

# WESTERN LEGAL HISTORY

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The Editorial Board welcomes unsolicited manuscripts, books for review, and recommendations for the journal. Manuscripts (three copies, and one diskette in Wordperfect 5.0 or higher, if possible) should be sent to the Editor, *Western Legal History*, 125 S. Grand Avenue, Pasadena, California 91105. Texts, including quotations and endnotes, must be double-spaced. Notes must be numbered consecutively and appear in a separate section at the end of the text. Authors are requested to follow the style for citations used in this journal. Manuscripts that are no more than thirty pages in length, not counting notes, charts and tables, and photographs, are preferred. Also preferred are manuscripts not concurrently under consideration by another journal.

Whether because of prejudice or custom, writers in earlier times often used language considered strange or offensive today. Because *Western Legal History* publishes articles that present the historical record as accurately as possible, it occasionally publishes quotations containing such language. The publication of such is not to be construed as representing the attitudes of either the authors or *Western Legal History*.

Communication with the editor is encouraged before submission of any manuscript. At that time, other guidelines for the preparation and publication of an article may be discussed. Consultation upon punctuation, grammar, style, and the like is made with the author, although the editor and the Editorial Board are the final arbiters of the article's acceptance and appearance.

Articles published in this journal are abstracted and indexed in *America: History and Life*; *Historical Abstracts*; the *Index to Legal Periodicals*; and the *Legal Resources Index*.

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*Cover Photograph:* The National Archives and Records Administration is the repository for all official permanent records of the United States courts. (NARA, Washington, D.C.)



## FOREWORD

This special issue marks the tenth anniversary of *Western Legal History*. When the journal began publishing in 1988, John Phillip Reid observed that *Western Legal History* was needed because “so little has been written” on the development of law in the American West. In the intervening years, this situation has changed as many books and articles have been published on the subject. *Western Legal History* has given historians, lawyers, political scientists, biographers, and other contributors a forum for exploring how the law has shaped the West and the Pacific Basin, and how in turn that vast region has shaped the law. We would like to think that our journal has enhanced the quality of the debate.

Anniversaries are occasions for celebration and reflection, and we have engaged in both these activities by inviting historians and others to join us in delving into the vast legal records (many of which are untapped) housed in courthouses, libraries, and archives throughout the West and the rest of the nation.

David McFadden’s article offers an entrée to the law library for historians and others unfamiliar with its workings. His guide is not intended to be exhaustive—there are many fine book-length handbooks on legal research, some of them reviewed in this issue—but, rather, it is a primer, an introduction for those just beginning to search for answers that only the study of cases, statutes, and administrative regulations can provide.

From the law library we move to the archives. Larisa Miller, an archivist at the National Archives branch in San Bruno, shows how to study the West’s development through federal court records. Using examples drawn from the documents, she describes how such topics as immigration, labor disputes, civil liberties, environmental issues, and the like can be illuminated by using materials in that repository.

Researching the lives and careers of judges, prosecutors, and other federal employees is the subject of Claire Prechtel-Klusens’s article. A specialist in genealogy at the National Archives in Washington, D.C., Prechtel-Klusens describes in depth the types of materials found in the various record groups relating to the federal courts. Researchers will find her citation of published finding aids particularly useful, since the sheer

volume of material in the National Archives can be so overwhelming.

A manuscript case file can lead a researcher to a gold mine, revealing background material not found in the published opinion. Peter Reich, who has prospected successfully among these records in state archives, shares his knowledge of the case files to be found in Arizona, California, Texas, and New Mexico.

In addition to encouraging new research, we wanted this issue to reflect on the state of western legal history, and asked John Wunder to do so. Wunder has been examining the debate between proponents of the New Western History and adherents to Turnerian concepts of western history in a series of articles published in various journals. Here he analyzes how both schools address (or avoid) legal issues and reviews recent trends in the study of western legal history, including an evaluation of this journal. He concludes that many surprises await researchers exploring law in the American West and issues raised by the New Western History, particularly regarding race and gender.

In 1988, *Western Legal History's* founding editor, Chet Orloff, set a broad agenda for the types of articles the journal would publish. With the revolution in desk-top and electronic publishing, the next ten years will bring changes to this journal that we can barely begin to contemplate. We will, however, endeavor to expand the variety of topics presented, with the goal of illuminating the role law has played in the development of society in the North American West and the Pacific Basin.

Achieving our objective would not be possible without the articles and reviews submitted by our authors. Thank you for entrusting us with your research, your scholarship, and your conclusions. Thanks are also due to the editorial board, whose advice and counsel have improved the journal's quality over the years. To the members of the Ninth Judicial Circuit Historical Society and our other readers, we are grateful for your continuing support. Simply put, this journal would not be possible without your generosity. This tenth anniversary issue of *Western Legal History* is dedicated to you.

Bradley B. Williams  
Editor

# LEGAL RESEARCH FOR HISTORIANS

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DAVID L. MCFADDEN

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**T**he purpose of this article is to explain the basic sources and techniques of legal research for historians and others not formally prepared to work with cases, statutes, and other legal materials. In order to focus on establishing an elementary common ground, I have intentionally omitted research in trial court documents, transcripts, and similar sources, and have mentioned electronic sources only briefly.

The three major primary sources of American law—cases, statutes, and administrative regulations and adjudications—parallel the three branches of government from which they come. Researchers need to know how to find materials from all three branches.

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## CASE LAW

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### *Collections of Cases*

Usually, “case law” refers to cases in collections called **reports** or **reporters**. This is only partially correct. One of the frustrations for the researcher is that many cases are not permanently compiled and published. They may have been rendered orally and at best are mentioned in newspapers and other similar sources. Whether a decision is published varies greatly by the level of court, the precedential value of the decisions, and the historical period when the decision was delivered. Fortunately, most decisions of the U.S. Supreme Court and the highest court of each state are published. At the other extreme, most trial court decisions are not published. Decisions of intermediate appellate courts fall somewhere in between. These decisions are selectively published.

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David L. McFadden is senior reference librarian at Southwestern University School of Law.

### *Slip Opinions*

In colonial times, decisions were given orally by the court, whereupon lawyers, law students, and sometimes judges would write down the decisions in notebooks to help them in their practice and study of law. Later, a tradition of selectively publishing newsworthy trials in pamphlets developed. Today, if a decision is written, its first form is the **slip opinion** written by the judges or justices rendering the decision. This is also the final form of the opinion if it is not published elsewhere. The vast majority of cases decided remain in this form and never appear in reporters. A slip opinion is merely the text of the opinion, including the name of the case, name of the court, docket number, and date of the decision. In some jurisdictions, a summary of the decision is included. Sometimes these are typed on 8½-by-11-inch sheets and some, such as those of the Supreme Court of the United States, are typeset. Regardless of the format, a slip opinion contains few, if any, editorial enhancements, summaries, or other information found in some of the reporters. For modern cases, this is the form of decision that is initially available through online systems such as Westlaw, Lexis, and decisions on Pacer and other bulletin boards and the Internet. Slip opinions are also reprinted in some legal newspapers and loose-leaf reporting services.

### *Early Case Reporting*

By their very nature and format, slip opinions are difficult to find and use, and even more difficult if a decision is merely given orally in open court. To avoid some of these problems, a tradition of compiling cases in bound reporter volumes developed early in American history and even earlier in England.<sup>1</sup> In part this was done in order to further the principle of *stare decisis*, in part to allow easier access to the cases. Early decisions, transcribed by individuals and privately compiled and published, were not official and not necessarily accurate. The early reporter volumes were often named after the person who did the actual transcribing and compiling (e.g., Cranch). The earliest nominative reporters would not necessarily be restricted to one jurisdiction—the early volumes of the *United States Reports* as compiled by A.J. Dallas, for example, contain cases

<sup>1</sup>For modern cases, the usual chronological pattern of publication is: 1) slip opinion, 2) advance sheet, and 3) bound reporter. Usually, though not always, cases in corresponding advance sheets and the bound reporter volumes have the same volume and page number. In general, two or three advance sheets are bound together to make one permanent reporter volume.

from Pennsylvania, Delaware, and New Hampshire—and only later did they contain exclusively Supreme Court cases. American nominative reports began in Connecticut in 1789, but by the mid- to late-nineteenth century most states had abandoned them. The last state to do so was Delaware, in 1919. The tradition of nominative reporters never took hold in the West. New Mexico had an unofficial series, and some early probate cases were published in a nominative reporter in California, but these are exceptions.

Official publishing of court decisions began in 1804 in Massachusetts. For the most part, the official reports use the name of the state or jurisdiction rather than that of the reporter, although some early official reports were initially nominative reports and later renumbered into an official numbering system. For example, vol. 68 of the *United States Reports* was originally vol. 1 of Wallace's Reports. Toward the end of the nineteenth century and into the twentieth, another trend emerged, in which private publishers competed with, and eventually in many instances replaced, official reports. Today, at the federal level, only the U.S. Supreme Court has an official report. Twenty-eight states do so, but this excludes states that have adopted a West Regional Reporter as their official report.

### *Modern Case Reporting*

West began publishing the *Supreme Court Reporter* (S. Ct.) with the October Term of 1882. This coincided with vol. 106 of the *United States Reports* (U.S.). Also in 1882, the Lawyers Cooperative Publishing Company began publishing the *United States Supreme Court Reports, Lawyers' Edition* (L. Ed.), now in its second series (L. Ed. 2d). Unlike West, it originally reprinted all U.S. Supreme Court decisions from 1789, and then began to publish contemporary volumes. Regardless of whether the text of the case is published in an official or unofficial reporter, it should be identical. The major difference is that West and other private publishers often have additional features to aid the researcher. Commonly, these include a synopsis/summary of the decision and headnotes summarizing key points of law within the case. West reporters' headnotes include references to a topic and a key number system that acts as a subject classification of the headnote and the related point of law. (This will be discussed further.) *Lawyers' Edition* has its own digest and links its headnotes to that. In addition, although initially the volumes did little more than reprint the original cases in a more condensed type, *Lawyers' Edition* began to include summaries of the briefs of counsel as well as annotations discussing the subject of law of selected cases in each volume.

# KEY NUMBER DIGEST



## ACTION

### I. GROUNDS AND CONDITIONS PRECEDENT.

#### ⊞62. Acts or omissions constituting causes of action in general.

**C.A.5 (Tex.) 1997.** Under Texas law, damages are prerequisite to cause of action; without damages, there is no injury to remedy.—*Matter of Swift*, 129 F.3d 792.

#### ⊞6. Moot, hypothetical or abstract questions.

**C.A.6 (Tenn.) 1997.** Case, or injunction, is only "moot" if, assuming that plaintiff receives relief which he or she requests, such relief would no longer afford any meaningful legal benefit.—*Smith v. S.E.C.*, 129 F.3d 356.

Doctrine of mootness, like parallel doctrine of standing, in no way depends on merits of plaintiff's contention that particular conduct is illegal.—*Id.*

#### ⊞13. Persons entitled to sue.

**C.A.6 (Tenn.) 1997.** Doctrine of mootness, like parallel doctrine of standing, in no way depends on merits of plaintiff's contention that particular conduct is illegal.—*Smith v. S.E.C.*, 129 F.3d 356.

### IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

#### ⊞61. Accrual of cause of action.

**C.A.5 (Tex.) 1997.** Under Texas law, accrual of cause of action means right to institute and maintain suit, and whenever one person may sue another, cause of action has accrued.—*Matter of Swift*, 129 F.3d 792.

For causes of action requiring some form of legal injury to accrue under Texas law, it is not necessary to know immediately type and extent of that injury; all that is needed is specific and concrete risk of harm to party's interest.—*Id.*

Determination of when cause of action accrues and determination of when statute of limitations begins to run for particular cause of action are two separate and distinct issues aimed at very different problems.—*Id.*

Under Texas law, discovery is relevant to determination of when statute of limitations begins to run, but it is not element necessary for cause of action to accrue for purposes beyond statute of limitations.—*Id.*

Cause of action accrues when any damage is suffered, even if injured party is not seeking recovery for those particular damages.—*Id.*

#### ⊞68. — In general.

**C.A.5 (La.) 1997.** District court's action on request for stay is matter of judgment and it is reviewed by Court of Appeals only for abuse of discretion.—*Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781.

## ADMINISTRATIVE LAW AND PROCEDURE

### IV. POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS AND AGENTS.

#### (A) IN GENERAL.

#### ⊞324. Discretion.

**C.A.D.C. 1997.** Question of how best to handle related, yet discrete, issues in terms of procedures is matter committed to agency discretion.—*Northern Border Pipeline Co. v. F.E.R.C.*, 129 F.3d 1315.

#### (C) RULES AND REGULATIONS.

#### ⊞390.1. — In general.

**C.A.1 1997.** Where Congress explicitly left gap for agency to fill, and where there is thus express delegation of authority to agency to elucidate specific provision of statute by regulation, court should uphold gap-filling regulation unless it is arbitrary, capricious, or manifestly contrary to statute.—*Choeum v. I.N.S.*, 129 F.3d 29.

#### ⊞413. — Administrative construction.

**C.A.D.C. 1997.** Court affords substantial deference to agency's interpretations of its own regulations, deferring to agency unless its interpretation is plainly erroneous or inconsistent with regulations.—*Northern Border Pipeline Co. v. F.E.R.C.*, 129 F.3d 1315.

#### (D) HEARINGS AND ADJUDICATIONS.

#### ⊞470. — Necessity and purpose in general.

**C.A.D.C. 1997.** It is not necessary that agency hold formal hearing in compiling administrative record, for Administrative Procedure Act (APA) specifically contemplates judicial review on basis of agency record compiled in course of informal agency action in which hearing has not occurred. 5 U.S.C.A. § 551 et seq.—*JMS, P.C. v. Alvarez*, 129 F.3d 618.

### V. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.

#### (A) IN GENERAL.

#### ⊞676. Record.

**C.A.D.C. 1997.** If parties to case involving challenge to administrative decision wish to contest merits of case by referring or submitting to district court any material that does not appear in administrative record, they may do so only by joint stipulation.—*IMS, P.C. v. Alvarez*, 129 F.3d 618.

#### ⊞681.1. — In general.

**C.A.D.C. 1997.** Although remands to agency normally lack finality necessary for appellate jurisdiction, there is exception where agency to which case is remanded seeks to appeal and it would have no opportunity to appeal after proceedings on

(1)

West Publishing developed an outline of the law that consists of more than 410 major topics divided by key numbers. [*Federal Reporter*, 3d ser., vol. 129, 1, reprinted by permission of West Group, St. Paul]



Lower federal court decisions were published in sixty different reporters and other publications until 1880, when West launched the *Federal Reporter*. This set is now in its third series and originally covered all levels of lower federal courts. Since 1932 federal district court decisions and cases from other federal trial courts have been included in the *Federal Supplement*, and since 1940 the *Federal Rules Decisions* have covered district court decisions dealing with the interpretation of federal court rules. To cover cases before the inception of the *Federal Reporter*, West published *Federal Cases* from 1894 to 1897. This thirty-volume set is arranged alphabetically by case name rather than chronologically, as most other reporters are organized.

### *State Reports*

By the end of the nineteenth century, cases were also being reported in various reports at the state level. In order to bring together cases from many jurisdictions, West Publishing developed the National Reporter System, which covers all published U.S. Supreme Court decisions, federal court decisions, decisions from specialized courts, and published decisions of all fifty states and the District of Columbia. Part of this system consists of a series of seven regional reporters, each covering a number of states' decisions, plus separate reporters for California and New York.<sup>2</sup> The names of each regional unit developed over time and are not necessarily logically related to the area of the country the state is in. For example, Oklahoma cases appear in the *Pacific Reporter*. In the late nineteenth century there were other regional reporters, but these were eventually taken over by West or folded completely. An important feature

<sup>2</sup>*Atlantic Reporter* (1886) covers Connecticut, Delaware, Maine, Maryland, New Jersey, Pennsylvania, Rhode Island, and Vermont; *California Reporter* (1960) covers California Supreme and Appellate Courts; *New York Supplement* (1888) covers New York Court of Appeals, Appellate Division, and Miscellaneous Cases; *North Eastern Reporter* (1885) covers Illinois, Indiana, New York (except lower courts), and Ohio; *North Western Reporter* (1879) covers Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin; *Pacific Reporter* (1884) covers Arizona, California (Supreme Court only since 1960), Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming; *South Eastern Reporter* (1887) covers Georgia, North Carolina, South Carolina, Virginia, and West Virginia; *South Western Reporter* (1887) covers Arkansas, Kentucky, Missouri, Tennessee, and Texas; and *Southern Reporter* (1887) covers Alabama, Florida, Louisiana, and Mississippi. The Regional Reporters also contain territorial decisions for the time period covered in the reporter. For a more detailed listing, see Morris L. Cohen et al., *How to Find the Law* (St. Paul, 1989), 663-64 [hereafter cited as Cohen, *How to Find the Law*].

of all of the units of the National Reporter System is that they all have headnotes that include topic and key numbers.

At about the same time that John B. West began his regional reporters, the Bancroft-Whitney Company began selectively to publish cases of multiple jurisdictions considered important. The Trinity Series consists of *American Decisions* (colonial period to 1868), *American Reports* (1871-1887), and *American State Reports* (1887-1911). Another early series, *American and English Annotated Cases*, was begun by the Edward Thompson Company in 1906. This series combined with the Bancroft-Whitney series in 1912 to form *American Annotated Cases*. The Lawyers Co-operative Publishing Company had *Lawyers' Reports Annotated* in three series from 1888 to 1918. The modern version of this selective reporting series began in 1919 with *American Law Reports* (*ALR*). This series, which originally contained selected federal and state cases, is now in its fifth series and also has a federal series from 1969 to the present. The annotated case reports are a combination of both **primary** and **secondary** legal material. The full text of the case appears, together with an essay that puts the case in its legal context. (The importance of the annotation has overshadowed the text of the cases to such an extent that serious consideration was given to including only summaries of the cases when the fifth series of *ALR* was being planned. The cases are now relegated to the back of the book.) *ALR* will be discussed further in relation to case finding and secondary sources.

### *Case Citations*

Various systems of citation have developed to enable lawyers and others to refer quickly to cases. A reference to a case usually consists of the name of the case, volume number, reporter, page number, name of court (if not obvious), and year of decision. There are many variations of this, but this is the basic form. Some citation conventions require that both the **official** and **unofficial** reporters be included. These parallel citations aid the researcher in finding the case, especially when the library has limited resources.<sup>3</sup> *The Bluebook: A Uniform System of Citation*, a citation guide from Harvard and other law schools originally designed for law-review citation, has been adapted to other uses. Citation styles have changed over time, and there

<sup>3</sup>A number of tools can be used to find parallel citations. They include: Tables of Cases in digests and other sources; Shepard's Citators; *National Reporter Blue Book*, state *Blue and White Books*; conversion tables in the beginning of reporter volumes; and AutoCite on Lexis and Instacite on Westlaw.

have been changes in various editions of the *Bluebook*. The fifteenth and sixteenth editions, for example, have a preference for citation to regional reporters exclusively. This is a change from past practice, in which parallel citations were used in all state citations. Adding to the confusion, many publishers and courts also have their own styles. Nonetheless, if the basic citation form mentioned above is understood, most citations can be deciphered. Examples of case citations may be found in the accompanying chart, below. The appendix to this article (p. 29) gives a list of citation manuals and abbreviations dictionaries.

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## EXAMPLES OF CASE CITATIONS

Plaintiff	Defendant	volume	reporter	first page cited	page	year
<i>Slidell</i>	<i>v. Grandjean</i> ,	111	U.S.	412,	421	(1883)

Plaintiff	Defendant	volume	reporter	volume	nominative reporter	page	year
<i>Arguello</i>	<i>v. United States</i> ,	59	U.S.	(18	How.)	551	(1855)

Plaintiff	Defendant	volume	reporter	page	circuit	year
<i>Beley</i>	<i>v. Naphtaly</i> ,	73	F.	120	(9th Cir.	1896)

Plaintiff	Defendant	official citation	unofficial citation	year
<i>Maynard</i>	<i>v. Polhemus</i> ,	74 Cal.	141, 15 P. 451	(1887)

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### *Case Finders*

Of the many traditional ways to find a case, two of the major ones are digests and the annotations in the *American Law Reports*. Westlaw, Lexis, and now various CD-ROM products are also good case finders. In addition, references to cases may be found in other cases, citators, and secondary materials.

### *Digests*

Case digests are collections of brief summaries of narrow points of case law, usually taken from the headnotes of cases that aid the researcher in finding other cases. These abstracts are then collected and organized by subject. Some publishers have digests for a particular court; *McKinney's New California Digest* and *United States Supreme Court Digest*, *Lawyer's*

*Edition* are examples. The most comprehensive system was developed by West. The basic feature of a West Digest is its topic and key numbers. West's outline of the law consists of more than 410 major topics, further divided by key numbers. This provides the organization for the entire digest system. One major digest series, the American Digest System, covers all federal and state cases since 1658. There are four regional digests and state digests for all states except Delaware, Nevada, and Utah. The unique feature of the West system is that topic and key numbers are interchangeable, allowing the researcher to use a topic and key number from an Arizona case, for example, to find a Washington State case on the same subject.

### *Known Case Method*

The easiest way to find a case in a West Digest is the known case method. The researcher uses the topic and key numbers from a known case headnote and takes them to whichever digest he or she needs. For example, if headnote no. 3 deals with the point of law classified as Habeas Corpus key no. 13, the researcher merely goes to the volume of the relevant West digest that contains the Habeas Corpus topic and key numbers to find cases on that point of law. Topic and key number searches are also available on Westlaw. However, this method will not work for nineteenth- and early-twentieth-century cases. The modern practice of including references to topics and key or section numbers as part of the actual headnote did not start for U.S. Supreme Court cases, for example, until 1909, with vol. 29 of the *Supreme Court Reporter*.<sup>4</sup> West included them for its other reporters at about the same time. For earlier cases, it is necessary to use the Table of Cases method mentioned below in order to find the topic and key numbers assigned to a particular case.

### *Descriptive Word Method*

A second method is to use the Descriptive Word Index. After analyzing the issue to be researched and determining the appropriate terms, the researcher merely looks them up in the Descriptive Word Index (DWI), an index to topic and key numbers. The list of relevant topic and key numbers can be then used to find cases in the main part of the digest.

<sup>4</sup>As early as 1903, some West reporters included footnote references to the *Century Digest*. Not every headnote had such references, however.

### *Analysis Method*

Another, more difficult, method uses the analysis at the beginning of each topic. Each topic has an outline of all of the key numbers, which precedes the actual collection of abstracts. The researcher can scan these outlines to find the appropriate topics and key numbers. This method is not usually the best place to start in a digest, as it presupposes a fairly sophisticated understanding of the law and the West Outline of the Law, but it is a good way to refine a search once a topic and key number have been found, to see if there are any related key numbers next to it in the outline.

### *Table of Cases*

All West Digests also have a table of cases.<sup>5</sup> In addition to the name of the case, usually both official and unofficial reporter citations are included with the jurisdiction. A list of the topic and key numbers assigned a particular case are also included. As we have seen, this is the only way to find relevant topic and key/section numbers for nineteenth-century and early-twentieth-century cases. Except for the regional digests<sup>6</sup> and pre-1976 Decennial Digests, all West Digests have a reverse table of cases, a Defendant Plaintiff Table. Only the case reporter citation is provided; no topic and key numbers are listed.

### *Words and Phrases*

Courts sometimes define or explain a word or concept. A list of cases that have these judicial definitions is found in the Words and Phrases section of all West Digests except regional digests and Decennial Digests. The researcher still needs to look up the case cited in order to find the meaning of the word. This feature of the West Digests is not to be confused with the multivolume set *Words and Phrases*, also by West, which prints definitions of legal concepts as well as citations to the source of the definition compiled for all published state and federal cases. Although not as comprehensive as *Words and Phrases*, the larger lawyer-oriented law dictionaries, e.g., *Black's*, *Ballentine's*, and *Bouvier's*, also include citations to cases defining terms.

<sup>5</sup>There is a combined Table of Cases for the *Century Digest* and the *First Decennial Digest*. All other Decennials have their own Table of Cases volumes.

<sup>6</sup>The most recent edition of the *Pacific Digest*, covering cases from volume 585 P.2d, has a Defendant-Plaintiff Table of Cases, but this is an exception.

### *Updating Digests*

Most West Digests are updated by pocket parts slipped into the back of individual volumes and issued annually. In addition to pocket parts, some sets also issue freestanding cumulative pamphlets, either mid-year or more frequently, to cover more recent cases. Westlaw can be used to find even more recent cases using the same topic and key numbers as found in the headnotes and digests. It should be noted that some West Digests are broken into two or more series covering different periods of time for the same jurisdiction. The federal digests and *California Digest* follow this pattern. Obviously, pocket parts are not issued for the earlier series once a new series is started. Often the historical researcher looking for older cases will only need to use the earlier series of some of these digests. In other cases, a second series of a digest replaces the first series. Many state digests, including Colorado, for example, use this second pattern. Only the most recent edition is needed at any given time.

### *American Digest System*

The American Digest System, consisting of the *Century Digest* and later sets referred to as *Decennial Digests*, is a comprehensive digest system covering all cases, federal and state, from 1658. It is organized into separate complete sets of digests for different periods of time. There are no pocket parts. Most of the series use the same West topic and key number system as the state and federal digests. The techniques described above also apply to the American Digest System. The *Century Edition of the American Digest*, which covers 1658 to 1896, uses a different classification system from the rest of the West Digests. There is a conversion table between the two systems in vol. 21 of the *First Decennial Digest*. The other features of the *Century Digest* are like those of other West Digests. The modern West Digest system began with the *1906 Decennial Edition of the American Digest*, covering ten years of cases from 1897 to 1906. This was followed by other *Decennial Digests* every ten years until 1976, when the publishing pattern switched to creating an entirely new digest every five years. For example, the *Ninth Decennial Digest, Part 1* covers from 1976 to 1981 and the *Ninth Decennial Digest, Part 2* covers from 1981 to 1986. Rather than issuing pocket parts for the *Decennial Digests*, West publishes hardbound, single-volume *General Digest* volumes covering all 410 topics each month or so until a new *Decennial Digest* is ready to be printed. As can be imagined, this form of supplementation requires looking at a number of different volumes to research a subject from 1658 to the present.

Since fourteen volumes of the *General Digest* are issued on average each year and there are twelve different completed digests from 1658 through 1991, using this system is comprehensive but time-consuming. For multi-state research Westlaw is an alternative to the American Digest System, but state coverage varies greatly. California Supreme Court decisions are included from 1883, but until recently coverage of court of appeals cases began in 1945. They now go back to 1905, when the court was instituted. Idaho Supreme Court coverage begins in 1944!

### *ALR as a Finding Tool*

Another aid in finding cases is the *American Law Reports*. *ALR* does reprint selected cases but the legal essays, or "annotations," are the most useful features for research purposes. The subject of the annotation stems from a case reprinted in the *ALR*. This subject is expanded to include a detailed narrative discussion of the topic, including a survey of how various courts throughout the United States treat that subject. Cases from states holding a majority view, for instance, as well as those holding minority views will be summarized and cited. This approach gives the researcher a context and explanation of the cases that are not to be found in the West Digests. Each annotation has a number of internal finding aids, including a detailed table of contents, an index to the particular annotation, and cross-references to related *ALR* annotations and other publications by the publisher on the subject. Also, by using the Tables of Jurisdictions (Table of Circuits for *ALR Fed*), the researcher is led to those sections of the annotation dealing with cases from the jurisdictions with which he or she is working. In addition, beginning with the *ALR 5th*, expanded research aids include lists of topic and key numbers from the competitor's West Digest System and sample searches for Westlaw or Lexis. The *ALR* is now in five series, starting in 1919, as well as *ALR Federal*, beginning in 1969. Annotations included in the *U.S. Supreme Court Reports, Lawyers, Second Edition* are also part of this system.

To find the *ALR* in question, external finding aids include the *ALR Index* and the *ALR Digests*. The *ALR Index* covers *ALR 2d* forward, and has a subject index plus a table of statutes and an annotation history table. One-volume indexes cover the first series of *ALR* and other series as well. The *ALR Digests* comprise three digests organized under a similar but different system from the West Digests. These *ALR Digests*, of course, send the user to *ALRS* and not directly to cases. In most instances, rather than mastering another digest system, it is preferable to

use the *ALR Index*. *ALR* annotations may also be found, if a case is known, through AutoCite on Lexis and Shepard's. The *ALR* is also searchable in full-text on Lexis and Westlaw.

### *Updating ALR*

A number of different updating systems have developed over the years. The first methods consist of pocket parts or later case services that list newer cases under the same outline points as in the original *ALR* annotation. Occasionally more text is added. *ALR 3d*, *ALR 4th*, *ALR 5th*, *ALR Fed*, and *Lawyers' Edition, Second* are all updated by pocket parts. *ALR 2d* uses hardbound *ALR 2d Later Case Service*, which itself has pocket parts to update it further. The first series of *ALR* is updated by a series of the non-cumulating *ALR Bluebook of Supplemental Decisions*, which merely lists new cases updating the annotation without any further breakdown or analysis. The *ALR Bluebooks*, the *ALR 2d Later Case Service*, and the pocket parts to the later *ALRS* all indicate whether the particular *ALR* has been supplemented or superseded. This is especially important for earlier *ALRS*, as the early *ALR* annotations, particularly from the first series originally published from 1919 to 1948, are often supplemented or superseded. Another source for this status information is the Annotation History Table in the last volume of the *ALR Index*. Although for historical purposes the earlier status of a legal principle or rule may be the one needed by the researcher, it is still helpful to know whether there have been changes.

