

**CHIEF JUSTICE JACK POPE:
COMMON LAW JUDGE AND JUDICIAL LEGEND**

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CHAPTER 6

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CHIEF JUSTICE JACK POPE: COMMON LAW JUDGE AND JUDICIAL LEGEND

I. INTRODUCTION

Abstract: The judicial legacies of Chief Justice Jack Pope are examined for their historical significance as well as their current relevance. His attributes as a judge and leader offer today's lawyers and judges an enduring role model.

Chief Justice Jack Pope is widely acknowledged in the legal community as one of the Texas judiciary's brightest stars. During his 38 years on the bench he not only authored more than 1,000 opinions, many of them landmark cases, but he also led the charge to bring about fundamental judicial reforms, among many other contributions. He was one of those rare individuals who looked to the past and to the future with equal sharpness of vision, a legal historian and judicial reformer who applied his talents to improving the law as well as the administration of law.

The first part of this paper focuses on Jack Pope the man and judge, on the aspects of his character and personality that earned the respect and support of his peers and enabled him to bring about major changes in the state's jurisprudence.

The second part extends the examination to specific areas of the law and judicial administration influenced by Chief Justice Pope's opinions and actions.

II. JACK POPE: COMMON LAW JUDGE AND UNCOMMON MAN

A. Education for the Law and the Judiciary

Andrew Jackson "Jack" Pope, Jr. was born in the West Texas town of Abilene on April 18, 1913. As the son of a medical doctor and the nephew of a Corpus Christi lawyer and state legislator, Jack was expected from the beginning to go to college and enter one of the professions. The decision about which one came at age 12 when his Uncle Elmer was visiting from Corpus Christi and asked Jack's father what he was going to do with him. As the story goes, Dr. Pope answered, "Well, Jack's going to be a lawyer," and in Jack's words, "End of discussion. . . . This is what my father had said about

me and I felt highly complimented. And I just never gave it any thought, never did.... He thinks I'd make a good lawyer and ... that was good enough for me."¹

It was a self-fulfilling prophecy, as Jack Pope prepared himself for the law by immersing himself in debate and student politics in his undergraduate years at Abilene Christian College and then excelling in law school at UT Austin. When Pope came to UT Law in 1934, the case-law method of legal study developed at Harvard was just being introduced. He was also exposed to important changes in American legal thought through the works of Justice Oliver Wendell Holmes, Justice Louis D. Brandeis, and Dean Roscoe Pound on legal realism and sociological jurisprudence. Pope was drawn to this practical approach, and he later attributed his abiding interest in improving civil procedure to his law school Civil Procedure course under Professor Robert Stayton.²

B. The Young Lawyer Becomes the Youngest Judge

After graduating from law school in 1937, Pope joined his Uncle Elmer's law firm in Corpus Christi and proved himself to be an extraordinarily gifted trial and appellate attorney. His uncle was less interested in practicing law than in serving in the Legislature, with additional involvement in real estate and other commercial endeavors, so Jack was put in charge of all the cases that required courtroom work. This assignment required him to be versatile and hard-working—in one week in 1939 he appeared in corporation court, county court, district court, a court of civil appeals, and the Texas Supreme Court.³ He later opened his own law firm, and his remarkable record of success in the courtroom did not go unnoticed in the legal community.

In late 1946 Pope was appointed by Governor Coke Stevenson to fill the unexpired term of Judge Allen Wood of the 94th District Court in Corpus Christi. Governor Stevenson's successor, Beauford Jester, then appointed him to Judge Wood's four-year term, which began January 1, 1947. At 33 years of age, Pope was Texas's youngest district judge.⁴ It was the beginning of a career that would span almost four decades.

C. The Drive for Statewide Judicial Education and Ethics

The genesis of Pope's later drive to improve the educational resources available to judges was in his

¹ William J. Chriss, *Chief Justice Jack Pope: An Oral History Interview*, vol. 2, 1 (2008); cited in MARILYN P. DUNCAN, ED., *COMMON LAW JUDGE: SELECTED WRITINGS OF CHIEF JUSTICE JACK*

POPE OF TEXAS (hereinafter *COMMON LAW JUDGE*) (Texas Supreme Court Historical Society 2014), at 324.

² H.W. BRANDS, *A TEXAS SUPREME COURT TRILOGY 3: ORAL HISTORY INTERVIEW WITH THE HONORABLE JACK POPE*

(Tarlton Law Library 1998), at 18 (hereinafter *SUPREME COURT TRILOGY*); cited by Chriss, *Chief Justice Jack Pope of Texas: Common Law Judge*, in *COMMON LAW JUDGE*, at 330 (hereinafter Chriss, *Chief Justice Jack Pope*).

