilling testimony, apparently being afraid of the consequences that may be visited on them after they have returned to their homes."⁷⁰

The cases also posed one of the most contentious legal issues of the day. The whitecappers were growing in number each year, and Judge Trieber often expressed his fear that mob rule might prevail over law and order. If anything had been proved since the Civil War, it was that the state of Arkansas was unwilling and unable to prevent whitecapper violence and racism. Moreover, of late, the state had acted in haste to pass numerous laws requiring racial segregation and discrimination, and now the only bulwark against entrenched racism was federal law.⁷¹ However, the Supreme Court had ruled that the fourteenth amendment did not reach private conduct,⁷² and although the thirteenth amendment did reach such conduct,⁷³ the scope of that amendment and the accompanying civil rights statutes was unsettled. Judge Trieber had researched the question thoroughly and had formulated a grand jury charge which he was confident reflected the correct state of the law.

Judge Trieber entered the courtroom, the grand jury before him. He charged the jury that the:

matters . . . before you . . . are somewhat extraordinary and of great importance. Under the laws of the United States . . . it is a serious offense "for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the

68. The only published district court decision of *Hodges and Morris* is reported at *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903), which is Judge Trieber's denial of demurrers to the indictments in both *Hodges and Morris*.

69. *Helena World*, February 23, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

70. *Arkansas Gazette*, March 18, 1904. (Full citation unavailable. See parenthetical, *supra* note 7.)

71. See Heaney, *Busing, Timetables, Goals and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 753 n. 116 (1985).

72. *Civil Rights Cases*, 109 U.S. 3, 19 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875).

73. *Civil Rights Cases*, 109 U.S. at 20-23.

United States." . . . Since the adoption of the thirteenth amendment to the constitution of the United States, slavery has ceased to exist in this country and every citizen is entitled to enjoy those rights which are inherent in every free man. Without enumerating what all of these rights are, it is sufficient to say that among them are, in the language of the Declaration of Independence, the cornerstone of our republican form of government, the following: "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness" The right to own, hold, dispose, lease and rent property, either real or personal, and to perform honest work for the support of himself and his family are natural rights belonging to every free man, without any statute or written law. Deprive a man of these rights and he ceases to be a free man. Congress, in order to leave no doubt on that subject, has enacted statute[s] [protecting these rights] Under these acts, the court charges you . . . that it is unlawful for two or more persons to conspire for the purpose of preventing by force, threats or intimidation any citizen of the United States from renting lands and cultivating the same, or performing any honest labor, when hired to do so, on account of his being a . . . citizen of African descent.⁷⁴

Two days later, the grand jury returned indictments against the twenty-seven defendants. The defendants then moved to dismiss the indictments on the ground that the federal statutes under which the indictments were made were unconstitutional. Judge Trieber overruled the demurrer and, the next day, announced his celebrated opinion in *United States v. Morris*,⁷⁵ in which he held that:

In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment That the rights to lease lands and to accept employment for hire are fundamental rights, inherent in every free citizen, is indisputable⁷⁶

Judge Trieber then continued the cases until the next term and set separate trial dates for the *Hodges* and *Morris* cases.

In the meantime, Judge Trieber learned that the whitecappers in the *Hodges* and *Morris* cases would be defended by two of the most

74. Arkansas Gazette, October 7, 1903. (Full citation unavailable. See parenthetical, *supra* note 7.)

75. 125 F. 322 (E.D. Ark. 1903).

76. *Id.* at 330-31.

prominent attorneys in the state, one of whom was the lieutenant governor of Arkansas and the other a popular candidate for prosecuting attorney. The whitecappers also remained busy in their campaign to eliminate blacks from the state's workforce. For example, in El Dorado, Arkansas, a band of whitecappers forced several black workers to quit their jobs at a construction site.⁷⁷

The *Hodges* case came on for trial on March 16, 1904, and Trieber, as usual, was well prepared. At the close of the evidence on March 17, he instructed the jury that:

[I]t is a question of whether a man shall be permitted to employ whom he pleases to employ, or whether he shall be compelled to employ those whom others with whom he has no relations wish him to employ. It is a question that strikes at the fundamental principles of our government, that of the right of every citizen, be he white or black, to work for a living, to engage in the pursuit of happiness and a livelihood. It is a question of whether right and law should prevail or the unlicensed mob.⁷⁸

After four hours of deliberation, the jury returned guilty verdicts against the three "ringleaders in the conspiracy" and found the remaining defendants innocent.⁷⁹ The jury recommended mercy for the defendants and the *Arkansas Gazette* commented that, "the general opinion is that the sentence will be a light one, the men being ignorant rather than vicious."⁸⁰ Judge Trieber sentenced two of the defendants to one year and one day in prison, plus a \$100 fine. The third defendant received sixty days in the county jail plus a \$100 fine.

The convicted men were released on bond pending appeal, their lawyer "propos[ing] to test the constitutionality of the federal statute . . . claiming that under this statute the negro citizen is granted a protection in the federal courts that is not given to white men."⁸¹

Meanwhile, on March 17, 1904, trial commenced in the *Morris*

77. *Arkansas Gazette*, May 29, 1906. (Full citation unavailable. See parenthetical, *supra* note 7.) Four white men were ultimately convicted before the federal district court at Texarkana under the same law as the *Hodges* defendants. Judge John H. Rogers sentenced the men to one-year's imprisonment in Fort Leavenworth. Because these convictions were based on the civil rights law declared unconstitutional in *Hodges*, the convictions were likely vacated after the Supreme Court's *Hodges* decision was announced.

78. *Arkansas Gazette*, March 18, 1904. (Full citation unavailable. See parenthetical, *supra* note 7.)

79. *Id.*

80. *Id.*

81. *Helena World*, March 21, 1904. (Full citation unavailable. See parenthetical, *supra* note 7.)

case. The defendants were charged with conspiracy to force blacks to give up their farms and to leave the county, and were also charged with conspiracy to hinder the investigation of these incidents by murdering detective J.F. Brown. Establishing the identity of the perpetrators was difficult: detective Brown was "shot several times through a window"⁸² by masked whitecappers, the attacks on farms owned by blacks had been perpetrated by masked whitecappers, and the victims were reluctant to testify because of threats of violence against them. After less than two hours of trial, the United States Attorney dismissed the complaints against four of the defendants because he was unable to prove his case against them. Judge Trieber denied demurrers by the remaining defendants who claimed insufficiency of the evidence. After a short attempt to adduce additional evidence, however, the United States Attorney believed he had not proven his case beyond a reasonable doubt and dismissed the complaints against all remaining defendants.

While the appeal in *Hodges* was pending, Judge Trieber expressed, in a letter to United States District Judge Thomas G. Jones of Montgomery, Alabama, the significance and hope he found in the whitecapping cases and their probable impact on racism. Judge Jones had asked for Trieber's comments on his charge to the jury in a pending lynching case.⁸³ Trieber wrote:

82. Helena World, March 18, 1904. (Full citation unavailable. See parenthetical, *supra* note 7.) Interestingly, on the same page of this paper is a short editorial: "The race question would be as well left alone. It has been settled a number of years in the South where the negroes are and it doesn't seem that it would be of much concern to people in other sections."

83. Judge Trieber's letter apparently refers to Judge Jones' jury charge in *Ex parte Riggins*, 134 F. 404 (N.D. Ala. 1904) *rev'd*, 199 U.S. 547 (1905). In *Riggins*, a gang of armed whites had taken a black man from a county jail "and murdered [him] by hanging him from the neck until he was dead." 134 F. at 405. *Riggins* and his co-defendant brought a petition for a writ of habeas corpus, alleging that the black victim had no right, under federal constitutional or statutory law, to be free from "lawless violence at the hands of white men." 134 F. at 406. Judge Jones, relying in part on Judge Trieber's opinion in the *Morris* case, held that:

as the purpose of the [reconstruction era-civil rights] legislation . . . was to secure and protect the former slave race from the aggressions of the master race, it is quite clear that the right to be free from attacks by members of one race, designed and intended to prevent the other race from enjoying the civil rights which go to make up that freedom, is a right, privilege or immunity "accorded by, or arising under, or dependent upon the Constitution," and that such right may be protected by Congress.

134 F. at 408.

The Supreme Court vacated this opinion and ordered the writ quashed on procedural grounds. *Riggins v. United States*, 199 U.S. 547 (1905). During the same term, the Supreme Court decided *Hodges*. See *supra* notes 78-81 and accompanying text. *Riggins* and his co-defendant, Powell, then sought to quash the indictment on the authority of *Hodges*. Judge Jones reluctantly agreed. He stated: "Since [*Ex parte Riggins* was decided], the Supreme Court has decided the *Hodges* case . . . which held, in effect, contrary [to substantial precedent], that the rights and immunities claimed here under the Thirteenth Amendment were not secured under the Constitu-

[I]t is such action on the part of Federal Judges, especially by one like yourself, who is a native of the South, has served in the Confederate Army, and whose former political views cannot be questioned by the people of the South, which will arouse public opinion to the enormity of the crime. . . . The responsibility in for this unfortunate condition we have this section is in part due, I think, to the spirit of some of the gentlemen connected with the press of the South. They seem to think that any criticism of any of the acts of irresponsible mobs is a stab at the South, when in fact it is for the benefit of the good people of the South.

I do not know the conditions existing in your state, but in our state the rabble seems to have obtained absolute control of the politics

tion or laws." *United States v. Powell*, 151 F. 650 (N.D. Ala. 1907), *aff'd*, 212 U.S. 564 (1909). The question presented in *Powell* was whether *Hodges* similarly barred the United States from prosecuting Riggins and Powell under authority of the fourteenth amendment. Judge Jones, in a lengthy and well-reasoned opinion, stated that, in his view, it should not:

[I]t is urged that the fourteenth amendment could not have intended to permit Congress to deal with lawless private individuals [P]rior to the great War, . . . in that era of our constitutional history, which the Supreme Court itself describes as "historical and of another age," . . . the general government had no concern in the execution of our state laws, however necessary their enforcement to enjoyment of the fundamental rights of the citizen to life, liberty, or property

The conditions brought about by war, demanded additional safeguards for these rights. . . . Race and sectional feeling, state action, and private lawlessness, operating alike in some form in every part of the Union, might hamper or prevent the enjoyment of these rights, and it was not deemed wise to leave their safeguarding wholly to the states

The framers of the [fourteenth] amendment, and the people who adopted it, were not building upon the old system, but laying on new foundations a different system for the enjoyment of due process The [fourteenth] amendment conferred a new power for a benevolent purpose. We ought not to shrivel the power by treating it as a mere penal enactment against faithless state officers.