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## CITATORS

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### *Purposes*

*Shepard's Citations* provide a means to update cases. These case citators commonly give parallel citations; confirm validity; list newer cases citing the original case; and list *ALR*, law reviews, and other secondary sources citing the original case. Shepard's lists the page number of the case in question followed by reference to abbreviated citations and later cases. In the printed versions, this column of letters and numbers is accompanied by one or two letter codes indicating the significance, e.g., "o" for overruled, "r" for reversed, "f" for followed. By this method a researcher can quickly determine the status of a case. Since the information is highly condensed, references to abbreviations tables at the beginning of the volume are necessary. These provide abbreviations to reporters and other sources as well as to the history and treatment symbols. Small



## ILLUSTRATIVE CITATIONS

Various symbols and notations have been used to reflect Shepard's analysis of the citing authorities shown in *Shepard's Federal Citations*. These symbols and notations are illustrated in the following diagram. The data contained in this diagram is provided solely for illustrative purposes, and should not be relied upon.

Case being  
Shepardized  
(Cited Case)

Vol. 980

Volume Number of the case to be Shepardized.

-219-

Page Number of the case to be Shepardized.

Case 1  
Smith v. Jones  
(1993)

**Multiple Cases.** Where more than one case begins on the same page of the reporter, the citations relevant to each case are distinguished by the use of a notation "Case 1," "Case 2," etc.

Cir. 1  
990F2d123

-219-

Case 2  
Reed v. Allen  
(1993)  
(300ADC9)

**Parallel Citations.** The citations appearing in parentheses are cross references to the decision being Shepardized. In this example, 980 F.2d 219, which is being Shepardized, is the same case that is reported at 300 App. D.C. 9. These parallel citations will appear only in the first Shepard's volume published after the parallel citations became available.

Citing  
Cases

Cir. 1

**Circuit/State Designator.** Citations following are to cases of the circuit or state indicated.

600F2d235  
736F2d922  
4F3d316

Cir. 4

**History or Treatment Letters.** Citing cases have been analyzed to determine the effect they have on the case being Shepardized. The resulting "history" or "treatment" is indicated by abbreviations preceding the citing case volume number. A table of these abbreviations appears on the inside front cover. Citations without history or treatment letters indicate that the case being Shepardized was referred to in a less significant way.

977F2d444  
d983F2d68  
986F2d789  
990F2d876

Cir. 5

957F2d288  
968F2d1220  
977F2d2345

Cir. 8

915F2d211  
780FS990  
788FS16

Cir. 9

933F2d44  
822FS566

827FS321  
125FRD13

Cir. 10

882F2d222  
899F2d999  
100ARF12n

100ARF454n

105ARF23n

107ARF45n

108ARF56s

111ARF67s

112ARF78s

**Headnote Numbers.** The superscript numeral to the right of the reporter abbreviation corresponds to a headnote in the case being Shepardized. These headnote numerals appear when it can be determined that the case was cited for the particular point of law stated in the headnote. The absence of a headnote numeral indicates either: (1) the court's reference to the case being Shepardized does not conclusively identify a specific point of law in that case; or (2) the case being Shepardized does not have a headnote stating that point of law.

**Headnote Pending.** A superscript "p" to the right of the reporter abbreviation indicates the citing case has not been analyzed to determine whether it discusses a point of law stated in the case being Shepardized. This analysis will appear in subsequent volumes of this publication.

**Annotation.** A small letter "n" to the right of the page number indicates that the case being Shepardized has been cited in an annotation. In this example, the case being Shepardized was cited on page 12 of bound volume 100 of *American Law Reports, Federal*. An "s" indicates that the citation appears in a supplement to the annotation. In this example, the case being Shepardized was cited in the *American Law Reports, Federal*, supplement that updates the annotation at 108 A.L.R. Fed 56.

*Shepard's Citations* provide a means to update cases. (Reproduced by permission of Shepard's. Further reproduction of any kind is strictly prohibited.)

superscript numbers are also included in the columns that refer to the headnote number from the original case. A researcher may look only for those cases with a small "2," for example. This would indicate that the case citing the original case was discussing the same point of law contained in headnote no. 2 from that original case. This is useful in a case in which many issues are irrelevant to the present research, since it enables the researcher to pick only those cases dealing with the issue under consideration. It should be noted that the assignment of treatment and history symbols is extremely conservative. For instance, Shepard's formerly indicated that *Brown v. Board of Education* merely questioned ("q") *Plessy v. Ferguson*, whereas it is commonly believed, and has subsequently been stated, that *Brown* overruled the separate-but-equal doctrine enunciated in *Plessy*. The discrepancy stems from the fact that the term "overruled" does not appear in *Brown*, and Shepard's did not therefore assign an "o."

### *How to Shepardize*

The mechanics of Shepardizing are simple. Since Shepard's is updated by bound and paper supplements to bound volumes, the first step is to look at the "What This Library Should Contain" note on the cover of the most recent paper advance sheet. This tells the researcher which volumes and supplements are necessary, and is a good way to see whether any volumes or supplements are outdated. Since the listings for a given case may be spread over six or more volumes and supplements, looking in only one part of the Shepard's set is not enough. Each volume and supplement must be consulted. The citing of a case does not always imply reliance on the case as precedent. It is not uncommon for a later court to cite to a case that has been partially or even totally overruled or otherwise held invalid. The historian, of course, will often cite and discuss invalid cases. Updating Shepard's is simplified when using CD-ROM or online versions.

*Shepard's Citations* are published in many different sets and subsets. The major sets are *United States Citations*, *Regional Reporter sets*, *state sets*, and *topical sets*. The state sets, *United States Citations*, and some of the specialty sets include code and administrative law citator services.

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## STATUTORY RESEARCH

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### *Session Laws*

The second major source of the law is from the legislature. A brief review of the legislative process is helpful in understanding statutes. A legislative enactment starts out as a bill, then is passed by both houses of the legislature (Nebraska's unicameral legislature being an exception), after which the bill becomes law, usually by being signed by the chief executive. Generally the bill retains the same number while going through this process, but is additionally assigned a public law or chaptered law number or some similar designation after becoming law. In the federal system, a Public Law Number is given (e.g., P.L. 103-12 is the twelfth law of the 103d Congress). State practices vary greatly. In western states the enacted version is most commonly called a Chaptered Law. These are first issued as **slip laws** and then later bound together by year or session. Hence they are generically referred to as **session laws**. At the federal level, these chronological compilations are called *Statutes at Large*. Some states simply call them, for instance, the Laws of 1883. In California they are known as *Statutes and Amendments of the Codes*. Sometimes the session laws may have indexes and various tables, including bills to law tables and various other aids. Most of these finding aids, however, are limited to one session of the legislature; finding all the laws on a given subject for various years is very time-consuming.

### *Codes*

In the mid- to late-nineteenth century, a movement to codify the law by subject emerged. There were many reasons for this, but one benefit of codification is to provide subject access to those laws *currently* in force. The *Revised Statutes of the United States* were published in 1875 covering laws through 1873, and a corrected version in 1878 covering laws through 1876. Supplements to the original *Revised Statutes* covered 1874-91 and 1892-1901. These early attempts were not altogether successful. The 1875 revision had many mistakes. There were also privately published subject arrangements to assist legal researchers, but in 1926 the official *United States Code (USC)* was approved. The *USC* is divided into fifty subject-related titles. Title 26 is the Internal Revenue Code. Title 28 deals with the judiciary. Title 43 covers public lands. Over the years, there have also been unofficial *U.S. Codes*. The *Federal Code Annotated*, for example, is no longer published. The two cur-

rent comprehensive annotated codes are the *United States Code Annotated (West)* (*USCA*) and *United States Code Service (Lawyers Co-operative)* (*USCS*). *USCS* has recently been sold to the LEXIS Law Publishing division of Reed-Elsevier, but most sets produced during this century will retain the Lawyers Co-operative name. In addition to the full text of the *United States Code*, they include references to secondary authority, research tools, and annotations to cases. West's *USCA*, for instance, includes references to topic and key numbers from its American Digest System. *USCS* includes citations to American Law Reports. The notes of decisions can be helpful in finding case law applying a particular code section. Often there is an index and a topical outline under which the case notes are arranged to assist the researcher further. In West codes the notes of decisions are derived from the head notes of cases in the West reporters. This is the same source as the abstracts appearing in the West Digests.

Immediately following the text of the code and preceding the notes and references is a history or source note listing the various session laws from which the current code section derives. For federal law, usually the Public Law number (and Chapter number for earlier years), *Statutes at Large* citations, and date of the original enactment and each amendment are included. All editions of the *U.S. Code* include historical notes with a more detailed listing of changes.

### *Finding Statutory Law*

Indexes at the end of the set and after each title of the annotated codes provide subject access to the *U.S. Code*. In addition, the *U.S. Code*, both annotated and unannotated, is available on Westlaw, Lexis, and other online services and on CD-ROM. Popular Name Tables are available in all three *U.S. Code* series. *Shepard's Acts and Cases by Popular Name* also provides this access. In addition, *U.S. Code* table volumes convert from code section to public law and from public law to code section. This is especially helpful if the researcher has only a reference to the public law, or if the public law has been codified in a number of scattered places in the *U.S. Code*.

### *Updating Statutory Law*

The *U.S. Code* and its annotated versions are updated differently. The *U.S. Code* is completely reprinted every six years with annual bound cumulative supplements. The researcher needs to use the main set as well as the latest bound supplement to find the law. Even the latest supplements and new sets

## TITLES OF UNITED STATES CODE

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| *1. General Provisions.                                  | 27. Intoxicating Liquors.                                |
| 2. The Congress.   | *28. Judiciary and Judicial Procedure; and Appendix.     |
| *3. The President.                                       | 29. Labor.   |
| *4. Flag and Seal, Seat of Government, and the States.   | 30. Mineral Lands and Mining.                            |
| *5. Government Organization and Employees; and Appendix. | *31. Money and Finance.                                  |
| †6. [Surety Bonds.]                                      | *32. National Guard.                                     |
| 7. Agriculture.  | 33. Navigation and Navigable Waters.                     |
| 8. Aliens and Nationality.                               | ‡34. [Navy.]   |
| *9. Arbitration.   | *35. Patents.  |
| *10. Armed Forces; and Appendix.                         | 36. Patriotic Societies and Observances.                 |
| *11. Bankruptcy; and Appendix.                           | *37. Pay and Allowances of the Uniformed Services.       |
| 12. Banks and Banking.                                   | *38. Veterans' Benefits; and Appendix.                   |
| *13. Census.   | *39. Postal Service.                                     |
| *14. Coast Guard.  | 40. Public Buildings, Property, and Works; and Appendix. |
| 15. Commerce and Trade.                                  | 41. Public Contracts.                                    |
| 16. Conservation.  | 42. The Public Health and Welfare.                       |
| *17. Copyrights.   | 43. Public Lands.  |
| *18. Crimes and Criminal Procedure; and Appendix.        | *44. Public Printing and Documents.                      |
| 19. Customs Duties.                                      | 45. Railroads.   |
| 20. Education.   | *46. Shipping; and Appendix.                             |
| 21. Food and Drugs.                                      | 47. Telegraphs, Telephones, and Radiotelegraphs.         |
| 22. Foreign Relations and Intercourse.                   | 48. Territories and Insular Possessions.                 |
| *23. Highways.   | *49. Transportation.                                     |
| 24. Hospitals and Asylums.                               | 50. War and National Defense; and Appendix.              |
| 25. Indians.   |  |
| 26. Internal Revenue Code; and Appendix.                 |  |

\*This title has been enacted as law. However, any Appendix to this title has not been enacted as law.

†This title was enacted as law and has been repealed by the enactment of Title 31.

‡This title has been eliminated by the enactment of Title 10.

The *United States Code*, which is divided into fifty subject-related titles, provides access to laws currently in force.

take up to one year or more for the U.S. government to issue. In contrast, the commercial publishers issue annual pocket parts and pamphlets throughout the year. These update both the law and the annotations. For the most recent changes, *USCA* has the *United States Code, Congressional and Administrative News* (*USCCAN*), and *USCS* has *Advance*. Although these are current unofficial session law sets and as such organize the law chronologically and not by subject, both sets include indexes and tables that can be used to update the *U.S. Code*. By checking these tables, a researcher can confirm the status of a code section as soon as a month or so after enactment. The *USCCAN* provides the official *Statutes at Large* page-numbering system for the public laws that bridges the gap between the slip laws and the official issuance of the *Statutes at Large*. The *USCCAN* is initially issued in a paperback format and then bound annually. Because of the official pagination and permanent format, it can function as a session law set if the official one is not available. Selected congressional reports are also published in the *USCCAN* to assist in doing a legislative history.

### *State Statutory Law*

State laws vary in their publication pattern but follow the general progression of bill to slip law to session law to code. The publication of session laws varies greatly, with long delays in some states. Often the publishers of the state annotated codes publish session law sets to fill this void. All states have at least one annotated code; some states have no official codes at all. Codes are most commonly updated by pocket parts and pamphlets. Some states issue their codes in a loose-leaf format. At least one state follows the federal pattern and issues a bound set with bound supplements.

States engage in re-codification programs converting the numbering system of their state codes. Sometimes they do less systematic changes of certain titles or smaller parts of a code. In these instances, tables are usually included in the set to help the researcher find an equivalent section between varying editions of the code.

### *Earlier Codes*

Another complication is finding the law from a particular period. It is relatively easy to find the current version of the statute, but finding earlier versions is more difficult. One method is to try to find a code printed around the time period under scrutiny. For example, a researcher looking for the California Code of Civil Procedure for 1914 could find the 1914 or

1915 editions of this code in some larger libraries. These should contain the law being sought. Some microfiche publishers are now selling sets of the *U.S. Code* and some state codes from earlier years. By using the early state codes, the researcher can see exactly how the law read at an earlier time. Often, however, a code is not available for the year needed. Since the text of the code is derived from session laws, the researcher can reconstruct the code by finding all the relevant session laws related to the code up to the year in question, and by doing so can see how the code would have read. One way to find the session laws is to turn to the current code and look at the historical notes following the text. This shorthand history of the code usually lists the public law or chapter number, section number of the act, reference to a year, and, perhaps, citation to a session-law set in which the act is found. From this the researcher can easily find the session laws. Fortunately, session laws are often available in larger law libraries in microfiche, if not in hard copy.

Another method is to find historical tables that trace a code section back, listing all the session laws affecting, amending, or repealing a particular code section. In California the *Statutory Record*, originally published in 1933, covers laws enacted from 1850 to 1932, with supplements covering 1933-48, 1949-58, and 1959-68. This has been further supplemented in later years in the Statutes and Amendments to the Codes. On the federal level similar tables are published in the commercial, unofficial session-law set, *USCCAN*, but not in the official sets. These are unfortunately not cumulative, and since the predecessor to *USCCAN*, the *U.S. Code Congressional Service*, began in 1941, this feature goes back only to the 77th Congress, First Session. Tables in all three editions of the *U.S. Code* go from a session law to a code section but not the other way round. A pamphlet, *Laws Affecting Tables for 1956-1970*, lists federal session laws updating earlier session laws. It makes no reference to *U.S. Code* sections. Although difficult and time-consuming, tracing a code back through the use of session laws can be the only way to see how a code read in earlier years.

### *Citation of Codes*

Citation of codes varies by jurisdiction. Except for historical purposes, citation to session laws is usually avoided in most legal documents. Instead, citation is to a code if available. Sometimes the popular name of an act is included in the citation to the law (e.g., Taft-Hartley Act).

If the set is organized by numerical titles and sections, a pattern is as follows:

48 U.S.C. § 1411.

Some states have single sequences of numbers:

Wash. Rev. Code § 2.44.010.

A few states have named codes:

Cal. Penal Code § 3.

Year of the edition or copyright date of the volume and publisher is also added.

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## ADMINISTRATIVE LAW

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The third source of law is the most difficult to describe and to research. Regulations and administrative decisions are binding law but are subject to, or under the authority of, legislative and judicial law. Regulations are sometimes referred to as "delegated legislation" for this reason. Administrative tribunal decisions are subject to review by "regular" courts. In terms of publication, the organization and relative ease of use in judicial and legislative materials is lacking in administrative law, especially in eighteenth- and nineteenth-century administrative materials. Fortunately, some of the modern advances in the organization and publication of these materials came during the twentieth century at the same time as the rapid growth of the number and prominence of administrative agencies.

Regulations, Executive Orders, Proclamations, and other similar executive laws have been issued since before the beginning of the country. In the 1930s, in response to a need to have reliable notice and access to regulations, the *Federal Register* was created. It publishes the text of proposed and final rules as well as certain administrative notices, and has three main sections. One publishes the text of proposed rules with background information, including references to the legal authority and sometimes other reasons for the rules, dates of hearings on the proposed regulations, names of contact persons in the agencies, and other helpful information. The second section contains the final rules, with accompanying information summarizing hearings, reasons for changes from the original proposed version, and so on. The third section has such things as notices of meetings and discipline from various agencies. Each issue has a table of contents and tables of the sections affected. In addition, lists of new public laws and advertisements for related publications are included. Official indexes are issued monthly and cumulated throughout the year.

All regulations currently in force are published annually in the *Code of Federal Regulations*, which consists of fifty titles. A quarter of these titles are updated every three months. By the end of a year, an entire new set of regulations is published.



# Rules and Regulations

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 178

#### RIN 3206-AH88

#### Procedures for Settling Claims

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final rules of procedure for the settlement of claims submitted to OPM for Federal civilian employees' compensation and leave, for proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries, and for the settlement of deceased employees' compensation. Before June 30, 1996, these claims were settled by the United States General Accounting Office (GAO). However, on that date, pursuant to the Legislative Branch Appropriations Act of 1996, the authority to settle these claims transferred to the Director, Office of Management and Budget, who delegated this function to the Office of Personnel Management.

**EFFECTIVE DATE:** January 30, 1998.

**FOR FURTHER INFORMATION CONTACT:** Paul Britner, Senior Attorney, (202) 606-2233, Claims Adjudication Unit, Office of the General Counsel, Room 7537, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Pursuant to the Legislative Branch Appropriations Act of 1996, most of the claims settlement functions performed by the General Accounting Office were transferred to the Director, Office of Management and Budget. See Sec. 211, Pub. L. 104-53, 109 Stat. 535. Subsequently, the Acting Director

delegated these functions to various components within the Executive branch in a determination order dated June 28, 1996. In summary, this order delegated to the Office of Personnel Management the authority to settle claims against the United States involving Federal employees' compensation and leave, deceased employees' compensation, and proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries. Subsequently, Congress codified these changes through additional legislation. See Pub. L. 104-316, 110 Stat. 3826. The proposed rules were published in the Federal Register on August 25, 1997. The deadline for receiving comments has passed and no comments regarding the proposed rules have been received. The final procedures contain no changes from the proposed procedures and are substantially similar to the procedures formerly used by GAO, which are found at 4 CFR parts 31, 32 and 33.

#### Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would only apply to Federal agencies and employees.

#### Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (42 U.S.C. 3501-3530), and assigned OMB control number 3206-0232. *An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.*

#### Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

#### List of Subjects in 5 CFR Part 178

Administrative practice and procedure, Claims, Compensation, Government employees.

U.S. Office of Personnel Management.  
**Janice R. Lachance,**

Director.

Accordingly, OPM is amending 5 CFR by adding part 178 as follows:

## PART 178—PROCEDURES FOR SETTTLING CLAIMS

### Subpart A—Administrative Claims—Compensation and Leave, Deceased Employees' Accounts and Proceeds of Canceled Checks for Veterans' Benefits Payable to Deceased Beneficiaries

- Sec.
- 178.101 Scope of subpart.
- 178.102 Procedures for submitting claims.
- 678.103 Claim filed by a claimant's representative.
- 178.104 Statutory limitations on claims.
- 178.105 Basis of claim settlements.
- 178.106 Form of claim settlements.
- 178.107 Finality of claim settlements.

### Subpart B—Settlement of Accounts for Deceased Civilian Officers and Employees

- 178.201 Scope of subpart.
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- 178.203 Designation of beneficiary.
- 178.204 Order of payment precedence.
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### Subpart C—Administrative Claims—Compensation and Leave, Deceased Employees' Accounts and Proceeds of Canceled Checks for Veterans' Benefits Payable to Deceased Beneficiaries

**Authority:** 31 U.S.C. 3702; 5 U.S.C. 5583; 38 U.S.C. 5122; Pub. L. No. 104-53, 211, Nov. 19, 1995; E.O. 12107.

#### § 178.101 Scope of subpart.

(a) *Claims covered.* This subpart prescribes general procedures applicable to claims against the United States that may be settled by the Director of the Office of Personnel Management pursuant to 31 U.S.C. 3702, 5 U.S.C. 5583 and 38 U.S.C. 5122. In general, these claims involve Federal employees' compensation and leave and claims for proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries.

(b) *Claims not covered.* This subpart does not apply to claims that are under the exclusive jurisdiction of administrative agencies pursuant to specific statutory authority or claims concerning matters that are subject to negotiated grievance procedures under collective bargaining agreements entered into pursuant to 5 U.S.C. 7121(a). Also, these procedures do not

The *Federal Register* publishes the text of proposed and final administrative rules and regulations.

Since the *U.S. Code* provides the authority for the regulations, is published by the federal government, and is also divided into fifty titles, one might assume that the titles of the two sets would correspond. They don't. Some titles cover the same subject matter; many do not.

A few publications and lists link the *Federal Register* to the *CFR*, and are of help in updating. The *List of Sections Affected* is published monthly, organized by *CFR* title and section, and does what its name states. These monthly cumulative pamphlets are sometimes up to two months out of date at any given time. A *List of Parts Affected* is published daily in the *Federal Register* and cumulates throughout a month. Looking at the *LSA* and the issue of the *Federal Register* for every month not yet covered will bring the researcher up to date within a few days.

Executive orders and presidential proclamations are published in the *Federal Register* and annually in title 3 of the *CFR*. Unlike the other titles of the *CFR*, title 3 does not contain all current presidential documents in force but instead publishes one year's worth of documents. Compilations spanning a number of years are published irregularly, and now cover from 1936 to 1975. In addition, executive orders and proclamations as well as speeches and other materials are published in the *Weekly Compilation of Presidential Documents* and eventually in the *Presidential Papers* series. For earlier executive orders and proclamations, see *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, comp. James D. Richardson (Washington, D.C., 1896-99). Other editions bring the work up through 1929.<sup>7</sup>

State administrative regulations vary by state. Some states have publications paralleling those of the federal government; others do not.<sup>8</sup>

Administrative decisions come from agencies variously called "courts," "boards," "commissions," "tribunals," and so on. These decisions have the force of law but are subject to review and constrained by judicial decisions. Administrative decisions are not uniformly published, and lack a National Reporter System. Sources of administrative decisions include slip opinions from the agency, formally printed compilations

<sup>7</sup>See Donna Bennett and Philip Yannarella, "Locating Presidential Proclamations and Executive Orders—A Guide to Sources," *Legal Reference Services Quarterly* (Summer/Fall 1985), 177, 178-79.

<sup>8</sup>For a list of state administrative codes and registers, see Cohen, *How to Find the Law*, *supra* note 2 at 614-62, or Kamla J. King and Judith Springberg, *BNA's Directory of State Administrative Codes and Registers* (Washington, D.C., 1993).

by the agency, privately published compilations, reprints (full text or abridgements) in loose-leaf services and newsletters, and the text in online services. Indexing and tables of cases vary greatly. In some situations, these finding tools are available only from the agency itself. In others, sophisticated indexing and tables have been developed over the years and vary by agency.

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## SECONDARY AUTHORITY

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This article is intended mainly to familiarize historical researchers with primary legal authority and research tools, but secondary legal sources are also important. They vary greatly in authority, reliability, and quality, among other respects. The major types include treatises, *American Law Reports*, legal periodicals, and legal encyclopedias.

A legal treatise may be seen as serving multiple purposes in historical research. Certain treatises have become classics in their own right in explaining, defining, and interpreting the law (e.g., *Blackstone's Commentaries*). Others by particular authors have become so well known as authoritative sources for a particular period of law that they are commonly referred to by the last name of the original author even when others have continued them posthumously (e.g., Wigmore on evidence and Prosser on torts).<sup>9</sup> Other more mundane treatises are good sources of explanation and a first listing of the relevant basic primary sources. Along with treatises, hornbooks, practice books, nutshells, and other such books are helpful in this role. In addition to the standard features of a comprehensive table of contents and index, the mark of a useful treatise is a table of cases and, perhaps (depending on the subject), tables of statutes, rules, and regulations. These allow access from an easily identifiable starting point.

*ALR* has already been mentioned as a finding aid for cases. It also, of course, serves as a commentary source. Its utilitarian strengths of jurisdictional breadth and multiple viewpoint coverage outweigh its relative low level of authority.

Legal periodicals are familiar to most researchers, as are the finding tools, periodical indexes in paper, CD-ROM, and online and full-text articles on Lexis and Westlaw. Of the two major sources of periodical indexing, H.W. Wilson produces the paper *Index to Legal Periodicals* (from 1908), a CD-ROM product

<sup>9</sup>William L. Prosser, *Handbook of the Law of Torts* (St. Paul, 1941), and John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Boston, 1904-15).

covering from August 1981 on the WilsonDisc system and also available on Westlaw and Lexis. More traditional, it indexes about 750 journals. Since 1980 Information Access has produced the *Current Law Index* and LegalTrac mounted on the InfoTrac CD-ROM. The latter is also available on Lexis and Westlaw, and the Internet. These indexes cover more than eight hundred periodicals and, with the exception of the *Current Law Index*, include legal newspaper coverage. In addition to subject approaches, including key word searching on the CD-ROM and online versions, all have access by case name and statute.

Legal encyclopedias fall somewhere between being a collection of elementary, brief articles for the uninitiated and scholarly presentations by eminent scholars in various disciplines. At best, they summarize all law on a particular topic, listing citations to cases and other authority. At worst, they oversimplify and superficially cover large areas of law. The two major national works, *American Jurisprudence Second* and *Corpus Juris Secundum*, attempt to cover all U.S. law, federal and state, in more than a hundred volumes. As their titles imply, earlier editions exist. *American Jurisprudence* and *Corpus Juris* are often helpful in finding "old" law. Legal encyclopedias act as a limited but sometimes useful starting point to define a point of law and find a case or two to get started. Both current sets are updated by pocket parts. *CJS* suffers from not being revised frequently enough. Pocket parts are useful only up to a point. In many cases, rewritten and updated articles are needed. Of the two, *Am Jur 2d* has a table of statutes and tends to cover more statutory material than *CJS*. Both sets have general indexes covering the entire set as well as title indexes covering each article, called a "title," in the encyclopedia. The earlier editions of both works are available at larger law libraries. Some states have state legal encyclopedias, which, because of their more limited focus, tend not to suffer the problems of generality of the two national sets. Some states have broad subject-matter treatises that serve some of the functions of a state encyclopedia. In California Bernard Witkin, who died in 1995, spent a lifetime writing a series of major treatises, *Summary of California Law*, *California Procedure*, *California Evidence*, and *California Criminal Law and Procedure*, which cover all of California law. Highly regarded, they are often quoted by the courts and are commonly known as "Witkin." They will be kept up by a staff of lawyers.

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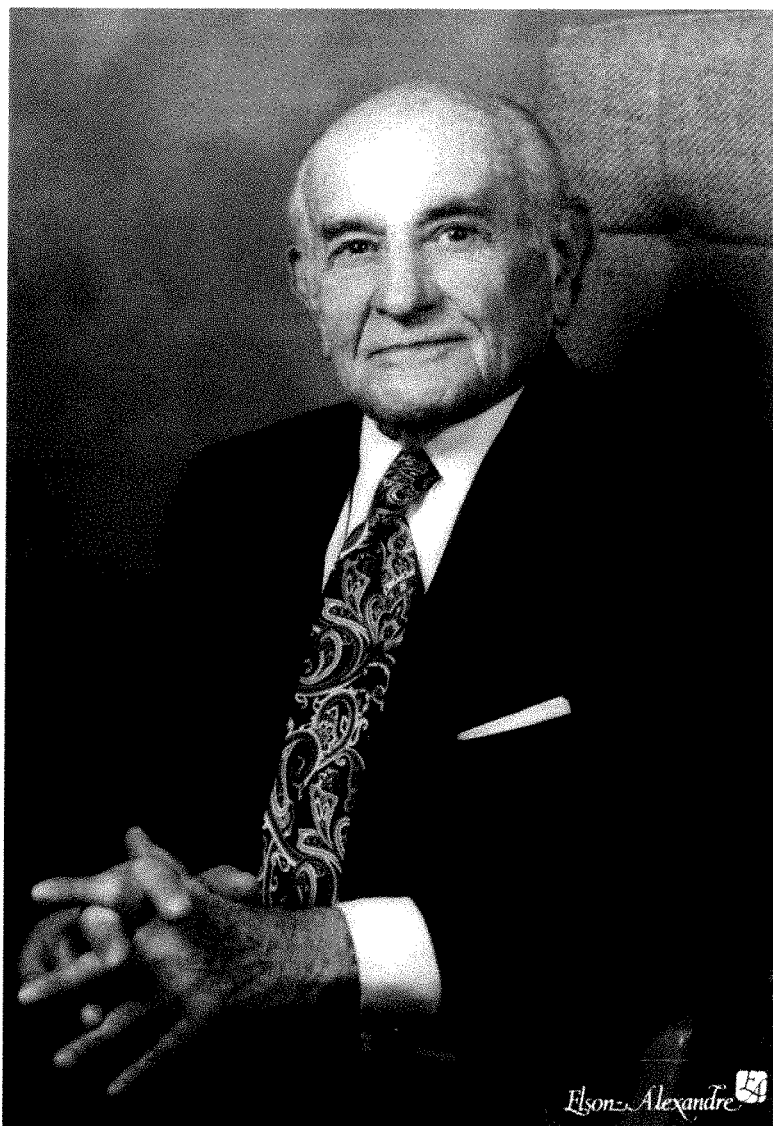
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*Corpus Juris Secundum*, a legal encyclopedia, summarizes all law on a particular topic listing citations to cases and other authority. (*Corpus Juris Secundum: A Contemporary Statement of American Law as Derived from Reported Cases and Legislation* [St. Paul, 1997], 1, reprinted by permission of West Group)



The late Bernard Witkin produced a series of subject-matter treatises that function as an encyclopedia of California law. (Courtesy of Alba Witkin)

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## RESEARCH TECHNIQUES

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As in any research, determining the purpose of the research is the first step. Starting points can vary, depending on the purpose of the research, and there is no one place to begin. A comparative approach contrasting various states' laws on a particular subject requires a different starting point from a comparative approach of the same state's laws over time. Studying the law of a particular jurisdiction in the nineteenth century takes yet another approach.