³ *Id.* at 332.

⁴ Marilyn P. Duncan, *Timeline of Significant Events and Accomplishments*, *COMMON LAW JUDGE*, at 356.

discovery that hardly any existed when he first took the bench. “I was looking for books that would improve my approach, my background for being a judge,” he recalled later. “I looked [all] over the United States to find a school ... but there was no place I could go ... to be trained, so I just decided to train myself as best I could.”⁵ He accumulated an impressive library of volumes on law, history, philosophy, and politics, and biographies and legal writings of great lawyers and judges. As a scholar and practitioner who identified strongly with the common law, he was particularly interested in the writings of Justice Holmes and Justice Benjamin Cardozo, as well as legal philosopher Karl Llewellyn’s *The Common Law Tradition*.⁶

In 1950, at age 37 and with almost four years’ experience on the trial bench, Judge Pope was approached by South Texas lawyers and political leaders about filling an even higher judicial post, that of Justice of the Fourth Court of Appeals in San Antonio. He ran for and won election to the seat and spent the next 14 years on that court.

Because he been forced to tailor his own program of self-study, Justice Pope set about advocating for improved education and accountability for judges. In 1962, when he was on the Court of Appeals, a State Bar committee he chaired drafted the first voluntary judicial ethics code. Over the years he assisted in founding the Texas Center for the Judiciary, a judicial education institute, and signed the order mandating education for Texas judges. Also, in 1972, when he was on the Supreme Court, he drafted the first mandatory judicial conduct code for Texas judges.⁷

D. Improving the Jury System

Throughout his tenure on the Court of Appeals, Justice Pope served on the State Bar’s Committee on the Administration of Justice, which recommended rules to make courtroom procedures fairer and more efficient. Early on, he had become fascinated with the jury system. In his landmark opinion in the 1953 case of *Trousdale v. Texas N.O.R. Co.* (264 S.W.2d 489), he had written about how to confine jury conduct and deliberation to the evidence properly admitted at trial. Attorney William J. Chriss, in his biographical essay about Justice Pope, offers this description of the sequence of events that led to one of Pope’s most enduring legacies:

[Justice Pope] eventually catalogued every Texas case of alleged jury misconduct and generated a series of lectures and law review

articles on the subject. He concluded that early and appropriate instructions to the jury from the trial judge were the best way to prevent jury misconduct. The State Bar’s Committee on Administration of Justice then appointed him to prepare a model set of such instructions and he did so. After several years of work, and at the end of his tenure in San Antonio, Justice Pope’s proposed instructions were approved by the full committee and he presented them for approval by the Texas Supreme Court. Two years later, and after he himself had joined the Supreme Court, Pope’s proposed instructions were adopted, and they remain the basic litany of admonitions recited by trial judges to juries throughout Texas.⁸

Justice Pope was an unusually effective advocate for improvements in the judicial system because he was willing to write convincingly about the need for reforms and to drum up support through law review articles and speeches to local bar associations and other influential groups around the state. This aspect of his personality and talents—and the impact of his opinions and reforms related to juries—will be discussed later in this paper.

E. The Historian Changes Texas Water Law

One area of substantive law in which Jack Pope’s name reigns supreme is that of water law. Pope’s interest in water rights was evident throughout the 1950s as he and other jurists tackled the multitude of legal problems that arose during the devastating drought in Texas. The state’s courts were hindered both by the lack of a coherent body of law governing water rights and by the fact that the seminal water law case—*Motl v. Boyd* (116 Tex. 82 (1926))—was based on erroneous conclusions. In 1961, writing on behalf of the Court of Appeals, Justice Pope took the first step toward addressing both of those problems. His opinion in *State of Texas v. Valmont Plantations* (346 S.W.2d 853 (1961)), which legal historian Hans Baade called a “masterpiece on the water law of the Spanish and Mexican eras,”⁹ was adopted verbatim by the Texas Supreme Court in 1962 and replaced *Motl v. Boyd* as precedential case law. In 1967, the Texas Legislature responded to the statutory problem by passing the state’s first comprehensive body of water laws.

Justice Pope continued to lend his expertise to subsequent water cases that came before the Supreme Court, including the landmark case that upheld the

⁵ Osler McCarthy, *Interview with Chief Justice Jack Pope* (oral history, 1994).

⁶ Chriss, *Chief Justice Jack Pope*, at 335.

⁷ Osler McCarthy, *Press Advisory, Supreme Court of Texas: Chief Justice Jack Pope, 1913–2017*. Available online at

<http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/>; last visited March 19, 2017.

⁸ Chriss, *Chief Justice Jack Pope*, at 339.