151 F. at 661.

In spite of his personal view, he held that, in light of the Supreme Court's *Hodges* opinion, the defendant must be released:

A deep sense of the judicial subordination which all inferior tribunals owe to the Supreme Court compels this court, in view of the circumstances of this case, not to run counter to these last utterances of the Supreme Court, though, strictly speaking, they "went beyond the case." It must therefore take the *Hodges* Case as a binding authority that no right, privilege, or immunity in respect of due process, at any stage in the duty of affording it, arises under the fourteenth amendment, unless there be denial of the right by the state or its officers, and that no immunity whatever is secured under the Constitution or laws, in a case like this, against lawlessness of private individuals which frustrates the state's efforts to perform its constitutional duty, although thereby all enjoyment of the benefits of due process be prevented.

Let an order be entered sustaining the demurrer to the indictment and each count thereof, and that the defendant go hence without [his] day [in court].

151 F. at 663-64.

The Supreme Court affirmed on the authority of *Hodges*. *Powell v. United States*, 212 U.S. 564 (1909).

of the state, and what is worse than anything else is the fact that their supremacy has been obtained solely by appealing to the prejudices existing in the minds of many against the negro. The true representative of our section, that is, those who are intelligent, have most at stake, and the greatest interest in the welfare of our section, are practically barred from participation in the administration of the affairs of our state.

I sincerely believe that this race question could be solved to the lasting benefit of our country and in conformity with the spirit of this civilized age, provided those well meaning Northerners could be induced to keep quiet and trust the good people of the South with the solution of this problem. When I tried the whitecapping cases here the jury which convicted the parties was composed exclusively of natives of the South; yet there was no trouble to secure a righteous verdict. This shows that the rabid expressions found in many of our leading newspapers, and so freely indulged in by petty politicians, do not express the sentiment of the better class of people. To awaken their conscience and supply them with the moral courage necessary to give expression of their views on the subject is all that, in my opinion, is necessary to influence a patriotic adjustment of the negro question.⁸⁴

Judge Trieber's opinion in the *Hodges* case was surprisingly well received by the Arkansas press and the public, and it appeared for a while that employment opportunities for blacks in Arkansas would be improved. This was not to be, for on May 28, 1906, the Supreme Court overruled *Hodges*, holding that the federal courts lacked jurisdiction to protect blacks from racially motivated discrimination by private individuals, no matter how severe. The Court reasoned that the ability to earn a living was not a fundamental right of citizenship protected by the thirteenth amendment, and that extending protection to blacks against racial discrimination would be a form of improper reverse discrimination against whites. The Court further stated that the punishment of such wrongs as were charged must be sought in the state courts.⁸⁵

Judge Trieber immediately saw the folly in this position. The Supreme Court in *Hodges* failed to note that the mill owner had first sought help from the state justice of the peace, but that officer had instead joined the mob in demanding that the black workers be discharged. Additionally, in the years since *Hodges*, no state charges were ever brought. Indeed, the new state prosecuting attorney had been

84. Letter from Jacob Trieber to Thomas G. Jones (1904).

85. *Hodges v. United States*, 203 U.S. 1 (1906), *overruled*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.78 (1968).

aided in his election by the fact that he had been defense attorney for the whitecappers. Jacob Trieber hoped that state authorities might, in the future, have the courage to use the state's reconstruction-era civil rights law⁸⁶ to quell the spread of whitecapper violence. However, the Arkansas Legislature shortly repealed that law, leaving blacks no access to federal or state courts for protection of their basic civil rights.⁸⁷

Judge Trieber was soon confronted with the abject tragedy of the Supreme Court's *Hodges* decision. The year 1906 was marked by some of the bloodiest race riots in this nation's history, but the federal government would no longer assist in quelling the violence.⁸⁸ Moreover, as the years went by, the whitecappers' forces and their violent racism grew exponentially; they were formally reorganized into the Ku Klux Klan in 1915. By 1923 that organization would reach a record national membership of six million and would engage in open displays and parades of proud racism.⁸⁹ "[F]or almost fifty years . . . the *Hodges* case . . . became the rod and staff of those who denied that the federal government had the authority to intervene in race relations."⁹⁰ Blacks would be denied protection from racial discrimination in employment until the late 1940's when a few states and municipalities passed the first barebones fair employment laws. Comprehensive protection against racial discrimination in employment was not provided until the enactment of the Civil Rights Act of 1964.

In 1968, Judge Trieber's interpretation of the thirteenth amendment and the Civil Rights Act of 1866 was at last vindicated when the Supreme Court⁹¹ overruled *Hodges*. The Court adopted Judge Trieber's reasoning in *United States v. Morris*⁹² and held that the Civil Rights Act of 1866,⁹³ by authority of the thirteenth amendment, reached private, racially-motivated interference with fundamental rights.

In the years following *Hodges*, Judge Trieber was faced with two other significant civil rights cases. In January 1905, trial commenced in

86. ARK. STAT. ANN. §§ 578-93 (1904).

87. See Heaney, *supra* note 71, at 760.

88. M. BERRY, BLACK RESISTANCE, WHITE LAW 128-55 (1971).

89. See A. GOLDBERG, THE KU KLUX KLAN IN COLORADO vii (1981); W. RANDEL, *supra* note 53, at x.

90. M. BERRY, *supra* note 88, at 128.

91. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Title 42 U.S.C. § 1982, analogous to section 1 of the Civil Rights Act of 1866, barred all racial discrimination, private and public, in the sale or rental of property, and Congress had the authority under the thirteenth amendment to enforce the statute).

92. *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903).

93. See Heaney, *supra* note 71, at 757 nn. 123-24.

a case which challenged the validity of the Arkansas poll tax amendment. The underlying events began in 1890, when the United States House of Representatives passed an election rights bill sponsored by representative Henry Cabot Lodge. The "Force Bill," as it was called, permitted federal officials to supervise balloting for Congressional candidates in the south to prevent election fraud and disenfranchisement of black voters.⁹⁴ Although the Bill had been defeated in the Senate in 1890, the possibility of the Bill's reintroduction was an issue in Trieber's race for Congress in 1892. He told an audience that he was generally opposed to the Bill because, "while fraud [is] sometimes perpetrated in our elections [I] would much rather have a ballot box stuffed by our people than have toughs from Massachusetts, New York, Ohio and Illinois come down here and stuff it to suit them."⁹⁵ Although the Bill ultimately was defeated, southern politicians realized that methods other than force and fraud were necessary to suppress the black vote. Mississippi led the way in 1890 by adopting a constitutional amendment requiring the payment of a poll tax as a suffrage prerequisite.⁹⁶ In 1893, the Arkansas Legislature submitted a poll tax amendment to the voters; the amendment passed by a 75,940 to 56,601 vote, and was declared adopted even though it did not receive a majority of the total vote of 156,192.⁹⁷

Judge Trieber was now called upon to decide a case that arose when the black plaintiff attempted to vote in the November 1904 Congressional election, and was barred from voting on the sole ground that he had not paid the Arkansas poll tax.⁹⁸ Plaintiff sought damages, claiming that the interference with his voting rights was unlawful and that the poll tax amendment was invalid because it had not been adopted by the majority of the total votes cast at the election, as arguably required by the Arkansas Constitution, rather than the total votes cast on the poll tax issue alone.

The case presented two significant legal issues: first, whether a federal court has jurisdiction to determine whether a state constitutional amendment is properly adopted,⁹⁹ and second, whether, under Arkan-

94. See *supra* note 14.

95. Helena World, October 9, 1892. (Full citation unavailable. See parenthetical, *supra* note 7.)

96. Crawford, *Arkansas Suffrage Qualifications*, II ARK. HIST. Q. 331, 336-37 (1943).

97. *Id.*

98. Knight v. Shelton, 134 F. 423 (E.D. Ark. 1905) (reprinted in full in Arkansas Gazette, January 8, 1905). (Full citation unavailable, see parenthetical, *supra* note 7.)

99. Two prior opinions suggest that there is no federal jurisdiction in such a case. See Luther v. Borden, 48 U.S. 1, 54 (1849) (Woodbury, J., concurring in part, dissenting in part); Smith v.

sas law, a constitutional amendment must secure a majority of the highest number of votes cast in the election or a majority of the number cast on that one question. Judge Trieber held that because the question concerned the right to vote in a congressional election, the federal court had jurisdiction.¹⁰⁰ He went on to hold that the poll tax amendment was invalid because it had not secured a majority of the votes cast in the election.¹⁰¹

The right of Arkansans to vote in federal elections without paying a poll tax was short lived. In 1909, the Arkansas Legislature enacted a second poll tax amendment, identical to the first. It was approved by a vote of 88,386 votes for and 46,835 votes against.¹⁰² The validity of the poll tax was not again challenged in Arkansas during Judge Trieber's tenure.¹⁰³

In 1905, Judge Trieber confronted another civil rights issue. In the spring of that year, the United States Attorney charged several individuals with keeping blacks in a state of peonage and with arresting and returning them to a condition of peonage when they attempted to leave their plantations.¹⁰⁴ These indictments, "the first of the kind ever known in Arkansas,"¹⁰⁵ marked an attempt to end the widespread peonage system in Arkansas. Judge Trieber knew this system well, having lived in Phillips County where over three-quarters of the population were black and worked as virtual slaves in the cotton farming areas of the east Arkansas delta. Typically, white planters would advance cotton seed and supplies at inflated prices to black sharecroppers, who would then sell their cotton at a below-market price to the white planters. Because the black sharecropper would usually be in debt to the white planter, and since no black could leave the farm until his debts were

Goode, 34 F. 204, 208 (D.R.I. 1888).

