

The Texas Law Reporter



# The Texas Law Reporter

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# Rarefied Air

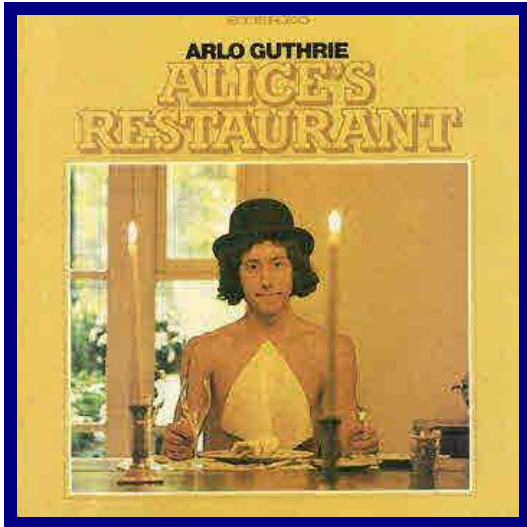
## Scorpioms

by David A. Schulman

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### If You Build It, They Will Come

With my apologies to Arlo Guthrie, here's what happened after Arlo and his friend were pinched for littering and admitted their culpability:

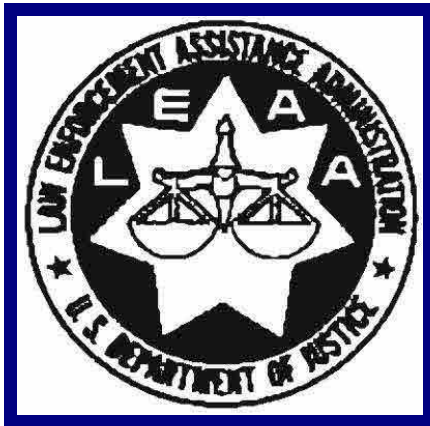


Now friends, there was only one or two things that Obie coulda done at the police station, and the first was he could have given us a medal for being so brave and honest on the telephone, which wasn't very likely, and we didn't expect it, and the other thing was he could have bawled us out and told us never to be seen driving garbage around the vicinity again, which is what we expected, but when we got to the police officer's station there was a third possibility that we hadn't even counted upon, and we was both immediately arrested. Handcuffed. And I said "Obie, I don't think I can pick up the garbage with these handcuffs on." He said, "Shut up, kid. Get in the back of the patrol car."

And that's what we did, sat in the back of the patrol car and drove to the quote Scene of the Crime unquote. I want tell you about the town of Stockbridge, Massachusetts, where this happened here, they got three stop signs, two police officers, and one police car, but when we got to the scene of the Crime there was five police officers and three police cars, being the biggest crime of the last fifty years, and everybody wanted to get in the newspaper story about it. And they was using up all kinds of cop equipment that they had hanging around the police officer's station. They was taking plaster tire tracks, foot prints, dog smelling prints, and they took twenty seven eight-by-ten colour glossy photographs with circles and arrows and a paragraph on the back of each one explaining what each one was to be used as evidence against us. Took pictures of the approach, the getaway, the northwest corner the southwest corner and that's not to mention the aerial photography.

In 1967, when I first heard this song, I thought it was funny, of course, but really didn't have a reference as to the detailed behavior of the police. I do remember, however, comparing the cops in my mind to Don Knott's Barney Fife character on the Andy Griffith show. Realistically, I have a better frame of reference at this point in my life -- for several reasons.





First, near the end of my undergraduate days, while working an internship in the U.S. Senate and having considerable time on my hands, I wrote my so-called undergraduate thesis on a federal agency which was slated for defunding and what we refer to here as “sunset.” The paper was styled, “The Life and Times of the Law Enforcement Assistance Administration: 1968-1982.”<sup>1</sup> An exciting read it wasn’t.

For those too young to remember, and in the polite lexicon of on-line encyclopedias, The “LEAA” was a U.S. federal agency within the U.S. Dept. of Justice. It administered federal funding to state and local law enforcement agencies, and funded educational programs, research, state planning agencies, and “local crime initiatives.” It was this latter function that allowed the LEAA to provide funding to law enforcement agencies to purchase “all kinds of cop equipment.”

