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THE GREAT DISSENTS OF
THE "LONE DISSENTER"

Justice Jesse W. Carter’s Twenty Tumultuous
Years on the California Supreme Court

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Justice Carter's Dissent in Hughes v. Superior Court of Contra Costa County: Harbinger of the 60s Civil Rights Movement and Affirmative Action?

By Frederic White*

The bombing of Pearl Harbor on December 7, 1941 undoubtedly was one of the most tumultuous events of the 20th century. It set the stage for four years of global warfare that resulted in the wholesale disintegration of nations and families, tremendous loss of life, and worldwide economic upheaval. One of the obvious challenges of what eventually became known as World War II was the U.S. government's need to design and construct the weapons of warfare, as well as produce the material to fuel those weapons. Some areas of the country were more suited than others to provide these kinds of services. Richmond, California was such a place.

The City of Richmond, located in the East Bay, north of Berkeley and northeast across the San Francisco bay from the city of San Francisco, already possessed twelve major shipyards, including Henry Kaiser's massive ship building facilities, as well as numerous oil refineries, at least two of the necessary ingredients for the successful waging of a fighting campaign. Richmond, however, lacked

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one important ingredient: enough labor to build the ships and work in the oil refineries. What to do?

Excerpts from one book discussing the World War II era details the events of the day, revealing how, because of the war, the old world had become new for black workers lured to Richmond:

Between 1942 and 1945, slightly more than 50,000 black people moved to the East Bay, fulfilling a utopian dream.... War industries, which dominated the landscape for those years, created an unprecedented demand for labor and seemed to promise a share of the California dream to every able-bodied worker who could make the journey. Thousands of blacks set out to claim what California offered. In doing so, they transformed the basic premises on which the prewar black community had existed in the East Bay. Their sheer numbers suddenly made black people highly visible in public places and gave them a dynamic presence which could not be ignored ...

The labor recruiters who traveled to Arkansas, Louisiana, Texas, Mississippi, and the Carolinas were looking for workers for Kaiser’s four gigantic shipyards in Richmond, for Marinship in Sausalito, for Moore in Oakland and Todd in San Francisco. The rapid growth of war industries in the Bay Area and the enormous mobilization of men [and women] into the Armed Forces demanded many more workers than the region could provide ...

In the poverty-stricken Dustbowl states and in the rural South, the promise of industrial jobs in the West appeared as a ticket out of an endless cycle of despair, and Federal recruiters were only one part of the network that carried the message. Blacks already in the East Bay wrote letters to relatives; whole church congregations heard from one or two members about the opportunities. In these informal communication networks, the successes of those who had already gone were emphasized and stories were told about a society where blacks were much freer than in the South. Recruiters urged men to come without their families to work “for the duration” of the war emergency.... Believing that freedom from southern restrictions would liberate their own resourcefulness, they had no intention of relinquishing the opportunities the war placed before them....

In keeping with the old saying, "be careful what you wish for," some southern blacks, recruited to the "promised land" of northern California in search of a brighter future full of new jobs and broader freedoms, soon learned that the harsh reality of their lives in the West was far less than the expected dream. Cleophus Brown, an African American from the south who traveled to the Bay Area in search of work during the war, provides this account:

Arriving in Richmond in 1942, Cleophus Brown got off the train and walked a block to a cafe. He was refused service. Neither Franklin D. Roosevelt Executive Order 8802 of June, 1941, forbidding racial discrimination in all defense contracts nor the desperate need for labor created equal opportunity.

Thus, all was not as promised. Despite assurances that things would be different, black workers who had been arriving by the trainload—sometimes as many as six full trains a day—soon found out that Jim Crow was alive and well in the Golden State. In many cases black workers were routinely shut out of higher paying, relatively safe jobs and relegated to the more dangerous ones and for less pay. Further, they were still the last to be hired and the first to be fired. After arriving with such hope, blacks found more and more doors shut to them at the docks and in the refineries, even hiring in grocery stores. Unions engaged in discriminatory practices. Landlords refused to rent. Restaurants, shops, and theaters began to segregate or refuse service altogether. One author observed:

The integration of blacks, women, and other newcomers was indeed a sensitive issue among white workers.... Although blacks and whites

4. See "Visions," supra note 1 at 46.
6. "Seeing them as well-suited to arduous labor, shipyard employers concentrated black workers in the hull trades—hard, outdoor work on a year-round basis. By contrast, Chinese-American workers were often placed in electrical work, a lighter, detail-oriented trade considered more suitable for them." Johnson at p. 92. Johnson notes that cultural stereotypes were not immutable and did change somewhat based on the labor demands dictated by the war effort.
7. See "Visions," supra note 1 at 46.
worked side by side, racial tensions were all-pervasive. "The slightest touch ... revealed the impermanence of the surface calm and the depth of the hatred beneath." The hostility ... was most evident among white Southerners and was often couched in gender terms invoking the threat of miscegenation.8

Out of this background arose the case of *Hughes v. Superior Court of Contra Costa County*,9 decided by the California Supreme Court in 1948.