100. *Knight*, 134 F. at 425-26, 440-41.

101. *Id.* at 438.

102. Crawford, *supra* note 96 at 336-37.

103. The twenty-fourth amendment of the United States Constitution, adopted in 1964, outlawed the poll tax as a requirement for eligibility to vote in any election for President, Vice President, or United States Senator or Representative. See *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Harman v. Forssenius*, 380 U.S. 528 (1965).

104. *Peonage Cases*, 136 F. 707 (E.D. Ark. 1905).

105. *Id.* at 707. Although the peonage system was widespread throughout the south, there was little attempt to use the federal anti-peonage laws to end this system, in part because it was well-accepted and because convictions on peonage charges were hard to obtain. P. DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH* 19-20 (1972). When a Florida jury found a defendant not guilty of peonage, Judge William B. Sheppard of the United States District Court for the Northern District of Florida stated that he believed the defendant was guilty despite the jury's verdict. *Id.* at 33-34. Even when the rare guilty verdict was secured, the Supreme Court reversed on procedural grounds. See *Clyatt v. United States*, 197 U.S. 207 (1905).

paid, he was held in economic bondage, or peonage. Judge Trieber knew that the white planters had prevented blacks from trucking their cotton to Helena or Memphis where they might obtain a fair price.¹⁰⁶ He also recalled the recent Cross County whitecapping cases where the whitecappers became enraged when former black sharecroppers saved enough money to purchase or lease lands which they could farm as independent planters.

Judge Trieber realized that it would be difficult to secure indictments and convictions because it was widely believed that peonage was not unlawful.¹⁰⁷ His challenge was to explain to the jury how peonage was unquestionably unlawful despite its widespread acceptance in the state. He informed the jury that:

[I]n the case of peonage, to protect the poor laborer against the exactions of the wealthy employer, compelling him to agree to work in many instances for a mere pittance for a loan made to relieve his most necessary wants, this law has been enacted. . . . If the evidence which is laid before you satisfies you that some men in this district have entered into contracts of that kind with some laborers, and that afterwards, before the debt was paid, the laborer wanted to quit, and he was prevented from doing so by force, threats or intimidation, or if he has left, and was arrested either on some trumped-up criminal charge or without any warrant of law, and returned for the purpose of compelling him to carry out his contract and work until his debt was paid off, then it is your duty as grand jurors to find an indictment against such person or persons. . . . This law is, no doubt, one of the most salutary statutes in existence, but it is wholly immaterial what your or my individual views as to the wisdom of the enactment of this law may be.¹⁰⁸

The grand jury returned a sixty-count indictment against nine persons. Although the *Arkansas Gazette* predicted a significant legal battle, it never occurred because seven of the men pled guilty before trial, one pled guilty after a short trial, and one man, Justice of the Peace John McElwee, was discharged by Judge Trieber for lack of evidence. McElwee's only role had been to issue a warrant for the arrest of a black laborer who had left the farm of a wealthy black planter.

Shortly after these cases were concluded, the Supreme Court, in

106. Unidentified newspaper article on "Elaine Riots." (Full citation unavailable. See parenthetical, *supra* note 7.)

107. *Peonage Cases*, 136 F. at 709.

108. *Id.*

Clyatt v. United States,¹⁰⁹ upheld the constitutionality of the anti-peonage laws. It overturned Clyatt's conviction for enslaving a black, however, on the highly suspect ground that, although he had enslaved the black, he had not *returned* him to peonage, as alleged by the indictment, because the black had not previously been held in peonage.¹¹⁰

The Supreme Court's ruling and other factors permitted the peonage system to continue in Arkansas. Ultimately black dissatisfaction with this system led to the infamous and bloody "Elaine Race Riots" in 1919. This historical event has been so well reported that it is not necessary to reiterate the details here.¹¹¹ In short, black sharecroppers in Phillips County were attempting to organize a union and, allegedly, a rebellion against the peonage system. When white planters and local authorities learned of this and tried to prevent blacks from organizing, a "race war"¹¹² broke out, resulting in dozens of injuries and the deaths of at least "five whites and eleven negroes . . . although many times that number probably were killed."¹¹³

One-hundred-twenty blacks were indicted and, ultimately, after short trials orchestrated by a lynch mob, fifty-four were sentenced to prison and twelve sentenced to death.¹¹⁴ With respect to the twelve (who received a forty-five minute trial), there were several state court appeals and habeas corpus petitions and petitions for certiorari to the United States Supreme Court.¹¹⁵ Finally, six were discharged and six sentenced to death. On September 21, 1921, two days before the scheduled executions, the six filed a petition for a writ of habeas corpus in the federal District Court for the Eastern District of Arkansas. Judge Trieber granted the writ and set a hearing date, but disqualified himself because of his long years of residence in Phillips County. The case was then assigned to Judge John H. Cotteral of Oklahoma City, Oklahoma. Judge Cotteral sustained a demurrer by the State of Arkansas and dismissed the case. However, Judge Trieber, although he had previously recused himself, certified that there was probable cause

109. 197 U.S. 207 (1905).

110. *Id.* at 218-22.

111. See, e.g., Rogers, *The Elaine Race Riots of 1919*, 19 ARK. HIST. Q. 142 (1960); Waterman & Overton, *The Aftermath of Moore v. Dempsey*, 6 ARK. L. REV. 1 (Winter 1951-52); Wise, *The Elaine Massacre*, 1 SOUTHERN EXPOSURE Nos. 3-4 at 9 (Winter, 1974).

112. Arkansas Gazette, October 2, 1919. (Full citation unavailable. See parenthetical, *supra* note 7.)

113. Rogers, *supra* note 111 at 143.

114. Waterman & Overton, *supra* note 111 at 1-2.

115. *Id.* at 2-4.

for appeal.¹¹⁶

The Supreme Court accepted certiorari and in *Moore v. Dempsey*,¹¹⁷ sustained Judge Trieber's initial grant of the writ of habeas corpus. It ordered a hearing to determine whether the six had been accorded a fair state trial. Justice Holmes reasoned:

[I]f . . . the whole proceeding is a mask—[if] counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and [if] the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.¹¹⁸

In the end, the hearing was never held, as counsel for the six agreed to dismiss the petition for writ of habeas corpus if the death sentences were commuted to twelve years.

During the period that Judge Trieber was deciding the whitecapping, peonage, poll tax and Elaine Riots cases, he publicly voiced his support for equality of opportunity in several speeches.¹¹⁹ For example, in April, 1914, in a speech before the "Political Equality League," he stated that, "a woman is a person and should be entitled to all the rights guaranteed by the constitution to a male person."¹²⁰ He accurately predicted that, within ten years, women in every state would have the right to vote.¹²¹ In a 1916 speech on the Constitution, he "warn[ed] against the dangers from radicals and demagogues attempting to influence the weak and ignorant [and] appealed to . . . lawyers to do all in their power to create a greater respect for the Constitution as the foundation of our liberty."¹²²

In sum, Judge Trieber decided several far-reaching civil rights cases, but, in his lifetime, the influence of these decisions was greatly limited by Supreme Court reversals—reversals which that Court subsequently recognized as unwise. In the final analysis, his greatest contribution to the cause of equality of opportunity was provided through his

116. *Waterman & Overton*, *supra* note 111 at 4.

117. 261 U.S. 86 (1923).

118. *Id.* at 91.

119. During this period of time, Judge Trieber also authored an article on the *Legal Status of Negroes in Arkansas Before the Civil War*, *supra* note 47 at 175-83.

120. *Arkansas Gazette*, September 17, 1919. (Full citation unavailable. See parenthetical, *supra* note 7.)

121. *Id.*

122. *Arkansas Gazette*, September 2, 1919. (Full citation unavailable. See parenthetical, *supra* note 7.)

own personal example. As the *Arkansas Gazette* wrote,

His life is a high example of the victory that may be won over adversity by unending labor, based upon the fundamentals of sound character and worthy ambition. By his conscientious loyalty to his convictions and his clients, and by the charm of his address, he has succeeded in overcoming various adversities and prejudices that threatened his early progress.¹²³

Similarly, as the *Helena World* commented upon his appointment to the federal bench:

It was long given in Arkansas that no Republican, foreigner or Jew could hold office in that state. This time-honored aphorism has just been discredited—and for the first time—by the appointment of the Honorable Jacob Trieber . . . as judge for the United States District Court for the Eastern District of Arkansas.¹²⁴

MIGRATORY BIRDS

Jacob Trieber had a profound interest in the question of state/federal relations under the Constitution. Early in 1914, he became involved in the first of two cases that would give him an opportunity to explore that question. The migratory birds provision of the Appropriation Act for the Department of Agriculture of 1913 allowed the Department of Agriculture to set aside closed seasons for migratory game and birds.¹²⁵ Harvey C. Shauver was indicted for a violation of this provision, a federal misdemeanor. The case stirred a bitter controversy. On one side were the hunters who wished to protect their traditional hunting practices; bird migrations in spring, one of the targeted seasons, provided an especially bountiful source of sport and food. On the other side were the conservationists, concerned about the “merciless slaughter of wild life,”¹²⁶ the farmers who needed the birds to control crop-destroying insects, and the farsighted sportsmen who realized that conservation was necessary to ensure continuing game availability. Shauver argued that the migratory bird provision was unconstitutional.

Judge Trieber’s sympathies lay with the conservationists and farm-

123. *Arkansas Gazette*, July 17, 1900. (Full citation unavailable. See parenthetical, *supra* note 7.)

124. *Helena World*. (Full citation unavailable. See parenthetical, *supra* note 7.)