Determining the purpose also dictates which type of legal material is consulted first. If the issues are statutorily controlled, it is best to begin with the codes or session laws of the jurisdiction involved. If the issues are more likely to be in common law, starting with cases or case-finding sources is preferable. The researcher is sometimes unfamiliar with the area of law being researched, especially in the case of earlier centuries. Although it is necessary to go beyond secondary sources and actually read cases, statutes, and other primary authority, treatises and law-review articles are often a good starting point. Secondary authority gives helpful background, indicates leading cases and statutes, and may also be of use in developing the needed terminology.

Historians undertaking legal research will be aware how essential it is to understand laws and legal principles in historical context. For the researcher this means violating a principle that most lawyers strive to practice. New law students, who are told to use the pocket parts and update all sources, endeavor to find the latest version of the law. This may be helpful or even necessary, but frequently the historical researcher has to ignore the new law and find the old.

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## APPENDIX

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### *Legal Research Guides*

Robert C. Berring, *Finding the Law* (St. Paul, 1995).

Morris L. Cohen and Kent C. Olson, *Legal Research in a Nutshell* (St. Paul, 1996).

Morris L. Cohen et al., *How to Find the Law* (St. Paul, 1989).

J. Myron Jacobstein et al., *Fundamentals of Legal Research* (Westbury, N.Y., 1994) (includes table of legal abbreviations).

Jenni Parrish, "A Guide to American Legal History

Methodology with an Example of Research in Progress," *Law Library Journal* 86 (1994), 105.

Miles O. Price et al., *Effective Legal Research* (Boston, 1979)  
(see appendix 3 for abbreviations commonly used in Anglo-American law).

*Citation Manuals and Sources of Legal Abbreviations*

Many legal research books and guides have lists of legal abbreviations. Citators and some treatises include lists of their abbreviations.

*Ballentine's Law Dictionary* (Rochester, 1969).

*Bieber's Dictionary of Legal Abbreviations Reversed*, ed. Igor I. Kavass (Buffalo, 1994).

*Black's Law Dictionary* (St. Paul, 1990).

*The Bluebook: A Uniform System of Citation* (Cambridge, Mass., 1996).

Mary Miles Prince, *Bieber's Dictionary of Legal Abbreviations* (Buffalo, 1993).

———, *Bieber's Dictionary of Legal Citations* (Buffalo, 1997).

Donald Raistrick, *Index to Legal Citations and Abbreviations* (London, 1993).



# FROM COURTROOM TO RESEARCH ROOM: STUDYING THE WEST IN FEDERAL COURT RECORDS

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LARISA K. MILLER

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Federal courts have been intimately involved in the growth and expansion of the American West, and the court records held by the Pacific Region (San Francisco) of the National Archives and Records Administration (NARA) illuminate and enrich the history of that growth.<sup>1</sup> In addition to recording legal decisions and constitutional precedents (which can be obtained from a law library), this vast collection of primary sources documents important issues in the economic, environmental, and social history of the West, and serves as a unique resource for historical research.

The records include those of U.S. District Courts for the Northern (San Francisco and San Jose) and Eastern (Sacramento and Fresno) Districts of California; the District of Hawaii; and the District of Nevada (Carson City/Reno). The jurisdiction and powers of district courts have varied over time, but generally they have had original jurisdiction in admiralty and bankruptcy cases, suits for penalties or seizures under federal laws, non-capital criminal proceedings, and suits exceeding one hundred dollars in value in which the United States was the plain-

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Larisa K. Miller is an archivist at the NARA—Pacific Region (San Francisco). She is indebted to Richard Boyden, Waverly Lowell, and Nancy Malan for their assistance in preparing this article.

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<sup>1</sup>The NARA's Pacific Region (San Francisco) maintains the historical records of federal courts and agencies in northern California, Hawaii, Nevada (except Clark County), American Samoa, and the Trust Territory of the Pacific Islands. It is located at 1000 Commodore Drive, San Bruno, CA 94066; telephone (650) 876-9009. NARA has thirteen regional records services facilities with archival holdings outside Washington, D.C., each of which holds court records analogous to those discussed here.

tiff. The district courts are divided into admiralty, bankruptcy, civil, criminal, and naturalization courts, each with a separate docket. District court records include records of U.S. magistrates, formerly called U.S. commissioners. The authority of U.S. magistrates has included issuing arrest warrants, examining persons charged with offenses against federal laws, initiating actions in admiralty matters, and instituting proceedings for violation of civil-rights legislation.

The NARA's Pacific Region (San Francisco) also holds the records of the U.S. Court of Appeals for the Ninth Circuit, seated in San Francisco and covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. The Ninth Circuit also had appellate jurisdiction over the U.S. Court for China from 1906 to 1948.<sup>2</sup> The courts of appeals were created in 1891 with relatively limited jurisdiction, but Congress has greatly expanded the range of cases they hear on appeal from federal trial courts.<sup>3</sup> Until 1981 these courts also heard appeals of decisions by federal administrative bodies such as the Federal Power Commission, National Labor Relations Board, and Securities and Exchange Commission.

The courts of appeals should not be confused with the federal circuit courts that existed until 1911. Initially the circuit courts heard appeals from the district courts and had original jurisdiction over actions involving aliens or citizens of different states, and law and equity suits in which the matter in dispute exceeded five hundred dollars. In 1891 the appellate jurisdiction of the circuit courts was transferred to the courts of appeals; in 1911 the circuit courts were abolished and their remaining jurisdiction transferred to the district courts.

Circuit court records available at the NARA—Pacific Region (San Francisco) include the records of the Special Circuit Court for California, 1855-63, and the following U.S. Circuit Court districts: District of California, 1866-86; Northern District of California (San Francisco), 1863-66 and 1886-1911; Southern District of California, Northern Division (Fresno), 1900-1911; District of Nevada (Carson City/Reno), 1865-1911.

Federal court records consist primarily of case files, containing papers for a specific case filed by lawyers or issued by the court. The extent of records and information in case files varies considerably. Some older case files include exhibits, although

<sup>2</sup>The court was abolished by statute in 1948, but had ceased to function in 1941. Erwin C. Surrency, *History of the Federal Courts* (New York, 1987), 326.

<sup>3</sup>David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941* (Berkeley, 1994), 240 [hereafter cited as Frederick, *Rugged Justice*].

after the 1920s these were usually returned to the litigating parties upon conclusion of the proceedings. District and circuit court case files occasionally contain transcripts of testimony. Court of appeals case files typically include briefs and a transcript of administrative agency proceedings or a transcript of the record on appeal, which contains at least a partial transcript of district court testimony.

Case files can usually be located by the name of the court and the case number. There is no cumulative index by subject, case name, or other access point. However, indexes arranged by the names of the parties involved in the proceedings are available for some courts. Sometimes the number may be determined from docket, minute, or order books, which often have indexes to the names of the parties involved in the proceedings. Such books are not available for all courts. Additional information is sometimes available from the clerk of the court involved.

Court records may be supplemented by records of the U.S. attorneys. These sometimes include investigative and trial records related to major court cases. U.S. attorneys investigate violations of federal criminal laws, present evidence to grand juries, prosecute federal criminal cases, and serve as the federal government's attorneys in civil litigation in which the United States is involved or has an interest. Most U.S. attorneys' records consist of case files, which typically contain correspondence with the Department of Justice and other government agencies about the facts of the case and its conduct, copies of case papers filed in federal court, attorneys' work papers, trial notes, exhibit material, and newspaper clippings. The NARA—Pacific Region (San Francisco) holds records of the U.S. Attorneys for the Northern and Eastern Districts of California, the District of Hawaii, and the District of Nevada.

There follows a description of the court cases and records held by the NARA—Pacific Region (San Francisco) relating to the development of the American West and the role of western states in a wider national context. Some of the cases document legal benchmarks while others demonstrate historical issues and trends.

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## MIGRATION AND IMMIGRATION

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After the discovery of gold in California in 1848, adventurers from other regions and countries poured into the area. The district in San Francisco heard many cases involving forty-niners who had come west by ship and sued their carriers for violations of their passenger contracts. These case files docu-

ment the early migrant experience. For example, in *Samuel E. Marshall v. Steamship "Tennessee,"*<sup>4</sup> filed in 1851, a witness reported, "The beef on the table at one time I could not eat. The bullock could not stand when he was killed. The mush looked dirty and did not seem to be cooked well."

The Chinese comprised the first large group of non-white immigrants to the West Coast. Although discrimination against them dates at least to the 1850s, the bulk of federal court records pertaining to them begins in 1882, with the implementation of the Chinese Exclusion Acts. Enacted from 1880 to 1943, the acts prevented the immigration of all but a few "exempt classes" of Chinese. Most Chinese immigrants claiming exemption were detained and denied entry to the United States. To gain release, they filed petitions for habeas corpus in federal court.

The district and circuit courts in San Francisco heard more than ten thousand habeas corpus actions.<sup>5</sup> Most of the cases involved determining whether the petitioner was an excludable laborer or a merchant or returning resident who was entitled to entry. Petitioners presented evidence to establish their unlawful detainment and were subjected to detailed examination by the court. The resulting records offer much material on life in China and in Chinese immigrant communities in California, including information on the litigants and photographs of them.

Criminal case files on allegedly illegal Chinese entrants also document the Chinese experience in the West. These files may contain photographs, passports, certificates of identity from Chinese consulates, transcripts of interrogations, and other supporting documents, in addition to the more typical legal papers.

Immigrants from all countries are documented in the naturalization records of the district and circuit courts in California, Hawaii, and Nevada. These records are thus a source of demographic and sociological data on foreigners settling in those states, and include certificates of and petitions for naturalization, depositions, and declarations of intention. Although naturalization records created before October 1906 usually contain relatively limited genealogical information, the country of origin is listed on all records. Many district court civil and equity

<sup>4</sup>Admiralty Case No. 32, U.S. District Court for the Northern District of California [hereafter USDC-NC], Records of the District Courts of the United States, Record Group 21.

<sup>5</sup>Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891* (Lincoln, 1991), 210 [hereafter cited as Fritz, *Federal Justice*].

IN THE  
 District COURT OF THE UNITED STATES,  
 NORTHERN DISTRICT OF CALIFORNIA.

IN THE MATTER OF

*Juan Wy Chung*

ON HABEAS CORPUS



To the Hon. *W. W. Morrow* Judge of the District Court of the United States, Northern District of California.

The Petitioner *Juan Wy Chung* respectfully shows:  
 That *Juan Wy Chung* is unlawfully imprisoned, detained, confined and restrained of his liberty by certain *Frank* Master of the Steamship *Pearl*

in the City and County of San Francisco, State of California, Northern District of California.

That said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by said Master that said passenger is a subject of the Emperor of China, and must not and cannot be allowed to land under the provisions of the Act of Congress of May 6th, 1882, entitled "An Act to exclude certain treaty stipulations relating to Chinese," and the Acts amendatory thereof and supplemental thereto.

That said passenger does not come within the restrictions of said Acts, but, on the contrary, your petitioner alleges that said passenger was a resident of the United States, and departed therefrom on the Steamship

*Heath* on the *24* day of *July* 18*94* (Counting from *July* year, *24* month, *24* day)

That the said passenger is a *citizen of the United States and was born in the City and County of San Francisco, State of California, and is now about twenty-four years of age*

That he has applied to the Collector of the Port of San Francisco to be permitted to land, but said application was denied.

That your petitioner is the *father* of said passenger, and makes this petition on *his* behalf.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted direct to the said Master, commanding him to have the body of said passenger before your Honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor, concerning him, together with the time and cause of his detention, and what *he* may be restored to his liberty.

Dated on the *13th* day of *April* 189*5* *Juan 関福 Frank* Petitioner

STATE OF CALIFORNIA,  
 CITY AND COUNTY OF SAN FRANCISCO,  
 Northern District of California,  
 United States of America.

*Juan Frank*

being duly sworn, says that he is the Petitioner above named, and that he has heard read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge; that he is *residing at the South East corner of Dupont Street*

Sworn to before me this *13th* day of *April* 189*5* at *San Francisco*

*J. H. H. H. H.*  
 Commissioner of the United States Court of the United States  
 in the Northern District of California.

Case files on allegedly illegal Chinese immigrants document the experience of many Chinese in the West. (Petition for Writ, 1895, *In the Matter of Quan Wy Chung on Habeas Corpus*, Admiralty Case No. 11157, USDC-NC, Record Group 21)

cases also involved naturalization matters, some of which were pursued in the courts of appeals. These naturalization records demonstrate the appeal of the West to immigrants long after Frederick Jackson Turner announced the western frontier's closure in the 1890s.

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### NATIVE AMERICANS

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Native American land-title and rights issues are an integral part of the history of relations between white settlers and the U.S. government on the one hand and tribal groups and individuals on the other.

As white settlers pushed the frontier ever farther west, the legal concept of "Indian country" came to mean Indian reservations determined by treaty.<sup>6</sup> With the end of the treaty-making period of 1871, lands subsequently purchased by the government for Native Americans did not have the status of reservations. Vital legal distinctions affected the two types of land. While Native Americans on reservations became subject to the general laws of the land in the 1880s, the legal status of purchased land not tied to a reservation remained in question. This distinction was particularly important in the Ninth Circuit, where Alaskan natives and many Native Americans in California were not treaty Indians. In the 1937 case *United States v. Pete McGowan and Dock Dick*,<sup>7</sup> two cars carrying liquor into the Reno Indian Colony were confiscated for illegally introducing liquor into the "Indian country." Briefs discuss the definition of "Indian country" and the history of the establishment of the Reno Colony. In sustaining the Nevada district court's decision, the Ninth Circuit Court declared, "It is obvious that the 'Indian Colony' is not 'Indian Country.'"

Other cases involve land and water rights. In the early 1940s the government successfully sued to eject defaulting white "squatters" and repossess lands within the Pyramid Lake Indian Reservation.<sup>8</sup> Some of the land was subsequently leased to the former white tenants, and the rights of Native Americans to use irrigation ditches traversing the land became an issue.

<sup>6</sup>Report, Superintendent of the Sacramento Indian Agency to Commissioner of Indian Affairs, ca. 1937, 24; file 150, Survey of Fresno and Madera Counties; Coded records, 1950-58; Sacramento Area Office; Records of the Bureau of Indian Affairs, RG 75.

<sup>7</sup>Criminal Case No. 2658, U.S. District Court for the District of Nevada (hereafter USDC-NV), RG 21; Case No. 8327, Ninth Circuit Court of Appeals, (hereafter 9th CCA), Records of the U.S. Courts of Appeals, Record Group 276.

<sup>8</sup>Civil Case 2741-2745, USDC-NV, RG 21; Case No. 10418, 9th CCA, RG 276.

The case file of the U.S. Attorney at Reno indicates that the government declined to file suit after it determined that the eviction cases had adjudicated land rights only.<sup>9</sup>

An important case on native fishing rights heard in the 1940s, *Frank Hynes v. Grimes Packing Co.*,<sup>10</sup> involved the U.S. Fish and Wildlife Service's decision to close Alaskan coastal waters of the Karluk Indian Reservation to commercial salmon concerns. The government's brief asserted the economic importance of fishing to the Alaskan natives and the resulting strong motive for conservation. The appellees argued against the exclusive fishing rights and reservation title to ocean waters. The testimony of Karluk natives included in the transcript of record on appeal relates to the methods of fishing, sale of the natives' catch to the the Alaska Packers' Association, decisions made by the village council, and other aspects of Karluk's fishing economy.

Tribal groups continue to fight in federal courts for protection of their hunting and fishing rights and restitution of their land and water, leaving a trail of court case files.

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#### LAND, NATURAL RESOURCES, AND THE ENVIRONMENT

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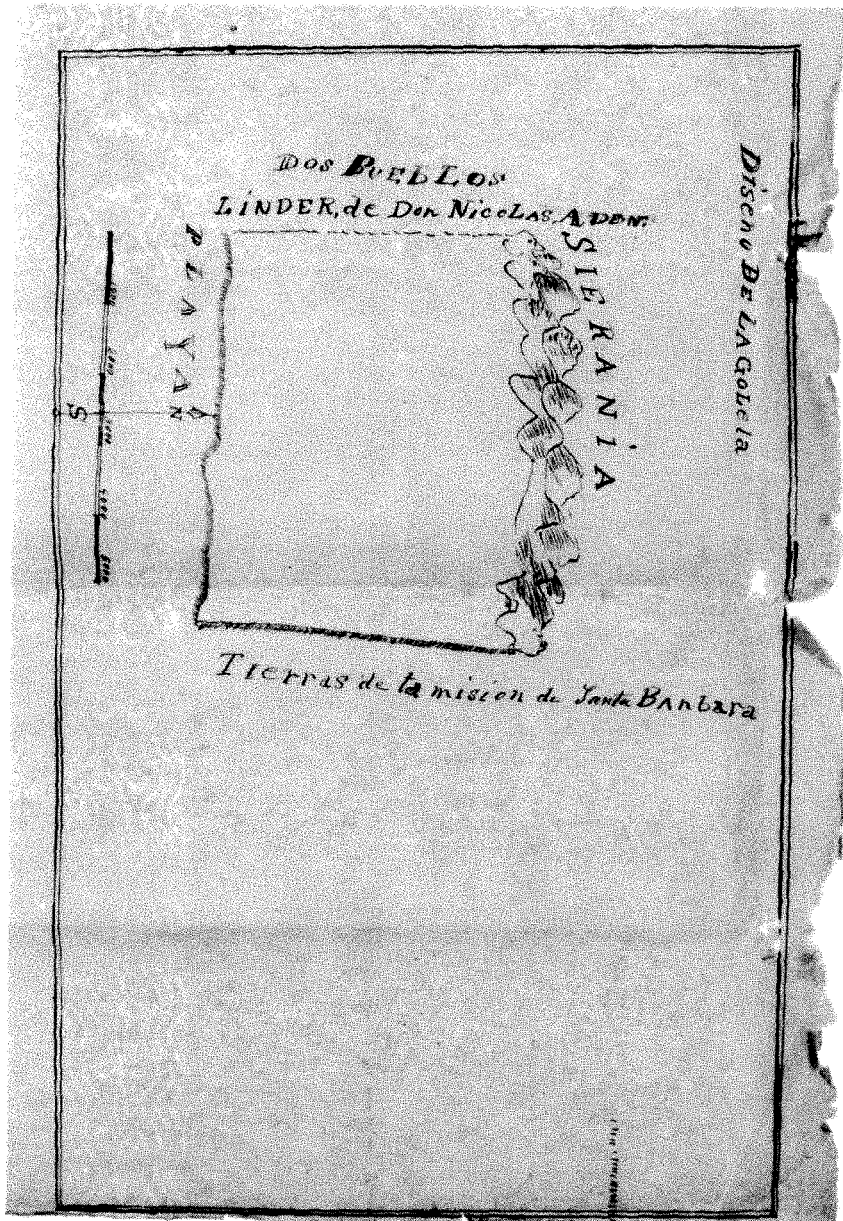
The allocation of natural resources and the allotment and use of the public domain were essential to the development of the West. As the technology for extracting resources advanced, environmental degradation increased. Because the U.S. government was, and remains, a major title holder to western land, it has been directly involved in many land disputes, and federal courts have therefore adjudicated many conflicts involving western lands and resources.

The California Land Law of 1851, established to protect titles to land in California owned under grants from Spain and Mexico, involved some of the most desirable land in the state and determined much of California's early history. Appeals of land-claim decisions made by a special federal land commission were heard by the district court in San Francisco. Although relatively few land claims passed out of Hispanic ownership as a result of the district court's decisions,<sup>11</sup> the private land-grant case files from 1852 to 1910 record the cultural clash between Spanish-Mexican rancheros and Anglo-American settlers.

<sup>9</sup>*United States v. DePaoli*; Significant civil case files, 1943-1952; District of Nevada; Records of United States Attorneys, RG 118.

<sup>10</sup>Case No. 11585, 9th CCA, RG 276.

<sup>11</sup>Christian G. Fritz, "Judge Ogden Hoffman and the Northern District of California," *Western Legal History* 1 (Winter/Spring 1988), 105.



Land-grant case files from 1852 to 1910 record the cultural clash between Spanish-Mexican rancheros and Anglo-American settlers. (Map showing land formerly part of Santa Barbara Mission, c. 1859, *Richard S. Den v. Daniel A. Hill*, Special Circuit Court for California, Record Group 21)



Disputes over mining claims were frequently heard by district and appellate courts, whose decisions created order at frontier mining sites. The Klondike gold rush of the 1890s created many conflicts settled by court action; of the mining cases decided by the Court of Appeals for the Ninth Circuit from 1900 to 1910, nearly 20 percent originated in Alaska.<sup>12</sup> One of these, involving the rights of foreign miners and the location of placer mining claims in the Cape Nome Mining District, was *Tornanses v. Melsing*. In part, it concerned a request for a restraining order against the defendants, who were accused of ruining the claim for proper working in a "miner-like fashion" by taking the richest pay dirt, valued at the rate of about a dollar a shovel. One miner asserted that "the work being done upon said claim is unskillful, improper, and evidently is being done for the purpose of extracting gold without regard to the ordinary, usual, and proper manner of developing and working a placer mining claim."<sup>13</sup> Disputes over mining claims were also common subjects of cases in Nevada's district court.

The theft of timber from federal lands is another category of resource cases adjudicated by district and appellate courts. Many of those prosecuted were private mining companies using the timber for shoring up mine walls and building hydraulic mine flumes.

Oil disputes in California pitted the federal government against railroad and oil companies. The government sought to revoke railroad land grants (claiming its statutory right to regain lands with mineral deposits), and to protect federal lands from drainage caused by a railroad company drilling on adjacent land.<sup>14</sup> Many of these case files include maps and other records relating to the assessment of lands for potential mineral development. In *Southern Pacific Company v. United States*,<sup>15</sup> for example, the United States accused the company of falsely obtaining patent to California's Elk Hills district by representing the land as nonmineral. The lower court's decision canceled the patent, the Ninth Circuit Court reversed the lower court, and the Supreme Court reversed the court of appeals. The appellate case file contains maps and a thirty-nine-hundred-page transcript of the record on appeal.

<sup>12</sup>Frederick, *Rugged Justice*, supra note 3 at 95.

<sup>13</sup>Case No. 634, 9th CCA, RG 276. For a fuller history of these events and related cases, see Frederick, *Rugged Justice*, supra note 3 at ch. 4.

<sup>14</sup>For examples, see Records relating to Ninth Circuit Court of Appeals cases involving withdrawn oil lands . . . , 1905-1950; Northern District of California; Records of U.S. Attorneys, RG 118.

<sup>15</sup>Case No. 2958, 9th CCA, RG 276.

Following the scandal in the 1920s of the Teapot Dome oil reserves in Wyoming, the Ninth Circuit Court received cases disputing the legality of the leases of the Elk Hills and Teapot Dome naval reserves. A conspiracy was alleged between the secretary of the interior and oil-company officers to procure leases of the naval reserves for the companies, not long after President Harding had transferred responsibility for the reserves to the secretary of the interior. The first case, *Pan American Petroleum and Transportation Company v. United States*,<sup>16</sup> involved the Elk Hills lease and set the precedent for the Teapot Dome case. Relying primarily on documentary evidence rather than testimony, the printed transcript of record is nearly fifteen hundred pages long, and Pan American's brief exceeds five hundred pages. Both cases continued to the Supreme Court.

Other district court cases concern the condemnation of land under eminent domain for the establishment and expansion of national parks.<sup>17</sup> The condemnation of private land in public-domain proceedings is common among the records of federal courts and U.S. attorneys' offices in Hawaii and California. A turn-of-the-century Hawaiian case involved Bishop Estate lands at Pearl Locks condemned for use as a naval fueling station.<sup>18</sup> In a case in California concerning the title to lowlands that served as a causeway to the Mare Island Navy Yard, at issue was a government claim to title based on a Mexican land grant sold to the United States, and a private claim based on a patent acquired from the state under the terms of the Swamp Land Act of 1850.<sup>19</sup>

Land, water, and environmental issues became tangled in the development of the Hetch Hetchy Valley in Yosemite National Park as a water supply for San Francisco. Application of the 1913 Raker Act, which prohibited the City and County of San Francisco from selling Hetch Hetchy's hydroelectric power to private corporations, eventually led to litigation in federal

<sup>16</sup>Case No. 4651, *ibid*.

<sup>17</sup>For example, *United States v. 9,273.96 Acres of Land*, Civil Case No. 4335, U.S. District Court for the Eastern District of California (hereafter USDC-EC), RG 21, involved the Interior Department's condemnation of land for the creation of the Sacramento National Wildlife Refuge. Related records in this case include a file in Significant civil case files, 1899-1971; Eastern District of California; Records of U.S. Attorneys, RG 118.

<sup>18</sup>*United States v. B.P. Bishop Est.*, Civil Case No. 3, U.S. District Court for the District of Hawaii (hereafter USDC-HI), RG 21.

<sup>19</sup>Records relating to civil cases filed as *United States of America v. James E. O'Donnell and Mary Stewart*, 1927-41; Northern District of California; Records of U.S. Attorneys, RG 118.

court. This complex history is recorded in the files of the U.S. attorney and in several court cases.<sup>20</sup>

Litigation has not been limited to conflicts over land and mineral resources. Among wildlife-resource cases are prosecutions of violations of the Sealing Act of 1924 and alleged misconduct of judicial and customs officers in connection with the sale of sealskins.<sup>21</sup> The U.S. attorney's files include transcripts of testimony, vessel logbooks, reports of the fur-seal catch, and statistical data on sealing from the 1880s to the 1920s.

Notable among early cases on environmental damage are those relating to the pollution caused by copper smelting and hydraulic gold mining in California in the late nineteenth century. The highly profitable hydraulic mining destroyed large tracts of forest and created debris that filled and polluted waterways and destroyed agricultural land and crops. In the landmark 1882 case *Edwards Woodruff v. North Bloomfield Gravel Mining Company*,<sup>22</sup> the circuit court ruled the practice "a public and private nuisance" and opened the way for a long series of government lawsuits against the remaining hydraulic mining firms.

The court of appeals issued an early pro-conservation opinion in *Ralph H. Cameron v. United States* when it decided in 1918 that the government could restrict mining and logging on land designated as a forest reserve.<sup>23</sup> Cameron had filed a patent for the Cape Horn Lode Mining Claim on part of the Grand Canyon forest reserve. The government's amended complaint asserted that the Grand Canyon was "an object of great scientific and scenic interest, . . . visited by many thousands of persons each year." The complaint accused Cameron of excavating "cuts, tunnels and shafts . . . thereby irreparably damaging that part of the rim of the Grand Canyon . . . most accessible to and most frequented by the public." The Supreme Court affirmed the decision.

Federal courts imposed order at frontier mining sites, and they continue to adjudicate the new environmental order. A

<sup>20</sup>Appeals concerning withdrawn oil lands and City and County of San Francisco Raker Act application, 1905-1950; Northern District of California; Records of U.S. Attorneys, RG 118. *United States v. City and County of San Francisco*, Civil Case No. 4173, USDC-NC, RG 21; Case No. 9055, 9th CCA, RG 276.

<sup>21</sup>Records relating to Alaskan Territorial Court criminal case violations of the Sealing Act of 1924, 1888-1927; Northern District of California; Records of U.S. Attorneys, RG 118.

<sup>22</sup>Civil Case No. 2900, U.S. Circuit Court for the District of California [hereafter USCC-CA], RG 21.

<sup>23</sup>Case No. 3001, 9th CCA, RG 276.



The landmark 1882 case *Edwards Woodruff v. North Bloomfield Gravel Mining Company* opened the way for a series of government lawsuits against hydraulic mining firms for environmental damage. (Hydraulic mine at work, c. 1880, Civil Case No. 7865, USCC-CA, Record Group 21)

record of the development and changing landscape of the West may thus be found in court case files.

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#### INCORPORATION AND INNOVATION

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The privatization of the public domain and the displacement of small-scale business operations by large-scale ones accelerated in the late nineteenth century. Large railroad companies, with their vast congressional land grants, as well as mining and oil companies, were major players in the incorporation process. This process often involved legal battles. From 1891 to 1906, nearly 25 percent of all appeals heard by the Ninth Circuit Court involved a railroad.<sup>24</sup> Court cases involving business firms necessarily contain information about the firms. Because many companies lack their own archives, these cases are often a singular source of business history.

Richard Maxwell Brown has suggested that a "Western Civil War of Incorporation" was fought by judges, lawyers, and gun-

<sup>24</sup>Frederick, *Rugged Justice*, supra note 3 at 50.

fighters from the 1850s to 1920, and that the war coincided with a land-enclosure movement in which powerful business interests attempted to force individuals and small-scale operations from the land.<sup>25</sup> The legal tactics of this war are documented in a number of federal court cases. Brown discusses one such battle, the Mussel Slough conflict, 1878-82, in which homesteading settlers resorted to violence after losing their legal fight with railroad magnates over land claims in California's Central Valley. The legal skirmishes in this conflict are documented in *Southern Pacific Railroad Company v. Pierpont Orton* and subsequent cases involving individual farms totaling roughly sixteen thousand acres.<sup>26</sup>

Brown does not address the Butte copper wars, in which the struggle to control Montana's copper eventually resulted in the agglomeration of the Anaconda Copper Company.<sup>27</sup> Of the many cases in this struggle adjudicated by the court of appeals at the turn of the century, *F. Augustus Heinze v. The Butte and Boston Consolidated Mining Company*<sup>28</sup> questioned the activities of a court-appointed receiver operating the Snohomish and Tramway mines. Heinze's mine inspector testified regarding the status and location of the Snohomish's drifts, level, stopes, and exposed ore bodies, and the absence of new development work in the mine. He believed that the receiver had made the mine a tributary to the property of Butte and Boston and depreciated the mine's value as an independent property.