⁹ Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 St. Mary’s L.J. 1, 2 (1986–87).

Water Rights Adjudication Act of 1967—*In Re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* (642 S.W.2d 438 (1982)). Justice Pope, writing for the Supreme Court, held that the act did not violate the doctrine of separation of powers, and that after notice and on reasonable terms, the termination of the continuous non-use of riparian waters was not a taking of property.¹⁰

F. Two Decades on the Texas Supreme Court

The *Valmont* decision further increased Justice Pope's already strong reputation in the legal community, and in December 1963, he threw in his hat in the ring for an open seat on the Texas Supreme Court after receiving 80 petitions from 55 Texas counties with more than 2,000 signatures of attorneys pledging their support.¹¹ He won the 1964 Democratic primary election by 400,000 votes and inevitably won the general election over his Republican opponent the next November (at that time, winning the Democratic primary was tantamount to winning the election). He was reelected in uncontested races in 1970 and 1976.¹²

Pope's tenure as Associate Justice (the title changed to Justice in 1980) was a productive one, filled with researching and writing opinions, giving speeches and lectures, and continuing his advocacy of judicial reforms and continuing education. As noted earlier, his reform efforts resulted in both compulsory continuing judicial education and the Supreme Court's adoption of the Texas Code of Judicial Conduct in 1974. He was also instrumental in establishing the State Law Library as a resource for Texas lawyers and judges, and served on the Friends of the State Law Library Board of Directors. At the same time, he wrote hundreds of opinions in every area of the law, a number of them landmark cases (see III.A. and IV.C. below for a discussion of some of the most significant opinions).

In June 1981, Pope announced that after 18 years on the Texas Supreme Court, he would retire when his term ended in January 1983. For the first eight years of his tenure on the Court, Pope had served under Chief Justice Robert W. Calvert. For ten years after that, he served under Chief Justice Joe R. Greenhill, who had been appointed by Governor Preston Smith to replace

the retiring Chief Justice Calvert in 1972. When Chief Justice Greenhill announced his own retirement in October 1982, he hand-picked his colleague Justice Pope to take his place, despite the fact that Pope planned to retire in January. The story of how Justice Pope, a Democrat, was subsequently appointed by an outgoing Republican governor and confirmed by an antagonistic Texas Senate is an inspiring one.¹³ The outcome was that Chief Justice Pope took his place at the helm of the Supreme Court in November 1982 and proceeded to exercise the same degree of leadership and vision that had characterized his previous service on the bench. Bill Chriss catalogs Chief Justice Pope's administrative achievements well:

[He] went to work immediately, and over the next two years he led the charge to bring about widespread improvements to the administrative machinery of the Third Branch. Under his leadership the court created the Judicial Budget Board to unify budget requests for the first time, adopted Rules of Judicial Administration for all levels of the judiciary, created the Council of Administrative Judges, created time standards for the disposition of cases to reduce delays and pendency, ordered a referendum to repeal outmoded lawyer disciplinary rules and replace them with more stringent rules, substantially overhauled the Rules of Civil Procedure, and signed the order establishing the state's IOLTA program, among other initiatives.¹⁴

Although he considered these administrative contributions to be an important part of his duty as a public servant, Chief Justice Pope took his responsibilities as a sitting judge to be his highest priority. From his first month as Chief Justice to the last, he devoted untold hours to researching and writing opinions. By the time he left the bench in January 1985, forced into retirement by the age limit on sitting judges, he had written an unprecedented 1,038 opinions, and he later liked to say he remembered something about every single one.¹⁵

¹⁰ Duncan, *Texas Water Law*, in COMMON LAW JUDGE, at 139; excerpts from *In Re the Adjudication of the Water Rights*, 642 S.W.2d 438 (1982), COMMON LAW JUDGE, at 210–12.

¹¹ Mrs. Frank L. Weimar and Son, *The Alto Herald* (Alto, Tex.) 29, December 19, 1963, UNIVERSITY OF NORTH TEXAS LIBRARIES, PORTAL TO TEXAS HISTORY, crediting Stella Hill Memorial Library. Available online at <https://texashistory.unt.edu/ark:/67531/metaph215807/m1/3/?q=jac%k>; last visited March 19, 2017.

¹² Chriss, *Chief Justice Jack Pope*, at 344.

¹³ *Id.* at 344–49. See also Nathan L. Hecht, *Supreme Court of Texas—Chief Justice Andrew Jackson “Jack” Pope, Jr., “Always His Own Man”*, THE STORIED THIRD BRANCH: A RICH TRADITION OF HONORABLE SERVICE SEEN THROUGH THE EYES OF JUDGES, Duke Law Center for Judicial Studies, October 2012. Available online at <https://law.duke.edu/sites/default/files/news/hecht2.pdf>; last visited March 17, 2017.