125. Act of March 4, 1913, ch. 145, 37 Stat. 828, 847.

126. *Times*, May 29, 1914. (Full citation unavailable. See parenthetical, *supra* note 7.) It is interesting to note that the passenger pigeon, a migratory bird, became extinct in about 1914 because of wholesale slaughter. WEBSTER’S NEW WORLD DICTIONARY 1038 (2d College Ed. 1972).

ers, but he agreed with Shauver.¹²⁷ In so agreeing, he was one of the first federal district judges to hold a federal statute unconstitutional.¹²⁸ He held that the Constitution did not authorize Congress to regulate the shooting of migratory wild game. He pointed out that Congress possessed only those powers granted by the Constitution expressly or implicitly, and that the court must declare void any statute beyond those powers.¹²⁹ He reasoned that although the federal government had power over its own property, it could not regulate migratory birds which were owned by the states in their sovereign capacity as representatives of their people.¹³⁰ He also held that the United States had no implied power to exert control even if the states were incapable of such control, there being no general police power not supported by a specific constitutional provision.¹³¹ Judge Trieber stated: "It may be, as contended on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary."¹³² Denying a motion for rehearing, he pointed out that, according to the Supreme Court, the commerce clause did not give the federal government power over migratory game, as game was internal state commerce, not interstate commerce.¹³³ He then added:

For this court to disregard these decisions of the highest tribunal of the land would be an assumption of authority not only unwarranted, but improper. The Supreme Court is the only tribunal which possesses that power, and it exercises it very sparingly. Fortunately, this question can be reviewed by that court on error, and it is hoped that the government will take proper steps to have it done.¹³⁴

Judge Trieber also stated that "although in full sympathy with all measures tending to preserve the wild game for the benefit of all the people, the court can find no valid reason for changing the conclusions reached

127. *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914).

128. For other cases in which federal district court judges held federal statutes unconstitutional, see *Howard v. Illinois Cen. R. Co.*, 148 F. 997 (W.D. Tenn. 1907) (Judge John E. McCall held the Federal Employers' Liability Act unconstitutional); *Brooks v. Southern Pac. Co.*, 148 F. 986 (W.D. Ky. 1906) (Judge Walter Evans held the Federal Employers' Liability Act unconstitutional). The Supreme Court upheld these two cases in the *Employers Liability Cases*, 207 U.S. 463 (1908).

129. *Shauver*, 214 F. at 156.

130. *Id.* at 157-59.

131. *Id.* at 156-57.

132. *Id.* at 160.

133. *Id.* at 160-61.

134. *Id.* at 161.

at the former hearing.”¹³⁵

The reaction to Judge Trieber’s opinion in *Shauver* was immediate and mixed. One incensed reader wrote to the *Kansas City Star* that the opinion supported “the soapbox decisions of learned spring shooters of wild fowl who never even saw the national constitution.”¹³⁶ The letter continued:

The friends of birds need feel no alarm over this incident, nor anything more serious than mild interest The side of the people and the birds will be taken care of, if need be, by a hundred able lawyers, who are fully convinced that the law is constitutional and that its stability can be demonstrated to the satisfaction of any open and logical legal mind.¹³⁷

Other writers were able to see beyond the immediate results of Trieber’s decision:

The principle involved is of considerable importance. If the bird law rests simply on the conservation of natural resources, why might not the federal government follow it up with a forest law and prescribe the conditions on which a farmer might fell a tree on his own land? The bird law is generally agreed except by pot-hunters to be a good law, but many of those who believe in it heartily are a little uneasy in regard to the invasion of state rights involved, and a decision by the supreme court will be welcome. If that is adverse the bird lovers will have to renew their campaign in the states; if it is favorable it is the states which will have to keep jealous satch against the use of the precedent for a further invasion of their prerogatives by the central government.¹³⁸

A supporter of the statute, Col. J. H. Acklen, president of the U. S. Game Commissioners and counsel for the United States in *Shauver*, stated:

Judge Jacob Trieber is admittedly one of the ablest judges on the federal bench. Furthermore, he is a man of remarkable attainments in matters outside of the law. He is an ardent advocate of game and bird protection. He knows both from study and observation the importance to the agricultural interests of the country of protecting our insectivorous birds and the inadequacy of most state laws to protect our

135. *Id.* at 160.

136. *Kansas City Star*, June 8, 1914. (Full citation unavailable. See parenthetical, *supra* note 7.)

137. *Id.*

138. *Republican* (Springfield, Missouri). (Full citation unavailable. See parenthetical, *supra* note 7.)

migratory wild fowl from threatened extermination. These facts add great weight to his conclusions, which I am sure he regretted to have to reach, but as an able lawyer and conscientious judge he felt undoubtedly constrained to declare the act unconstitutional.¹³⁹

The United States appealed to the Supreme Court. Meanwhile, it sought another means of obtaining the desired results. In 1916, it negotiated a treaty with Great Britain for the protection of migratory birds.¹⁴⁰ Pursuant to this treaty, Congress enacted the Migratory Bird Act of July 3, 1918.¹⁴¹ Subsequently, on January 7, 1919, the Supreme Court dismissed the appeal on the government's motion.¹⁴²

An opportunity to test the new Act arose soon thereafter. E.D. Thompson was accused of a violation of this Act. Like Shauver, Thompson demurred to the accusation, arguing the unconstitutionality of the Act.¹⁴³ Judge Trieber disagreed.¹⁴⁴ He initially noted that the Constitution expressly gave to the federal government, through the President and Congress, the power to make treaties, and expressly denied this power to the state. He then stated that the treaty power of the federal government was broader than Congress' power to enact statutes, pointing out that while the legislative power is limited to the enumerated powers, the treaty power was limited only to the "authority of the United States." He concluded by saying:

While this court is of the opinion that the power to declare treaties void, if clearly violative of some provision of the Constitution . . . exists, it should . . . "never be exercised but in a very clear case indeed."

To make treaties is one of the highest attributes of every sovereign government, and if the United States does not possess it to the fullest extent it would not be invested with the powers which belong to independent nations, and the rights of our citizens in their intercourse with foreign nations, or their right to the protection of life, liberty, and the enjoyment of property in foreign countries would be at the mercy of foreign nations, as the states are without authority to enter into treaties. It is impossible to conceive that the framers of the Con-

139. Unidentified newspaper article. (Full citation unavailable. See parenthetical, *supra* note 7.)

140. Convention between the United States of America and the United Kingdom of Great Britain and Ireland for the protection of migratory birds in the United States and Canada, August 16, 1916, United States-Great Britain, 39 Stat. 1702.

141. Act of August 16, 1916, ch. 128, 40 Stat. 755, U.S. COMP. ST. 1918, at 1795.

142. *United States v. Shauver*, 248 U.S. 594-95 (1919).

143. *United States v. Thompson*, 258 F. 257, 257-58 (E.D. Ark. 1919).

144. *Id.* at 268.

stitution overlooked a matter of such importance, and intended to deprive the people of protection in foreign lands, which can only be secured by treaty.

To say that by the exercise of that power the people of the states may be deprived of their liberty is to reflect, not only on those who by the Constitution are invested with that power, but on the people themselves, for a treaty can only be made by the President and the concurrence of two-thirds of the Senators, all elected by the people, and their servants.

In the opinion of the court, the power to make the treaty in controversy exists, and the act of Congress to carry it into effect was in discharge of a moral obligation assumed by the nation, by the convention with Great Britain.¹⁴⁶

Judge Trieber's decision in *Thompson* went unchallenged.¹⁴⁶

UNITED SHOE MACHINERY COMPANY CASES

Two years after Judge Trieber became involved in the migratory bird cases, Chief Judge Edward Douglas White of the United States Supreme Court asked him to become involved in a complex antitrust case involving the United Shoe Machinery Company. In the early 1900s, United Shoe manufactured and leased more than ninety-five percent of the shoe-manufacturing machinery in the United States. The leases contained "tying clauses" which restricted the lessees' rights to use machinery or supplies made by other companies.¹⁴⁷

These tying clauses had been a target of the federal government's antitrust campaign. In December, 1911, the United States filed suit against the company,¹⁴⁸ claiming that the leases violated the Sherman Act.¹⁴⁹ Three months after the *United Shoe* suit was filed, the Supreme Court, in *Henry v. A. B. Dick Co.*,¹⁵⁰ held that the Sherman Act did

145. *Id.*

146. Later, both Judge A. S. Van Valkenburgh, in the Western District of Missouri, and Judge J.C. Hutcheson, Jr., of the Southern District of Texas also sustained this second migratory bird act. See Bulletin of the American Game Protection Association (July, 1919).

147. See, e.g., *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 61-63 (1918).

148. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1022 (1985); see *United States v. United Shoe Machinery Co.*, 222 F. 349 (D. Mass. 1915) *aff'd*, 247 U.S. 32 (1918).

149. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)). This act provided that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is [hereby] declared to be illegal." (Language omitted from the United States Code appears in brackets.)

150. 224 U.S. 1 (1912) *overruled*, *Motion Picture Patent Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917).

not forbid tying arrangements.

Reaction to *A. B. Dick* was strong. Many were concerned that the tying arrangement exception to the Sherman Act punched a dangerous hole in antitrust protection.¹⁵¹ Consequently, in 1914, Congress passed the Clayton Act.¹⁵² During congressional debates, United Shoe's tying arrangements were specifically condemned.¹⁵³

Meanwhile, the suit against United Shoe under the Sherman Act continued. In 1915, the United States District Court for the District of Massachusetts held that the lease clause did not violate the Sherman Act.¹⁵⁴ The Supreme Court affirmed in a 4-3 decision.¹⁵⁵

Shortly after the Clayton Act was passed, the United States tried once more to enjoin the tying arrangements of United Shoe, this time under section 3 of that act. This case initially came before Judge David P. Dyer, United States District Judge for the Eastern District of Missouri.¹⁵⁶ On November 15, 1915, he granted the motion of the United States for a preliminary injunction.¹⁵⁷ The United States Court of Appeals for the Eighth Circuit reversed this order without prejudice on

151. Kramer, *supra* note 148, at 1019. "The 1912 National Platform of the Democratic Party stated: 'We regret that the Sherman Anti-Trust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretations.'" *Id.*

152. Clayton Act, ch. 323, § 3, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 14 (1982)). This section states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . or fix a price charged therefore, or discount from or rebate upon, such price, on the condition agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

153. Kramer, *supra* note 148, at 1021.

154. *United States v. United Shoe Machinery Co.*, 222 F. 349 (D. Mass. 1915), *aff'd*, 247 U.S. 32 (1918).