In a spate of rate cases filed by private utilities against municipalities in the early 1900s, companies complained that the rates set by municipalities did not provide just compensation, and presented evidence of earnings, expenses, and assets to substantiate their claims. In *Oro Water, Light and Power Co. v. The City of Oroville*, *Spring Valley Water Works v. The City and County of San Francisco*, *Contra Costa Water Co. v. City of Oakland*,<sup>29</sup> and other cases, exhibits such as annual reports

<sup>25</sup>Richard Maxwell Brown, "Law and Order on the American Frontier: The Western Civil War of Incorporation," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. John McLaren et al. (Pasadena, 1992).

<sup>26</sup>*Ibid.* at 87, fn. 27, provides the case files involved: Common Law Case nos. 2034-38, 2160-65, 2282, 2317, 2320-22, 2358, 2361-2479, USCC-CA, RG 21.

<sup>27</sup>Frederick, *Rugged Justice*, *supra* note 3 at 102.

<sup>28</sup>Case No. 677, 9th CCA, RG 276. Subsequent cases involving the same parties in the 9th CCA include Case Nos. 852, 958, and 966.

<sup>29</sup>*Oro Water*: Common Law Case No. 14459, U.S. Circuit Court for the Northern District of California (hereafter USCC-NC), RG 21. *Spring Valley Water*: Common Law Case No. 15569, USDC-NC, RG 21; Case No. 2176, 9th CCA, RG 276. *Contra Costa Water*: Common Law Case No. 13599, USCC-NC, RG 21.

and lists of property are sometimes available. Other court cases involving corporate assets occurred after the 1906 San Francisco earthquake and fire. Many insurance claims were denied on the grounds that the losses were caused by the earthquake rather than the fire. When foreign insurance companies were involved, San Francisco businesses filed suits in federal court.<sup>30</sup>

In addition to lawsuits on the civil docket, bankruptcy case files are available in district court records. These files may include petitions of creditors and schedules of assets and liabilities, as well as more typical case file papers. They can be used to study individual firms, regional industries, business practices, patterns of trade and commerce, or larger economic trends.

Patent, copyright, and trademark infringement cases reflect the pioneering work of manufacturers and inventors. Many of California's early industries are documented in patent cases involving wine labels, gold-dredging machines, cable cars, fruit-canning processes, and blue jeans. The case files may include copies of patents and letters of patent, contracts, depositions made by experts concerning a particular patent, drawings, and photographs.

The early San Francisco cable-car system is documented in cases such as *John Hammond v. Stockton Combined Harvester and Agricultural Works*,<sup>31</sup> which involved Hammond's 1891 patent of design for a double-end railway car. His patent recognized the car's form and functional utility. According to Hammond's lawyer, in addition to saving turn-around costs, the "beautiful and tasty appearance" of the design helped secure passengers when two lines were competing. The jury found in favor of Hammond, but in 1895 the case was reopened. The judge found Hammond's patent "void for want of invention," because the Market Street Cable Road in San Francisco had operated a similar car patented in 1884, as had other companies. Exhibits in the case file include photographs of cars in use on other urban railway systems.

As holders of the original patent for denim trousers, Levi Strauss and Levi Strauss & Company were involved in patent-infringement cases against individuals producing garments using patented technology, such as the metal rivet for fastening pocket openings.<sup>32</sup> Some of the defendants in these cases in

<sup>30</sup>For example, *Haas Bros. v. Hamburg-Bremen Fire Insurance Co.*, Common Law Case No. 14285, USDC-NC, RG 21.

<sup>31</sup>Common Law Case No. 11524, USCC-NC, RG 21.

<sup>32</sup>*Levi Strauss v. A.B. Elfelt*, Equity Case No. 1211; *Levi Strauss v. Kan Lun*, Equity Case No. 1468; *Levi Strauss v. B. Greenebaum*, Equity Case No. 1906, all in USCC-CA, RG 21.

Many of the West's early industries are documented in patent cases. (Gibbons patent for pockets in jeans, 1876, *Elfelt v. Steinhart*, Equity Case No. 1779, USCC-CA, Record Group 21)

turn charged other manufacturers with infringing on their patents.<sup>33</sup>

The Ninth Circuit Court heard many patent and related cases. *The Koke Company of America v. The Coca-Cola Company* was a trademark-infringement case appealed in 1917.<sup>34</sup> The case file includes a printed, twenty-five-hundred-page transcript of record with extensive transcripts of testimony heard in lower court, as well as photographs of the two companies' beverage bottles and their caps.

Other patent-infringement cases involve clothes wringers, corsets, drawing and drafting tools, elevators, farm equipment, hydraulic dredging machinery, peanut roasting, raisin seeders, traction engines, wall beds, and water wheels. Among the notable people caught up in these lawsuits was Irving Berlin, who defended his musical copyrights fiercely in numerous court cases. Mickey Mouse himself was the subject of a copyright-infringement case.<sup>35</sup>

Government regulation of business may also be studied in the appeals of rulings of the Federal Trade Commission, Securities and Exchange Commission, and U.S. Board of Tax Appeals, which were heard by the Ninth Circuit Court of Appeals. In *Hills Brothers v. Federal Trade Commission*,<sup>36</sup> filed in 1925, the company unsuccessfully challenged an order restraining it from stopping the sale of its coffee below cost. At the time, Hills Brothers had more than twenty-five thousand accounts in the western states and sales of more than twenty-five million pounds of coffee per year. The records document the company's business practices in transcripts of testimony and exhibits such as advertisements in trade publications and company bulletins for sales people.

Court case files thus document the incorporation of the resource-based western marketplace, the commercial development of patented technology, corporate failure and bankruptcy, and commercial regulation by federal agencies.

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### LABOR ISSUES AND DISPUTES

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The struggle for workers' rights and the rise of labor unions is recorded in court cases involving lawsuits by individual workers, injunctions in labor-management disputes, and enforcement of federal labor legislation.

<sup>33</sup>A.B. *Elfelt v. W. Steinhart*, Equity Case No. 1779, USCC-CA, RG 21.

<sup>34</sup>Case No. 3012, 9th CCA, RG 276.

<sup>35</sup>Case No. 6493, *ibid.*

<sup>36</sup>Case No. 4493, *ibid.*



Labor cases regarding seafarers provide important documentation of the otherwise largely voiceless seamen and their struggle for rights in the nineteenth century. For example, the Northern District of California's first twenty-one criminal cases concerned the murder or mistreatment of seamen by Captain "Bully" Waterman and other officers of the clipper ship *Challenge*.<sup>37</sup> Libels by seamen accounted for nearly 40 percent of the admiralty docket of the Northern District of California in its first forty years; most were suing for their wages.<sup>38</sup>

Among the cases involving collective action, the Pullman strike of 1894 led to the indictment of strikers in California for conspiracy to obstruct the passage of U.S. mail and to restrain trade and commerce.<sup>39</sup> A full transcript of the testimony of strikers, law-enforcement officials, and others is part of the case file. Typical of the less sensational cases is *D.E. Loewe & Co. v. California State Federation of Labor*,<sup>40</sup> filed in the early 1900s. This case involved a product boycott supporting a struggle by the United Hatters of North America for union conditions at the hat-making company.

Because the courts of appeals heard appeals from the decisions of the National Labor Relations Board, the Ninth Circuit Court's records provide extensive documentation of labor-management conflict in most major industries. These cases typically involved the protection of workers' rights to organize into unions and to engage in collective bargaining. Among the numerous landmark cases is *NLRB v. Red River Lumber Co.*,<sup>41</sup> regarding a bitter jurisdictional dispute between the Congress of Industrial Organizations and the American Federation of Labor. It eventually contributed to congressional attacks on the agency.

Another major case, *NLRB v. Mackay Radio & Telegraph Co.*,<sup>42</sup> involved a strike and the discharge of employees who were union members. The company argued that it could not be proven guilty of an unfair labor practice by mere proof that the discharged men were union leaders, and asserted that it had reemployed several others who had been more active in union affairs. The Supreme Court upheld the constitutionality of the NLRB in the case.

In *NLRB v. Grower-Shipper Vegetable Association of Cen-*

<sup>37</sup>These cases are on the USDC-NC criminal docket, 1850-51. Criminal cases for 1851-67 are unnumbered.

<sup>38</sup>Fritz, *Federal Justice*, supra note 5 at 85.

<sup>39</sup>*United States v. John Cassidy*, Criminal Case No. 3059, USDC-NC, RG 21.

<sup>40</sup>Civil Case No. 13764, USCC-NC, RG 21.

<sup>41</sup>Case No. 8764, 9th CCA, RG 276.

<sup>42</sup>Case No. 8137, *ibid*.

tral California,<sup>43</sup> the NLRB charged the association with unfair labor practices for a 1936 lockout of employees who joined a union and implementation of a hiring-hall system that discriminated against union members and sympathizers. The case file contains a thirty-eight-hundred-page printed transcript of record, a three-thousand-page NLRB report of proceedings, and a card index used in the associations' employment office. The cards bear notations about employees such as "employed as strikebreaker 1936," "Communist," "rock thrower," and "solicitation and aid of Filipino Laborers."

Another NLRB case involved the dismissal by the Disney Company of Arthur Babbitt, the creator of Donald Duck and the lead animator of *Fantasia*, for union activity.<sup>44</sup>

During World War II the War Manpower Commission administered a system of job referrals and clearances for essential war-industry workers. In 1944 the San Francisco machinists' union sued the commission and other federal agencies in connection with a labor dispute in which union members were denied employment through the commission's job-referral offices.<sup>45</sup> Other wartime cases involved individuals suing unions for racial discrimination. African Americans filed suit in federal court seeking injunctions against discriminatory shipworkers' unions and shipbuilding companies in *Joseph James v. Boilermakers*, *W.H. Griffin v. Boilermakers*, and *Earl C. Brown v. Boilermakers*.<sup>46</sup> When the district court decided it lacked jurisdiction, the plaintiffs pursued their grievances in California's state courts.

Cases concerning prominent labor figures include a series of actions regarding the leader of the West Coast longshoremen's union, Harry Bridges, who was investigated by the Immigration and Naturalization Service from the 1930s to the 1950s for his alleged Communist Party membership. The case files document the government's repeatedly unsuccessful attempts to deport him to Australia.<sup>47</sup>

The rights of nineteenth-century sailors, the alleged subver-

<sup>43</sup>Case No. 9577, *ibid.*

<sup>44</sup>Case No. 10603, *ibid.*

<sup>45</sup>*San Francisco Lodge No. 68 of International Association of Machinists v. James Forrestal*, Civil Case No. 23721, USDC-NC, RG 21.

<sup>46</sup>*James*: Civil Case No. 22972; *Griffin*: Civil Case No. 22992; *Brown*: Civil Case No. 22993, all in *ibid.*

<sup>47</sup>Admiralty Case No. 23673, Civil Case No. 28876, Criminal Case No. 32217, all in USDC-NC, RG 21; Case Nos. 10450, 12597, 12598, 12607, and 12643, all in 9th CCA, RG 276. Also available at the NARA—Pacific Region (San Francisco) is the extensive investigation file on Bridges compiled by the San Francisco District Office of the Immigration and Naturalization Service.

sive activities of labor leaders, and the growth of collective action are recorded in case files relating to labor issues and disputes.

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### WAR AND A PERCEPTION OF DISLOYALTY

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Northern California has been an important center of U.S. military and naval operations since the 1850s, and Hawaii has played a similar role since 1900. In World War II they became the principal staging areas for the war in the Pacific.

The Civil War prompted a treason prosecution in California, *United States v. Ridgely Greathouse*,<sup>48</sup> concerning a group of men who outfitted and armed the schooner *J.W. Chapman* to raid shipping along the California coast under a Confederate letter of marque. Convicted in 1863 and sentenced to ten years' imprisonment and a fine of ten thousand dollars, the prisoners were released early in 1864 under a general amnesty for Southerners proclaimed by President Lincoln.

Wartime exigencies triggered legislation limiting individual freedoms, and the limits were tested in federal courts. During World War I, issues involving selective service and opposition to the war caused the Ninth Circuit Court to devote significant attention to civil-rights issues for the first time in its history.<sup>49</sup> Cases arising from selective service matters included *Noah F. Hardwick v. United States*,<sup>50</sup> in which Hardwick was convicted of fraudulently claiming exemption from the draft by stating that he was married, and *Edward H. Phelan v. United States*,<sup>51</sup> in which Phelan's true date of birth, and thus eligibility to register, was questioned.

Several World War I neutrality cases involved a German-Hindu conspiracy on the West Coast, in which the government prosecuted the German consul general at San Francisco, Franz Bopp, and members of the Ghandar party, a California-based emigré political group that sought the overthrow of British rule in India.<sup>52</sup> The Ghandar party failed in its attempt to ship arms

<sup>48</sup>Criminal Case Nos. 7 and 8, USCC-NC, RG 21.

<sup>49</sup>Frederick, *Rugged Justice*, supra note 3 at 142.

<sup>50</sup>Criminal Case No. 6801, USDC-NC, RG 21; Case No. 3240, 9th CCA, RG 276.

<sup>51</sup>Case No. 3086, 9th CCA, RG 276.

<sup>52</sup>*United States v. Franz Bopp, E.H. Von Schack, Wilhelm von Brincken, J.F. Van Koolbergern*, Criminal Case Nos. 5865, 5870, and 5885; *United States v. Franz Bopp, Wilhelm von Brincken, Jod Singh, Ram Chandra*, Criminal Case No. 6133, all in USDC-NC, RG 21. Records relating to the "German-Hindu Conspiracy" neutrality cases, 1913-20; Northern District of California; Records of U.S. Attorneys, RG 118.

and ammunition to India when the crew of the vessel was captured and its cargo seized. Court and U.S. attorney case files include transcripts of testimony and investigative reports.

Actions against members of the Industrial Workers of the World were common during the war. A case that directly accused the organization and its members of supporting the "forcible revolutionary overthrow of all existing governmental authority" was *Edward Anderson v. United States*.<sup>53</sup> The defendants were found guilty of interfering with the labor and production needed to prosecute the war, and the court of appeals affirmed the conviction. An extensive appellate case file contains transcripts of testimony and excerpts from IWW literature. In another case, *Marie Equi v. United States*, which reached the Ninth Circuit Court after the war, the government stated:

It is well known that the IWW organization stands for all things subversive to law and order [and] . . . teaches that our Declaration of Independence and our Federal Constitution are merely instruments deliberately concocted to perpetuate fraud, robbery and oppression. . . . The war could not have been successfully carried on by the United States if such an attitude as the defendant's had prevailed, for such an attitude would have led inevitably to disorder and finally to the destruction of the Government.<sup>54</sup>

Other IWW records include those of the U.S. attorney's office in San Francisco, which investigated IWW interference in the war effort, primarily involving destruction of property at Mare Island.<sup>55</sup>

In 1919 the Ninth Circuit Court heard the case of *Robert Goldstein v. United States*.<sup>56</sup> Goldstein had been convicted of exhibiting a motion picture "intended to arouse antagonism, hatred and enmity between the American people . . . against the people of Great Britain" while the countries were allied in war against Germany. The motion picture, *The Spirit of 76*, included such scenes as that of a British soldier "whirling an American infant around on the point of his bayonet." The briefs argue the veracity of the events of the film and cite similar films, such as *The Battle of Bunker Hill*, which shows a

<sup>53</sup>Criminal Case No. 256, USDC-EC, RG 21; Case No. 3461, 9th CCA, RG 276.

<sup>54</sup>Case No. 3328, 9th CCA, RG 276.

<sup>55</sup>IWW involvement during WWI [file]; General correspondence, 1913-50; Northern District of California; Records of U.S. Attorneys, RG 118.

<sup>56</sup>Case No. 3289, 9th CCA, RG 276.

British grenadier bayoneting the body of the American commander, "who is already wounded and dying in the arms of an attendant."

Prostitution within five miles of a military fort was outlawed by Congress during the First World War. In one of the many resulting cases, *Ernest Pappens and Marie T. Pappens v. United States*, the defendants were convicted of "keeping a house of ill fame, in which prostitution was carried on" near a military fort in San Francisco. The court of appeals affirmed the conviction: "Congress, in protection of the common good, may enact such legislation as in its wisdom it deems essential to the prosecution of the war with vigor and success . . . the protection, it may be the existence, of the Nation depends upon the efficiency of the Army and Navy and the service of those in it."<sup>57</sup> Cases arising from such laws demonstrate the growth of the federal government's role in local affairs well before the popular conception of its mushrooming in the New Deal era.<sup>58</sup>

The internment of Americans of Japanese ancestry during World War II was authorized by Executive Order 9066, signed in 1942. The War Relocation Authority forcibly removed one hundred twenty thousand such persons from their homes and interned them for the duration of the war in camps in remote regions of the West. Federal courts adjudicated a number of criminal prosecutions of those resisting the relocation, as well as a civil suit attempting to overturn renunciation of citizenship in the Tule Lake camp, and other actions against the government testing the legality of the internment. These include *Korematsu v. United States, Ex Parte Endo, Hirabayashi v. United States*, and *Abo v. United States*.<sup>59</sup> The Supreme Court ultimately decided some of these cases, which contributed to the successful campaign to win restitution for the surviving internees in 1987. Case records, which include background and supplementary material in the U.S. attorney's files,<sup>60</sup> provide personal accounts of those interned.

In the Territory of Hawaii, habeas corpus cases tested the constitutionality of martial law during World War II. These concerned, among others, Hans Zimmerman, a naturalized

<sup>57</sup>Criminal Case No. 6210, USDC-NC, RG 21; Case No. 3130, 9th CCA, RG 276.

<sup>58</sup>Frederick, *Rugged Justice*, supra note 3 at 146.

<sup>59</sup>*Korematsu*: Criminal Case No. 27635, USDC-NC, RG 21; Case No. 10248, 9th CCA, RG 276. *Endo*: Admiralty Case No. 23688, USDC-NC, RG 21; Case No. 10605, 9th CCA, RG 276. *Hirabayashi*: Case No. 10308, 9th CCA, RG 276. *Abo*: Civil Case Nos. 25294 and 25296, USDC-NC, RG 21; Case Nos. 12195 and 12196, 9th CCA, RG 276.

<sup>60</sup>Japanese-American internment cases (Tule Lake citizenship renunciation), 1943-59; Northern District of California; RG 118.

American of German descent, and Lloyd Duncan, a civilian worker at Pearl Harbor.<sup>61</sup> In the Duncan case, the petitioner maintained that no real threat of invasion of Hawaii had existed for more than a year before his imprisonment. The government defended its rule by martial law and suspension of habeas corpus by arguing that Hawaii had been constantly in imminent danger of invasion since the attack on Pearl Harbor. As evidence, the government submitted general orders of the Office of the Military Governor, as well as photographs of the destruction caused by the attack.

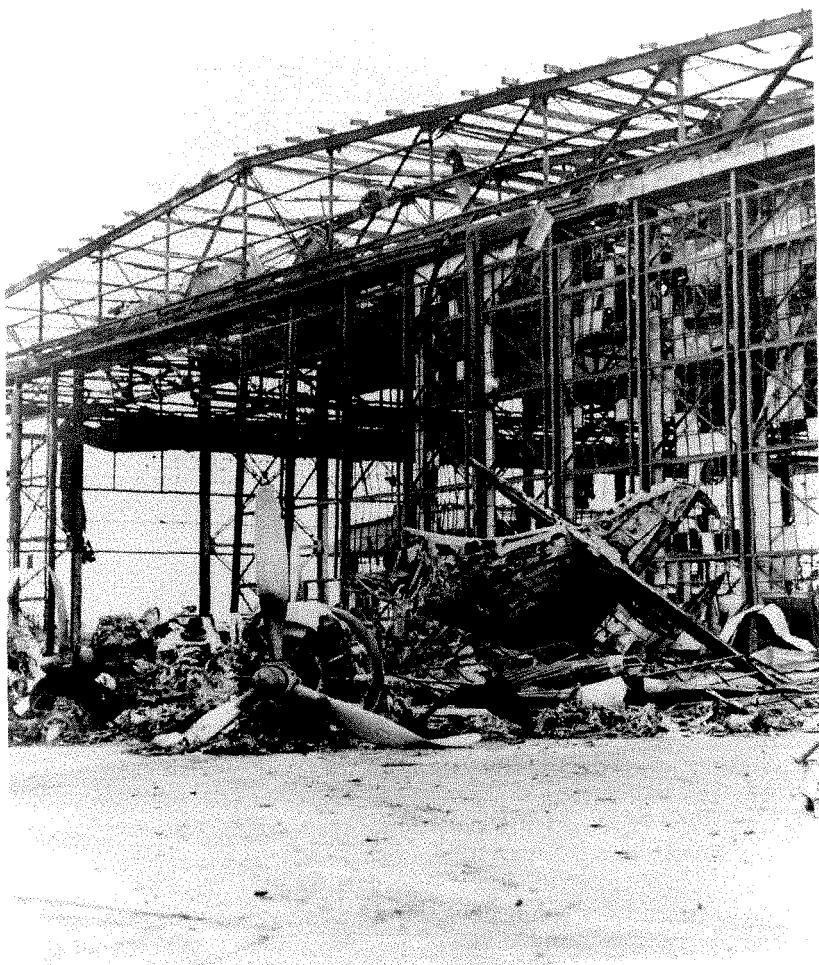
A famous World War II treason case involved Iva Togura D'Aquino, better known as "Tokyo Rose."<sup>62</sup> Born and educated in California, she was caught in Japan at the outbreak of the war, and, with other American citizens, served as a radio announcer in Japan's propaganda effort aimed at American servicemen in the Pacific. Her claims that she had served under duress and that she had aided in covert (and admittedly effective) efforts to make the propaganda ridiculous were disregarded in the prosecution, which many now believe was tainted by racial prejudice. After serving a long prison sentence, she successfully fought to retain her American citizenship and received a presidential pardon from Gerald Ford in 1976. In addition to the court files, the records of the U.S. attorney include tape recordings of Radio Tokyo's "Zero Hour" broadcasts from July 1944 to August 1945, some of which were entered into evidence in the D'Aquino trial.

More than a hundred Japanese Americans who served in Japan's military during the Second World War subsequently sued in district courts in California and Hawaii to have their U.S. citizenship confirmed or restored. The files provide information about life in Japan just before and during the war, focusing on the activities of, and the climate created by, the Japanese police and military. One such case involved Hisao Murata,<sup>63</sup> who had been born in Hawaii and was studying in Japan at the outbreak of the war. He was later accused of guarding American prisoners of war. The case file does not address this issue; indeed, the court's opinion noted that Murata found life in the Japanese Army "unpleasant," in part because of being beaten

<sup>61</sup>*Writ of Habeas Corpus, Clara Zimmerman, for and on behalf of Hans Zimmerman, Habeas Corpus Case No. 294, USDC-HI, RG 21; Case No. 10093, 9th CCA, RG 276. In the Matter of the Application of Lloyd C. Duncan for a Writ of Habeas Corpus, Habeas Corpus Case No. 298, USDC-HI, RG 21; Case No. 10763, 9th CCA, RG 276.*

<sup>62</sup>Criminal Case No. 31712, USDC-NC, RG 21; Case No. 12383, 9th CCA, RG 276. Sound recordings of monitored Japanese radio broadcasts, 1944-45; Northern District of California; Records of U.S. Attorneys, RG 118.

<sup>63</sup>*Hisao Murata v. Dean Acheson*, Civil Case No. 1011, USDC-HI, RG 21.



In the Territory of Hawaii, habeas corpus cases tested the constitutionality of martial law during World War II. (Burned hangar, N.A.S. Pearl Harbor, after the attack on December 7, 1941, *In the Matter of the Appln. of Lloyd C. Duncan*, Habeas Corpus Case No. 298, USDCO-HI, Record Group 21)

almost nightly by his fellow soldiers owing to his birth in the United States.

Poised far from the focus of Civil War operations, western courts nevertheless became involved in the action; the world wars thrust the courts much further into the fray.

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### CIVIL LIBERTIES

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Peacetime civil-rights cases have addressed equal protection, free speech, obscenity, privacy, and other constitutional issues.

Prohibition greatly increased the criminal docket of the Ninth Circuit Court, with many of the cases involving search-and-seizure issues.<sup>64</sup> In an important privacy case, *Roy Olmstead v. United States*,<sup>65</sup> prohibition agents used telephone wiretaps to gather evidence. Olmstead's attorney argued that his telephone was "his against all the world. . . . No one has a right to interpose an ear-piece upon it, any more than he has a right to peek into another's window." The Ninth Circuit Court, followed by the Supreme Court, upheld the legality of the wiretap.

The Alien Registration Act, or Smith Act, passed in 1940, made it illegal to advocate the forceful overthrow of the U.S. government or to organize or join any group that advocated such overthrow. Cases resulting from this act included the prosecution of Charles Fujimoto, Jack Hall, and five purported leaders of the Communist party of Hawaii in *United States v. Charles K. Fujimoto*.<sup>66</sup> The government asserted that the Communist party of Hawaii was attempting to unionize and control sugar workers, coordinating the efforts of island and mainland party members within the International Longshoremen's Union. The 1952 conviction was overturned by a reluctant Ninth Circuit Court after other Smith Act cases had been reversed by the Supreme Court.

In 1949 the American Civil Liberties Union of Northern California intervened in an obscenity case involving Henry Miller's novels *Tropic of Cancer* and *Tropic of Capricorn*.<sup>67</sup> The novels, printed in France, were seized by U.S. Customs officials while being imported in San Francisco. To demonstrate the

<sup>64</sup>Frederick, *Rugged Justice*, supra note 3 at 157-58.

<sup>65</sup>Case No. 5016, 9th CCA, RG 276.

<sup>66</sup>Criminal Case No. 10495, USDC-HI, RG 21; Case No. 13915, 9th CCA, RG 276. Records relating to criminal case 10495, *U.S. v. Charles K. Fujimoto*, 1953-58; District of Hawaii; Records of U.S. Attorneys, RG 118.

<sup>67</sup>*United States v. Two Obscene Books*, Admiralty Case No. 25449, USDC-NC, RG 21; Case No. 13227, 9th CCA, RG 276.



books' literary merits, opinions of critics published in American, British, French, and Russian periodicals were submitted. In 1954, after the appellate court ordered that the books be destroyed, they were burned in the incinerator of the San Francisco Post Office.

In 1890 San Francisco became the first American city to segregate its residents by race when the Board of Supervisors passed an ordinance requiring all Chinese to move to a prescribed area.<sup>68</sup> In striking down the ordinance, the circuit court cited the Fourteenth Amendment and a series of federal decisions upholding Chinese rights against discriminatory actions by government.<sup>69</sup> One of the earlier cases involved a San Francisco ordinance requiring laundries to be made of brick or stone for reasons of fire safety, at a time when most laundries were owned by Chinese and made of wood. The circuit court, and subsequently the Supreme Court, ruled that the laundry ordinance was being applied in a discriminatory manner, and the ordinance was voided.<sup>70</sup>

A more recent Fourteenth Amendment case involved school segregation of Latin Americans. *Westminster School District of Orange County v. Gonzalo Mendez*,<sup>71</sup> filed in 1946, drew the attention of the American Jewish Congress and the National Association for the Advancement of Colored People, which filed amicus curiae briefs. The NAACP provided statistics from states in which segregation was part of the public educational policy: the average expenditure per student was \$18.82 for African Americans and \$58.69 for whites; the average school term was 156 days in African-American schools and 171 days in white schools. The NAACP maintained that segregation was a deprivation to the nation; in June and July 1943, "when the nation was crying for manpower," 34.5 percent of rejections of African Americans from the armed forces was due to educational deficiency, as opposed to 8 percent for whites.

From tapping minerals to tapping wires, decisions by the federal judiciary helped shape the American West. The original records of the federal courts held by the NARA—Pacific Region (San Francisco) are a mine of raw material in that history.

<sup>68</sup>Charles J. McClain, "In *Re Lee Sing*: The First Residential-Segregation Case," *Western Legal History* 3 (Summer/Fall 1990), 179.

<sup>69</sup>*In re Lee Sing*, Common Law Case No. 10730, USCC-NC, RG 21. See also *Lee Sing v. Henry Bingham*, Common Law Case No. 11071, USCC-NC, RG 21.

<sup>70</sup>*In the Matter of Wo Lee on Habeas Corpus*, Common Law Case No. 3947, USCC-CA, RG 21.

<sup>71</sup>Case No. 11310, 9th CCA, RG 276.

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National Archives and Records Service, "Archives II," College Park, Maryland (NARA, Washington, D.C.)

# THE LIVES AND CAREERS OF JUDGES AND OTHER EMPLOYEES IN THE FEDERAL JUDICIAL SYSTEM: SOME POINTERS ON RESEARCH

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CLAIRE PRECHTEL-KLUSKENS

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A variety of records and publications are useful in researching the lives and careers of judges, marshals, clerks of court, and other employees in the federal judicial system, including records of the federal government held by the National Archives and Records Administration. This article identifies some of those sources, with an emphasis on nineteenth-century records.

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## PUBLISHED SOURCES

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Generally, researchers should begin their work by exhausting any published sources. These often provide valuable biographical data and clues to archival records that may verify and expand upon the published information. A natural starting point is to determine what has already been written in biographies or professional journals about the subject and his or her colleagues and friends, and the law and history of the relevant jurisdiction. Useful indices to historical and legal journals include *America: History and Life*, *Historical Abstracts*, *Index to Legal Periodicals*, and the *Legal Resources Index*. An Online Computer Li-

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brary Center search should be conducted to find books catalogued under the subject's name and related materials.<sup>1</sup>

In addition, much basic biographical information about notable individuals has been published in general, geographic, occupational, and ethnic group encyclopedias and directories, such as *Judges of the United States*<sup>2</sup> and *The United States Marshals of New Mexico and Arizona Territories, 1846-1912*.<sup>3</sup> The most comprehensive index to publications such as these is the *Biography and Genealogy Master Index*,<sup>4</sup> which serves as a finding aid to several million biographies in more than 350 current and retrospective biographical dictionaries. County and other local histories, and contemporaneous state and local bar directories, city directories, and telephone books should not be overlooked.