¹⁴ Chriss, *Chief Justice Jack Pope*, at 350.

¹⁵ Marilyn P. Duncan, conversations with Chief Justice Pope between 2007 and 2010.

III. CHIEF JUSTICE JACK POPE'S WRITTEN LEGACIES

A. A Closer Look at the Opinions

Chief Justice Pope's erudition and highly readable prose style were always evident in his opinions, as were his deep interest in history and legal philosophy. In addition to his landmark opinions in water law and special issues submission, he made important contributions in many other areas of law—property rights, marriage law, and juvenile justice, to name a few.

When *Texas Lawyer* magazine sifted through the thousands of cases decided in the twentieth century to select 21 that “rocked the century,” two of Chief Justice Pope's opinions made the prestigious list—*State v. Valmont Plantations* (346 S.W.2d 853 (1961)) and *Eggemeyer v. Eggemeyer* (554 S.W.2d 137 (1977)).¹⁶ As noted earlier, *Valmont* corrected the prevailing misinterpretation of riparian water rights and paved the way for a viable set of water laws in Texas. *Eggemeyer* established that a spouse's separate real property cannot be divided by the court in a divorce decree, and that even if an act of the legislature seemed to allow the division of separate property, such a divestiture would be unconstitutional.

Interestingly, some of Pope's most influential opinions were dissents. One of these was *State of Texas v. Santana* (444 S.W.2d 614 (1969)), in which Pope argued in dissent that the reasonable doubt standard, not preponderance of evidence, should be applied in juvenile proceedings involving a felony. When the case went to the U.S. Supreme Court, his dissent was adopted unanimously. In *Hall v. Helicopteros* (638 S.W.2d 870 (1982)), he held—and the U.S. Supreme Court agreed—that the Texas Court had over-reached the state's long-arm statute by assuming jurisdiction over a case involving non-resident plaintiffs and a non-resident defendant with no qualifying connection to Texas.¹⁷

B. Jack Pope the Master Writer

Jack Pope's talent as a writer was evident in all of his written work. He was an early advocate of clear, unambiguous language in legal writing, whether a court opinion or a law review article. To this principle of clarity he added an originality of thought and expression that distinguished all of his compositions—non-legal as well as legal. In addition to his 1,000-plus court opinions, he wrote more than 1,000 lectures and papers, and he continued this prodigious production after he left the Court. He also organized all of his written work into notebooks that he carefully indexed for accessibility.¹⁸

Chief Justice Pope's writing style can best be illustrated with excerpts from a few of his opinions and other written pieces. The examples below show how he was able to capture the essence of a topic with colorful—often epigrammatic—language.

1. “Water is life, and one accustomed to its uses who suddenly finds his supply is cut off, in our opinion, experiences a materially changed and tragically different status. To divert attention from that important fact is to abandon the substance of this controversy in favor of a legal mirage.”

Hidalgo County Water Improvement District No. 2 v. Cameron County Water Control and Improvement District No. 5, 253 S.W.2d 254, Texas Court of Civil Appeals, San Antonio, November 12, 1952.¹⁹

2. “Law is applied history. Standards worth saving from the wear and tear of civilization are preserved in our Constitutions, Bills of Rights, statutes, and precedent. When we neglect our history, we also erode our heritage. Good law is born of decent customs, patterns of conduct, and experiences that are worthy of preservation or, perhaps, improvement.”

“A Story about Texas Surface Waters,” essay, May 1999.²⁰

3. “The common law is that application of history which affords the public and the professional bar, not certainty in the law, but predictability. Unless the common law possesses that quality of stability, then society itself cannot be stabilized.” ...

“If the system works, the product that comes off from week to week in the form of new declarations of the common law should give the law revived sinews. This then is the system, the unsung system, which is the foundation of the rights of people.”

“The Common Law,” speech delivered to various organizations, 1974.²¹

4. “Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second.”

¹⁶ Duncan, *Other Significant Opinions*, COMMON LAW JUDGE, at 215.

¹⁷ *Id.*

¹⁸ Duncan, *Introduction*, COMMON LAW JUDGE, at xvii. Before his death in February 2017, Pope donated his 40 bound

notebooks to Abilene Christian University as part of the Brown Library's Pope Collection.

¹⁹ COMMON LAW JUDGE, at 158.

²⁰ *Id.* at 141.

²¹ *Id.* at 12.