155. *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918). Justices Brandeis and McReynolds disqualified themselves. "Justice Brandeis not only had been counsel for the defendant, he subsequently had opposed the defendant's practices and worked toward the passage of the Clayton Act." Kramer, *supra* note 148, at 1027 n. 70 and accompanying text. Justice McReynolds had served as President Wilson's attorney general during part of the case's pendency. *Id.* Justice Day, one of the three dissenting justices, wrote for the majority when, four years later, the Supreme Court found the tying clauses violative of the Clayton Act. *See infra* notes 170-71, and accompanying text.

156. *United States v. United Shoe Machinery Co.*, 227 F. 507 (E.D. Mo. 1915), *rev'd*, 232 F. 1023 (8th Cir. 1916), *appeal dismissed*, 254 U.S. 666 (1921).

157. 227 F. at 511.

May 16, 1916, when the government abandoned its claim to a preliminary injunction.¹⁵⁸

When Chief Justice White asked Judge Trieber if he would be willing to take over the case,¹⁵⁹ he agreed to do so without hesitation, even though he knew that it meant months away from his family, and that he would be required to keep his own calendar current. There were important questions of antitrust law to be addressed, including the constitutionality of the newly-passed Clayton Act. The matter was of great economic importance. The case was complex—precisely the type of litigation upon which his disciplined mind thrived. Moreover, his extensive business experience would be of value in deciding the issues.¹⁶⁰

The case proved to be as complex as Judge Trieber had anticipated. It first came before him on United Shoe's motion to dismiss, a motion which he denied. A trial on the merits followed.

Judge Trieber initially held that section 3 of the Clayton Act was within Congress' powers under the commerce clause. He started with the basic premise "that courts are slow to declare the acts of co-ordinate departments of the government . . . void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it."¹⁶¹ He acknowledged that leases as a mode of commerce may not have even existed when the United States Constitution was written, but stated:

The fact that the question has never been before the courts, or that the power has never been exercised by Congress, is no proof that the Constitution does not authorize it.

It may be conceded that every lease is not commerce, but that is

158. *United States v. United Shoe Machinery Co.*, 232 F. 1023 (8th Cir. 1916), *appeal dismissed*, 254 U.S. 666 (1921).

159. United Shoe filed an affidavit of prejudice against Judge Dyer, who subsequently disqualified himself.

160. Additionally, the law in this area was unsettled and in need of attention. Although the Supreme Court had held in 1912 that, under the Sherman Act, a tying arrangement could be incorporated as a condition of sale of a patented article, *Henry v. A. B. Dick Co.*, 224 U.S. 1, in 1917 it overruled this decision. *Motion Picture Patent Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917). One year later, the Court held that the Sherman Act did not apply to United Shoe's tying arrangements because they involved leases rather than sales. *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918). Thus, tying arrangements were enforceable under the Sherman Act when they were incorporated into a lease, but not when they were a condition of sale.

The efficacy of the Clayton Act was also still unsettled. In *Motion Picture Patent Co.*, the district court and the United States Court of Appeals for the Second Circuit found violations of the Clayton Act, but the Supreme Court did not reach that issue in affirming the decision.

161. *United States v. United Shoe Machinery Co.*, 234 F. 127, 143 (E.D. Mo. 1916) (on motion to dismiss).

not conclusive that none may be. Each case must be determined from the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels, instead of selling them, why is it not as much engaged in commerce as if it sold them outright?¹⁶²

His decision on the commerce clause foreshadowed the broad reach later Supreme Court decisions¹⁶³ would give to the commerce clause:

It is sufficient to say that as new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.¹⁶⁴

The trial on the merits continued for nearly four years. In 1920, Judge Trieber found that the Clayton Act did not constitute an unconstitutional taking of patent rights: "In short, individual rights, whether claimed under patents or otherwise, must be subordinated to the public good, and, unless clearly arbitrary and unreasonable, courts will respect the acts of the legislative department."¹⁶⁵

He concluded:

[W]hile Congress cannot deprive a patentee of the exclusive use of the patent, or reduce the time for which it is granted by existing law, without violating the Fifth Amendment, a patentee has no vested right in conditions of contracts for use, license, or lease of his patented invention, which Congress may not prohibit, if in its judgment they are injurious to the public welfare, though he may have possessed that right under the common or municipal law, as theretofore construed by

162. *Id.* at 143-44.

163. Although Chief Justice Marshall suggested in 1824 that Congress' powers under the commerce clause were very broad, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 86-87 (1824), the Supreme Court in Trieber's day generally took a more restrictive approach to Congress' commerce power. *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *L. TRIBE, AMERICAN CONSTITUTIONAL LAW*, 234-35 (1978). In 1937, the Supreme Court initiated its more liberal view in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

164. *United Shoe*, 234 F. at 145.

165. *United States v. United Shoe Machinery Co.*, 264 F. 138, 148 (E.D. Mo. 1920) (trial on merits) *aff'd*, 258 U.S. 451 (1922).

the courts.¹⁶⁶

He also held that the tying provisions did violate the Clayton Act:

Can it be doubted that these provisions are not only within the spirit but the letter of the statute? What is the natural, direct, and necessary effect of these conditions? There can be but one answer to this: To compel the lessees to use defendants' machinery and material, regardless of whether the terms granted by the defendants are as favorable as can be obtained from other manufacturers of some of the machines or dealers in some of the materials.¹⁶⁷

Judge Trieber refused, however, to apply the act to leases and contracts entered into before the enactment of the provision.¹⁶⁸ He did so notwithstanding the fact that four federal courts, including the United States Court of Appeals for the Second Circuit held that section 3 should be given retrospective construction.¹⁶⁹

The Supreme Court affirmed.¹⁷⁰ It noted that "[t]he record embraces twenty-seven volumes of printed matter and four volumes of exhibits. . . . [W]e may add that . . . the opinion gives evidence of careful and painstaking research."¹⁷¹

To this day, Judge Trieber's opinions in *United Shoe Machinery Co.* continue to be among the most cited cases in antitrust law.

RAILROADS

During his entire term of office, Jacob Trieber was involved in many aspects of railroad litigation. As an unabashed supporter of economic development in Arkansas, he believed that the expansion of the railway system in the state was essential. In the 1900 campaign, he argued,

there [are] some things upon which we all should agree, viz, to develop the resources of the state and build up a home market . . . so far as Arkansas [is] concerned, it should be considered the great garden spot of the United States because of its wonderful resources . . . yet . . . the state [has] not been developed as it should be.¹⁷²

166. *Id.* at 154.

167. *United Shoe*, 234 F. at 148-49.

168. *United Shoe*, 264 F. at 175.

169. *Id.* at 170.

170. *United States v. United Shoe Machinery Co.*, 258 U.S. 451, 465 (1923).

171. *Id.* at 454-55.

172. *Arkansas Gazette*, August 29, 1898. (Full citation unavailable. See parenthetical, *supra* note 7.)

He criticized the Democrats' "policy of the past few years [which] has been to antagonize new enterprises and keep them out."¹⁷³ His Democratic adversary, Governor Joseph Clarke, mockingly retorted that, "while he was in the governor's office, a New England party of capitalists came into the office and said there was no outlook for factories in Arkansas because we have but one railroad system and they couldn't distribute their product at a fair rate of freight."¹⁷⁴ He attacked Trieber's suggestion that Arkansas should encourage railroads and manufacturers to come to the state through tax breaks and promises of profitability and stated, "the right of railroads to charge rates must be limited" and advocated the formation of a railroad commission.¹⁷⁵

A railroad commission was indeed created and in subsequent years, this commission would attempt to limit railroad rates, and to impose special taxes and public improvement obligations on railroads. These activities and other public laws regulating railroads led to numerous lawsuits in Judge Trieber's court. In 1907, the Arkansas Legislature passed an act, aimed at foreign railroad corporations, which prohibited a foreign corporation from removing to federal court any suit brought against it in state court and which required the payment of a substantial reincorporation fee. The Chicago, R.I. and P. Railway Company brought suit in Judge Trieber's court to enjoin enforcement of the law. Judge Trieber held that the suit was not barred by the eleventh amendment and enjoined enforcement of the act on the ground it impaired the franchise of the railroad in violation of the contract clause of the federal Constitution and several provisions of the Arkansas Constitution.¹⁷⁶

On February 9, 1907, the Arkansas Legislature passed an act fixing the maximum passenger fare within the state on certain lines at two cents per mile. On June 4, 1908, the Arkansas Railroad Commission similarly limited railroad freight rates. Several railroads then filed an action which alleged that the rates were confiscatory and unreasonable. Judge Van Devanter of the United States Court of Appeals for the Eighth Circuit, sitting as a district judge, granted a preliminary injunction in favor of the railroads¹⁷⁷ and the case was set for trial in Judge Trieber's court. After a lengthy trial, Judge Trieber agreed with Judge

173. *Id.*

174. *Id.*

175. *Id.*

176. *Chicago R.I. & P. Ry. Co. v. Ludwig*, 156 F. 152 (E.D. Ark. 1907), *aff'd*, 216 U.S. 146 (1910).

177. *In re Arkansas Railroad Rates*, 163 F. 141 (E.D. Ark. 1908)

Van Devanter's view that the two-cents-per-mile rate was confiscatory and unreasonable, but he also found that the rate increases which the railroads had initiated after the preliminary injunction had been granted were "extortionate."¹⁷⁸ He wrote,

[t]herefore, not only to prevent a multiplicity of suits, but to require complainants who seek equity do equity, this court is justified in prescribing such maximum rates as may be just to the railroads as well as the public. . . . The railroads are entitled to reasonable profits on their investments, and the public to reasonable rates or to express it differently, the rights of the public and railroad companies are reciprocal¹⁷⁹

Judge Trieber adopted a temporary tariff which allowed the railroads to charge three cents per mile for passengers and 2.67 cents per mile for freight.¹⁸⁰

To avoid appeal, the parties agreed to try for eighteen months a rate of 2.5 cents per mile for freight and three cents per mile for passengers. At the end of this period, both parties were dissatisfied; the state wanted the two-cents-per-mile rate and the railroads wanted the three-cents-per-mile rate. When the parties were unable to agree, the railroads brought suit, seeking a permanent enjoining of the two-cents-per-mile rate. Judge Trieber issued a long and detailed opinion holding that the two-cents-per-mile rate was confiscatory and unreasonable.¹⁸¹

The Supreme Court reversed on the ground the data submitted by the railroads was inadequate.¹⁸² Not to be dissuaded, the railroads again brought suit. This time they submitted more complete data. Judge Trieber again ruled that the rates were confiscatory and set a rate which allowed the railroads a profit.¹⁸³ He noted that railroads in recent years had been saddled with new costs associated with a variety of remedial legislation, and stated that rail rates must be set high enough to allow railroads to pay for these obligations. Praising

178. *In re Arkansas Railroad Rates*, 168 F. 720, 722 (E.D. Ark. 1909).