As a response to the discriminatory hiring practices of a large number of white-owned businesses in the 1940s, Hughes and others established a group called "Progressive Citizens of America" ("Progressive") in Richmond, California. The *Hughes* case detailed the events surrounding unemployed black workers picketing certain "Lucky Stores," a grocery chain with a store located near the Canal Housing Project in Richmond, in order to compel the store to hire more black clerks. In response to the picketing, lawyers for Lucky Stores requested a preliminary injunction against the picketing. The request for injunctive relief was granted by the Superior Court of Contra Costa County. The injunction, challenged by Hughes' attorneys as a Due Process Clause violation, was annulled by the intermediate appellate court,10 but reinstated on review by the Supreme Court of California.11 Nevertheless, despite the reinstatement of the preliminary injunction, the picketing continued. Thereafter, Lucky Stores protested these actions and the picketers were adjudged in contempt of court. They appealed via certiorari to the California Supreme Court, seeking annulment of the judgment of contempt. In a 4-2 decision, the court affirmed the judgment of contempt. Justice Jesse W. Carter, Golden Gate Law class of 1913, wrote one of the two dissents.12 Hughes' application for a rehearing was denied.13 Hughes applied for a writ of certiorari to the United States Supreme Court, but the judgment of the California Supreme Court was affirmed.14

Although some of the *Hughes* facts were in dispute, it appears that Hughes and another petitioner met with some Lucky Stores officials (1) to protest some store employees' treatment of a black man named Jackson who had been accused of shoplifting, and (2) to request that Lucky Stores gradually hire black

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8. See Johnson, *supra* note 1 at 93.
11. Id.
12. Justice Roger Traynor wrote the other dissent.
13. Justices Carter and Traynor also voted for a rehearing.
clerks until the proportion of black to white clerks approximated the store's proportion of black to white customers. At the time of the controversy, about 50% of the Lucky Stores Canal store customers were black.\textsuperscript{15} Lucky Stores indicated that Hughes had requested that it discharge white employees and replace them with black employees. Hughes denied this allegation.

Justice Carter wrote, in part:

\textbf{DISSENT}

\textsc{Carter, J.} I dissent.

As the majority make no attempt to state the facts with particularity, it seems advisable to do so here.\textsuperscript{16} The controversy centered around a grocery store in Richmond, Contra Costa County, one of a chain operated by Lucky Stores, Incorporated. Petitioners were adjudged guilty of contempt in that, in violation of the terms of a preliminary injunction, they admittedly continued to picket the store in question. They seek by this proceeding in certiorari to have the adjudication of contempt annulled, charging that their constitutional rights have been violated. This court has held that certiorari is the appropriate method to test the jurisdiction of the superior court where it is challenged on constitutional grounds [Citations omitted]. Lucky Stores sought an injunction in the Superior Court of Contra Costa County, naming petitioners and various organizations and individuals as defendants. In its verified complaint that alleged that it was a party to a collective bargaining contract under a certain clerks' union where it had agreed to employ only members of the union unless the union could not meet its demands, or unless the unemployed members of the union were not satisfactory to it, in which event it might employ nonunion members, but that such nonunion employees must then join the union within a specified time. It was further alleged that these petitioners and other defendants demanded that Lucky Stores agree to hire Negro clerks in such proportion as the Negro customers bore to the white customers who patronized the store, and that plaintiff (Lucky Stores) discharge those employees who had participated in the apprehension and arrest of one Jackson who had been accused

\textsuperscript{15} \emph{Id.} at 719.

\textsuperscript{16} Here one wonders whether Justice Carter is accusing his fellow justices of stupidity, duplicity, or both.
of shoplifting. Lucky Stores alleged these demands were refused because to comply with them would violate the contract existing between it and the union, and that no labor dispute exists between it and the union, and that as a result of its refusal to comply, the petitioners and other defendants have picketed its store. It is contended that this picketing will cause irreparable injury, that it is an infringement on plaintiff's right to do business, and would require it to violate its contract with the union.

In response to the order to show cause why a preliminary injunction should not issue, petitioner Hughes filed a counter-affidavit in the injunction proceeding in which he sets forth the following facts [Hughes and others had met to protest the treatment of Jackson, to request that Lucky Stores gradually hire black clerks to approximate the number of black customers and that they did request the discharge of any store employees].