State of Texas v. George Rivera Santana, 444 S.W.2d 614, Supreme Court of Texas, July 23, 1969.²²

5. “Appellate judges soon develop their own styles. Often that fact does not even occur to us. Advocates are slow to tell us anything but that our opinions are sound. It has never been good advocacy to tell us that our opinions are semi-literate, graceless, obscure, opaque, tiresome, mysterious, or that the opinion is florid, repetitious, elaborate, sketchy, garrulous.”

“So You Want to Write an Opinion?,” lecture presented to the Lubbock Bar Association, 1977.²³

6. Pope was a veteran speech giver, and at one point during his campaign for Supreme Court in 1964, he decided to have in hand a satirical speech filled with non sequiturs and other meaningless statements. It never failed to surprise and amuse his audiences. A sample sentence:

“We must preserve influences which affirm, negate, and create feelings of validity. On this issue, there can be no middle ground.”
 “All-Purpose Speech,” delivered to various audiences between 1964 and 1966.²⁴

IV. CHIEF JUSTICE POPE’S LEGACY— LESSONS FOR TODAY’S PROBLEMS

In reflecting on Chief Justice Pope’s legacy in the days after his passing, it became clear that the Chief Justice’s thinking and writing remains—not just relevant—but essential in thinking about today’s legal problems. In the sections that follow, we will examine Chief Justice Pope’s writings about the common law, opinion writing, and the jury system and offer some thoughts about why they matter now more than ever.

A. The Critical Role of the Law-Conditioned Official

We live in a time of concerning attacks on the judiciary and the rule of law, both at home and abroad. Chief Justice Pope would no doubt have much to say about these troubling times and we submit would be confident in our common-law system’s ability to survive them if we are able to do one thing: maintain a commitment to “law-conditioned” officials. Pope explained that “[l]aw-conditioned officers who administer the law” are essential to stability in the law, “and in a government of law it is indispensable.”²⁵

Chief Justice Pope wrote about this concept in the context of criticism of judicial decisions. Pope’s concern was not that public critiques would be leveled—he welcomed them—but to ensure that we are using “reliable criteria for evaluating judicial opinions.”²⁶ This will aid judges and lawyers in understanding such criticism and, perhaps more importantly, responding to it. That is where law-conditioned officials come in.

So, what did the Chief Justice mean by the term “law conditioned”? “Law is to him no expedient; it is a necessary way of life. It is not a notion; it is an institution.” How does law become a “necessary way of life”?²⁷ One must have advised clients, “marshaled authorities,” “prepared for adversary arguments,” delivered written legal analysis, or taught the law.²⁸ Law-conditioned officials are tethered to “a body of legal doctrine which is embalmed in the books rather than in the personal notions of the public official.”²⁹

With increasingly ferocious attacks—rhetorical and even physical—on the judicial branch, Pope compels us to understand problems “through law spectacles rather than policy, popular, or political spectacles.”³⁰ Pope’s observations are as true today as when he wrote them in 1964. As lawyers and legal historians, we have a special obligation to adhere to these principles to ensure the stability of a system built on “applied history,” careful and thoughtful application of precedent, and predictability.

B. As Lawyers, We Can Never Stop Our Journey of Learning

Chief Justice Pope had an unparalleled passion for learning. That passion comes through in many areas. But none more so than in the Chief Justice’s commitment to learning the craft of judicial writing. “Jack Pope was first and foremost a judge, but he was also a formidable scholar. Having found himself unexpectedly appointed to the district bench at the age of thirty-three, and then to the civil appeals bench four years later, he searched in vain for courses or how-to manuals on decision making and opinion writing. Insatiably studious, he pursued a course of self-education that led to his being of the best-informed judges in the state on matters of legal history and jurisprudence.”³¹

The result of this scholarly pursuit was a bevy of articles and speeches on the topic of opinion writing. In Pope’s *So You Want to Write an Opinion*, we get a window to his thinking about what it means to be a writer. The very first question the Chief Justice raises is

²² *Id.* at 289.

²³ *Id.* at 15.

²⁴ *Id.* at 302.

²⁵ COMMON LAW JUDGE, at 9, 11, 13.

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 13.

³⁰ *Id.*

³¹ *Id.* at xviii.

particularly striking: who is the audience?³² One gets the sense that “audience” is not a topic judges thought a whole lot about before Chief Justice Pope put his ideas to paper.

This introspection shines through when Pope talks about what kind of opinion is right for a particular case. Is it the brush-off opinion for a frivolous appeal?³³ Or is it the simply-decide-the-case kind?³⁴ Sometimes a judge must take a deep-dive and write the “spelunking opinion.”³⁵ And in the rare case, the writer must prepare the magisterial opinion to bring synthesis to law and resolve conflicts.³⁶

What does this project have to do with being a “modern” lawyer? Quite a lot, we would submit. We may not all need to learn how to write the perfect judicial opinion. And we certainly cannot all be Jack Pope. But in an increasingly fast-paced business and legal world, it is often difficult to hit the pause button and think. Think about our clients’ legal problems, their business objectives, or telling their stories. Think about our role in the legal system.