179. *Id.* at 725, 733.

180. *Id.* at 735-37.

181. *In re Arkansas Rate Cases*, 187 F. 290 (E.D. Ark. 1911), *rev'd*, 230 U.S. 553 (1913).

182. *Allen v. St. Louis, Iron Mountain & S. Ry. Co.*, 230 U.S. 553 (1913). Ironically, Judge Trieber had requested the parties to agree to the appointment of a special master to supplement the data and make further calculation, but the parties would not agree. 187 F. at 294.

183. *Boyle v. St. Louis & S.F.R. Co.*, 222 F. 539 (E.D. Ark. 1915), *aff'd*, 244 U.S. 106 (1917). Perhaps the most significant thing about these cases was that Judge Trieber was willing to set the rates himself rather than to remand to the state rate-making board to establish a new rate. Perhaps he felt that the question of rail rates in Arkansas was so political that no fair rate could be set.

Trieber's "careful discussion," the Supreme Court affirmed, agreeing that the Arkansas rates were "unduly low."¹⁸⁴

In subsequent years, Judge Trieber decided a number of similar cases involving railroads in which he agreed that rate limitations or special taxes or obligations on railroads were confiscatory or in violation of the state or federal constitutions. In *Mudge v. McDougal*,¹⁸⁵ he granted an injunction prohibiting St. Francis County from taxing the property of the railroad plaintiff at a rate twice that of the property of other corporations or individuals.¹⁸⁶ In *Hines v. Clarendon Levee District*,¹⁸⁷ he held unconstitutional a special act of the Arkansas Legislature which required the plaintiff railroad to build up a certain section of its railbed to prevent flooding and to serve as a levee for the town of Clarendon. He wrote, "[i]t is impossible to escape the conclusion that the real object of the act is to require the railroad to protect, at its expense, the town of Clarendon from overflow."¹⁸⁸ Quoting the United States Supreme Court,¹⁸⁹ he explained, "'[t]he business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.'"¹⁹⁰

Although Judge Trieber was criticized in the press for being a "friend of the railroads,"¹⁹¹ he commented in an interview that:

There is a different view taken of railroads in courts than is taken by the people and the legislature. The general public thinks that the principal purpose of having railroads is to enact acts to raise wages, put up beautiful structures in every town for stations, to reduce hours of labor, to pay all taxes on road improvements and to make them liable for damages. . . . The principle of damn the railroads doesn't apply in court any more than the principle so largely practiced by the railroads of damn the public did.¹⁹²

Notwithstanding his belief that railroad expansion should be encouraged, he also supported the view that railroads should be regulated

184. *Rowland v. Boyle*, 244 U.S. 106, 108 (1917).

185. 222 F. 562 (E.D. Ark. 1915), *rev'd*, 233 F. 235 (8th Cir. 1916).

186. 222 F. at 569. The Eighth Circuit reversed on the grounds that although the double assessment was unlawful, the suit had to be brought before an Arkansas Commission set up to adjust property evaluations in the state to a common standard. *See supra* note 183.

187. 264 F. 127 (E.D. Ark. 1919).

188. *Id.* at 133.

189. *Great Northern Ry. v. Minnesota*, 238 U.S. 340, 345 (1915).

190. *Hines*, 264 F. at 134.

191. *St. Louis Post Dispatch*, June 12, 1912. (Full citation unavailable. *See* parenthetical, *supra* note 7.)

192. *New York Times*, March 8, 1923. (Full citation unavailable. *See* parenthetical, *supra* note 7.)

to ensure fair and safe working conditions. In *Spain v. St. Louis & S.F.R. Co.*,¹⁹³ he upheld the constitutionality of the Federal Employers' Liability Act (FELA), which he viewed as a desirable step toward humanitarian treatment of labor. He expressed his philosophy with respect to employees' rights before the Arkansas Bar Association:

[FELA] is a recognition by Congress of the broad humanitarian views of the right of employees now prevailing, instead of the narrower one established by the common law at a time when the workman was accorded but few privileges, and considered but little better than a serf; when property rights were recognized as paramount to personal rights. It expresses the twentieth century conception of human rights instead of that of proceeding centuries, a view now generally recognized by all civilized Nations.¹⁹⁴

Shortly thereafter, however, the Supreme Court, in a badly divided 5-4 plurality opinion, held the act unconstitutional on the ground that the language of the act could be construed to cover intrastate traffic and employees injured in such traffic.¹⁹⁵

After Congress passed an amended act limited to interstate traffic, Judge Trieber became the first federal judge to uphold its constitutionality. He wrote:

The object of Congress in the enactment of the law was to protect the men employed in this hazardous occupation, in which thousands are annually killed or maimed without any fault of the master himself, but by the negligence of other employees, over whom the servant has no control, and in whose selection he had no voice. The legislation is neither new nor revolutionary.¹⁹⁶

In stating that Congress clearly had the constitutional authority to pass the act, he noted that such legislation not only advanced safety for workers, but also improved the safety of railroads for all customers and improved the productivity of labor. This time the Supreme Court

193. 151 F. 522 (E.D. Ark. 1907).

194. Trieber, *The National Employers' Liability Act*, 18 REP. PROC. B.A. ARK. 51, 54 (1915). Similarly, Judge Trieber, in a letter to Edward H. Hibbard, wrote:

The Employers' Liability Act passed by Congress is quite a step in advance, still it is only the first step towards protection of the workman and those dependent upon him. . . . Still, we are marching onward, and many beneficent statutes have been enacted within the last decade which could not have been passed before, and as experience adds to our wisdom, more reform measures are enacted.

Letter from Jacob Trieber to Edward H. Hibbard (September 25, 1908).

195. *Employers Liability Cases*, 207 U.S. 463 (1908).

196. *Watson v. St. Louis, Iron Mountain & S. Ry. Co.*, 169 F. 942 (E.D. Ark. 1909), *aff'd*, 223 U.S. 745 (1912).

agreed.¹⁹⁷

In *United States v. Kansas City Southern Railway Co.*,¹⁹⁸ Judge Trieber upheld the constitutionality of an act of Congress (the Hours of Service Act) which limited the maximum working hours of railroad employees to sixteen hours a day. United States District Judge Rogers had directed a verdict for the defendants on the grounds that the unlawful overtime was excusable because of unavoidable accident, an act of God, or unforeseeable cause. The government had then moved for a new trial. In the meantime, Judge Rogers died, and Judge Trieber was assigned to the case. Judge Trieber granted the motion for a new trial, holding:

[A]ll the delays shown to have occurred could have been prevented by the exercise of reasonable diligence or at least anticipated, and the court is unable to find, after a careful reading of all the testimony, that any delays were caused by casualty, unavoidable accident, or act of God, or by any cause which could not have been foreseen.¹⁹⁹

Similarly in *St. Joseph & G. I. Railway Co. v. United States*,²⁰⁰ Judge Trieber, writing for the United States Court of Appeals for the Eighth Circuit, rejected the contention of the railroad that the Hours of Service Act did not limit the working hours of an employee on a "work train" operating wholly within one state. "In our opinion, this is too narrow a view of this act, which was intended . . . to be a remedial statute . . . to promote the safety of employes and travelers on trains moving in interstate commerce, and should be liberally construed to effect its purpose."²⁰¹

Not only was Judge Trieber a vigorous advocate of railroad expansion, but he also made other important contributions to the economic development of the state of Arkansas. He was an early advocate of a Uniform Commercial Code and played a key role in the drafting of Arkansas's first banking law.²⁰² He wrote several articles and speeches

197. *St. Louis, Iron Mountain & S. Ry. Co. v. Watson*, 223 U.S. 745 (1912) (mem.) *aff'g* 169 F. 942 (E.D. Ark. 1909).

198. 189 F. 471 (E.D. Ark. 1911).

199. *Id.* at 479-80.

200. 232 F. 349 (8th Cir. 1916).

201. *Id.* at 352.

202. One article stated:

He was a great force among the bankers for the enactment of a state banking law. He . . . worked long and patiently on the provisions of a banking law for Arkansas that would be fair and helpful to the state banks of just that period in the state's development—a law that would fit the needs of that time and yet not retard wise and conservative state progress. . . . It is also recalled that Judge Trieber wrote and had

on banking, commercial law, and economic development in Arkansas,²⁰³ was a member of the Little Rock businessmen's club, and took part in many economic development projects, including the restoration of Arkansas' first state capitol.

CRIMINAL JUSTICE AND COURT REFORM

In 1925, Jacob Trieber completed a difficult and thought-provoking task at the request of the *Arkansas Democrat*: to reflect upon and write about the twenty-five years he had served on the district court bench. He decided not to discuss specific cases, even though he had, over the years, compiled a list of what he considered his most important decisions. Instead, he devoted one article to a general discussion of criminal law and another to court reform.

When it came to criminal cases, he believed that:

Before a man can be punished, his case must be plainly and unmistakably within the statute. At the same time, even penal statutes must be naturally construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other hand, equally refusing, by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.²⁰⁴

Occasionally, of course, a case arose where the language of the statute would have allowed prosecution of the defendant, but common sense dictated to the contrary. One such case involved a young man who had spent the night with his girl friend in a hotel fifty yards outside of their home state. The young woman's irate father had the man brought before Judge Trieber on charges of transporting a woman across a state line for immoral purposes. Judge Trieber dismissed the case, stating that the difference between a felony and a sin must be greater than fifty yards.²⁰⁵

Judge Trieber's philosophy of strict construction of criminal stat-

passed by the Arkansas Legislature in 1901 or 1902, that part of the present state banking law known as the law governing trust companies.