Newspaper articles and obituaries are often rich sources of biographical information. Although researching such articles is especially time-consuming in the absence of a comprehensive index, the time spent is well worth the effort. The great and mundane issues of the day are discussed; prominent persons' civic and charitable activities are mentioned. Articles referring to federal judges most frequently appear in connection with their appointment to, and resignation from, the bench, and before, during, and after major trials. As an example, the trial of several men from Oberlin, Ohio, charged with violating the Fugitive Slave Law generated numerous articles during the spring of 1859, including summaries of trial testimony, in newspapers all across northern Ohio.

Judges' judicial and legal philosophies are, of course, evident from their opinions. Published opinions are available in law libraries in the printed opinions of a judge's jurisdiction, or electronically through Lexis or Westlaw,<sup>5</sup> which also carry many late-twentieth-century unpublished opinions.

The most comprehensive source for identifying federal employees is the *Official Register of the United States*, which the federal government published biennially from 1816 to 1959.<sup>6</sup> The *Official Register* lists an employee's position or title;

<sup>1</sup>As of this writing, the Online Computer Library Center is an electronic database of the holdings of several thousand libraries.

<sup>2</sup>2d. ed. (Washington, D.C., 1983).

<sup>3</sup>Albuquerque, 1978.

<sup>4</sup>2d. ed. (Detroit, 1985), and 1981-85, 1986, 1987, 1988, and later supplements.

<sup>5</sup>Explaining the legal research process is beyond the scope of this article. Books on the subject include Christina L. Kunz, et al., *The Process of Legal Research*, 2d ed. (Boston, 1989).

<sup>6</sup>From 1907 to 1959, the government reduced publication costs by listing only the highest-ranking employees.

agency and place of employment; and compensation, which is usually stated as an annual salary for court employees. It may also indicate the employee's state or country of birth and the state, county, and congressional district in which he or she resided at the time of appointment.

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### BASIC GENEALOGICAL SOURCES

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Basic biographical information about federal judges and other court employees can be found in sources that genealogical researchers routinely use,<sup>7</sup> some of which are in the custody of the National Archives.<sup>8</sup> Others are available at the state or county level. Many federal and local records are available on microfilm.<sup>9</sup>

The U.S. federal population census, taken every ten years, is available from 1790 to 1920.<sup>10</sup> Censuses from 1790 to 1840 list only the names of the heads of household plus the number of household members in different age categories. Censuses from 1850 to 1920 list every household member's name, age, occupation, and state or country of birth. The later censuses also provide such information as the value of real estate owned (1850-70); the value of personal property owned (1860-70); relationship to head of household (1880-1920); parents' birthplaces (1880-1920); year of immigration (1900, 1910, 1920); naturalization status (1900, 1910, 1920); street address in cities (1880-1920); and whether the head of household owned or rented the

<sup>7</sup>Many "how-to" books on genealogical research are widely available in public libraries.

<sup>8</sup>For more information about genealogically useful records in the National Archives, see the *Guide to Genealogical Research in the National Archives* (Washington, D.C., 1985) [hereafter cited as *Guide to Genealogical Research*]. For information about the research process, see Claire Prechtel-Klusken, "Archival Research Basics for Beginning Genealogists, Part 1: Microfilmed Records," *The Record* 1 (January 1995), 9-10, and "Archival Research Basics for Beginning Genealogists, Part 2: Records That Have Not Been Microfilmed," *The Record* 1 (March 1995), 9, 16. The advice in these articles is applicable to any research in the National Archives.

<sup>9</sup>The microfilmed federal population census, 1790-1920, for example, is available in many public libraries and historical societies, as well as at the thirteen National Archives Regional Archives. The National Archives Microfilm Rental Program is limited to the federal population census and Revolutionary War military service and pension records. The National Archives sells its microfilm publications for \$34 per roll. Many federal, state, and local microfilmed records are available for rental through the American Genealogical Lending Library, P.O. Box 329, Bountiful, Utah 84011, or through Family History Centers operated by the Church of Jesus Christ of Latter-day Saints.

<sup>10</sup>To protect personal privacy, the federal population census is not available to the public for seventy-two years.

dwelling, and, in the former case, whether the dwelling was mortgaged (1900-1920).<sup>11</sup>

Details about farms or manufacturing businesses owned by those in the census may appear in the "nonpopulation" schedules of agriculture (1850-80) or industry/manufacturing (1820 and 1850-80). These schedules provide details about annual production, the amount of wages or number of persons employed, the amount of capital invested, and related factors.<sup>12</sup> In addition, "slave schedules" for 1850 and 1860 list, under the name of the slaveholder, the sex and age of each slave.<sup>13</sup>

An act of 1862 (12 Stat. 432) subjected lawyers to an annual \$10 license, and they are thus listed in Internal Revenue tax assessment lists for the period of 1862-74.<sup>14</sup>

Military-service records from the Revolutionary War through the Spanish-American War provide information about soldiers' war service. Pension application files based on a soldier's military service may provide additional information about his military experiences, as well as his medical condition and family.<sup>15</sup>

At the state and county level, details about the size and value of real-estate holdings can easily be found by searching the deed and mortgage records at the county recorder's office. Real-estate and personal-property tax lists may provide additional information. Vital records provide exact dates and other information concerning births, marriages, and deaths, and may indicate the cause of death. Probate records provide much information about decedents' property and heirs. For judges and other employees of the county or state, there may be court case files, and employment or other relevant records. If a subject was involved as a litigant or witness in legal proceedings, state and local court case files, docket books, and other judicial records should be examined.

<sup>11</sup>For more information about federal census records, see *Guide to Genealogical Research*, supra note 8 at ch. 1.

<sup>12</sup>Many of these are available on microfilm from the National Archives or state historical societies or archives, or through the microfilm rental programs listed in note 9.

<sup>13</sup>Note, however, that these schedules do not indicate names of slaves.

<sup>14</sup>Internal Revenue Service Tax Assessment Lists are available on microfilm for the following western states: California, 1862-66; Idaho, 1865-66; Montana, 1864-72; and Nevada, 1863-66. For more information about available micro-filmed tax records for these and other states, see *Genealogical and Biographical Research: A Select Catalog of National Archives Microfilm Publications* (National Archives, 1983). For historical information about these records, see Cynthia G. Fox, "Income Tax Records of the Civil War Years," *Prologue: Quarterly of the National Archives* 18 (Winter 1986), 250-59.

<sup>15</sup>For more information, see *Guide to Genealogical Research*, supra note 8 at chs. 4-9.



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## JUDICIAL AND RELATED RECORDS IN THE NATIONAL ARCHIVES

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The National Archives and Records Administration is the repository of the permanently valuable records of the U.S. federal government.<sup>16</sup> It arranges records by federal agency, each of which (or each major part thereof) is designated a "record group" that has a name and a number, such as "Records of the U.S. District Courts, Record Group 21."<sup>17</sup> Basic information about federal records held by the National Archives can be found in the *Guide to Federal Records in the National Archives of the United States* (Washington, D.C.: Government Printing Office, 1995),<sup>18</sup> and in *Microfilm Resources for Research: A Comprehensive Catalog of National Archives Microfilm Publications* (Washington, D.C., National Archives, rev. 1996).<sup>19</sup> Published finding aids for particular record groups may also exist, such as inventories or preliminary inventories, a number of which are mentioned in this article.<sup>20</sup> In addition, there may be unpublished finding aids, such as inventories or box lists, which describe particular records in more detail.<sup>21</sup>

<sup>16</sup>The National Archives Establishment was created by the Act of June 19, 1934, and renamed the National Archives and Records Service in 1949, when it became part of the General Services Administration. In 1985 it regained status as an independent federal agency and was renamed the National Archives and Records Administration.

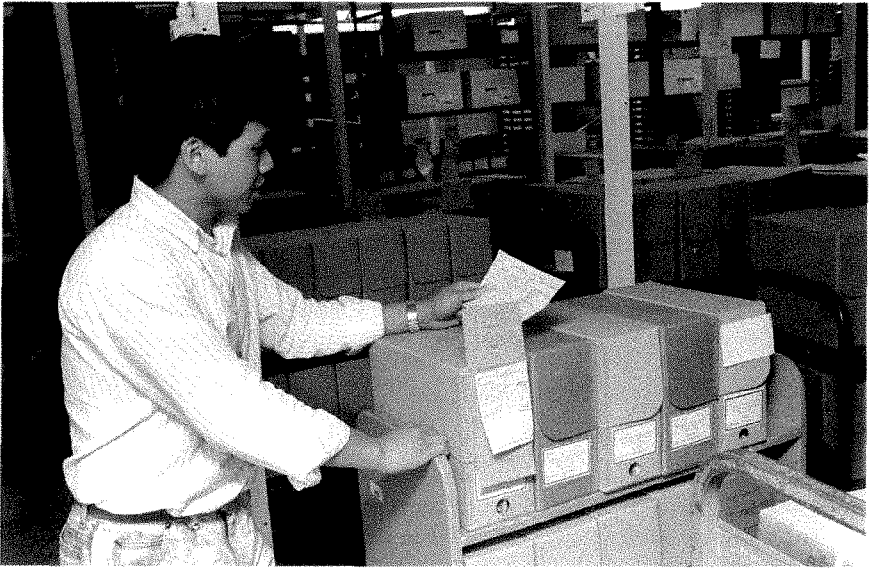
<sup>17</sup>In general, the National Archives assigns record group numbers in the order in which it receives records from federal agencies. Thus, for example, the Records of the War Labor Policies Board were designated Record Group 1, since that agency's records were the first ones received by the National Archives. Record group names change occasionally, when agency names change.

<sup>18</sup>Older versions are often still available in libraries under the title *Guide to the National Archives of the United States* (1974; reprint, Washington, D.C., 1987).

<sup>19</sup>For National Archives publications, call 1-800-234-8861, or write to Publication Sales "branch code," National Archives, Washington, DC 20408. Researchers interested in learning more about the National Archives, the records in its custody, and its publications are encouraged to subscribe to *The Record*, a free newsletter it publishes five times per year. Researchers who publish their work should consult *Citing Records in the National Archives of the United States*, General Information Leaflet No. 17 (Washington, D.C., rev. 1997) for proper citation format.

<sup>20</sup>See *Select List of Publications of the National Archives and Records Administration*, General Information Leaflet No. 3 (Washington, D.C., rev. 1996).

<sup>21</sup>Contact the appropriate National Archives reference branch or regional archives for more information.



The National Archives arranges records by the federal agency that created them, each of which is designated a "record group." (NARA, Washington, D.C.)

Descriptive pamphlets for microfilm publications may also be available.<sup>22</sup>

Within a record group, records are arranged in the manner in which the agency arranged its records. A record series consists of records arranged in a particular filing scheme by the agency, such as letters sent or letters received.<sup>23</sup> Inventories and preliminary inventories prepared by staff of the National Archives provide the following information about each record series: Name of the record series; date span of the series; series entry number; amount of the records (cubic or lineary footage); ar-

<sup>22</sup>Microfilm publications have names and numbers, such as *Admiralty Case Files of the U.S. District Court for the Northern District of California, 1850-1900*, National Archives Microfilm Publication M1249 (401 rolls). Descriptive pamphlets are available for some microfilm publications. These provide a brief administrative history of the agency and description of the records, as well as a general description of the contents of each roll. Unpublished roll lists are available for microfilm publications that do not have a descriptive pamphlet; these indicate in general terms the contents of each roll.

<sup>23</sup>In this article, I have italicized series titles in order to distinguish them from the surrounding text. For more information about archival theory and practice, see Maygene F. Daniels and Timothy Walch, eds., *A Modern Archives Reader: Basic Readings on Archival Theory and Practice* (Washington, D.C., 1984), or articles in *The American Archivist* and other professional archival journals.

rangement of the records (alphabetical, chronological, or other system); a brief description of the records; and whether the record series serves as a finding aid to other series (i.e., a register or index).<sup>24</sup> There may also be an indication of whether the records are available on microfilm. In addition, brief histories of the agency and its major subcomponents are included. Understanding the filing scheme and how the record series relates to other records is essential to conducting thorough archival research.

Several record groups relate to the federal court system and its judges and other court employees. Chief among these are the Records of the U.S. Supreme Court, Record Group 267; Records of the U.S. Courts of Appeals, RG 276; Records of U.S. District Courts, RG 21 (also contains records of U.S. Circuit Courts); General Records of the Department of Justice, RG 60; Records of the Solicitor of the Treasury, RG 206; Records of the Pardon Attorney, RG 204; General Records of the Department of State, RG 59; Records of U.S. Attorneys and Marshals, RG 118; and Records of the Court of Claims Section (Justice), RG 205. If the judge under study presided over cases involving other federal agencies, those agencies may also have created pertinent files. Files relating to the Senate confirmation of federal judges are among the Records of the U.S. Senate, RG 46.

### *U.S. Supreme Court (RG 267)*

The judicial power of the United States is vested by the Constitution in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>25</sup> The older, mostly pre-1955, records of the Court are described in Preliminary Inventory No. 139, *Preliminary Inventory of the Records of the Supreme Court of the United States*, comp. Marion M. Johnson (Washington, D.C.: National Archives, 1973). However, many post-1955 Supreme Court records are also in the custody of the National Archives, including the Court's case files through 1990.<sup>26</sup>

The records of the U.S. Supreme Court include dockets, indexes to case files, minutes, case files, journals, opinions, correspondence of the clerk with justices and others, oaths of office

<sup>24</sup>Published and unpublished finding aids necessarily become out of date as more records become available. In addition, over time the National Archives has changed the names of some series titles for greater uniformity in describing archival records.

<sup>25</sup>Art. III, sec. 1.

<sup>26</sup>Researchers should contact the Archives I Textual Reference Branch of the National Archives, 700 Pennsylvania Avenue, N.W., Washington, DC 20408-6001, for additional information and assistance.

of the justices, and records relating to admissions to the bar of the Court. Many of the records are available on microfilm, including the *Dockets of the U.S. Supreme Court, 1791-1950*, National Archives Microfilm Publication M216 (27 rolls); *Index to Appellate Case Files of the U.S. Supreme Court, 1792-1909*, National Archives Microfilm Publication M408 (20 rolls); *Appellate Case Files of the U.S. Supreme Court, 1792-1831*, National Archives Microfilm Publication M214 (96 rolls); *Minutes of the U.S. Supreme Court, 1790-1950*, National Archives Microfilm Publication M215 (41 rolls); and *Attorney Rolls of the U.S. Supreme Court, 1790-1951*, National Archives Microfilm Publication M217 (4 rolls). These, as well as other un-filmed records, should serve as primary source material to supplement study of the published opinions of the Court.

### *U.S. Courts of Appeals (RG 276)*

The courts of appeals are intermediate courts created by an act of March 3, 1891, to relieve the Supreme Court of considering appeals in cases originally decided by federal trial courts. They also review and enforce orders of federal administrative bodies. The older, noncurrent records of these courts, such as dockets, minutes, opinions, and case files, are in the custody of the National Archives Regional Archives serving the state in which the court sits.<sup>27</sup>

### *U.S. District and Circuit Courts (RG 21)*

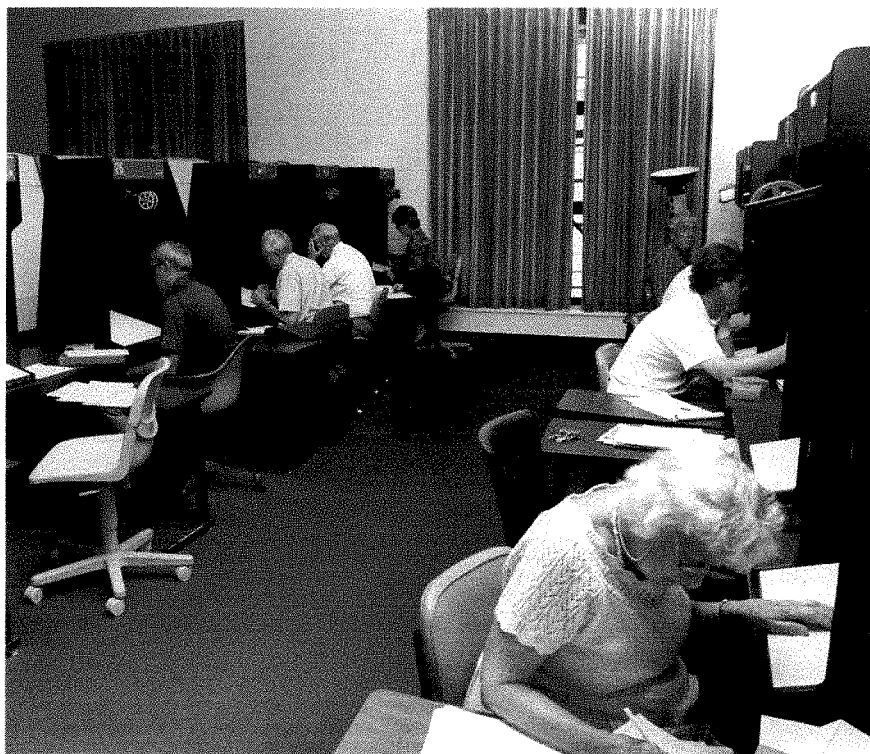
Pursuant to the authority granted by Article III, Section 1 of the U.S. Constitution, Congress enacted the Judiciary Act of September 24, 1789 (1 Stat. 73), which, among other things, established thirteen judicial districts. From time to time since then, the number of judicial districts and district courts has increased.

The noncurrent records of U.S. district courts and circuit courts are in the custody of the National Archives Regional Archives serving the state in which the judicial district is located.<sup>28</sup> Some of the records have been microfilmed.<sup>29</sup> Records of these courts vary, depending upon the nature of each court's

<sup>27</sup>For addresses and telephone numbers of the thirteen Regional Archives, see *The Regional Archives System of the National Archives*, National Archives General Information Leaflet No. 22 (Washington, D.C., 1996).

<sup>28</sup>*Ibid.*

<sup>29</sup>For more information, see *Microfilm Resources for Research: A Comprehensive Catalog of National Archives Microfilm Publications* (Washington, D.C., rev. 1996) [hereafter cited as *Comprehensive Catalog*].



Researchers should consult *Microfilm Resources for Research: A Comprehensive Catalog of National Archives Microfilm Publications*, to ascertain whether the records in which they are interested are available in this format. (NARA, Washington, D.C.)

docket and the nature of the record-keeping systems it employed. Each court generally has separate dockets for civil matters (law and equity before adoption of the Federal Rules of Civil Procedure), and criminal, bankruptcy, appellate (circuit courts only), and admiralty matters. There may also be appearance, bar, execution, trial, and other dockets.

Docket books or other indexes are finding aids to cases filed with the court. Minute books record actions taken by the court chronologically. Case files include pleadings, briefs, and other material filed with the court, as well as judgments, orders, or opinions of the court. Judgment dockets, records, registers, or rolls indicate the judgment or final decree of the court for the recovery of debts, damages, or costs. Orders and decrees indicate the decisions made by the court in particular cases. Praecipes, writs of *capias*, and other records of process issued gener-

ally show the name of the defendant, the form of process to be issued and the date of issuance, and the amount of the claim or judgment involved. There may also be bonds, rule books, ledger books, receipts, transcripts, and other miscellaneous records.

These records should be the heart of any study of a particular district or circuit federal judge's opinions, philosophy, and role in shaping the law of the judicial district.

### *Department of Justice (RG 60)*

The records of the Department of Justice include a wide variety of records relating to the administration of the department, its personnel, and its caseload in the federal courts. In addition, there are many records related to the administration of the federal courts and their personnel. The record group includes the records of the Attorney General's Office before the creation of the Department of Justice in 1870. The basic finding aid for RG 60 is Preliminary Inventory No. 194, *Preliminary Inventory of the Department of Justice, Record Group 60*, comp. Marion Johnson (Washington, D.C.: National Archives, 1981).

The duties relating to the administration of justice exercised by the Department of Justice upon its creation in 1870 (and by its predecessors before that date) included the supervision of the accounts of district attorneys, marshals, clerks, and other officers of the courts, who were then paid principally from fees; the control of the judiciary fund from which the expenses of the courts and the safekeeping of prisoners were paid; and the provisions of facilities in state, territorial, or other prisons for the imprisonment of federal prisoners for whom facilities were not available in the judicial districts where they were convicted.<sup>30</sup>

For example, among the records of the Office of the Attorney General are *Letters Received, 1809-1870*. These are arranged by source of letter (such as president, various executive departments, and judicial districts) and thereunder chronologically. The Department of Justice continued the same filing scheme from its creation until September 1884; incoming correspondence during this period are in the *Source-Chronological Files, 1871-1884*.<sup>31</sup> Thus letters from U.S. District Judge Isaac C. Parker, who was appointed in 1874, are in the letters received from the Western District of Arkansas, which also includes

<sup>30</sup>Marion Johnson, comp., Preliminary Inventory No. 194, *Preliminary Inventory of the General Records of the Department of Justice, Record Group 60* (Washington, D.C., 1981), 2 [hereafter cited as Johnson, *Preliminary Inventory No. 194*].

<sup>31</sup>*Ibid.* at 6 and 13.

letters from other federal, state, and local officials, and citizens in that district. Parker's letters during the period, for example, relate to the execution of a convict, other matters regarding prisoners, court funds, the bonds and accounts of the U.S. marshal, and recommendations for the appointment of an assistant U.S. attorney.<sup>32</sup>

In September 1884, the department changed its filing scheme for incoming correspondence to an annual numbering system known as the *Year Files, 1884-1903*, in which each subject of correspondence was given the file number of the first letter received on that subject followed by the year itself. Each subsequent letter in the year dealing with that subject was given that file number as well as a current number.<sup>33</sup> For example, File 2725/1885 relates to examinations of the accounts of Arizona U.S. Marshal C.P. Dake and his deputies, including Wyatt Earp. In the twentieth century, the department's record-keeping practices became more complicated as the number of filing systems increased.<sup>34</sup>

The records of the Department of Justice likewise contain copies of correspondence and instructions it sent to federal judges, U.S. marshals, U.S. attorneys, clerks of court, and others. These outgoing letters are generally arranged chronologically in various series. Much of the material is available on microfilm. Among these are the *Letters Sent by the Department of Justice: General and Miscellaneous, 1818-1904*, National Archives Microfilm Publication M699 (81 rolls); *Letters Sent by the Department of Justice Concerning Judiciary Expenses, 1849-1884*, National Archives Microfilm Publication M700 (24 rolls); *Letters Sent by the Department of Justice to Judges and Clerks, 1874-1904*, National Archives Microfilm Publication M703 (34 rolls).

Correspondence, docket, opinion, and other files relating to specific subject matter also exist, such as antitrust, interstate commerce, internal revenue, customs, and California land-claims cases.<sup>35</sup>

The records of the Department of Justice also include records of files relating to specific federal judges and other judicial em-

<sup>32</sup>See *Select Letters and Related Documents from the Files of the Department of Justice Concerning Judge Isaac C. Parker, 1875-1896*, National Archives Microfilm Publication M2015 (1 roll).

<sup>33</sup>Johnson, *Preliminary Inventory No. 194*, *supra* note 30 at 15.

<sup>34</sup>See generally *ibid.* Interested researchers should study the preliminary inventory as a matter of course.

<sup>35</sup>For further information, see *ibid.* District court records relating to California land claims have been microfilmed; for further information, see *Comprehensive Catalog*, *supra* note 29 at 2.

ployees and nominees. Examples of records that serve as finding aids to other records include separate card indexes to files on U.S. commissioners, ca. 1886-1910; federal judges and clerks of court, ca. 1889-1912; and U.S. attorneys and marshals, ca. 1900-1912.<sup>36</sup> These series indicate the name of the judicial employee, the subject matter of correspondence, and the year or numerical file in which the correspondence can be found. There is also an *Index to Names of U.S. Marshals, 1789-1960*, National Archives Microfilm Publication T577 (1 roll), and *Indexes of Applicants by District, 1889-1903*.<sup>37</sup>

Other personnel files include appointment files for judicial districts, 1853-1933; circuit court judges, 1855-1901; judges of the U.S. Court of Claims, 1855-1901; Supreme Court justices, ca. 1853-1971; and U.S. Supreme Court candidates who were not commissioned, 1853-1924.<sup>38</sup> There are also *Records Relating to Members of the Supreme Court, 1853-1932*, *Correspondence Concerning Deputy Marshals, 1896-1937*, *Application Files for Clerical Personnel of the U.S. Customs Court, 1911-1937*, and *Federal Judgeship Candidate Files, 1960-1972*.<sup>39</sup>

Some records relating to western states have been microfilmed, such as *Records Relating to the Appointment of Federal Judges, Attorneys, and Marshals for the Territory and State of Idaho, 1861-1899*, National Archives Microfilm Publication M681 (9 rolls); *Records Relating to the Appointment of Federal Judges, Attorneys, and Marshals for Oregon, 1853-1903*, National Archives Microfilm Publication M224 (3 rolls); and *Records Relating to the Appointment of Federal Judges and U.S. Marshals for the Territory and State of Washington, 1853-1902*, National Archives Microfilm Publication M198 (17 rolls).

Payroll records relating to regular assistant U.S. attorneys, marshals, and judges of the U.S. Supreme Court, circuit courts, district courts, and court of claims, are extant for 1870 to 1907.<sup>40</sup>

### *Office of the Solicitor of the Treasury (RG 206)*

The Office of the Solicitor of the Treasury was originally created in the Treasury Department by an Act of Congress of May 29, 1830 (4 Stat. 414), and abolished by an act of May 10,

<sup>36</sup>Johnson, *Preliminary Inventory No. 194*, supra note 30 at 15.

<sup>37</sup>*Ibid.* at 59.

<sup>38</sup>*Ibid.*, at 26, 60-62.

<sup>39</sup>*Ibid.* at 60-62.

<sup>40</sup>*Ibid.* at 31.



1934 (48 Stat. 759). The principal function of the office was the collection of debts owed to the United States by individuals that required legal proceedings for enforcing payment. To perform this function effectively, the solicitor (or his predecessors) had the authority to direct and instruct U.S. district attorneys, clerks of court, and marshals in the judicial districts in all matters relating to the prosecution of such suits.<sup>41</sup> As one of the chief legal officers of the federal government, the solicitor of the treasury carried on extensive correspondence with various government agencies and officials.<sup>42</sup> The records are described in Preliminary Inventory No. 171, *Preliminary Inventory of the Records of the Solicitor of the Treasury*, comp. George S. Ulibarri (Washington, D.C.: National Archives, 1968).

The records include indexes and registers that serve as finding aids to the solicitor's voluminous correspondence. Most of the correspondence is arranged by the name of the office of the recipient or sender, and thereunder chronologically. For example, there are separate series of letters received from the attorney general, 1822-98; U.S. district attorneys, marshals, and clerks of court, 1801-98; U.S. attorneys, 1839-45; U.S. marshals, 1839-45; and U.S. clerks of court, 1839-45.<sup>43</sup> The *Letters Received from U.S. District Attorneys, Marshals, and Clerks of Court, 1801-1898*, for example, include letters from officials in Alaska, 1885-95; Arizona, 1865-96; California, 1851-98; Idaho, 1861-96; Montana, 1865-96; Nevada, 1863-96; Oregon, 1848-97; and Washington, 1854-97.<sup>44</sup> There are likewise separate series of letters and regulations or circulars sent to these officials.<sup>45</sup> U.S. attorneys, marshals, and clerks of court also submitted annual, term, and special reports to the solicitor of the treasury concerning suits being prosecuted in their districts. These series are generally arranged by the type of officer making the report, thereunder by state, thereunder by judicial district, and thereunder chronologically.<sup>46</sup>

There are several series of case files and related indexes and registers of suits prosecuted by the solicitor of the treasury.<sup>47</sup> These were not the official files of the suits maintained in the

<sup>41</sup>George S. Ulibarri, comp., Preliminary Inventory No. 171, *Preliminary Inventory of the Records of the Solicitor of the Treasury* (Washington, D.C., 1968), 1.

<sup>42</sup>Ibid. at 3.

<sup>43</sup>Ibid. at 9.

<sup>44</sup>Ibid. at 9 and 29.

<sup>45</sup>Ibid. at 13-14 and 24.

<sup>46</sup>Ibid. at 22-23.

<sup>47</sup>Ibid. at 4 and 16-22.

federal courts, but, rather, files maintained for some cases for the solicitor's convenience in conducting business.<sup>48</sup>

The miscellaneous records of the Office of the Solicitor of the Treasury include a single-volume *Register of U.S. Judges, District Attorneys, Marshals, Clerks of Court, and Depositories of Public Moneys, 1849-1850*, which indicates for each official the state and judicial district where employed, name, place of residence, date of appointment, and sometimes date of retirement.<sup>49</sup> There is also a single *Register of Payments to Courts by Clerks, 1837-1839*, which records moneys collected as a result of suits,<sup>50</sup> and a single volume of *Accounts of District Attorneys and Clerks of Court, 1853-1857*, which indicates amounts received by the solicitor as a result of suits.<sup>51</sup>

#### *Office of the Pardon Attorney (RG 204)*

The Constitution vests in the president the "Power to grant Reprieves and Pardons for offences against the United States, except in Cases of Impeachment."<sup>52</sup> Included is the full discretionary power to pardon or remit, in whole or in part, any punishment to which an individual may have been sentenced by a federal court. The Office of the Pardon Attorney, which was established in the Department of Justice in 1891,<sup>53</sup> has responsibility for receiving petitions, investigating them, and issuing a recommendation as to whether executive clemency should be granted.

The basic finding aid for RG 204 is *Preliminary Inventory of the Records of the Office of the Pardon Attorney, Record Group 204*, comp. Gaiselle Kerner (Washington, D.C.: National Archives, 1955). The records include Pardon Case Files, 1853-1946, various indexes to pardon cases, pardon warrants, correspondence, and related records. Letters from federal judges may exist in pardon case files of convicted criminals over whose cases they presided. For example, Pardon Case H-689, relating to Sah-quah-nee, includes a recommendation for commutation of punishment by Judge Isaac C. Parker of the Western District of Arkansas.

<sup>48</sup>Ibid. at 16.

<sup>49</sup>Ibid. at 25.

<sup>50</sup>Ibid. at 24.

<sup>51</sup>Ibid. at 25.