Second, using their “cop equipment” is what cops do. The behavior detail by Arlo Guthrie is no different than what kids do with new toys. They use ‘em. Like the cops in Stockbridge, Massachusetts, once a law enforcement agency obtains some equipment, they wait with great anticipation until they can roll it all out.

Fast forward to today. As referenced in a recent New York Times article,<sup>2</sup> law enforcement agencies all over the country:

are adding more firepower and military gear than ever. Some, especially in larger cities, have used federal grant money to buy armored cars and other tactical gear. And the free surplus program remains a favorite of many police chiefs who say they could otherwise not afford such equipment.

According to the Times, since 2008, as we brought more and more equipment home from our far-flung military excursions, police departments have received



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<sup>1</sup> The LEAA actually began in 1965, but operated under the name “Office of Law Enforcement Assistance.” More importantly, the topic forced on me by my faculty adviser (otherwise why would you expect me to chose a topic like the LEAA) was to concentrate on the effect of the “Omnibus Crime Control and Safe Streets Act of 1968,” from which the funding for the LEAA was provided.

<sup>2</sup> See “War Gear Flows to Police Departments,” Matt Apuzzo, © June 8, 2014; New York Times.

hundreds of silencers, armored cars and aircraft; thousands of pieces of camouflage and night-vision equipment; tens of thousands of machine guns; and hundreds of thousands of ammunition magazines.

Like the cops in Stockbridge, Massachusetts, or as Barney Fife would have done if he had been given “all kinds of cop equipment,” police today can’t wait to use the military equipment provided by Uncle Sam. It’s what they do.



I recall a guest speaker, during undergraduate school, who was advocating that police on the streets start wearing business clothing such as detectives wear, although still uniformed.

His premise was that the more casual the police dressed, the more friendly would be their relations with the public. That idea went nowhere. Today, with more and more street police officers dressing and acting like military commandos, it wouldn’t even get that far.



If you haven’t gathered it yet, I am absolutely against the militarization of our police forces. Relationships between the police and the public appear to me to be at an all time low, and I don’t expect they will get any better, so long as local cops ride around in 9-foot-tall armored trucks which weigh 20 tons.

I know Austin likes to “Keep Austin Weird” and that many of you think that many of us here in Austin are weird. Maybe we are.

The Austin Police Department has a bicycle patrol in the downtown area. The folks (men and women) wear much more casual clothing when they’re on patrol. I’ve seen groups of them several times in my favorite downtown restaurant. They looked more relaxed and approachable than regularly uniformed Austin police officers.

Get them out of their armored personnel carriers and onto the ground, either on bikes or scooters (they used Lambrettas in NY for years), and cops are much more



approachable. OK, I know the plastic helmets and shorts won't cut it everywhere, but I'd like to see more police around the country dressing like this.

## Traveling



I spent two days during the last week traveling by air to and from a vacation in Minnesota. This allowed me (or forced me, depending on your feelings) to spend time in four different airports (Austin, Chicago-O'Hare, Dallas-Fort Worth, and Minneapolis-St. Paul). This also allowed me, once again, more than a little time to watch many of fellow travelers during their travels. It's not a pretty picture.

Some years ago, I read a criticism of Americans as travelers which claimed that, as a group, we tend to dress for travel as if we were going outside to mow the lawn. Sadly, having observed people in various airports over the years, I have come to agree with this assessment. One rarely sees a traveler in dress suits, and, for most of those I observed, "casual Friday" dress would be a big step towards formality. It is simply amazing to me how many people who (obviously) never engage in any sport, dress to travel as if they were headed for a basketball court, ball diamond, or soccer (futból) pitch.



I'm also not sure what percentage of Americans are obese and what percentage are considered "in shape." From outward appearances in any airport, however, there seems to be



a significant number of travelers who are carrying more than a few extra pounds. Having been able to view air travelers in approximately twenty international airports in the last dozen years, I can tell you that the situation is different in other countries.