11 ARKANSAS BANKER 22 (1927).

203. See, e.g., Trieber, *The Rights and Liabilities of Banks at Law*, (pt. 1) 11 ARKANSAS BANKER 5 (1927), (pt. 2) 11 ARKANSAS BANKER 21 (1927) (Based on a speech given by Trieber at the Eighth Annual Convention of the Arkansas Bankers Association, Little Rock, Arkansas, on April 21, 1898); Trieber, *The Jurisdiction of Federal Courts in Actions in which Corporations are Parties*, 8 REP. PROC. B.A. ARK. 35 (1905).

204. *United States v. Schlierholz*, 137 F. 616, 617 (E.D. Ark. 1905).

205. Letter from J. Marshall Trieber to the author (January 2, 1986).

utes compelled him to release defendants when their actions, even though reprehensible, did not fall precisely within areas forbidden by law.²⁰⁶ Conversely, there were times when, although his heart went out to the defendants and their families, the law required him to impose sentence:

Judge Trieber wept and seemed to be almost choking several times while he was announcing the penalty. The wife and mother of the prisoner were also in tears. . . . Judge Trieber told [the defendant] that he would have been glad to give him a lighter sentence if the law permitted it.²⁰⁷

He stated in the *Arkansas Democrat* article that:

Few laymen realize the feeling of a judge, when compelled to inflict punishment which in many instances causes as much, and in some greater suffering to the innocent wives, children and other members of the family of the guilty party, than on the violator of the law. Nor is this feeling confined to criminal cases. . . . Yet, under his oath, a judge must suppress these feelings of sympathy and decide in accordance with what he conceives to be the law, regardless of the suffering his decision may cause.²⁰⁸

His sentencing philosophy, as expressed in the article, also reflected his compassion for the defendants:

As I do not believe in severe sentences, I rarely ever sentence a person on more than one count, or if I do I make the sentences on each count concurrent, which is equivalent to a sentence of one count. In my

206. See, e.g., *Vernon v. United States*, 146 F. 121, 123 (8th Cir. 1906) ("No matter how reprehensible the conduct of the defendant might have been, under the indictments there could be no conviction unless there was substantial evidence justifying a finding by the jury that he had offered, given or promised to [the federal officer] money for the purposes in the indictment set out. There is nothing in the statute under which he was indicted forbidding [the defendant] from persuading [the officer] to select the sites he recommended to the end that [the defendant] may receive a fee from the owners of the sites."); *United States v. Sandefuhr*, 145 F. 49 (E.D. Ark. 1906) (where statute prohibited the transportation of liquor in falsely labeled containers, no violation where defendant transported liquor in unlabeled containers); *United States v. Schlierholz*, 137 F. 616 (E.D. Ark. 1905) (defendant, although he was a special agent of the Land Department of the United States, was not an "officer of the United States" within the meaning of the statute in question, and, therefore, could not have violated the statute); *United States v. Ryan*, 123 F. 634, 636 (E.D. Ark. 1903) (where statute provided for punishment for using the mails to defraud, no violation where defendants wrote to one another "for the purpose of concocting schemes to defraud, but not for the purpose of carrying them into effect, nor were they written to be used as a part of the fraudulent scheme.")

207. Unidentified newspaper article. (Full citation unavailable. See parenthetical, *supra* note 7.)

208. *Arkansas Democrat*, September 20, 1925. (Full citation unavailable. See parenthetical, *supra* note 7.)

opinion it is not the severity of punishment but the certainty of it, with no likelihood of the pardon which deters those inclined to violate the law from doing so. This, of course, does not apply to habitual criminals, who must be sentenced for long terms for the protection of society.²⁰⁹

One of his reasons for giving short sentences was his disapproval of prison conditions. He often expressed the view that the Arkansas state prisons were especially inhumane and in need of improvement. On May 19, 1902, he wrote to F.F. Kitchens, Sheriff of Phillips County, to discuss the unsatisfactory condition of the county jail there: "It is an old, filthy place with no sewage connections and . . . a bad smell. The jail here [in Little Rock] has modern improvements. [Accordingly, I will continue to send prisoners to Little Rock and will not send them to Phillips County] . . . if I can possibly avoid it."²¹⁰ On October 23, 1902, he wrote to Marshall Ford, Sheriff of Lee County, stating:

[I]t is my intention . . . that the prisoners are treated properly. . . . I understand that there are three and four prisoners in one cell and the cells are rather small. That ought not to be. I do not want the prisoners to get sick; besides they are human beings and ought to be treated humanely. They ought also to have a little fresh air every day, and if you can arrange it so as to give them an hour or two of exercise without too much expense to yourself in guarding them, I wish you would do it. There will probably be other prisoners sent to you for safe keeping to await trial, provided they are properly treated. If this is not done, they will all have to be brought here to Little Rock.²¹¹

On January 3, 1912, he wrote to H.M. Jacoway, of the United States House of Representatives and said:

A Federal jail is an absolute necessity in this district. The best jail in the district is that in Little Rock, but it is usually so crowded with state prisoners that the Federal prisoners have to be crowded in and the place cannot be kept clean. [Our prisons are so bad that] [i]n a number of instances persons have asked to be sent to Atlanta for a year and a day rather than spend six months or more in one of our jails. . . . It is a great injustice to put [many of the federal prisoners] in such a jail. Aside from that the health of the prisoner is seriously affected. . . . Several hundred dollars are annually spent in this District for medical bills which would not be incurred if they were kept in

209. *Id.*

210. Letter from Jacob Trieber to F.F. Kitchens (May 19, 1902).

211. Letter from Jacob Trieber to Marshall Ford (October 23, 1902).

a clean, wholesome prison.²¹²

In his second article for the *Arkansas Democrat*, Judge Trieber discussed a few of his ideas on court reform, focusing primarily on judicial efficiency. He believed: that a judge should take a firmer hand in jury selection and do much of the questioning of prospective jurors himself, thus avoiding many of the attorneys' irrelevant questions; that the number of peremptory challenges allowed should be reduced; that a judge should take a more active role during the trial because "[a] judge should be something more than a moderator to decide on objections. He should be responsible for correct results[.]"²¹³ He also proposed that the rules of evidence should be liberalized and made uniform because the old rules were developed in times when defendants had no rights to counsel or to testify.²¹⁴

Judge Trieber had additional ideas about court reform which he did not discuss in his article, principally, the establishment of lower courts which could relieve the district courts of some of their more mundane, yet time-consuming, cases:

[T]he dignity of the federal district courts has been to a great extent destroyed by the requirement that all criminal cases, no matter how trivial, can only be tried in those courts, and to a jury. The motley crowds seen now in those courts, as defendants or witnesses is nauseating. Lawyers, whose practice was heretofore confined to police and magistrates' courts, who were never seen in a federal court, now crowd them, defending parties charged with violations of the national prohibition law and similar offenses of a petty nature, who, if charged with violations of petty offenses of the laws of the state would only be tried in inferior courts.²¹⁵

The quantity of prohibition cases Judge Trieber heard tried his patience.²¹⁶ On one occasion, upon seeing an all-too familiar face before him, he delivered a reprimand:

"What is the matter with you people in Saline County," Judge Trieber asked of the attorney who had represented R.D. Baxter, an

212. Letter from Jacob Trieber to H.M. Jacoway (January 3, 1912).

213. *Arkansas Democrat*, September 27, 1925. (Full citation unavailable. See parenthetical, *supra* note 7.)

214. *Id.*

215. Trieber, *Letter to the Editor*, 12 A.B.A. J. 424 (1926).

216. In a letter to his wife, Judge Trieber said, "We did a lot of work yesterday, but there is lots more. . . . There are 6 more whiskey cases, in which the parties demand a trial. . . . It is possible we may not finish tomorrow, but I'll try very hard. . . . In court everything moves smoothly, and the lawyers don't waste time any more than I do." Undated letter from Jacob Trieber to Ida Trieber.

old offender of that county. "What can be done to stop the manufacturing of liquor down there? It seems to me that in spite of the penalties I assess, the violators continue to thrive in Saline county. That county is the worst in the state, it has even exceeded the record made by Garland county several years ago for liquor violations.

"I believe that the churches are not doing their duty. They should send missionaries into Saline county instead of sending them into Africa and other foreign countries, and educate the people to obey the laws.

"What are the people coming to? They come into my court here after getting into family rows and swear falsely against their neighbors without any apparent fear that there is a God!"²¹⁷

Friendship with him provided no refuge for offenders. In 1924, the *Jonesboro Daily Tribune*, calling him "A Just Judge," reported:

When forty-two citizens of Jackson county, some of whom were good friends of the justice, were brought before him on the charge of buying booze, the judge fined the whole "pot and biling" without discrimination or favoritism. Among the number who faced the jurist was a fellow practitioner at the bar, who had been a warm personal friend for twenty years. There was no bar of friendship to stand in the way of justice and no fixing of things by sympathetic fellow lawyers. They all received what they were entitled to under the law. . . .²¹⁸

Another time, "Grandma Wirges," an elderly North Little Rock woman who ran a dairy, dropped in on Judge Trieber and presented him with a bottle of her homemade wine. Although he accepted the gift, he affectionately admonished her, "Grandma, you know the law of the land. And you know I will uphold the law. If you are ever brought into my court for violating the prohibition law, I will sentence you just like anyone else." He knew that Grandma Wirges loved to tell that story, and that she always ended by saying, "and the old goat would have done it, too!"²¹⁹

Looking back on the twenty-five years, Judge Trieber was reasonably satisfied with the workings of the criminal justice system, despite its failings, as justice seldom miscarried:

[T]he instances of convictions in criminal cases of persons, who were not guilty, are rare. I can recall but two such instances, although I

217. Arkansas Democrat, October, 1926. (Full citation unavailable. See parenthetical, *supra* note 7.)

218. Jonesboro Daily Tribune, 1924. (Full citation unavailable. See parenthetical, *supra* note 7.)

219. Letter from J. Marshall Trieber to the author (July 9, 1985).

make it a rule to investigate independently after the conviction, if my attention is called to matters which were not brought out at the trial.