The deep reflection that Chief Justice Pope applied to the craft of opinion-writing is instructive. One does not devise multiple approaches to deciding appeals without slowing down and setting aside the time to articulate a systematic approach to the discipline. As lawyers, we want to be better at our craft, better at solving problems, and better at making contributions to the legal system. We must be willing to pause, think, and learn. Chief Justice Pope’s approach to learning his craft provides a model for doing so.

C. Enduring Questions about the Jury System

As noted earlier, Chief Justice Pope was a leading figure in the effort to reform the jury system. An ardent proponent of the right to trial by jury,³⁷ Pope focused on improving the jury trial process—simplifying issues, protecting the jury’s deliberative process while at the same time reducing the risks of external influences, and eliminating procedural barriers to effective trials. Below we will examine a few of the Chief Justice’s projects and their modern-day relevance.

Instructing the jury and preventing misconduct. Chief Justice Pope believed that the root problem in the jury system was inadequate and confusing

instructions.³⁸ The failure to clearly explain a juror’s responsibilities resulted in a troubling number of misconduct complaints and mistrust amount jurors.³⁹

Pope’s opinion in *Trousdale v. Texas & N.O.R. Co.*⁴⁰ captures this concern. During the course of deliberations, two jurors allegedly opined that findings on negligence and unavoidable accident were irrelevant after the jury answered the damages submission.⁴¹ Based on this statement, two jurors changed their votes.⁴² The question in this case was whether these internal deliberations constituted juror misconduct.⁴³ The Court held no, based on a long line of precedent that bars a court from delving into the jury’s deliberative process.⁴⁴ The answer in this case was easy enough, but it also revealed shortcomings in the Texas jury-trial process—the absence of clear instructions about proper conduct during the trial and a lack of understanding about when the jury can be questioned about its conduct.

Chief Justice Pope wrote that “[j]uries were increasingly charged with a number of forms of misconduct in the period from 1940 to 1965.”⁴⁵ A public crisis had developed, with “[i]nnocent jurors ... outraged at the idea that the performance of a public service brought their integrity into question.”⁴⁶ Without clear instructions about how jurors were to conduct themselves at the various phases of trial, misconduct was possible and misconduct allegations could easily be hurled.⁴⁷ So, in the 1950s, the Chief Justice led the effort to publish a uniform set of admonitory instructions.⁴⁸ These are the same basic instructions that we still use today.

The instructions—phrased in plain and accessible language—explain the jury’s role and responsibilities at each stage of the trial. A first set of instructions relate to contacts between jurors and lawyers.⁴⁹ The second set tells the jury how to conduct itself during the presentation of evidence.⁵⁰ A third round of instructions guides the deliberative process.⁵¹ And a final set explains that, after release, jurors are free to speak—or not—about the case and that they can be questioned by lawyers about whether these rules were followed.⁵² This project was a great success. It reduced the number of misconduct allegations and provided important context for jurors when an inquiry was made.⁵³

³² *Id.* at 16.

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.* at 3-4.

³⁶ *Id.* at 4.

³⁷ Jack Pope, *The Jury*, 39 *Texas L. Rev.* 426 (1961).

³⁸ COMMON LAW JUDGE, at xxi, 79.

³⁹ *Id.* at 82.

⁴⁰ 264 S.W.2d 489 (Tex. Civ. App.—San Antonio 1953), *aff’d* 154 Tex. 231 (1955).

⁴¹ *Id.* at 491-92.

⁴² *Id.*

⁴³ *Id.* at 491.

⁴⁴ *Id.* at 493-95.

⁴⁵ COMMON LAW JUDGE, at 81.

⁴⁶ *Id.* 82.

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Pope's writings in this area offer important insights about jury misconduct in the age of social media. It is the rare trial today that does not include at least some mention about the use of social media and related communications. And there are concerns about jurors conducting their own factual or legal diligence—a problem compounded by the relative ease of acquiring information on complex and specialized topics. Thoughtful reflection on Pope's warnings and writings about misconduct and the critical role clear and specific admonitory instructions can play will be increasingly important in the years ahead.