<sup>52</sup>Art. II, sec. 2.

<sup>53</sup>Act of Congress, March 3, 1891 [26 Stat. 946].

*Department of State (RG 59)*

Today, the Department of State is primarily concerned with diplomatic matters. From the beginning of the Republic through much of the nineteenth century, however, it exercised responsibility over many domestic matters, including administering the appointment process of judicial officers, marshals, and attorneys, among others,<sup>54</sup> and the supervision of federal judges, clerks of district courts, U.S. marshals, and U.S. attorneys.<sup>55</sup>

The *Applications and Recommendations for Public Offices, 1797-1901*, are arranged roughly by presidential administration, and thereunder alphabetically by the name of the applicant. Much of the material is available on microfilm.<sup>56</sup>

Several registers or indexes may prove useful. The *Register of Applications for Appointment to Miscellaneous Federal Offices, 1813-1823 and 1834-1889* includes applicants to the office of district judge and district attorney. Each entry shows the name of the applicant, the position desired, and the names of persons recommending the applicant.<sup>57</sup> In addition, the *Register of Applications Referred to Other Agencies, 1869-1889*, includes the name of the applicant, the date and nature of application, the nature of recommendations received, any protests against the appointment, and the agency to which the application was referred.<sup>58</sup> The *Card Record of Appointments Made from 1776 to 1960* is arranged alphabetically by name of appointee, and includes the date of appointment and type of position.<sup>59</sup> The *Lists of Miscellaneous Federal Officers, 1789-1912*, which are mostly arranged by name of office and thereunder chronologically by date of appointment, include Supreme Court justices, judges of the U.S. Court of Claims, district courts, circuit courts, and courts of the District of Columbia.<sup>60</sup>

<sup>54</sup>Inventory No. 15, *Inventory of the General Records of the Department of State, 1789-1949* [Washington, D.C., 1992], 218 [hereafter cited as *Inventory No. 15*].

<sup>55</sup>*Ibid.* at 42-43.

<sup>56</sup>Applications made during the presidencies of Adams through Grant (1797-1877) are available on microfilm. See *Comprehensive Catalog*, *supra* note 29 at 26. Applications for the presidencies of Hayes through McKinley (1877-1901) have not been microfilmed; for assistance, consult the Archives II Textual Reference Branch, National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740-6001.

<sup>57</sup>*Inventory No. 15*, *supra* note 54 at 219.

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.* at 226.

<sup>60</sup>*Ibid.* at 226-27.

There are also separate lists of U.S. district attorneys, 1789-1887, and federal judges, 1789-1888.<sup>61</sup>

Persons who resigned or declined public office may be included in the *Letters of Resignation and Declination of Federal Office, 1789-1905, 1904, and 1974*, for which there is a card index.<sup>62</sup> Other miscellaneous records relate to the nomination and commissioning of federal judges, marshals, and attorneys. These include copies of Senate resolutions, 1794-1979, giving consent to or rejecting presidential nominations for attorneys, circuit judges, and associate justices of the Supreme Court.<sup>63</sup> There are also acceptances of appointment and orders for commissions, 1789-1893,<sup>64</sup> and record copies of commissions of federal judges, 1837-88; permanent marshals, 1825-88; temporary marshals, 1829-87; permanent U.S. attorneys, 1825-88; and temporary U.S. attorneys, 1829-87.<sup>65</sup>

In addition, the attorney general shared with the secretary of state the responsibility of making recommendations to the president on petitions for pardon from 1789 until about 1853. Pertinent records in the cases were maintained in the State Department, and the secretary of state had the main responsibility for the administrative work in connection with pardons, including the receipt of petitions, investigation, correspondence, and issuing and recording the pardon warrants.<sup>66</sup> After about 1853, most of these responsibilities were transferred to the attorney general, except the issuing of pardon warrants, which remained with the secretary of state until about 1870.<sup>67</sup>

#### *Records of U.S. Attorneys and Marshals (Record Group 118)*

The offices of U.S. attorney and U.S. marshal were created by the Judiciary Act of September 24, 1789. The officials holding these positions are appointed for each judicial district by the president, and since 1870 the Department of Justice has exercised general supervision over them.<sup>68</sup>

U.S. attorneys investigate violations of federal criminal laws;

<sup>61</sup>Ibid. at 229.

<sup>62</sup>Ibid. at 220.

<sup>63</sup>Ibid. at 221.

<sup>64</sup>Ibid.

<sup>65</sup>Ibid. at 224-25.

<sup>66</sup>Ibid. at 249. Record series are described at 249-51.

<sup>67</sup>Ibid. at 249.

<sup>68</sup>Marion M. Johnson, comp., Preliminary Inventory NC-51, "Preliminary Inventory of the Records of U.S. Attorneys and Marshals, Record Group 118" (National Archives, 1964), 1.

present evidence of such violations to a grand jury; prosecute federal criminal cases; and act as the government's attorney in civil litigation in which the United States is involved or has an interest.<sup>69</sup>

U.S. marshals execute and serve all lawful writs, processes, and orders issued to them by U.S. courts and other competent authorities, and act as local disbursing officers for the Department of Justice and the federal courts. As disbursing officers, the U.S. marshals have customarily made disbursements for salaries and expenses of U.S. attorneys, marshals, and federal courts within their districts. Since the establishment of the Administrative Office of U.S. Courts in 1839, the marshals have disbursed funds appropriated for the maintenance and operation of federal courts only at the discretion of that office.<sup>70</sup>

Records of these officials include dockets, case files, and correspondence, which provide information on the administration of justice in the judicial district. Most of these records are in the custody of the National Archives Regional Archives serving the state in which the judicial district is located, and researchers should contact the appropriate Regional Archives for more information.

*U.S. Court of Claims (RG 123) and Court of Claims Section of the Department of Justice (RG 205)*

The Act of Congress of February 24, 1855 (10 Stat. 612) established the Court of Claims to pass upon claims of citizens against the U.S. government. Although it is out of date, the basic finding aid for records created by this court is Preliminary Inventory No. 58, *Records of the United States Court of Claims, Record Group 123*, comp. Gaiselle Kerner (Washington, D.C.: National Archives, 1953).

The act establishing the Court of Claims also provided for a solicitor to represent the interests of the government before the court. Under an act of June 25, 1868 (15 Stat. 75), the office of solicitor was abolished and its functions were transferred to the attorney general and then, upon establishment of the Department of Justice in 1870, to that department. Since then, claims matters have been handled by a unit known by various titles but formally designated as the Claims Division by Department of Justice Order No. 2507, effective January 1, 1934. The same order created the Tax Division, to which Court of Claims tax

<sup>69</sup>Ibid.

<sup>70</sup>Ibid.

matters were transferred, while Native-American claims were transferred to the Land Division.<sup>71</sup>

The basic finding aid for records created by this Department of Justice subcomponent is Preliminary Inventory No. 47, *Preliminary Inventory of the Court of Claims Section of the Department of Justice, Record Group 205*, comps. Gaiselle Kerner and Ira N. Kellogg, Jr. (Washington, D.C.: National Archives, 1952). The records include various series of indexes, dockets, case files, and correspondence. These may provide additional information concerning specific cases heard by the U.S. Court of Claims and the role of the judges of that court in resolving the cases. Since the cases are brought by individuals, most of the records cannot easily be identified with any particular section of the United States except for those relating to the District of Columbia, French spoliations, Indian depredations, and the enrollment and claims of the Eastern Cherokee. The Indian depredation case records relate uniquely to the history of the western United States, and include indexes, dockets, case files, and correspondence regarding claims by individuals against the U.S. government for compensation for property forcibly taken by American Indians between 1814 and 1890.<sup>72</sup>

#### *U.S. Senate (RG 46)*

The U.S. Constitution provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States." As a result of the Senate's power to give or withhold consent, its records include nomination files relating to the appointment of federal and territorial judges and others.<sup>73</sup> For detailed information on the records of the Senate, and how to research and cite them accurately, consult the *Guide to Records of the United States Senate at the National Archives, 1789-1989* (Washington, D.C.: National Archives, 1989), S. Doc. 100-42 (Serial 13853).

The National Archives has two useful finding aids to nomination files for the period 1789 to 1946. The first is Special List 20, *Papers of the United States Senate Relating to Presidential*

<sup>71</sup>Gaiselle Kerner and Ira N. Kellogg, Jr., comps., *Preliminary Inventory No. 47, Preliminary Inventory of the Court of Claims Section of the Department of Justice, Record Group 205* (Washington, D.C., 1952), 1.

<sup>72</sup>*Ibid.* at 18-20.

<sup>73</sup>Under current rules of the Senate and the House of Representatives, as of November 1997, unpublished records of the Senate are closed for twenty years and of the House for thirty years, and files of investigative committees are closed for fifty years.

*Nominations, 1789-1901*, comp. James C. Brown (Washington, D.C.: National Archives, 1964). The second is an unpublished typescript by James C. Brown, comp., "Papers of the United States Senate Relating to Presidential Nominations, 1901-1946" (1968).<sup>74</sup> In addition, the nominee may be mentioned in records of the Senate committee to which the nomination was referred.<sup>75</sup>

The researcher should also research the *Senate Executive Journal*, 1789-present, which records proceedings on treaties and nominations. The messages of the president placing a candidate's name in nomination are included. Floor debate or speeches concerning the nomination may be found in the *Annals of Congress* (1789-1824), *Congressional Globe* (1833-73), or *Congressional Record* (1873-present). Reports and documents published by Congress are found in the *Congressional Serial Set*, which is indexed by the *CIS U.S. Serial Set Index, 1789-1969*.<sup>76</sup> Other useful indexes to congressional records include the *CIS U.S. Congressional Committee Hearings Index, 1833-1969*,<sup>77</sup> and the *CIS U.S. Committee Prints Index*,<sup>78</sup> which serves as a finding aid to more than fifteen thousand committee prints issued from the early nineteenth century to 1969.

### *Other Archival Resources*

The personal papers of judges or their associates may have been donated to universities or state or local archival institutions. A useful, though not comprehensive, resource for determining the location of such material is the *Index to Personal Names in the National Union Catalog of Manuscript Collections, 1959-1984* (Alexandria, Va.: Chadwyck-Healey, 1988), and the set to which it refers, the *National Union Catalog of Manuscript Collections* (Washington, D.C.: Library of Congress, 1959-). Another source is the Research Libraries Information Network, an electronic finding aid to manuscript collections. If a search of these sources is negative, the researcher is well advised to write to the appropriate state and local archival

<sup>74</sup>For more information, contact the Center for Legislative Archives, National Archives and Records Administration, Washington, DC 20408.

<sup>75</sup>To locate all unpublished Senate hearings through 1964, consult *CIS Index to Unpublished U.S. Senate Committee Hearings, 1823-1964* (Bethesda, 1986).

<sup>76</sup>Washington, D.C.: Congressional Information Service, Inc., 1975-79. For serial set documents from 1969 to the present, consult the CIS annual and cumulative indexes and abstracts.

<sup>77</sup>Bethesda, 1981-85.

<sup>78</sup>Bethesda, 1980.

or historical institutions to determine whether such papers may be found there.

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### CONCLUSION

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Careful and methodological use of the resources mentioned in this article should produce substantial information, useful in writing biographies of federal judges and other court employees. Researchers are also advised to exhaust any published and archival sources relating to the subject's other careers.



# SOURCES FOR JUDGING JUDGES: STATE SUPREME COURT ARCHIVES IN THE SOUTHWEST

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PETER L. REICH

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**A**t a recent conference on judicial biography, Judge Richard Posner stated that "no evaluative study of an individual judge is complete until his opinions are compared with the lawyers' briefs. This is necessary in order to determine not only the judge's 'value added' but also his scrupulousness with respect to the facts of record and the arguments of the parties."<sup>1</sup> As Posner suggests, legal historians all too often ignore manuscript case files and rely only on published appellate opinions for their analyses. In so doing, scholars may fail to appreciate the context and development of cases, as well as the extent to which judges can reshape the issues in accordance with their own predilections.

The sine qua non of primary research beyond published reports is the availability of archival collections of manuscript case files. This article surveys six collections relating to the supreme courts of four southwestern states: Arizona, California, New Mexico, and Texas. These courts form a convenient unit in that they all adjudicated numerous disputes involving Hispanic as well as Anglo-American law, since their respective jurisdictions had been under Mexican rule. The case files in the archives generally include transcripts of lower court records, exhibits, briefs, oral arguments, and other appellate documents.

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Peter L. Reich is professor of law at Whittier Law School. He is grateful to the archivists and librarians at the institutions discussed here for their assistance.

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<sup>1</sup>Richard A. Posner, "Judicial Biography," *New York University Law Review* 70 (1995), 522.



Manuscript case files, which are often to be found in county courthouses, are important records for primary research beyond the published reports. (Benton County Courthouse, Corvallis, Oregon, photograph by Lynn C. Stutz, 1990)

While files for some cases are incomplete or even missing, others contain hundreds of pages of eyewitness testimony and lawyers' arguments. To illustrate the potential of such materials, I explain how I have used them to critique judicial opinions dealing with a specific topic, that of Hispanic influences on western water law.

### *Arizona*

Original files of cases appealed to the Arizona Supreme Court during the territorial period (1863-1912) are contained in the Arizona State Archives in Phoenix. This collection encompasses civil files from 1866 to 1911 and criminal files from 1871 to 1912. A published guide to the collection is available,<sup>2</sup> and photocopying is possible on site. The archives are at 1700 West Washington, Phoenix, AZ 85007, telephone (602) 542-4159.

For research into Arizona's statehood era (1912-present), scholars should consult the microfilmed case files in the State Law Library, which overlap somewhat with the territorial period. The microfilm covers civil cases from 1866 to 1988, and criminal cases from 1884 to 1991. There is no published guide, but photocopying is possible and microfilm rolls may be purchased. The State Law Library is at 1501 West Washington, Phoenix, AZ 85007, telephone (602) 542-5297.

### *California*

The largest case-file collection considered here is that of the California Supreme Court in the California State Archives. The original records are voluminous, covering civil and criminal cases from 1850 to the mid-1980s. Although published opinions in the *California Reports* often include appellate arguments for the court's early years, these are excerpts and are far less complete than the case files. An inventory of the records is obtainable, but unfortunately is somewhat outdated.<sup>3</sup> Photocopies are available and may be ordered by telephone. The State Archives are at 1020 O Street, Sacramento, CA 95814, telephone (916) 653-2246.

<sup>2</sup>Department of Library, Archives and Public Records, *A Guide to the Public Records in the Arizona State Archives*, 2d ed. (Phoenix, 1994), 33-34.

<sup>3</sup>David L. Snyder, comp., *Records of the Supreme Court of California* (Sacramento, 1970).

### *New Mexico*

Original case files for the New Mexico Territorial Supreme Court (1846-1912) are housed in the New Mexico State Records Center and Archives. Photocopying is possible on site, and there is a guide to the collection.<sup>4</sup> The Center and Archives are at 404 Montezuma Street, Santa Fe, NM 87501, telephone (505) 827-7332.

The Clerk's Office of the New Mexico Supreme Court, with its collection of supreme court files for 1912 through the present, enables scholars to continue the story after statehood. The files are available on microfilm, and photocopies may be made. The Clerk's Office is at 237 Don Gaspar Avenue, Santa Fe, NM 87503, telephone (505) 827-4860.

### *Texas*

The oldest materials in the repositories surveyed here are held by the Texas State Library's Archives Division. The State Library's collection of Texas Supreme Court files reaches from 1840 to 1980, thus comprehending a portion of the period before statehood when Texas was an independent republic (1836-45). Sadly, some of the earlier files have been lost to theft. A finding aid is available,<sup>5</sup> and photocopies may be ordered. The State Library is at 1201 Brazos, Austin, TX 78711, telephone (512) 463-5480.

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## CASE FILES AS A RESEARCH TOOL

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Manuscript case files in collections such as those described above can be used to shed new light on published judicial opinions. In a recent article, I showed how California, New Mexico, and Texas supreme court judges created absolute property rights in water—the “pueblo water doctrine” and automatic riparian irrigation rights—which they knowingly misattributed to Spanish and Mexican law.<sup>6</sup> Previous scholars had believed that these judges were simply mistaken about the communal nature of Hispanic water use. But the case files I examined revealed that ample testimony and documentary evidence of Hispanic water apportionment had been presented to the courts, proving that the judges were consciously mischaracter-

<sup>4</sup>New Mexico State Records Center and Archives, *Territory of New Mexico Supreme Court Records* (Santa Fe, 1983).

<sup>5</sup>Texas State Library, *Texas Supreme Court Finding Aid* (Austin, 1995).

<sup>6</sup>Peter L. Reich, “Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850,” *Washington Law Review* 69 (1994), 869-925.

izing the prior tradition to mandate exclusive municipal and landowner rights. In a later essay, I similarly used Arizona case files to show that judges intentionally fabricated Spanish and Mexican precedents for the American prior-appropriation water doctrine.<sup>7</sup>

Legal historians wishing to pursue such critical studies of judicial decision making are fortunate in having access to supreme court case-file collections not only in the Southwest, but nationwide as well.<sup>8</sup> For scholars interested in federal court records, U.S. Supreme Court, courts of appeals, and district court files are available in the National Archives and a number of other repositories.<sup>9</sup> Research in such sources helps us get beyond the official picture of facts and law that judges put forward in their published opinions, and enables us to understand better the various influences upon doctrinal development.

<sup>7</sup>———, "The 'Hispanic' Roots of Prior Appropriation in Arizona," *Arizona State Law Journal* 27 (1995), 649-62.

<sup>8</sup>See Gene Teitelbaum, "State Court of Last Resort's Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 5 (Summer/Fall 1985), 187-228. Teitelbaum provides a useful survey of archives and libraries containing state supreme court materials.

<sup>9</sup>See Robert B. Matchette et al., comps., *Guide to Federal Records in the National Archives of the United States* (Washington, D.C., 1995), 1: 21-1—21-29, 2: 267-1—267-2, 276-1—276-2; Gene Teitelbaum, "United States Supreme Court Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 2 (Summer 1982), 9-46; idem, "United States Courts of Appeals Briefs and Records: An Updated Union List," 3 (Fall 1983), 67-85.



Douglas Street, Omaha, Nebraska, c. 1907 (Courtesy Nebraska State Historical Society)

# WHAT'S OLD ABOUT THE NEW WESTERN HISTORY?

## *Part 3: LAW*

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JOHN R. WUNDER

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Late on the sultry night of July 11, 1907, Ham Pak ambled to the back room of his Chinese restaurant, the Sing Hai Low, on Douglas Street in downtown Omaha. The restaurant had already closed, and he needed to count the receipts.<sup>1</sup> Two of his waiters suddenly burst in. These young African American men, who had only recently moved to Omaha, were with someone else, a white man Ham Pak had recently hired but did not really know. One of them attacked Ham Pak with a pickax, but he recovered from the impact and began a struggle for his life. The intruders also used a heavy club and a meat cleaver, and blood splattered all over the room. Nevertheless, before Ham Pak passed out he managed to injure at least one of his assailants. The three attackers limped away with more than two hundred dollars they had taken from a tin box.

Next morning the iceman, Edward Gardipee, went to the Sing Hai Low with his regular delivery and found Ham Pak barely alive on the floor. A doctor was called but could not save the victim, who died without regaining consciousness. The authorities were also called. A robbery had become a murder, and suspicion immediately turned to Ham Pak's employees Willie Almack, Basil Mullen, and Charles Pumphrey, when they failed to show up for work.<sup>2</sup>

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<sup>1</sup>*Omaha Bee*, July 12, 1907, quoted in Thomas Massey, "Pumphrey v. State of Nebraska (1907): Race and Law on the Great Plains," (honor's thesis, University of Nebraska-Lincoln, 1990) [hereafter cited as Massey, "Pumphrey v. Nebraska"], 12.

<sup>2</sup>Massey, "Pumphrey v. Nebraska," supra note 1 at 1-2, 12-13; Ke Lu, "Asians, Race and Law in the American West: *Charles Pumphrey v. State of Nebraska*

Two had known each other for some time, and had probably moved to Omaha together. They sometimes referred to themselves as the Rogers brothers, an alias. Almack, who was only nineteen at the time of the murder, grew up in southeastern Iowa on a farm owned by his father just outside Melrose. Mullen, who was probably in his mid-twenties, was from Lenox, a town in the south-central region of Iowa, where coal mining and subsistence farming predominated. As a child he had been in trouble, and had spent time at the Iowa reform school for children at Eldora. The third man was Charles Pumphrey, a short, swarthy young white man born in St. Louis who had moved to Omaha to live with his brother, two sisters, and mother in an apartment not far from the Sing Hai Low. He also worked as a bellboy at a downtown hotel.<sup>3</sup>

After they robbed Ham Pak, all three boarded trains leaving Omaha for the east. They headed for Chicago, but whether they got there is not known. Petty criminals, even murderers, often return to familiar ground, and that was exactly what Mullen and Pumphrey did. Mullen went back to the rural area around his home town in Iowa, and Pumphrey to St. Louis. He took Almack with him. Omaha police, meanwhile, were searching for Mullen and Almack.<sup>4</sup>

After ten days, Pumphrey made a mistake. He wrote to a woman from Omaha, one Anna Parr, who worked at the hotel with Pumphrey. She told her employer and then the police that Pumphrey was involved in the crime and that he was with Almack in St. Louis. The St. Louis authorities were notified, and Almack was arrested. Parr may have been in on the robbery, since at first she described herself as merely an acquaintance until it was discovered that she lived with the Pumphreys in their apartment.<sup>5</sup>

Almack was returned to Omaha to stand trial for murder and robbery charges, and began to lay the blame on the other two. Although Pumphrey was still at large, the manhunt next closed in on Mullen, who was arrested in Lenox. He, too, had a story for the Omaha police, explaining that he had not really participated in the murder, that it was Pumphrey's plan to commit the robbery, and that he had taken his share and immediately left town.<sup>6</sup>

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[1909], A Case Study" (Ph.D. diss., University of Nebraska-Lincoln, 1997), 146-53.

<sup>3</sup>Ibid. at 13-14.

<sup>4</sup>Ibid. at 13-14. The *Omaha Bee* followed this case closely during the summer of 1907.

<sup>5</sup>Ibid. at 14-15.

<sup>6</sup>Ibid. at 15-16.



Almack and Mullen were charged with murder and robbery, convicted, and sentenced to life in prison. Pumphrey was captured and tried separately. During his trial there was a surprise, which eventually led to an important legal precedent. A witness, Jack Naoi, a Japanese laborer, knew Pak well and was able to identify a ring and watch found in Pumphrey's apartment as the victim's. Because Naoi's testimony would be particularly damaging, Pumphrey's attorneys challenged it on the basis that the court could not allow a person of Japanese descent to testify, as he was racially suspect and not a Christian.<sup>7</sup>

This amazing pattern of facts happened in the turn-of-the-century American West. Where else in the United States might Chinese, African American, white, and Japanese people be involved in a significant legal precedent but in the American West? The murder of Ham Pak involves circumstances that led to a test of American law and western American society, and its telling now is a direct result of the advance made in the New Western History.

Elsewhere I have articulated some of the essence of the New Western History with reference to discussions of race, gender, economics, and the environment. In those essays, new investigations of western history have been characterized more often than not as transitional. This is especially true of much of the new literature on race, most of it on gender, and some of it on the environmental history of the American West. New works on western economic history and some aspects of environmental history have represented a greater break from past historiography.<sup>8</sup> The basic question posed—What's old about the New Western History?—is particularly relevant to understanding the breadth, scope, and meaning of the new scholarship. Now that it has been applied to topics of race, gender, economics, and the environment, it is necessary to address the growing and developing field of the legal history of the American West. Is there, in fact, a New Western *Legal* History, and, if so, does it represent a clear break from the past? Have American legal historians and New Western History proponents collaborated, or are they on parallel paths? Further, might the New Western History as applied to law require additional considerations? And,

<sup>7</sup>Ibid. at 9-10, 22-24. For interracial legal relationships in the American West, see, for example, Sucheng Chan et al., eds., *Peoples of Color in the American West* (Lexington, Mass., 1994), esp. chs. 8 and 10.

<sup>8</sup>See John R. Wunder, "What's Old About the New Western History?: Race and Gender, Part 1," *Pacific Northwest Quarterly* 85 (April 1994), 50-58 [hereafter cited as Wunder, "What's Old About New Western History?: pt. 1"]; idem, "What's Old About the New Western History?: The Environment and the Economy, Part 2," *Pacific Northwest Quarterly*, forthcoming [hereafter cited as Wunder, "What's Old About New Western History?: pt. 2"].

finally, might there be something "old" about the new legal history of the American West?

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TURNER, WEBB, AND WESTERN LEGAL HISTORY

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A number of historians have already commented on the relative strengths and weaknesses of the works of Frederick Jackson Turner and Walter Prescott Webb. Both sought to explain the unique contribution of the frontier to American history and the place of the American West within a process. New Western historians reject the Turner frontier thesis and its related Webb corollary for a variety of reasons. Turner, they point out, viewed economic development as a forward-advancing process with minimal hardship to those involved, and the environment as an enemy to be conquered. Webb accepted these concepts and further posited a more environmentally deterministic outlook with his notion that the Great Plains acted as an institutional fault line requiring adaptation as settlers passed it. As for women and members of minority groups, both men either ignored them or used stereotypical and pejorative references. New Western historians reject these treatments.<sup>9</sup>

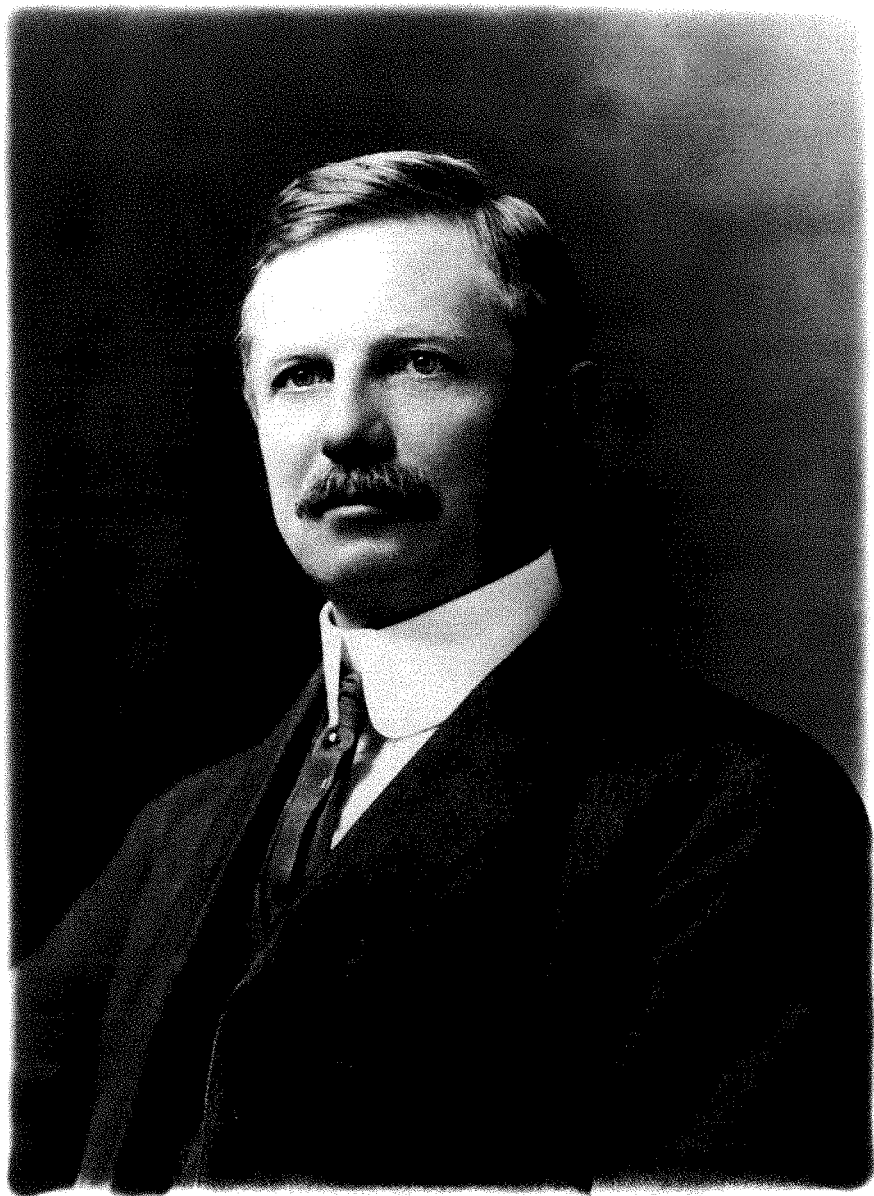
Turner and Webb differ, however, in their references to law. Turner rarely directly addresses the role law and legal institutions might have played in his frontier process. True, he does state that "free" land was crucial to the evolution of settlement and by implication admits that land law had to adjust in order for settlement to occur. He even hints at questions of regional legal cultural development when he states that "Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions."<sup>10</sup> For Turner, Americans adapted and created new institutions, and that presumably meant legal institutions for "winning a wilderness."<sup>11</sup>

In his description of successive frontiers, he seems on the verge of articulating a central role for law. It was the Atlantic frontier from which democratic institutions were kindled and made complex from the simple, and it was this frontier that

<sup>9</sup>Frederick Jackson Turner, "The Significance of the Frontier in American History," *Annual Report of the American Historical Association for the Year 1893* (Washington, D.C., 1894), 199-227 [hereafter cited as Turner, "Significance of Frontier"]; Walter Prescott Webb, *The Great Plains* (New York, 1931) [hereafter cited as Webb, *Great Plains*]. For recent criticism of the Turner thesis, see Patricia Nelson Limerick, Clyde A. Milner II, and Charles E. Rankin, eds., *Trails: Toward a New Western History* (Lawrence, Kans., 1991).

<sup>10</sup>Turner, "Significance of Frontier," supra note 9 at 199.