Carter's dissent then described the picketing as peaceful and non-violent. According to Carter, "The sole question involved, at the present time, therefore, is the right of petitioners to picket a retail store, thereby setting forth their grievances and demands and publicizing the same." Lucky Stores contended that the picketing was for the "attainment of an unlawful objective" that would violate the company's agreement with the Retail Clerks' Union. Justice Carter countered that argument with a number of United States Supreme Court cases holding that "picketing is identified with the freedom of speech guaranteed by the First Amendment to the Constitution of the United States." Further, he indicated that the California Supreme Court already had held that "the right to picket peacefully and truthfully is one of labor's lawful means of advertising its grievances to the public." Further, he noted that "Labor, always in a less advantageous bargaining position, has been held privileged to picket in an endeavor to put before the public its position, needs and desires."

17. See Hughes, 32 Cal. 2d at 858–59 (Carter, J., dissenting).
18. The possibility of violence arising from picketing was clearly on the minds of the justices when Hughes was decided. One author's account of the violent post-World War II indicates that was a tremendous amount of labor unrest during that time. See Lannon at 104–11.
19. See Hughes, 32 Cal. 2d at 860 (Carter, J., dissenting).
20. Id.
21. Id.
22. Id. at 861.
23. Id.
The majority in Hughes held the case of James v. Marinship Corp. was controlling. Marinship involved a dispute against the Marinship Corp., a Sausalito-based employer who had a closed shop agreement with a labor union that would not admit black people to its membership. The question in Marinship was whether a closed union coupled with a closed shop was a legitimate objective of organized labor. The court held in the negative, noting that a union could not maintain a closed shop and an arbitrarily closed union at the same time.

In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.

Lucky Stores contended that Hughes and his supporters were illegally picketing for the purpose of setting up a closed shop and a closed union, contrary to the mandates of Marinship. In essence, Lucky Stores argued that if the company acceded to the picketers' demands, they would be forced to hire employees on the basis of race.

Carter disagreed. In his dissent, he noted that the Retail Clerks' Union was not a closed union, thus distinguishing it from the closed union discussed in Marinship. Further, he noted that the 'Petitioners are asking that Negro clerks be hired, and they are quite willing, and would consider their demands fully met if the unemployed qualified Negro clerks, presently members of the union

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26. A "closed union" is one which arbitrarily denies admittance to qualified workers. See Hughes, 32 Cal. 2d at 864–65. The wave of newcomers to Richmond, blacks included, led shipyard and other unions to close their ranks, often barring newcomers altogether, or a hierarchy of "auxiliary unions." See Johnson, supra note 3 at 93–102; see also, Albert Lannon, "Fight or be slaves: the history of the Oakland-East Bay labor movement," UNIVERSITY PRESS OF AMERICA, 2000, 94–96 (hereinafter, "Lannon").
27. See James v. Marinship Corp., 25 Cal. 2d at 731.
involved, were hired. The statement in the majority opinion that the right to work for Lucky Stores would be based on race, rather than qualification for the work, is absolutely without foundation. Nothing could be more remote from the truth.\textsuperscript{28} Carter concluded that "the situation presented here does not fall within the rule announced in the Marinship case. It does not fall within the definitions of either a closed shop, or a closed union. It must be remembered that picketing for either a closed shop or a closed union is not forbidden by law, but that the combination of the two is considered unlawful."\textsuperscript{29}

Lastly, Carter took the position that the end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of employees ... if the picketing is truthful and peaceful, it may be resorted to as the exercise of the constitutional right of freedom of speech or press, and that is all petitioners did in this case.\textsuperscript{30}

Comment

Justice Carter's dissent in Hughes ultimately embodied more than an opinion about the right to picket and the Free Speech implications of such actions. In truth, the actions taken by Hughes and his friends had been occurring in the Bay Area and in other parts of California before the beginning of the war.\textsuperscript{31} Although the Hughes holding was upheld by the United States Supreme Court, Justice Carter no doubt would have argued that their ruling was due to the same misapplication of Marinship undertaken by his own California Supreme Court colleagues in the Hughes case.\textsuperscript{32}