Jury submissions. Chief Justice Pope took the mantle of simplifying jury submissions early in his career. The problem of “special issues” in jury instructions was rampant, and the Chief Justice was a fierce advocate for their reform. He believed that special issues “complicate[d] trials,” “generate[d] conflicting jury answers and mistrials,” and created “traps for the jury.”⁵⁴ Recounting the history of this practice, Chief Justice Pope noted that there has been “such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible.”⁵⁵ The Legislature responded with the Submission of Special Issues Act, requiring the use of special issues to be submitted “separately and distinctly.”⁵⁶ This enactment properly targeted a pressing problem in jury trials. But it created another: “a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective.”⁵⁷

Pope undertook a “systematic campaign of lectures, articles, and opinions (at first, dissents) to convince the legal community” of the urgency of this issue.⁵⁸ It was certainly a journey. But by 1971, the Supreme Court of Texas embraced Pope's vision when it issued *Yarborough v. Berner*, which held that it was improper to separately submit issues on “unavoidable accident” and “sudden emergency” in a negligence case.⁵⁹

Writing for a unanimous Court, the Chief Justice made a broader case for simplifying jury submissions.

The “unavoidable accident” submission—like many other prevalent special issues—had “become an instrument” to manufacture jury conflicts and “defeat a verdict and a trial.”⁶⁰ The solution? Include concepts like unavoidable accident, emergency, and new-and-independent cause in instructions or definitions.⁶¹ That way the jury is aware that those issues are in play without “smother[ing] what would otherwise be a simple submission of a negligence case.”⁶²

His project was fully realized in 1973 with the adoption of our current rule—Rule 277—commanding that issues be submitted in broad form “whenever feasible.”⁶³ This change eliminated “the requirement that issues be submitted distinctly and separately.”⁶⁴

Despite the rule change, “special issues still lingered in the court system.”⁶⁵ The Court's 1984 decision in *Lemos v. Montez*⁶⁶—again authored by the Chief Justice—nailed the door shut on that practice. In that case, the trial judge included a back-door special issue on unavoidable accident by asking the jury whether the negligence was caused by the plaintiff, the defendant, or *neither*.⁶⁷ This submission forced the plaintiff to negate unavoidable accident.⁶⁸ A proper submission under Rule 277 was simply this: Whose negligence caused the collision? (a) Plaintiff, yes or no; or (b) Defendant, yes or no.⁶⁹

Chief Justice Pope's writing in *Lemos* delivered a broader, system-wide message. Rule 277 was not a license “to devise new or different instructions and definitions,” compounded to the point that special issues become the norm.⁷⁰ Pope concluded that “[j]udicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.”⁷¹

Fast forward 20 years. The debate about the proper use of broad issues continues—informed by Chief Justice Pope's thoughtful and considered advocacy for simplifying the jury-trial process. Courts continue to struggle with defining when a broad-form issue is truly “feasible” and when it might obscure trial court error.⁷² But all agree that we should not return to the confusion

⁵⁴ *Id.* at 96.

⁵⁵ *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ COMMON LAW JUDGE, at xxi.

⁵⁹ 467 S.W.2d 188 (Tex. 1971).

⁶⁰ *Id.* at 192.

⁶¹ *Id.* at 193.

⁶² COMMON LAW JUDGE, at 96.

⁶³ TEX. R. CIV. P. 277.

⁶⁴ COMMON LAW JUDGE, at 99.

⁶⁵ *Id.*

⁶⁶ 680 S.W.2d 798 (Tex. 1984).

⁶⁷ *Id.* at 799.

⁶⁸ *Id.* at 800.

⁶⁹ *Id.*

⁷⁰ *Id.* at 801.

⁷¹ *Id.*

⁷² *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) (presuming harm when broad-form question commingles damage elements that are unsupported by legally sufficient evidence); *Harris Cnty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (presuming harm when a broad-form question commingles damage elements that are unsupported by legally sufficient evidence); *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012) (presumed harm analysis does not apply to the broad-form submission in a single-theory negligence charge that includes both an improper defensive theory of contributory negligence and an improper inferential rebuttal instruction); *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d

and conflict-riddled special-issue practice that dominated Texas trials for the better part of a century.

Public or private justice. Despite procedural deficiencies in the jury-trial process, Chief Justice Pope remained a faithful proponent of the jury trial. In a definitive historical piece titled simply *The Jury*, Pope provides a detailed account of the evolution of the jury system from the Old Testament to America's founding.⁷³

Pope believed the jury was the crowning achievement of the common law: "The common law has no achievement more remarkable than the transformation of the jury from a body of witnesses to a body before whom witnesses should appear and present evidence."⁷⁴ Pope observed that "the struggle for survival by the institution we call the jury is truly the epic story of our law."⁷⁵

Reverence, marvel, and staying power. For Chief Justice Pope, those ideas captured the defining characteristic of our system of public justice. Pope was also a realist and understood the challenges a jury-trial system faces. For many reasons—and many good ones—commercial actors have turned away from public, jury-trial litigation towards private, confidential arbitration to resolve disputes.