. . . .
In both instances I immediately, after ascertaining the facts, recommended pardons, which were at once granted. . . .²²⁰

He also noted in his article that, similarly, there had been few instances where juries had returned verdicts of not guilty when the defendant's guilt had been established beyond question. Nevertheless, he continued his campaign for court and prison reform; he knew that love of and respect for the law were fully consistent with a desire to improve conditions.

THE LATER YEARS

Jacob Trieber celebrated his seventieth birthday on October 6, 1923. His wife, family, and close friends used the occasion to renew their requests for him to take senior status or, at the very least, to decline further assignments to the Court of Appeals and other district courts. They knew that he had regular angina pains and that he tired more easily than in the past. He would have none of it. He loved the law and would continue on active status until his health would no longer permit or until he died. As for accepting outside assignments, he would not give them up. He enjoyed the companionship of the judges at the Court of Appeals, and the stimulation of serving in other districts. Moreover, he felt that it was his duty to respond to requests by the Chief Justice of the United States Supreme Court to help out in other districts. Jacob Trieber's reputation was national in scope.

In the fall of 1923, Chief Justice William Howard Taft asked Judge Trieber to spend some time in the Southern District of New York. That district was then experiencing a serious backlog because political leaders were unable to agree on appointments for three vacancies. Judge Trieber was unable to accept the designation at that time because of the press of business in the Eastern District of Arkansas and prior commitments to the Court of Appeals, but he cleared his calendar so that he could spend several weeks in New York in the winter and spring of 1925. The *New York Times*, in an unusual editorial, chronicled his work in the City:

Arkansas has sent the perfect judge to this metropolis in the person of Federal District Judge Jacob Trieber[.] . . . Judge Trieber, previ-

220. Arkansas Democrat, September 20, 1925. (Full citation unavailable. See parenthetical, *supra* note 7.)

ously unknown to a great many jurists and attorneys of prominence in New York, has attracted considerable attention and been the subject of approval from every one who has come in contact with him.

During his first few days in court, he gave the local legal talent and prosecutors a very direct intimation of his ability to administer and propound the law. It happened that a young assistant federal attorney was late in appearing before Judge Trieber, and had held up the orderly procedure of the day's business. The visiting jurist delivered a very pertinent lecture on timeliness, and declared his attitude in this regard in such a way that there was not any doubt about how he felt when government officers are late to work.

He has made such a hit with the associate judges that he is unable to keep up with the list of social activities such as luncheons and visits which they have arranged for him.

In the first mail fraud case which was called before the Arkansas judge, the five defendants stayed on trial two days. After their attorneys found out what an extraordinary jurist they were appearing against, the clients were advised to ask leave to change their pleas from not guilty to guilty.

The case involved a notorious scheme of "bucketing brokerage" firms which had failed for more than \$1,000,000. He sentenced them less than 15 minutes after their counsel asked him to accept a plea of "guilty."

It is the zippy way in which Judge Trieber disposes of the business before his court that has made him an instantaneous success as a visiting jurist in this city. He is much more alert on the law, some attorneys contend than a large percentage of the regular district judges. It is conceded that he is the most perfect out-of-town judge who ever presided in the big town.

The mail fraud case which he tried smashed all records in the Southern district. Heretofore, some of these cases have taken up the trial time of from three to seven weeks.

The distinguishing characteristics of the Arkansas jurist as seen by casual observers in his court may be substantially outlined as follows:

He is a keen student on all pivotal decisions of federal law. He calls off United States Supreme Court decisions and cites cases without any recourse to reference books. Only in one instance was he known to have taken one doubting attorney to his chamber and pointed out the particular decision. He speaks with confidence and leaves those whom he addresses perfectly satisfied that he is right and they are wrong. This finality phase of Judge Trieber is not a mannerism, New York attorneys admit. It is a finality which is strongly fortified by fact and authority. It is a finality which has been developed by a keen student of the law.

Judge Trieber has shown New York courts how to move through a trial expeditiously. The irrelevant matters, the repetitions, the long regiments of witnesses all testifying to the same points are chopped out. During the mail fraud case, the judge told one of the defense counsel who had called witnesses for repetition, that he should concede "some intelligence to the jury."

His court room is dignified and possessed of that atmosphere of orderliness for which the English courts are noted. This typifies the administrative ability of Judge Trieber. It is a frequently discussed fact among lawyers that some of our best American judges know the law and procedure perfectly, but fail miserably as administrators of order and respect in their court rooms. Judge Trieber combines these two excellent qualities.

There is no pounding of a gavel or shouting while Judge Trieber is on the bench. The usual turmoil which frequently starts off a New York criminal trial is absent. The visiting jurist proceeds in a dignified and businesslike manner with the problems of the day. Neither side is allowed to become oratorical or qarrulous.

He apparently has little consideration for poor lawyers. It has not taken him long to separate the goats from the sheep, during his visit.²²¹

Others were similarly impressed. Augustus N. Hand, the Chief Judge of the Southern District of New York, wrote, "You taught me some new law to which my attention had never been called in the opinion which you sent. . . . [B]efore the spring you might make a judge out of me. [You are] the best teacher I have seen in a long time. . . . You did us a lot of good and I want to get you again as soon as possible and for as long as possible."²²² United States Attorney for New York, Emory R. Buckner, wrote to Trieber, "I have not given up our hope to entice you to visit us again, even for a short time."²²³

In November of that year, Chief Justice Taft again wrote to Judge Trieber on behalf of Judge Hand: "He says you like to come and can do about twice the work of an ordinary Judge. I am sure that when you are so much appreciated, you will feel like going to New York."²²⁴ Trieber reluctantly declined because he had only been back in Arkansas for a few months. He would have liked to return for two reasons, to

221. Jonesboro Daily Tribune, September 9, 1925 (quoting New York Times editorial). (Full citation unavailable. See parenthetical, *supra* note 7.)

222. Letter from Augustus N. Hand to Jacob Trieber (September 19, 1925).

223. Letter from Emory R. Buckner to Jacob Trieber (September 16, 1925).

224. Letter from W.H. Taft to Jacob Trieber (November 20, 1925).

serve in the busy, challenging New York district, and to spend some additional time with his daughter Bess and his grandson, who lived in Scarsdale, New York.

In April of 1927, Judge Hand wrote to Trieber: "How about your coming up here and giving us a little legal education this summer?"²²⁵ Chief Justice Taft joined in the invitation. He wanted Judge Trieber to take over the important and complex *Journeyman Stone Cutter* case which was then pending. Ida Trieber tried to dissuade him, telling him he should take his regular summer vacation in a cooler climate. Nevertheless, Judge Trieber accepted and went to New York in August and plunged into his calendar. The weather was hot and the work hard. In September his arteriosclerosis worsened, and he developed an infection in his hand. He had no alternative but to suspend his work. He was taken to his daughter's home where he became progressively worse, and died on Saturday, the seventeenth of September.

In honor of Judge Trieber, flags were at half mast over the state capitol and all federal buildings in the Eastern District of Arkansas. Moreover, all federal offices in the district closed.²²⁶ The governor, John E. Martineau, the two United States Senators, Thaddeus H. Caraway and Joseph T. Robinson, and Judge Trieber's old opponent, Edgar A. McCullough, all sent letters of condolence to Mrs. Trieber. The eulogy in the *Arkansas Gazette* was typical of those throughout the press:

Judge Trieber's respect for the dignity of his profession was a part of his devotion to it. His court was conducted with high regard for the importance and the seriousness of its functions. He was an austere as well as a wise judge. But when he left the bench he dropped his austerity as one might drop a cloak. His kindness, his quick wit and his polished mind won him many friends without as well as within his profession. He was a charming conversationalist because his love of study had given him an unusually broad range of information.

Judge Trieber found his greatest pleasure in his home, which was constantly the object of his tenderness and thoughtfulness. He was always a loving husband and an affectionate and helpful father. And he was a kind and thoughtful neighbor. He will be sadly missed by many laymen who enjoyed a friendship that was always sincere and loyal.²²⁷

225. Letter from Augustus N. Hand to Jacob Trieber (April 29, 1927).

226. Unidentified newspaper article, September 19, 1927 (Full citation unavailable. See parenthetical, *supra* note 7.)

227. Unidentified newspaper article. (Full citation unavailable, See parenthetical, *supra* note

Funeral services were held at the Trieber home. The final eulogy was delivered by William H. Martin, United States District Attorney, Masonic brother, and maternal grandfather of Judge G. Thomas Eisele, presently the Chief Judge of the Eastern District of Arkansas. Ironically, Martin, the judge's closest friend and an ardent Democrat, was campaigning for Democrat Al Smith in rural Arkansas when he was notified of the death. Martin eulogized:

His life is a high example of the victory that may be won over adversity, by unending labor, based upon the fundamentals of sound character and worthy ambition. His great prominence in his profession, rounded out by an illustrious career on the bench, is known by all men. He equipped himself splendidly to meet the demands of high office, and brought to bear upon their discharge a storehouse of knowledge acquired throughout his industrious life, and to this he added that lofty uprightness which had already marked him as one to be trusted under all conditions. With such a man it is not strange that his record contains no scar or blotted page or that the finger of doubt or suspicion never pointed his way. To those privileged to know him well his life was an ever present inspiration, and his gentle manliness and broad charity bound him to us with ever-increasing strength. He was never a disappointment. He hoped his friends might be always right, but this did not prevent his commiserating with them when they were wrong.

And so his was a full life. Full of labor and high endeavor, fully compensated by a distinct degree of success, by the love of his friends, by the development of his family along lines and in a way that made his life very content.²²⁸

Thus ended the career of the young Jewish immigrant, the self-educated small-town lawyer, the Republican politician from Helena, the federal judge who admonished the nation in 1903 that black men and women were entitled to equal treatment in the workplace, a man whose integrity and competence inspired the respect of all who knew him.

7.)

228. Unidentified newspaper article. (Full citation unavailable, See parenthetical, *supra* note 7.)