The peaceful picketing in the 1940s described by Justice Carter in Hughes set the stage for the expanded use of both violent and non-violent picketing, protests and demonstrations in the 1960s, the beginning of the modern Civil Rights Movement. Further, it can be argued that some of the language used in his dissent could have been inserted into a brief extolling the benefits of modern day affirmative action. For example, Carter wrote in Hughes that:

\begin{itemize}
\item \textsuperscript{28} See Hughes, 32 Cal. 2d at 864 (Carter, J., dissenting) (emphasis added).
\item \textsuperscript{29} Id. at 864–65.
\item \textsuperscript{30} Id. at 866–67.
\item \textsuperscript{31} See "Visions," supra note 1.
\item \textsuperscript{32} Justice Traynor's dissent also indicated that the majority had erroneously applied Marinship. See Hughes, 32 Cal. 2d at 867 (Traynor, J., dissenting).
\end{itemize}
It must be admitted by every thinking person that Negroes are, and have been, constantly discriminated against. They are considered by some as being fit only for the most menial positions. It was even found necessary for the Legislatures of the various states to pass laws that they might obtain shelter and food on an equal basis with members of the white race. The abolition of slavery did not free the Negro from the chains his color imposes on him. It has been said that Negroes may obtain equal opportunities with others for employment by organization, public meetings, propaganda, and by personal solicitation. The effectiveness of these methods may well be doubted. Labor, as a whole, found that the only way it might attain its objectives of better working conditions, hours and pay was to exert economic pressure on employers. Nothing else is heeded. Is the Negro here to be denied his only effective means of communicating to the public the facts in connection with the discrimination against him, and the only effective method by which he may achieve nondiscrimination?

The majority assume, without deciding, that if racial discrimination exists, picketing in protest of it would not be for an unlawful objective. How can it be said that picketing to attain nondiscrimination is unlawful? Petitioners are asking equal treatment, that which is guaranteed to them by the Constitution of the United States, and yet their objective is called "unlawful."

The end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of his employees. Because, if such employer should employ only one of such race or color in some menial position, such as janitor or messenger boy, any claim of discrimination, according to the majority view, would be unjustified, and picketing to prevent discrimination (even though thousands of qualified members of such race or color were refused employment for that reason) would be unlawful, and could be restrained by injunction. Thus must be the effect of the rule announced in the majority opinion.33

This portion of Carter's dissent clearly recognizes the long history of discrimination against blacks and the philosophy embodied in the majority's opinion that effectively stifled blacks the opportunity to challenge long-held discriminatory hiring practices. Further, Justice Traynor's dissent, in which he

33. Id. at 866–67.
endorsed a policy of "proportionate hiring" echoed some of the sentiments voiced by Justice Carter in his dissent and signaled an approach that would be used to fuel the proponents of the concept of affirmative action in the years to follow.34

Wholesale picketing, together with the bus and business boycotts of the 1950s and 1960s, eventually led to nationwide school integration,35 the support of affirmative action advanced in President John F. Kennedy's 1963 Executive Order 10925,36 and the national policy forbidding job discrimination pursuant to Title VII of the Civil Rights Act of 1964.37 Along the way, the opinions expressed by Justice Carter in his Hughes dissent were taken up by many who believed that the road to the American Dream should be opened up for all. Accordingly, the language contained in United Steelworkers of America v. Weber,38 a Title VII case decided by the Supreme Court in 1979, could easily have been penned by Justice Carter himself:

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend [black unemployment] were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." As Senator Humphrey explained to the Senate:

"What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated education facilities if he has no hope of getting a job where he can use that education?"

34. "The picketing in this case is directed at persuading Lucky to take action that it may lawfully take on its own initiative. No law prohibits Lucky from discriminating in favor or against Negroes. It may legally adopt a policy of proportionate hiring. The picketing confronts Lucky with the choice of adopting a policy that is not illegal in itself or risking the loss of patronage that may result from the picketing. Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky violate the law. Neither the Legislature nor the people have adopted such a statute, and I find no implication in the majority opinion that its equivalent exists under the common law of this state." Hughes, 32 Cal. 2d at 869 (Traynor, J., dissenting) (emphasis added).
"Without a job one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?"

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act of 1963.39

It is well-documented today that there has been a steady nationwide backlash against affirmative action, evidenced by legislation like California's Proposition 209, the efforts of affirmative action opponents Ward Connerly40 and the Center for Individual Rights, and in United States Supreme Court holdings such as Richmond v. J.A. Croson Company41 and Adarand Constructors v. Pena.42

In the balance is the question whether there will be further erosion in the rights and protections that John Hughes and others fought for during World War II in Richmond, California. Despite the changing political landscape of the 21st century, it is doubtful that if he were alive today, Justice Carter would change his mind about the principled and straightforward views he expressed in Hughes.

George Bernard Shaw once wrote, "all progress depends on the unreasonable man."43 Justice Carter's judicial colleagues may often have thought that some of the opinions he expressed in dissents were intractable, stubborn and unreasonable, perhaps all three. Perhaps. But he was right.

39. Id. at 202–03 (citations omitted).
43. George Bernard Shaw, "Man and Superman: Maxims for Revolutionists" (1903).