I have no idea whether the unhealthy appearance of many of the folks seen in airports is a result of our "fast food" culture and the food we



consume, and/or the quantities of food we consume. All I can tell you, to paraphrase actor Will Smith in the original “Men in Black” movie, is that some of us “pudgie \_\_\_\_\_s” need to spend some time on the Stairmaster.

I know that losing those extra pounds isn't easy -- I've been spending 30-45 minutes at the gym five or six days every week for years and I'm still six pounds above the “target” I set at the beginning of that particular quest. What I thought I could accomplish in two years might be accomplished within the next (sixth) year. To me, however, not doing anything is not the answer. Those airline seats are not getting any bigger, even if we are, nor are the rates of heart disease or diabetes dropping. This is clearly something on which we need to work.

Spending time in airports reveals, however, not just the downside of American travelers, it also demonstrates many of the things I like about our society. Putting aside for at least a moment the current unrest in Ferguson, Missouri, someone spending time in airports would be left with an impression of good relations between the various ethnic groups which make up our society.

Traveling today, one sees many different ethnic groups in our airports, and all are getting along nicely, thank you. There are many different ethnic groups which make up our air travelers, and there are many different ethnic groups which make up the personnel who serve us at the airports. One need only listen to hear a variety of languages being spoken.

It is not unusual at all to see people of different ethnic groups being courteous to each other and often going out of their way to help one another. Foreign travelers experiencing our society solely in our airports would be left with the impression that we are a fully integrated society in which all ethnic groups actually enjoy the same privileges. As we all know, however, that simply isn't true.



## Scorpions

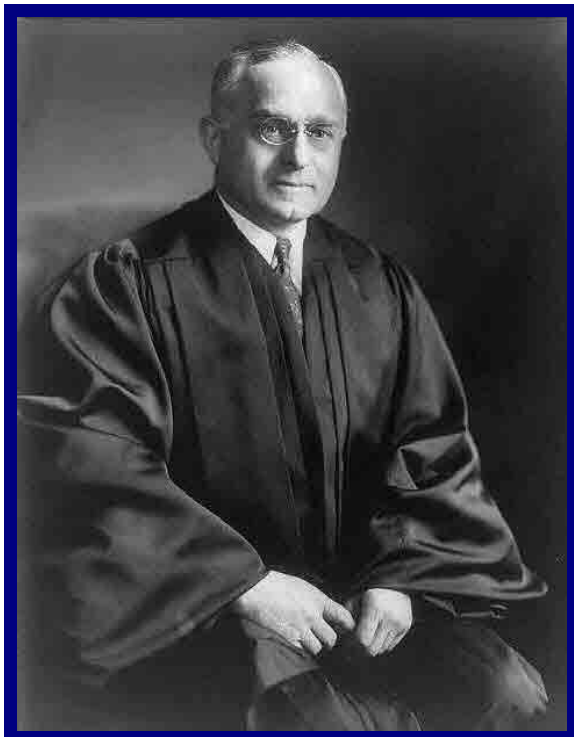
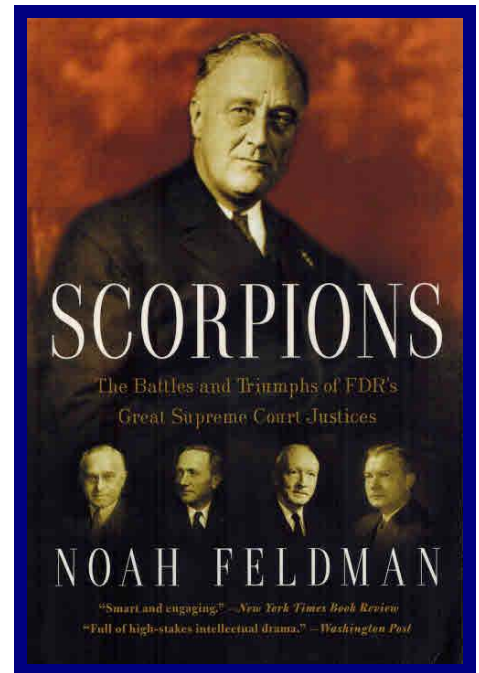
At this year's Advanced Criminal Law Course in Houston, Court of Criminal Appeals' Judge Mike Keasler gave a presentation on ethics for appellate practitioners. During his talk, Judge Keasler recommended the book, "Scorpions," by Noah Feldman, a professor of law at Harvard Law School.