<sup>11</sup>*Ibid.*



Frederick Jackson Turner put little emphasis on law in his frontier thesis. (Reproduced by permission of the Huntington Library, San Marino)

had to resolve the issues surrounding the distribution of land. Successive frontiers built upon these endeavors, and when new kinds of problems presented themselves, innovations in law were discovered and freshly applied. Turner cites the lead-mining experience in Wisconsin, Illinois, and Iowa, and how, after statutes had incorporated mining customs, the law assisted in the creation of the mining frontier so successfully that the same lead-mining laws were used in California's gold rush.<sup>12</sup> He leaves this idea undeveloped, however.

Later in his thesis, Turner does note that law played a critical role in the history of the frontier because legislation was conditioned by the frontier. Moreover, he claims that nationalism and political institutions were dependent upon frontier advances. He is quite direct when he states that slavery, in particular, is not nearly as important as these general political and, by implication, legal adaptations. Thus, it is in the West rather than the South that the American experience can more adequately be explained. He goes so far as to state that "The purchase of Louisiana was perhaps the constitutional turning point in the history of the Republic," a recognition of the importance of westward expansion to American legal history.<sup>13</sup> Still, he is dealing with law indirectly, and when the hunter, trader, miner, rancher, farmer, and urban builder parade across his frontier landscape, nowhere is the lawyer to be found. There is great irony and short-sightedness here, for if there were ever a place to find a lawyer, it is in social and economic movements and in disputes over land.

Webb, however, in his classic work, *The Great Plains*, directly addresses the role of law in the American West. He does so in a variety of ways, all within a Turnerian framework. For Webb, the Great Plains forever changed all those who lived on it or passed through it. This included notions of law and legal institutions. He wrote, "Practically every institution that was carried across it [the Great Plains] was either broken and remade or else greatly altered." His choice of words shows his respect for the implications behind legal change. He noted that "The ways of travel, the weapons, the method of tilling the soil, the plows and other agricultural implements, and *even* the law themselves were modified."<sup>14</sup>

What, then, did the Great Plains do to people and their relationships to law and legal institutions? Webb noted four fundamental alterations—what we might term aspects of western

<sup>12</sup>Ibid. at 204-6.

<sup>13</sup>Ibid. at 217-18.

<sup>14</sup>Webb, *Great Plains*, *supra* note 9 at 8-9. Emphasis added.

legal exceptionalism. First, he explained that because of the environmental harshness of the Plains and the uniqueness of the terrain, people who lived there developed a different approach to life from those in other regions. He singled out the police and the criminals of the Plains, all of whom seemed more courageous and self-reliant than those of other regions. While he granted that such characteristics could occur in places other than the American West, he emphasized that the method and equipment Plains law enforcers and lawbreakers used with their mental acuity were influenced by their environment. It made them distinctive.<sup>15</sup>

Second, people's survival in the arid West meant, according to Webb, that they were consistent lawbreakers. Why was this? Social conditions were such that people frequently had to act on their own volition, and the laws and legal institutions transported to the West were often not useful. Webb cites preexisting land law, federal Indian policy, water law, and fence legislation as being irrational in application to the West, and states that as a result westerners either ignored them, broke them, or forcibly changed them. Thus, for Webb, the "blame for a great deal of Western lawlessness rests more with the lawmaker than with the lawbreaker."<sup>16</sup>

Webb noted a third characteristic of westerners stemming from either the absence of law or the presence of unsuitable laws: Westerners worked out customs and extralegal ways for dealing with the maintenance of order in society. Webb says an "understanding" was reached among westerners; in essence, a code of the West evolved. This legal mentality required fundamental fairness and class equity, and punishments that were swift and that fit the nature of the crime in terms of surviving in a difficult environment. Because of this "code," he surmises, there was little petty thievery on the Plains. And the most severe crime, that of stealing a horse, met with the most severe of punishments—death.<sup>17</sup>

Finally, he confronts what he calls the radical legal tradition of the West. Given the spirit of self-reliance, the culture of law-breaking, and the need to find extralegal solutions to problems, it should not be surprising, he allows, that the Plains embraced radical politics, particularly when confronted with threats to its legal culture that had evolved. Moreover, Plains people just as quickly cast aside radical solutions to problems if the threat eased. According to Webb, "When men suffer, they become

<sup>15</sup>Ibid. at 496-98.

<sup>16</sup>Ibid. at 500.

<sup>17</sup>Ibid. at 497-98.

politically radical; when they cease to suffer, they favor the existing order."<sup>18</sup> Because this tradition culminated in the failed Populist movement, Webb, like Turner, ends the unique history of the West with the coming of the twentieth century. This time freeze, of course, New Western historians emphatically reject.

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### THE NEW WESTERN HISTORY AND LAW

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Any study of New Western History and law requires an essential question to be addressed. Its mere asking makes some New Western historians and American legal historians nervous. The question legal historians of the American West are tackling is whether the West developed its own unique regional legal culture.<sup>19</sup> To some degree, Webb was attempting to answer this question, but he could not get beyond the strictures of the Turner frontier thesis and his own baggage as a scholar. This question places at the apex of any New Western Legal History the fundamental issue of exceptionalism.<sup>20</sup>

The intersection of the New Western History and legal studies has been anything but direct. Just as Turner danced around the subject of even an Old Western Legal History, so, too, have many modern American history scholars. One of the greatest myths in the writing and reading of American history is that legal history requires an understanding or training nearly impossible to attain. All too many historians of the American West have bought into this mythology, which consequently allows them to avoid the legal dimensions of human actions.

That few western history practitioners have sought to participate in an extensive evaluation of American legal history shows in the primary works devoted to the New Western

<sup>18</sup>Ibid. at 503.

<sup>19</sup>See Kermit L. Hall, "The Legal Culture of the Great Plains," *Great Plains Quarterly* 12 (Spring 1992), 86-98; John R. Wunder, "Toward a Legal History of the Great Plains," in *Law and the Great Plains: Essays on the Legal History of the Heartland*, ed. idem (Westport, Conn., 1996), 3-8, and "Persistence and Adaptation: The Emergence of a Legal Culture in the Northern Tier Territories, 1853-1890," in *Centennial West: Essays on the Northern Tier States*, ed. William L. Lang (Seattle, 1991), 104-21.

<sup>20</sup>For a recent discussion of exceptionalism, Turner, and the West, see David M. Wrobel, *The End of American Exceptionalism: Frontier Anxiety from the Old West to the New Deal* (Lawrence, Kans., 1993). See also Gregory M. Tobin, *The Making of a History: Walter Prescott Webb and "The Great Plains"* (Austin, 1976), and "Walter Prescott Webb," in *Historians of the American Frontier: A Bio-Bibliographical Sourcebook*, ed. John R. Wunder (Westport, Conn., 1988), 713-28.

History. Richard White and Patricia Nelson Limerick have consulted little secondary material on western legal history, either because it does not exist, as is often the case, or because their training lacked a grounding in legal history or their own interests have not found it conducive to consult. This means that their seminal works do not address a fundamental issue, that of the nature of a western legal culture, but they have not completely ignored "the law."

White helped redefine western history with the publication of his text, *"It's Your Misfortune and None of My Own": A New History of the American West*, in 1991.<sup>21</sup> Look in the table of contents or the index for a specific treatment of western law. You won't find it in a chapter, and in the index the only singular reference to law is land law (a necessity for any Vernon Carstensen student to consider); water law; and "L.A. Law," the glamorous TV serial.<sup>22</sup>

That one cannot identify a specific "legal" chapter or specific references under law in the index, however, does not mean that law is not present in the text. It is there. For example, White mentions fourteen court cases, twelve U.S. Supreme Court decisions and two from the California State Supreme Court. Of the California decisions, one, *Woodruff v. North Bloomfield*, concerned mining dumping and environmental concerns, and the other, *Lux v. Haggin*, dealt with water rights.<sup>23</sup> Of the U.S. Supreme Court cases, eight of twelve concerned disputes over Indian rights and federal and state laws, although three were disputes not originating from the West. State and territorial courts are ignored, as are local courts, traditional mining courts, and Indian courts.

Law is most often involved in discussions of land policy, federal Indian programs, and water law. Water law, in particular, is cogently and carefully presented, and this is important because water and its shortage is crucial to any understanding of the West's past. Extralegal violence is mentioned frequently as social history, and here the inability of legal institutions to function is addressed. Federal statutes are also added to discussions that involve almost every aspect of the West's development in the twentieth century.

Nevertheless, law is always supplementary or peripheral to the historical subject at hand. Sometimes it is missing altogether. How can one consider internment of the Japanese

<sup>21</sup>Richard White, *"It's Your Misfortune and None of My Own": A New History of the American West* (Norman, 1991) [hereafter cited as White, *"It's Your Misfortune"*].

<sup>22</sup>Ibid. at 636-44.

<sup>23</sup>Ibid. at 234, 402.



Patricia Nelson Limerick and other New Western historians have rarely integrated legal history into their syntheses of the West's past. (Photograph by Ken Abbott, courtesy Center of the American West)



without describing attempts by the Japanese to resist through state and federal courts? How does one evaluate the Chinese experience without a discussion of *Yick Wo v. Hopkins*? Is the treatment of Elizabeth Gurley Flynn, a cofounder of the American Civil Liberties Union, and labor unrest in the Pacific Northwest complete without a paragraph or two devoted to the free-speech movements or mention of the murder trial of Big Bill Haywood for the assassination of Idaho's governor, which dramatically pitted the lawyers William Borah and Clarence Darrow against each other?<sup>24</sup> One could continue to nitpick, which is inherently unfair, yet the point must be made that while law permeated the social and economic history of the American West, it has yet to infiltrate deeply into any synthesis of the West's past.

Limerick, in *The Legacy of Conquest*, also skirts the issue of a western legal culture.<sup>25</sup> Ironically, the question, if openly addressed, clearly assists with her paradigm. There are hints that she believes it is an integral part. For example, in her introduction, she explains how her conquest paradigm works. For her, "Conquest basically involved the drawing of lines on a map, the definition and allocation of ownership (personal, tribal, corporate, state, federal, and international), and the evolution of land from matter to property."<sup>26</sup> She sees these vital steps as a two-pronged process. First the lines had to be drawn, but second—and here is where law might aid her—the significance of the lines had to be backed up by power. To Limerick, western history is a distillation of what she calls a "competition for legitimacy," in which ethnic diversity and resource allocations clash. "The contest for property and profit," she observes, "has been accompanied by a contest for cultural dominance." She uses words such as "contest," "struggle," and "dispute" without ever mentioning "law."<sup>27</sup>

It is not as though Limerick has not thought about this. She has, and the evidence is in her book. She is especially perceptive in her discussions about mining and law.<sup>28</sup> She even addresses the question of how legal doctrines had to be changed in order for western mining technology to advance. However, more often than not, she either ignores or only indirectly considers it. Perhaps the best example in comparison with mining

<sup>24</sup>*Ibid.* at 293, 320-23, 510-13.

<sup>25</sup>Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987).

<sup>26</sup>*Ibid.* at 27.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.* at 108-16.

is her treatment of farming, where law has a direct impact up to the present, or even prostitution, which by definition is a legal creation. To the latter she devotes four pages, but does not discuss how western legal systems, as distinct from those in other regions, reacted to it.<sup>29</sup> How does one explain this? As in White's book, questions surrounding a western legal culture are secondary to Limerick's general thesis.

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*Western Legal History* AND THE NEW WESTERN HISTORY

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To be fair to Limerick and White, one must emphasize that the integration of the New Western History and legal history is only just beginning. They should not be expected to have anticipated this development. What signs there have been of this integration are mixed. They may even be too underdeveloped to call transitional, yet, clearly, new approaches by western legalists fit into the New Western History.

The evolution of modern western legal history scholarship began in the late 1970s, with some talk among legal history scholars based in the West of forming a Pacific Coast branch of the American Society for Legal History patterned on the Pacific Coast Branch—American Historical Association. It resulted in the first conference devoted to legal history to be held in the West at Pepperdine University's School of Law. Although such a branch was never formed, legal historians who wrote western history or who lived in the American West resolved to continue a dialogue.

In 1988 a new journal, *Western Legal History*, was born.<sup>30</sup> The journal is the official organ of the Ninth Judicial Circuit Historical Society. Chet Orloff, its founding editor, wrote on its first page that the journal was to include contributions of more than just the study of courts. Embedded in it were to be the seeds of the New Western History, for Orloff included on his list "issues of natural resources and minorities."<sup>31</sup> The journal was to embrace the greater American West beyond the boundaries of the U.S. Courts for the Ninth Circuit.

John Phillip Reid wrote the first published essay, "Some Lessons of Western Legal History," in which he used David Langum's then path-breaking book, *Law and Community on*

<sup>29</sup>Ibid. at 49-52, 54, 124-33, 170.

<sup>30</sup>First printed in 1988, the journal was founded to encompass the legal history of the entire American West, and not be restricted to the states served by the United States Courts for the Ninth Circuit. It has also expanded into the Canadian West.

<sup>31</sup>Chet Orloff, Foreword, *Western Legal History* 1 (Winter/Spring 1988), 1.

*the Mexican California Frontier* (1987),<sup>32</sup> as a springboard to a discussion of why considerations of regional legal culture are so important. Reid observed that Langum's theme, "a clash of legal cultures," was unique to the American West. It could only have occurred in a place where competing legal cultures were forced to deal with each other. For Reid, who has also investigated the mobile legal life of the Oregon Trail in his pioneering work, *Law for the Elephant*,<sup>33</sup> there was more to be done: "Evidence of a nineteenth-century legal culture provided by the westward movement—by the behavior of emigrants on the overland trail and the conduct of expatriates in Mexican California—has raised issues about the nature of American law ways that require that more scholars begin to investigate western legal history. It is a neglected field awaiting its reapers and its gleaners."<sup>34</sup> He is not sure that the West as a place encompasses a unique regional culture, but he has an open mind to further investigations.

*Western Legal History* is now ten volumes old. It was created just when the New Western History was noticed not only within the West but beyond it. The eighty-one essays published up to, and including, the issue of Winter/Spring 1995 include twenty-six on race and law in the American West, or roughly 31 percent.<sup>35</sup> This can be broken down into topical essays as follows: fourteen devoted to Native Americans, four to Chinese, two to other Asian groups, four to Hispanics, and two to multiple racial topics. Western women's history has not been as likely to be found in print. Approximately 15 percent, or twelve articles, deal with western women's legal history, and of those, six appeared in a recent special issue on the topic.<sup>36</sup> Articles devoted to economic history and natural-resource topics are even scarcer, only six having been published in the period under review. This is somewhat surprising, considering that the modern age of American legal history is predicated upon economic and resource considerations, and that two of

<sup>32</sup>David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987).

<sup>33</sup>John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, Calif., 1980).

<sup>34</sup>John Phillip Reid, "Some Lessons of Western Legal History," *Western Legal History* 1 (Winter/Spring 1988), 17.

<sup>35</sup>Compilations are based upon all issues through vol. 8, no. 1.

<sup>36</sup>See *Western Legal History* 7 (Summer/Fall 1994), "Women, Legal History, and the American West," special issue; guest editors, John R. Wunder and Paula Petrik; articles by Anne M. Butler, Margaret K. Holden, Donna C. Schuele, and James Muhn; interview by Carole Hicke.

the most prominent legal historians in this area—Lawrence Friedman and Harry Scheiber—are based in California.

Although the initial charge said that the new journal would not emphasize writings that dealt with courts, that has been the pattern. The twenty-three essays about courts and judges represent nearly 30 percent of all published contributions. This is somewhat inflated because of the early policy of including recollections from oral histories of prominent jurists and members of the bar. Legal doctrine is the subject of ten articles, the second-highest demarcation of traditional legal history topics. Thus it would appear that *Western Legal History* as a journal has been receptive to New Western History topics, particularly those dealing with race and law, while maintaining a balance with Old Western Legal History approaches.

The evolution of western legal history scholarship has been significantly advanced in the 1990s by the Ninth Judicial Circuit Historical Society's sponsorship of western legal history sessions at the annual meeting of the Western History Association; the start of two new western legal history book series at the two largest western academic presses, the University of Nebraska Press and the University of Oklahoma Press;<sup>37</sup> and the first transboundary legal history conference on the North American West, at the University of Victoria in February 1991. Entitled "Law for the Elephant, Law for the Beaver," the conference gathered together, for the first time, legal history scholars of the American and Canadian Wests. Out of the symposium came a volume of essays by seven Canadians and five Americans.<sup>38</sup> John Phillip Reid, in his provocative essay "The Layers of Western Legal History," opens the book, and he issues a warning. He is skeptical about any finding that there is a unique western legal culture. Instead, he sees greater clarity in pursuing comparative North American legal parallels. Although he notes a number of specific "western" contributions to law, he prefers to stress continuities of continental law and

<sup>37</sup>The works published by 1995 include Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891* (Lincoln, 1991); Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, 1991); Shelley Bookspan, *A Germ of Goodness: The California State Prison System, 1851-1944* (Lincoln, 1991); M. Catherine Miller, *Flooding the Courtrooms: Law and Water in the Far West* (Lincoln, 1993) [hereafter cited as Miller, *Flooding the Courtrooms*]; C. Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* (Lincoln, 1994) [hereafter cited as Clark, *Lone Wolf v. Hitchcock*]; and Jeffrey Burton, *Indian Territory and the United States, 1866-1906: Courts, Government, and the Movement for Oklahoma Statehood* (Norman, 1995).

<sup>38</sup>John McLaren, Hamar Foster, and Chet Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Pasadena, 1992).

commonalities.<sup>39</sup> Nevertheless, the sympathy of those giving papers at the conference and writing in the anthology was for investigating thoroughly the notion of a distinct western legal culture. Canadian West legal historians, unencumbered by Turnerisms and frontier theses, have made substantial progress in this area.<sup>40</sup>

In the fall of 1990 the annual meeting of the American Society for Legal History was to take a rare trip to the Far West. It was scheduled to meet in San Francisco. The meeting was not held in California, however, because the day before its convening a devastating earthquake struck the Bay Area. Instead, the society met in Atlanta the following February. A session originally planned for San Francisco was held, entitled "Western Legal History: Where Are We and Where Do We Go From Here?" It featured a panel of western legal history scholars who had been present at its modern creation: Lawrence M. Friedman, Christian G. Fritz, David J. Langum, Harry N. Scheiber, and Gordon M. Bakken.<sup>41</sup>

Taken as a whole, in many ways the panel accurately sums up the relationship of current western legal history scholarship to the New Western History. Bakken was the only panelist directly to embrace a legal history connection to the New Western History. Addressing the notion of a western legal culture, he said, "Western legal history is distinctive because the law of the East had to come to grips with the facts of the trans-Mississippi West." Bakken sees western law as being directly connected to the West as a unique place. Known for his work on the reception of common law in the American West and the history of western legal institutions, he reflects that during his scholarly life he has sought to discover continuities in American legal and constitutional history. "My answers have been mixed," he observes. "There has been continuity; there is some uniqueness. Western legislatures and jurists drew upon American legal experience when they made law for unique situations." But what is important to Bakken—as in the study of western water law—is that new law of such a distinctive nature was created to make the West an exceptional place.<sup>42</sup>

Friedman reversed the question of western legal exceptionalism, suggesting that after a century of legal distinctiveness

<sup>39</sup>John Phillip Reid, "The Layers of Western Legal History," in *ibid.*, 23-73.

<sup>40</sup>See, for example, Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto, 1994), and Constance B. Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth-Century Canada* (Toronto, 1991).

<sup>41</sup>*Western Legal History* 3 (Winter/Spring 1990), 115-43.

<sup>42</sup>Gordon M. Bakken, *ibid.* at 115-18; quotation, 117.

perhaps the West, like the South, is developing a legal history of convergence with the rest of the nation. But in addressing this concern, he notes the hallmarks of the New Western History. He believes that economic development, law and order, and the presence of minorities in the West must be investigated fully.<sup>43</sup>

Fritz carefully posited the dilemma of western legal exceptionalism in mainstream ideology. He sees the law of the American West as characterized by "some distinctive aspects," but considers those distinctions unimportant unless they are compared with the rest of the country. Fritz wants to understand western legal history through treatments of minority groups, histories of federal courts, and shared constitutional cultures, such as state constitution-making. Although he is taking a somewhat traditional approach, he recognizes that certain aspects of western history, such as the California gold rush, require highlighting. Might the gold rush immigrants, he asks, have developed a shared legal culture?<sup>44</sup>

Langum saw value in studying the history of western law comparatively. He rejects Limerick's fundamental notion about ethnicity and the West and does not believe that the West differs much from the East in terms of diversity. Rather, it is the West as "place"—its vastness and isolation—that makes it different. Nevertheless, he credits western ethnic diversity with creating exceptional alternative systems of law, but is uncomfortable with examinations of the treatment of western minorities before American legal systems as evidence of western legal exceptionalism.<sup>45</sup>

Scheiber issued a clarion call for adopting portions of the Turnerian concepts in the examination of western legal culture. He encouraged western legal historians to look into community building, territorial legal experiences, and constitution-making from a framework of successive regional frontiers. Having harkened back to the Old Western History, he then suggested that conquest as a paradigm can be addressed within this framework. Known for his work on law and the economy, he turned to an important link for law to the New Western History, anticipating notably the works of William Robbins and Donald Worster.<sup>46</sup> Scheiber connects law to the New

<sup>43</sup>Lawrence M. Friedman, *ibid.* at 118-19.

<sup>44</sup>Christian G. Fritz, *ibid.* at 119-23.

<sup>45</sup>David J. Langum, *ibid.* at 123-26.

<sup>46</sup>See William G. Robbins, *Colony and Empire: The Capitalist Transformation of the American West* (Lawrence, Kans., 1994); and Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York and Oxford, 1985), and *idem*, *Under Western Skies: Nature and History in the American West* (New York and Oxford, 1992).

Western History focus on the environment and the economy when he notes that the West's relationship to world capitalism is a most fruitful area for scholars. Potential western legal exceptionalism is found where the West struggled to develop its natural resources. "The problem for western law," he observed, "was to accommodate large-scale capitalism and the latest, state-of-the-art technologies. . . . In some respects, the western states confronted some of the most difficult and intractable problems of modern capitalism even earlier than other parts of the country."<sup>47</sup>

There is thus no clear consensus on the direction of western legal history, but it is obvious that the New Western History has begun to penetrate the debate. This is especially true of those western legalists who have received both legal and history training and who conceptualize the history of the American West in regional terms. Nevertheless, as Scheiber noted during the panel discussion, "It's a mixed picture: regionalism is a slippery concept."<sup>48</sup>

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#### RACE AND GENDER

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The New Western History is especially persuasive when it considers questions of race and gender, areas previously ignored. Western legal historians have also begun to look into these topics, and they have done so through a variety of approaches. The result is a strong, original treatment in most instances.

Considerations of race and western law are most developed in new works on the history of American Indians. This should not be too surprising, because so much of the history of Native Americans relates to legal definition. Even how one becomes a member of a tribe requires significant legal considerations. Two recent works on this topic, Sidney L. Haring's *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*<sup>49</sup> and Blue Clark's *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*<sup>50</sup>—both case biographies—deserve our attention.

<sup>47</sup>Harry N. Scheiber, *Western Legal History* 3 (Winter/Spring 1990), 127-32; quotation, 130.

<sup>48</sup>*Ibid.* at 131.

<sup>49</sup>Sidney L. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York and Cambridge, 1994) [hereafter cited as Haring, *Crow Dog's Case*].

<sup>50</sup>Clark, *Lone Wolf v. Hitchcock*, *supra* note 37.

Harring immediately establishes how the New Western History has had an impact on American legal history in his book about the U.S. Supreme Court case *Ex parte Crow Dog* (1883). He explains how classic legal histories have ignored American Indian legal history. In particular, he singles out J. Willard Hurst's *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, a book generally regarded as the origin of modern American legal history.<sup>51</sup> It should not be overlooked that Hurst taught at Turner's university, and that his modernization of American legal history dealt with economic legal aspects of an industry prominent in the West—that of timber.

Hurst's legal history left out Indians, even though Indians had a great deal to do with the legal history of Wisconsin's forests. Harring observes, "Omitted is any discussion of the forced removal of the Winnebago, fraudulent timber contracts on Chippewa and Menominee lands (there were hearings in Congress in 1889 they were so blatant), a lawsuit over state title to timber on school lands on the Menominee Reservation that reached the U.S. Supreme Court in 1877, deprivation of Indian hunting and fishing rights reserved by treaty, and an extensive legal conflict over basic issues of federalism as the state resisted federal jurisdiction over the tribes resulting in at least ten reported cases."<sup>52</sup> This is a serious and significant indictment. Harring precisely argues the need for a New Western Legal History, and does so around the issue of race.

What Harring has done is to take a traditional form—that of a biography—and use it in a nontraditional way. He demonstrates conclusively that the best approach to discussing Indian law is to explain and discover the two kinds of law at play. This is really a historical exercise in the conflict of laws. There are two legal traditions in conflict, and to explain the legal issues at hand one must uncover and understand all the cultural dimensions, not just one of several. Harring's book represents a call for ethnohistorical legal history.<sup>53</sup>

Harring proves that tribal law has not disappeared. It continued to function, not only in Crow Dog's case on the Rosebud

<sup>51</sup>James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, Mass., 1964).

<sup>52</sup>Harring, *Crow Dog's Case*, supra note 49 at 9.

<sup>53</sup>*Ibid.* at 10. Thomas Biolsi eloquently argued recently that law is "a fundamental constituting axis of modern social life—not just a political resource or an institution but a constituent of all social relations, particularly relations of domination." *Idem*, "Bringing the Law Back In: Legal Rights and the Regulation of Indian-White Relations on Rosebud Reservation," *Current Anthropology* 36 (August-October 1995), 543.



Reservation, but in other instances. Crow Dog, or Kan-gi-shun-ca, shot and killed Sin-ta-ga-le-Scka, or Spotted Tail, a prominent Brulé Sioux chief. These are undisputed facts. When the event became known, the families of both men met and settled on a means of atonement: a case remuneration of six hundred dollars from Crow Dog's family to Spotted Tail's family, plus eight horses and one blanket. Under tribal law, harmony through restitution had been achieved.<sup>54</sup>

However, because the Bureau of Indian Affairs and other federal officials were anxious to establish legal control over tribal institutions, Crow Dog was indicted for murder and convicted in Dakota Territory courts. The BIA actually influenced the lawyers for both sides so as to guarantee an appeal. Crow Dog's attorney eventually appealed to the U.S. Supreme Court, and in *Ex parte Crow Dog*<sup>55</sup> the court ruled that Crow Dog must be released because U.S. federal courts had no criminal jurisdiction over Indian tribes in Indian country. This was ostensibly because Congress had not given them jurisdiction. The door was now open for legal attack, and the next several decades witnessed a frontal assault on tribal law and sovereignty, an era Harring describes as a period of legal genocide.<sup>56</sup>

As influential a book as *Crow Dog's Case* is, it includes at least one transitional element. Harring is sometimes less convincing because of what he does not consider. He thoroughly discusses *Crow Dog* and subsequent cases at both the U.S. Supreme Court and appellate and district court levels, and places much of this research impressively in his overall theme. The problem is that he does not observe that legal genocide, the war on tribal institutions, is essentially a place war. It is centered in the American West. The force may have been national, but its impact is overwhelmingly western.

For example, Harring accurately summarizes the dualism he is unraveling. "The contradiction between tribal sovereignty and a colonial mode of imposed law," he explains, "was nowhere more publicly debated than in U.S. policy toward the Indian nations in eastern Oklahoma."<sup>57</sup> This is a potentially powerful entry into a regional discussion, but it never happens. Instead, Harring ties these legal developments into a national framework and ignores regional legal ramifications. This one aspect, an approach used in virtually all studies of American

<sup>54</sup>Harring, *Crow Dog's Case*, supra note 49 at 1.

<sup>55</sup>*Ex parte Crow Dog*, 109 U.S. 556 (1883).

<sup>56</sup>Harring, *Crow Dog's Case*, supra note 49 at 251-52.

<sup>57</sup>*Ibid.* at 37.

Indian law, is the only strand that separates *Crow Dog's Case* from all aspects of the New Western History.<sup>58</sup>

The other recent Indian legal history, Clark's study, considers what is arguably the most important U.S. Supreme Court decision regarding Indian law in American history. In *Lone Wolf v. Hitchcock*, Clark explains why this challenge to the basic fabric of Indian culture occurred and what its legacy proved to be. The case grew out of the allotment policy designed to carve up Indian reservations and separate lands not assigned to individual tribal members so that they could be sold to non-Indians. Most Indians opposed this land grab, and the Kiowas residing on their reservation in southwestern Oklahoma were especially adamant.

Lone Wolf was one of several Kiowas who tried to adjust to reservation life by finding ways to preserve as much of their national culture as they could, and he realized that maintaining the Kiowa communal land base was crucial to cultural preservation. The federal government wanted to take as much land as possible from the reservations and force Indians onto individual allotments so that they might be more like whites. Despite the unfairness of these concepts, many whites could not resist attempting to take all the land by illegal means, and even when this was revealed, Congress accepted the allotment of the Kiowa land holdings. Lone Wolf and other Indians on the reservation challenged this action in U.S. courts, and eventually the Supreme Court ruled that Congress had plenary power over Indians and could exercise that power regardless of whether fraud had occurred or treaty provisions were violated. It was a devastating legal pronouncement for Indians whose reservations were at risk throughout the American West.<sup>59</sup>

In his treatment of *Lone Wolf*,<sup>60</sup> Clark successfully provides the dualistic approach that Haring so eloquently urges in *Crow Dog's Case*. Read together, these case biographies set the standard for new treatments of Indian law. Clark takes Kiowa

<sup>58</sup>One year later, *Zuni and the Courts* was published. This is a collection of essays and original testimony by those who have been most involved in Zuni Pueblo's attempts to obtain payment for lands taken by the United States without adequate compensation, restitution for environmental damage to Zuni lands caused by the U.S. government, and the retention of religious rights in the face of non-Zuni intimidation. E. Richard Hart, a public historian who directs the Institute of the North American West, a private research company headquartered in Seattle, edited the volume. This collection does not fit into either Sidney Haring's model for Native American legal history or the general direction of the New Western History. E. Richard Hart, ed., *Zuni and the Courts: A Struggle for Sovereign Land Rights* (Lawrence, Kans., 1995).