The use of arbitration panels to resolve cases may turn out to be a shift that stays with us. But Chief Justice Pope wouldn't bet against the jury system. After all, "[i]t is one of the most durable and stubborn of all human institutions."⁷⁶ Before transitioning to a private, and sometimes unaccountable, justice system, we would do well to think about why "[i]ndistinct yearning for popular participation in the affairs of justice have brooded over the spirits of many people."⁷⁷ Pope's writings provide us the opportunity to think critically about problems of public justice, with an eye towards historical context and a realistic understanding of challenges facing the jury system.

V. CONCLUSION

Texas has been fortunate to attract to its judiciary a number of individuals with the intelligence, vision, and energy to change the course of Texas law even as they work to preserve its fundamental tenets. Chief Justice Jack Pope is among that select group of judicial legends.

As we have shown in this paper, his contributions to Texas jurisprudence began early in his career and spanned almost four decades. His production of more than 1,000 opinions alone was a record worth noting, but the fact that many of them were precedent-setting decisions is even more notable. His record of improvements to the judicial system—promulgating jury instructions, establishing a judicial code of ethics, and instituting required continuing education for judges, to name a few—added even further to his reputation in the legal community. He was a legend in his own time, but he was not one to rest on his laurels.

After Chief Justice Pope retired from the Court in 1985 he continued to advocate for the programs he had helped put in place—legal aid for the poor through the Texas Access to Justice Foundation, for example—and to sponsor new initiatives. In 1989, he joined with Chief Justices Robert Calvert and Joe Greenhill to found the Texas Center for Legal Ethics, a nonprofit foundation dedicated to promoting ethics and professionalism among attorneys. In 1990, he cofounded, again with Chief Justices Calvert and Greenhill, the Texas Supreme Court Historical Society to preserve the history of the courts. He continued to give lectures to local bar associations, judicial forums, law schools, and civic groups for many years—the sum of his speeches and lectures numbered more than 1,000 over his lifetime.⁷⁸

Not surprisingly, the Chief Justice accumulated many honors over his lifetime. Some of the most meaningful came in his later years. The Chief Justice Jack Pope Professionalism Award was established in 2009 by the Texas Center for Legal Ethics to honor an appellate judge or lawyer who epitomizes the highest level of professionalism and integrity.⁷⁹ To his great surprise (but to no one else's), Chief Justice Pope himself was the first recipient. In 2013, soon after he turned 100, the Texas Legislature passed the Chief Justice Jack Pope Act to increase funding for the state's system of legal aid to the poor—the IOLTA program he had signed into existence 30 years earlier. Chief Justice Pope was present when Governor Rick Perry signed the bill into law.⁸⁰

At the time of his death on February 25, 2017, Chief Justice Jack Pope was approaching 104 years of age. For several years he had held yet another record—

753 (Tex. 2006) (holding that a presumed harm rule does not apply to inferential rebuttal instructions).

⁷³ Jack Pope, *The Jury*, 39 Texas L. Rev. 426 (1961).

⁷⁴ *Id.* at 438.

⁷⁵ *Id.* at 426.

⁷⁶ *Id.* at 448.

⁷⁷ *Id.* at 426.

⁷⁸ INDEX OF JACK POPE PAPERS, original volume donated to Abilene Christian University; copy in the archives of the Texas Supreme Court Historical Society.

⁷⁹ Texas Center for Legal Ethics, Chief Justice Jack Pope Professionalism Award, <https://www.legaethicstexas.com/Spotlight-on-Ethics/Awards/Pope-Award>; last visited March 20, 2017.

⁸⁰ Texas Access to Justice Foundation, *Texas Legislature Provides Funding for the State's Legal Aid System—“Chief Justice Jack Pope Act” to Increase Funds for Civil Legal Aid*, <http://www.teajf.org/news/releases/2013Session.aspx>; last visited March 20, 2017.

as the longest-living chief justice of any state supreme court in U.S. history. His passing was widely noted and mourned, perhaps most eloquently by the current head of the Texas Supreme Court, Chief Justice Nathan L. Hecht. “Chief Justice Jack Pope was a judicial icon,” he said. “His hard work, scholarship, common sense, humor, and integrity are legendary. No Texas judge has ever been more committed to serving the rule of law and the cause of justice. He was my mentor, role model, counselor, and most especially, my friend. Texas has lost a great, great man.”⁸¹

⁸¹ Texas Supreme Court Advisory, <http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/>; last visited March 20, 2017.