The book's title, as referenced in the book, is from a quotation attributed to Alexander Bickel, who clerked for Justice Felix Frankfurter in 1952 and 1953 -- "the Supreme Court is nine scorpions in a bottle." The scorpions of interest in this book are four of the members of the Court appointed by Franklin D. Roosevelt: Felix Frankfurter, Hugo Black, William Douglas and Robert Jackson.

Feldman's concentration is in constitutional studies, with particular emphasis on the relationship between law and religion, constitutional design, and the history of legal theory. His insight into the lives and careers of these four justices is simply phenomenal.

As he recommended this book, Judge Keasler revealed that Justice Jackson was his favorite. Even before reading the book, my favorites, in reverse order, were Frankfurter, Jackson, Black and Douglas, although I would admit that I basically admired the latter three justices, and, all in all, found little to like in the life or career of Justice Frankfurter.

I have long admired Justices Black and Jackson for the way they transformed themselves while members of the Court, and how that transformation benefitted the people of this country. Justice Douglas, on the other hand, is someone I admired for the manner in which he worked to expand civil liberties. Douglas's personal life may have had its ups and downs, but, certainly during his



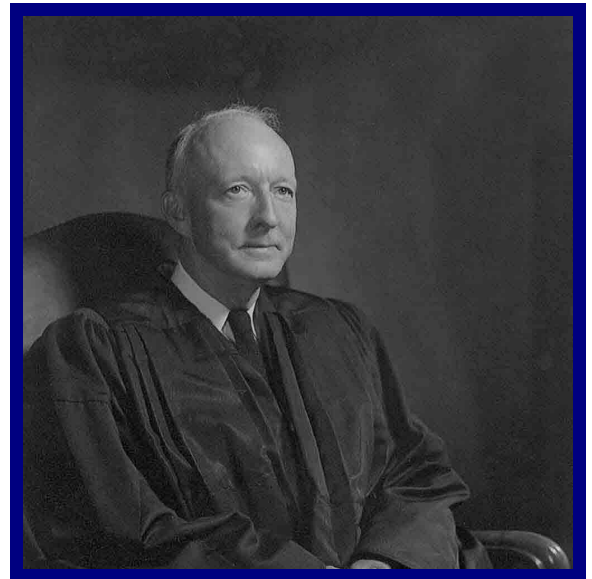
Justice Felix Frankfurter



latter years on the Court, he did more to provide us with the very freedoms that many of us take for granted than any other member of the Court in my lifetime.

My reasons for liking or disliking each of these justices are both varied and dissimilar. Even after reading the book, none of these opinions has really changed. The sad thing, however, is that taking all of Feldman's anecdotes as true, I have less respect for each of the four men than I had before hand.

Nevertheless, having finished reading the book, I heartily recommend it to any of you who have more than a passing interest in the inner workings of the Supreme Court of the United States. "Scorpions" is a riveting and detailed explanation (I will not use the word "exposé") of the Court, its procedures, and its members, these four in particular, and it is well worth the read. My thanks to Judge Keasler for his recommendation.



Justice Hugo Black

Most interesting is that the direction of the book leads ultimately to a very good discussion of the several race based cases which came before what Feldman aptly refers to as the "Roosevelt Court," culminating in his take on the Japanese curfew and internment cases (Hirabayashi,<sup>3</sup> Yasui,<sup>4</sup> Korematsu,<sup>5</sup> and Endo,<sup>6</sup> and Brown v. Board of Education<sup>7</sup> -- all of which became of extreme interest to me during law school.<sup>8</sup> I share

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<sup>3</sup> Hirabayashi v. United States, 320 U. S. 81 (1943).

<sup>4</sup> Yasui v. United States, 320 U.S. 115 (1943).

<sup>5</sup> Korematsu v. United States, 323 U. S. 214 (1944).

<sup>6</sup> Ex parte Endo, 323 U.S. 283 (1944)

<sup>7</sup> Brown v. Board of Education, 347 U. S. 483 (1954) ("Brown I"); see also Brown v. Board of Education, 349 U.S. 295 (1955) ("Brown II").

<sup>8</sup> As discussed in Scorpions, the Korematsu, Hirabayashi and Yasui cases returned to the Court during the early 1980s via an application for writ of quorum nobis, with a claim that, during the original litigation, the Government had hidden important information from the Courts. I had the pleasure of attending a lecture hosted by my law school, Neil Tominaga, during which Peter Irons, the historian who had uncovered the evidence on which the writ application. Relied Professor Irons detailed the history of the case, as well as his (ultimately successful) theory on why Mr. Korematsu, Mr. Hirabayashi, Mr. Yasui, and all wrongfully interned citizens of Japanese ancestry, were entitled to relief.

Feldman's belief that the Japanese cases are the low point, while Brown was and remains not only the high point of service for the four justices, but one of the most important cases ever decided by the Court.

Mr. Feldman relates the history of Justice Frankfurter's impact on Brown, and why the phrase with "all deliberate speed" was inserted into Chief Justice Warren's opinion in Brown II. This story has long been known, but its importance cannot be understated. Similarly, the apparent agreement by the majority of the Court that segregation had to end versus the disagreement regarding the speed at which it should end, is something that could continue to be examined, as it still impacts our lives today.



Justice Robert Jackson

It is noteworthy that, in this 60th year since the Court delivered its unanimous decision in Brown, the problems associated with the relations between different ethnic groups continues to divide our country. Whether you believe we have made significant strides towards elimination of race and ethnicity divisions or not, one simply cannot pretend they do not continue to constitute a problem for our country.

One need look no further than how different ethnic groups (in general) looked at the jury verdicts in the 1994 O.J. Simpson case and the 2013 George Zimmerman case. One need no further than the problems being experienced right now in Ferguson, Missouri, where disparate groups have already reached different conclusions, even before the facts are known.

Even here in Texas, police response when dealing with ethnic minorities is a major topic. Several of our towns and cities have experienced



Justice William Douglas

significant angst over police shootings in just the last two or three years.

In short, one need look no further than our proverbial “own back yard” to be able to form an opinion on how far we’ve come on so-called “race” relations. You might think we’re doing well, you might think we’re not. Sadly, there is no easy answer . . . and no easy solution.

I’m not sure that the answer is all that complex, even if it is not easily obtainable. Like many other things, it’s all in the attitude we display.

If you’re in law enforcement and you want justice, work for peace. Get out of your vehicle, military or civilian, and meet the people you’re sworn to protect and serve. This is good advice for those in government, also. Let your hair grow out and ditch the “man with no eyes” sunglasses. It worked for Morgan Woodward in “Cool Hand Luke,” it doesn’t work for you.



If you’re not in law enforcement and you want peace, work for justice. Recognize that those in law enforcement are not there to make you happy, they’re on the streets to protect everyone. Say “hello” to them once in a while and, without relying too much on the Chris Rock video of questionable taste, watch what you say and do.

Most of all, and I know that many will think this is too simplistic, treat others like you would like to be treated by others. Don’t judge people by their color or appearance, or their weight (yeah, I know, I’m guilty), give them a chance to demonstrate their humanity. Be charitable.

Finally, along those lines, I gave blood today. You should consider it, as this is charity that doesn’t cost anything but your time. Ten seconds of a little pain and you can save someone’s life. Do it.



David A. Schulman, one of the founders of TIBA, has been a co-author of this report for many years. He was a member of the Court of Criminal Appeals’ staff in 1991-1993, and has been lead counsel in hundreds of direct appeals and habeas corpus proceedings. David reviews every published criminal case from the Court of Criminal Appeals and every Court of Appeals on a daily basis. He has been Board Certified in Criminal Law since 1991 and was one of the first attorneys to become Board Certified in both Criminal Law and Criminal Appellate law. See his website at [www.davidschulman.com](http://www.davidschulman.com).