<sup>59</sup>Clark, *Lone Wolf v. Hitchcock*, *supra* note 37 at 95-106.

<sup>60</sup>*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

history seriously, and he outlines how this history and the individual role of Lone Wolf play essential parts in this seminal case's evolution. He treats the federal side and its myriad characters similarly, from the Jerome Commission and the fraudulent petitions it forced upon the Kiowas to a future Supreme Court justice, Willis Van Devanter, who argued the case before the Supreme Court.

Clark shows dramatically the duality of understanding. When he explains how the Treaty of Medicine Lodge, which was essential to the Kiowa defense, was negotiated, he tells us that federal government representatives called the Kiowas their children and asked that the children obey their father and cede their lands. The Kiowas, however, discussed the mutual responsibilities that were a part of every family. Thus, writes Clark, "one spoke of relationships; the other spoke of land transactions."<sup>61</sup>

These latest works in Native American legal history show the dynamics of the New Western History. There are a few transitional elements and some traditional methodological forms, but generally they represent considerable breakthroughs. Not only are many topics being addressed for the first time, but they are stretching the parameters of traditional American legal history.<sup>62</sup>

Although the treatment of women's and men's roles within western legal institutions has not received as much attention as race, what it has received is significant. The first systematic investigation of modern gender and law in the American West can be found in Paula Petrik's *No Step Backward: Women and Family on the Rocky Mountain Mining Frontier, 1865-1900* (1987).<sup>63</sup> In this book, Petrik explains in a case study of Helena, Montana, how an urban mining frontier transformed women,

<sup>61</sup>Clark, *Lone Wolf v. Hitchcock*, *supra* note 37 at 22.

<sup>62</sup>See, for example, a summary of questions concerning race and law in the American West, in John R. Wunder, "The Intersection of History, Race, and Law in the American West," *Universitas Helsinkiensis (University of Helsinki Quarterly)* 4 (December 1995), 43-45, synopsis of inaugural address at the University of Helsinki, September 1995. See also "Rotu ja lainkäyttö," *Yliopisto* 16 (September 1995), 40.

See also recent works on Chinese and law in the American West, such as Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley and London, 1994); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill, 1995); and John R. Wunder and Clare V. McKanna, Jr., "The Chinese and California: A Torturous Legal Relationship," *California Supreme Court Historical Society Yearbook*, vol. 2 (1995), 195-214.

<sup>63</sup>*No Step Backward: Women and Family on the Rocky Mountain Mining Frontier, 1865-1900* (Helena, 1987).

affording them increased economic opportunity and providing them greater social equality. These developments were reinforced by the legal system. Is this not the making of a specific legal culture? Possibly so, particularly in family law and suffrage, two topics Petrik addresses thoughtfully.<sup>64</sup>

Petrik's Helena is diverse. There are Christians and Jews, whites and Chinese. Class is also important, and she investigates several representative examples. Sex and age ratios fluctuate, and considerably affect the legal environment.<sup>65</sup>

When Petrik considers the law, she looks at three major distinctions. The first of these, although not explicitly stated, is defined by law and its selective enforcement. It is prostitution, the largest female employment category outside the home. Petrik approaches prostitution primarily from the perspective of business history, and convincingly demonstrates how women lost control over prostitution to men and how the marketplace became much more dangerous as a result. What is fascinating is the level of legal involvement of prostitutes in Helena in property transactions (Petrik found that 44 percent of Helena's prostitutes owned realty), in the movement of capital, and in the use of civil and criminal law to control their businesses. In 1874 Montana Territory created this kind of legal terrain by approving a law giving separate business identities to women. Thus to Petrik the role of law in prostitution might seem secondary to economic activity, but she does allow that law inadvertently reshaped the profession.<sup>66</sup>

After a full discussion of prostitution, Petrik considers the life of middle- and upper-class women. They, too, benefitted from Montana's favorable business climate. By 1900, women in Montana had made lives for themselves apart from marriage, were frequently employed, and used the legal system to advance reforms and to obtain self-protection, primarily through divorce. Middle-income women demonstrated significant community activism, and this took the form of advocating legal change.<sup>67</sup>

Petrik's greatest contribution in terms of addressing gender issues and the law comes in chapter 4, "Occasions of Unhappy Differences: Divorce in Helena, 1865-1907."<sup>68</sup> Here she definitively shows how Montana helped create distinctive family law. Courts responded to women by broadly interpreting the

<sup>64</sup>*Ibid.* at xiii, xv.

<sup>65</sup>*Ibid.* at 5-9, 16, 21.

<sup>66</sup>*Ibid.* at 25-6, 29, 37.

<sup>67</sup>*Ibid.* at 71, 86.

<sup>68</sup>*Ibid.* at 97-114.

grounds of extreme physical and mental cruelty in divorce actions. Women used divorce courts. The Montana divorce rate from 1865 to 1870 was 33 percent of all marriages, and in one year—1867—the number of divorces actually exceeded marriages in the territory. Women successfully achieved severance of their marriages by pressing actions based upon abandonment; adultery; cruelty, including sexual abuse; and drunkenness. In addition, alimony and child-custody decisions in Montana allowed women to make a clean break from difficult marital relationships.<sup>69</sup>

Eventually Montana adopted the Domestic Law Code in 1895, and the effect of this action was to begin to tighten court interpretations and attempt to nationalize Montana family law. Whether this movement succeeded is not the subject of Petrik's book, but it remains an important question, for if Montana family law was nationalized, then a possible special legal culture had been altered.<sup>70</sup>

Petrik concludes (as have a number of scholars of western women's history) by trying to find something Turnerian to apply to the subject at hand. Perhaps if the conclusion were being written today she might alter it. Nevertheless, she provides a framework for looking carefully at gender in the American West and its relationship to American law. She states that "the frontier had shaped a new vision of what was necessary and possible for women."<sup>71</sup> It reordered social relationships of the sexes and provided alternatives under new pronouncements on domestic law, both within and outside family structures.<sup>72</sup> This was possible only in the American West.

Another recent development in western legal gender studies occurred with the publication of the Summer/Fall 1994 issue of *Western Legal History*.<sup>73</sup> Four historians present four separate, very promising areas of research: Anne Butler on work requirements of women in western prisons, Margaret Holden on white women's roles in the Oregon anti-Chinese extralegal movement, Donna Schuele on California's struggle with married women's property rights under community property legal traditions, and James Muhn on western women exercising their rights under the Homestead Act. These essays show that further studies may provide an opportunity to address questions pertaining to the western formation of a distinct legal

<sup>69</sup>Ibid. at 97-100, 108.

<sup>70</sup>Ibid. at 111.

<sup>71</sup>Ibid. at 136.

<sup>72</sup>Ibid. at 137-38, 140-41.

<sup>73</sup>John R. Wunder and Paula Petrik, guest eds., *Western Legal History* 7 (Summer/Fall 1994), 193-331.

culture.<sup>74</sup> Gender, law, and the American West await significant developments.

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### ECONOMICS AND THE ENVIRONMENT

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It is not surprising to find new works in the legal history of the American West that consider various aspects of western economies and the environment. This is simply because of the tradition of modern American legal history and the works of Hurst, Friedman, Scheiber, and many others. Indeed, Scheiber's location, first at the University of California, San Diego, and then at the University of California, Berkeley, has assured the profession of the evolution of new scholars whose interests lie in regional economic and environmental legal studies. Among them are Arthur F. McEvoy and M. Catherine Miller, the authors of *The Fisherman's Problem: Ecology and the Law in the California Fisheries, 1850-1980*<sup>75</sup> and *Flooding the Courtrooms: Law and Water in the Far West*,<sup>76</sup> respectively.

Perhaps McEvoy has taken western legal history furthest into the domain of the New Western History. *The Fisherman's Problem* avoids all the pitfalls of the Old Western History. It does not set arbitrary time frames ending economic and environmental considerations in 1890. It does not ignore or dismiss the contributions of nonwhite participants. It does not sugar-coat the message of environmental despoliation and economic sacrifice and disruption. It does not pretend there is no colonial relationship between the West and outside economic forces. In short, McEvoy's history of California's fishing industry is a prototype of how New Western History concepts can be successfully adapted to legal economic and environmental topics.

McEvoy traces the history of ecological change affecting California's fish population in its rivers and offshore waters over a 130-year period. It is not a happy story, and it includes wanton destruction of the most valuable fisheries, tremendous human loss and bitter rivalries among diverse groups, and public agency failure.<sup>77</sup> Through it all, McEvoy keeps in mind the intersection of ecology with economic enterprise and the legal processes involved. For him, in the history of California's

<sup>74</sup>See John R. Wunder and Paula Petrik, "Women, Legal History, and the American West," in *ibid.* at 193-99.

<sup>75</sup>Arthur F. McEvoy, *The Fisherman's Problem: Ecology and the Law in the California Fisheries, 1850-1980* (New York and Cambridge, 1986) [hereafter cited as McEvoy, *Fisherman's Problem*].

<sup>76</sup>Miller, *Flooding the Courtrooms*, *supra* note 37.

<sup>77</sup>McEvoy, *Fisherman's Problem*, *supra* note 75 at xi.

fisheries, "It was simply not possible to maximize both environmental values and the satisfaction of human needs."<sup>78</sup>

McEvoy clearly enunciates what he believes is needed in any discussion of the environmental history of the American West. There must be a careful delineation of the ecology, an understanding of the complexities of production, and a thorough tracing of the role of legal process. From each change associated with each of these concepts may ensue a uniquely western legal culture. Hurst, as McEvoy sees it, understood intuitively that the law and the market were interrelated, but for McEvoy one must push beyond Hurst to factor in time, place, and culture to describe more fully the interrelationship of law with ecology and economy.<sup>79</sup>

In California, McEvoy finds that a story of conquest is at play. There is resource depletion and economic waste, and there are gross inequities among diverse peoples, including Native Americans and Chinese, Japanese, Italian, and Portuguese immigrant fishers, which McEvoy describes as "patterns of ethnic regulation."<sup>80</sup> As to the racial composition of the state's fishing industry, he observes that "Nowhere else in the United States, and possibly the world, has [it] ever been so ethnically diverse."<sup>81</sup>

The key to resource depletion was demand, and the demand for fish took a variety of turns. Agricultural expansion claimed swamps and floodplains, and farming necessitated vast quantities of fertilizer made from the fish. Motorized technology had an enormous effect on the industry, making fishing more effective and efficient. McEvoy echoes William Robbins when he observes that western capitalism promoted and facilitated the destruction of California's fisheries because it allowed for the open license of individual self-interest that could adapt quickly to a changing environment.<sup>82</sup>

Interestingly, it is the state (in this case California) that first recognizes the potential crisis. It tries to regulate the fishing industry, but is generally unsuccessful. McEvoy explains that the greatest hindrance to state regulation or anyone's intervention in this environmental destruction came from federalism. Control over California's fish became a matter of political economy, and federalism "encouraged a kind of competition in regulatory flaccidity" between states, and, in the case of

<sup>78</sup>Ibid. at 11-12.

<sup>79</sup>Ibid. at 13. McEvoy also directly distinguishes his work from that of Turner and Webb. Ibid. at 39.

<sup>80</sup>Ibid. at 15-16, 95.

<sup>81</sup>Ibid. at 65.

<sup>82</sup>Ibid. at 72-73. See also Robbins, *Colony and Empire*.

California's fishing industry, between the state and federal bureaucracy.<sup>83</sup> With the New Deal, federal regulatory agencies prevailed, but even the environmental consciousness of the 1970s and its natural legal outgrowth at both federal and state levels could not save California's fish.<sup>84</sup>

If there is any aspect of this book that seems related to the Old Western History, it is the lack of a personal dimension. The only profiles of participants are of fishing-industry lobbyists and scientists. Individual laborers, such as Chinese, Italians, or Yuroks, are not described in detail. True, the "other's" participation is interwoven throughout the book, much to the author's credit, but McEvoy's history of California's fisheries emanates a kind of antiseptic tragedy to it. This aside, *The Fisherman's Problem* represents one of the best works on the legal history of the West's environment and economy that has yet been produced.

A different approach, although no less effective, is found in M. Catherine Miller's chronicling of the legal web surrounding one western cattle company, Miller & Lux, and its fight for water in California, Oregon, and Nevada. Miller & Lux was no ordinary ranching operation. The company, formed in 1858 by two butchers in California, became synonymous with agricultural capitalism. Its first purchase was twelve thousand acres, a quarter of a Spanish land grant ranch in the San Joaquin Valley; this was followed by an "orgy of land and cattle buying" until Miller & Lux accumulated nearly a million acres in three states.<sup>85</sup>

Miller (not related to the founder of the company) notes that the key to profitability for Miller & Lux was water. In her legal study of this prominent land and cattle company, she ponders questions surrounding the role of law in the development of California and the American West. She shows how Miller & Lux fought to maintain its water rights, which it associated with riparian water law.

*Flooding the Courtrooms* takes issue with one of the key aspects of the New Western History, that of how water and its control is central to understanding the history of the American West. Miller sees Donald Worster's conceptualization of a hydraulic society for the American West as too one-dimensional. It was not simply a matter of physical control of water that formulated the basis for a hydraulic society, a social and economic concept Miller accepts, but also one of law and

<sup>83</sup>McEvoy, *Fisherman's Problem*, supra note 75, quotation at 182; 182-84.

<sup>84</sup>Ibid. at 228-47.

<sup>85</sup>Miller, *Flooding the Courtrooms*, supra note 37, quotation at 3; 1-3.



ideology.<sup>86</sup> To Miller, water was "an object of physical, ideological and legal contention," and Miller & Lux, as a western company, manipulated the legal system in order to retain physical control of vast amounts of water.<sup>87</sup> In short, Miller has built upon Worster with *Flooding the Courtrooms*.

Although she does not attempt to argue that a special legal culture was at play in Miller & Lux's legal world, she does note that western water law's evolution is differentiated from that in other regions and transcends in time any restrictive "frontier" processes. This is because of the advent of capitalism. Miller writes: "While its environment was unique, California was struggling with the implications of corporate capitalism for government, law, and society, and Miller & Lux, like many others in the legalistic culture of the United States, looked to law to mediate its place in these changing times."<sup>88</sup>

The story of Miller & Lux's early legal success is one of a struggle for power over resources. Competing legal doctrines gave courts choices, and, with Miller & Lux's help, judges adopted a doctrine that fit the land and the region. It was an issue of past settlement and its incumbent need to keep secure property rights versus future development and property risks. Miller says it was a legal contest pitting regional and local stability against national futuristic projections, and for the last half of the nineteenth century Miller & Lux and regional considerations prevailed.<sup>89</sup> This triumph of legal ideology was evident in the California Supreme Court's watershed case *Lux v. Haggin*,<sup>90</sup> decided in 1886.

Population growth and economic development repeatedly challenged Miller & Lux for control of water. Most threatening were power companies, so Miller & Lux simply joined them. Irrigation, by 1900, was marketed as "a new frontier for the expansion of family farming," and Miller & Lux co-opted it by building their own canal system and selling water. Still more legal struggles continued, pitting competing ideologies, that of water being available to all who needed it against the protection of private property rights in water that could be bought

<sup>86</sup>Ibid. at 5, 181-82.

<sup>87</sup>Ibid. at 5.

<sup>88</sup>Ibid. at 1. Miller also concludes, "While the lawyer's prism refracted the material conflicts over water into legal categories, the lens of ideology refocuses them. Ideology linked the private demands of Miller & Lux and the issues of *western water law* to broader changes in the capitalist economy and mediated the relationship between legal doctrine and material development." Ibid. at 178 (emphasis added).

<sup>89</sup>Ibid. at 7-16.

<sup>90</sup>Ibid. at 17. See *Lux v. Haggin*, 69 Cal. 255 (1886), and White, "It's Your Misfortune," *supra* note 21 at 402.

and sold. Questions of water rates, water rights, water value, and taxation were fleshed out.<sup>91</sup>

Until the end of the Progressive Era, courts in California generally favored vested property rights. This had a strange side effect. Riparian rights made ownership of public utilities an effective means for private companies to retain cheap water. "Ironically," concludes Miller, "the commitment of the courts, of the state, to private property also rendered inoperative efficiency models of pricing and economic growth in the capitalist system."<sup>92</sup> This clearly places her within the debate of the New Western History and its recent discussions concerning the role of capitalism in the history of the American West.

Miller & Lux lost control of its exclusive water rights and its strength and viability as a corporate player in the 1920s. In the company's pursuit of profits, economic rivalry and class hostility generated notions of justice that sometimes overrode legal formalism, but the struggles that counted usually featured not the general public versus corporate interests, but intraclass, company versus company, legal interplay. Missing from Miller's description are not the individual winners and losers from the upper classes, but the losers from the small water users and the original owners of the lands under question. Miller is in a league with most other western historians in this aspect of her work.<sup>93</sup>

Thus *Flooding the Courtrooms* links the legal history of the American West with the modern scholarship of the New Western History. It focuses economic and environmental issues in a legal construct that has not been considered widely by most historians. As in *The Fisherman's Problem*, this particular kind of legal history extends the intellectual boundaries of the New Western History.

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### NEW WESTERN HISTORY CRITICS

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To summarize, it should be clear at this point that a New Western Legal History exists. Proponents are asking new questions and uncovering new data about a neglected region. The break from Hurstian notions of modern American legal history may not be as pronounced as it is among anti- and neo-Turnerians, but there is a clear separation nevertheless. New Western Legal History has much to contribute to the New Western

<sup>91</sup>Miller, *Flooding the Courtrooms*, supra note 37 at 20, 26, 29-30, 33, 40, 50, 55, 59-61.

<sup>92</sup>Ibid. at 66.

<sup>93</sup>Ibid. at 67, 79, 118.

History, and it may be that both groups of scholars are traveling the same road, but recognition by non-legal New Western historians of this new dimension, particularly that of a distinct western legal culture debate, remains minimal.

Criticism of the New Western History by Turnerians and ascribers to the Old Western History has been loud and confrontational. It has been met by writers of the New Western History with vigor. These contests have been summarized previously in academic journals, newspapers, and popular magazines.<sup>94</sup> Yet somewhat remarkable and at the same time quite explainable is the lack of criticism or even recognition of new works in western legal history, or of what might be termed the New Western Legal History. Only reporters seem to appreciate the overriding significance of law to the new history of the American West.<sup>95</sup> Throughout the barrage, few have taken on, for example, preliminary notions of a distinct western legal culture.

At best there is a generalized criticism that the New Western History is too dark, that it emphasizes the down side in the story of the American West. This most certainly can be stated with reference to new revelations about the role of law in the history of the American West. The works of Harring, Clark, and McEvoy lend credence to this generalization. Still, a counter argument exists—that there are good and bad in history, and historians make choices about whether to present *all* of the facts or just some of the facts. If the information leads to “dark” conclusions, then a truthful recounting of the past demands that it be told.

One reason for the lack of debate over a New Western Legal History may be a more general deficiency. It is possible that only the people reading about water law, divorce in Montana,

<sup>94</sup>For critics, defenders, and observers, see Gerald D. Nash, “Point of View: One Hundred Years of Western History,” *Journal of the West* 32 (January 1993), 3-4; William W. Savage, Jr., “The New Western History: Youngest Whore on the Block,” *Bookman's Weekly* 92 (October 4, 1993), 1242-47; Larry McMurtry, “How the West Was Won or Lost,” *New Republic* (October 22, 1990), 32-38; John Mack Faragher, “Gunslingers and Bureaucrats,” *New Republic* (December 14, 1992), 29-36; and Wunder, “What's Old About New Western History? pt. 1,” *supra* note 8 at 57-58, esp. nn. 24-27; and *idem*, “What's Old About New Western History? pt. 2,” *supra* note 8.

<sup>95</sup>Richard Bernstein, “Unsettling the Old West,” *New York Times Magazine* (March 18, 1990), 34, 57, 59. Bernstein notes in a legal reference that one critic, William H. Goetzmann, “mingles skepticism over the supposed newness of some of the new historians' discoveries with a strong sense that the scales of judgment have tipped too far toward the negative.” *Ibid.* at 57. Also see Dick Kreck, “Showdown in the New West,” *Denver Post Magazine* (March 21, 1993), 6-8, and “New History of the West Fans Fiery Debate on Culture, Myth,” *Omaha World Herald* (October 22, 1995), 12A.

and Indian Supreme Court decisions may be western legal historians themselves, not the general public or, in particular, nonlegal scholars of the history of the American West. This realization points toward an urgent challenge. If this new kind of message, this new kind of research about law and the American West is to have an impact, it must be explained to the general public and nonlegal historians in much the same way as New Western historians, such as White, Limerick, and Worster, have taken to film, popular news magazines, and other media. The myth of the law's complexity must be overcome in the minds of the audience.

There is, after all, drama to this story of law in the American West, and there is a general readership that wants to know about it. The year 1995 closed with a new book at the top of the best-selling fiction list. *Snow Falling on Cedars* is a historic dramatization of a 1950s murder trial on an island in Puget Sound that addresses issues of law, race, gender, war, environment, and economics with such power that most who begin to read the book cannot stop, and when they finish they feel compelled to talk about it.<sup>96</sup>

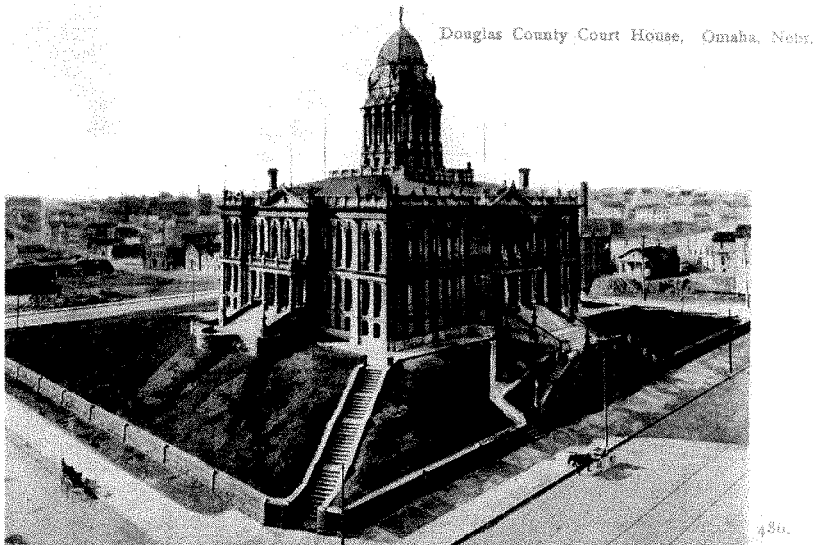
Such a historical recreation can easily be found in the nonfiction records of any local western courthouse, such as those in Douglas County, Nebraska, which revealed an important legal decision in 1907. And it is the New Western History that has opened these archives to the general public and has thrown light on such classic dramas as that facing Charles Pumphrey, Ham Pak, Jack Naoi, Anna Parr, Willie Almack, and Basil Mullen in early twentieth-century Omaha.

Pumphrey was found guilty of murdering Ham Pak, despite arguments made by his attorneys to try to keep out the damning testimony of the Japanese witness Jack Naoi. When their painting of Naoi as a "citizen of a heathen nation" who could not swear to tell the truth did not sway the judge, they appealed to the Nebraska Supreme Court, hoping to create new law for the American West.<sup>97</sup> Two years after the trial court in Omaha convicted Pumphrey for a brutal murder, his appeal was heard before Nebraska's seven supreme court justices.

In a unanimous opinion written by Justice Jesse Root, the Nebraska Supreme Court ruled that testimony by a Japanese against a white person in a Nebraska criminal court was constitutional. Pumphrey's lawyers, arguing that Naoi could not testify because he did not hold Christian beliefs and consequently could not swear to give truthful testimony, had sought to have him classified as an Indian, not unlike an 1854 determination

<sup>96</sup>David Guterson, *Snow Falling on Cedars* (New York, 1995).

<sup>97</sup>Massey, "Pumphrey v. Nebraska," *supra* note 1 at 18.



In separate trials held at the Douglas County Courthouse in Omaha, Willie Almack, Basil Mullen, and Charles Pumphrey were convicted of murdering Ham Pak. (Courtesy Nebraska State Historical Society)

by California's highest court that excluded Chinese testimony through a Native American evidentiary California exclusion statute. Justice Root and Nebraska's highest court, however, would have nothing of this argument and responded with a patronizing directness.<sup>98</sup>

One might think that justice had been served, and that racial and cultural prejudice had not been allowed to tarnish a legal decision. Testimony by Japanese in western courts was admissible. However, Pumphrey, who had been in prison since 1907 and, after this appeal was denied, was condemned to a life of imprisonment, was not to serve his full term. Unlike his African American counterparts, in 1909, shortly after the Nebraska Supreme Court decision, his sentence was reduced by Governor Ashton C. Shallenberger to seven years. With good time, on

<sup>98</sup>Ibid. at 32-33. See *Pumphrey v. State*, 84 Neb. 636 (1909). California precedents were not considered viable by Nebraska's highest court. See *People v. Hall*, 4 Cal. 399 (1854) and *Speer v. See Yup Co.*, 13 Cal. 73 (1859). See also John R. Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17 (January 1986), 25-41, and idem, "Territory of New Mexico v. Yee Shun: A Turning Point in Chinese Legal Relationships in the Trans-Mississippi West," *New Mexico Historical Review* 65 (July 1990), 305-18.

January 21, 1913, Charles Pumphrey, the murderer of Ham Pak, was released from the Nebraska State Penitentiary, after which he drops from the historical record. As far as can be determined, Willie Almack and Basil Mullen died in prison.<sup>99</sup>

Thus race did play a role in this legal confrontation, but not in the way one might have surmised. Surprises like those found in tracing the history of *Pumphrey v. State of Nebraska* await all who search for answers to the questions raised by the New Western History and law in the American West.

<sup>99</sup>Massey, "Pumphrey v. Nebraska," supra note 1 at 37-41. These disparities in murder sentencing in the American West based upon racial variables have been researched by Clare V. McKanna, Jr., in *Homicide, Race, and Justice in the American West, 1880-1920* (Tucson, 1997).

## BOOK REVIEWS

*Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941*, by David C. Frederick. Berkeley: University of California Press, 1994; 331 pp., illustrations, notes, index; \$50.00, cloth.

Numerous histories of federal courts have appeared since the bicentennial of the Declaration of Independence in 1776, at which time the Judicial Conference of the United States encouraged each United States Court of Appeals to publish a history of itself. Many, though not all of them, did so. In addition, a growing interest in federal court history has resulted in the publication of histories of several district courts.

David Frederick's history of the United States Court of Appeals for the Ninth Circuit provides a worthwhile addition to that body of work. Lively and engaging, it adds significantly to our understanding of the Ninth Circuit's development.

*Rugged Justice* has two major points of focus and one minor one. Frederick first offers incisive portraits of the court's judges, their different paths to the bench, and their legal outlooks generally. He also discusses relations between them, giving clear accounts of their differences and rivalries. Next, he presents significant cases, either individual or group, and gives an account of their resolution by the court. More briefly, he traces the evolution of court organization, noting the growing separation from the district courts of the court of appeals, with parallel changes in its internal administration.

In his portrayals of Ninth Circuit judges, Frederick's depictions of William Gilbert and Erskine Ross are particularly illuminating. Together, they dominated the court for some twenty-five years, and the author shows us how their conflicting legal philosophies shaped the court's decisions from early in this century until they left the bench. Equally interesting are the dynamics of the New Deal court, particularly the differences between the Republican chief judge, Curtis Wilbur, who selected panels, and the New Deal majority on the court.

Complementing these portraits are discussions of notable cases. Frederick starts with the case of the Stanford will, which determined whether Leland Stanford's estate would go to Stanford University or pay off Central Pacific indebtedness to the United States. He then presents cases arising from Chinese

immigration, natural-resource litigation, intrigue in the Alaska gold fields, World War One civil-liberties questions, Prohibition, and New Deal legislation. These cases appear to have constituted a major part of the court's business.

Running through these topics is Frederick's consideration of the court's organization and administration. Initially, district judges frequently sat as members of the three-judge panels that heard appeals; their presence helped preclude any one circuit judge from dominating the court of appeals. By the 1930s, however, a larger Ninth Circuit court relied far less often on district judges to hear cases. This change, coupled with the deep philosophical divisions within the court, gave great political significance to the issue of how panels were chosen. Partly in consequence, during the early 1940s the court developed a procedure for hearing controversial cases en banc.

Although each of these areas is treated well, they combine somewhat uneasily in *Rugged Justice*. Frederick sometimes tries to use the administrative changes in the court to tie the book together, when what it needs—despite all its virtues—is an overarching theme that links the separate topics more strongly.

This problem is perhaps reflected in the title. Although "Rugged Justice" evokes the "Old West," the phrase is not linked to the narrative. In an irony for which the author is not responsible, the dust-jacket title runs across a picture of the U.S. Court of Appeals at Seventh and Mission in San Francisco, a building that epitomizes luxury and sophistication.

Nevertheless, *Rugged Justice* adds considerably to our knowledge of western legal history. With its extensive research on issues previously little investigated, it offers a revealing and insightful overview of the first fifty years of the Ninth Circuit Court of Appeals. Its strengths and its findings will make possible many future research projects on the history of the court.

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*Federal Justice in Western Missouri: The Judges, the Cases, the Times*, by Lawrence H. Larsen. Columbia: University of Missouri Press, 1994; 285 pp., illustrations, bibliography, index; \$42.50, cloth.

Legal histories proliferate. In the West, histories of the Ninth Circuit Court of Appeals and several district courts have recently been completed. Several more are under way.

The emergence of this genre acknowledges the role courts play in public controversies. Today, many of society's most



important debates occur in court. For example, years from now historians may research the late-twentieth-century debate over whether to allow a person to hasten his or her own death. Their research will lead them again and again to files and transcripts of court proceedings. The legal historian interprets these events by studying the motivations of the parties, the lawyers and judges at the center of them.

But to succeed at legal history, the historian must overcome the genre's limitations. First, not every case fits into a larger theme. Many cases are too mundane, the disputes too universal, to give insight. Others defy generalization. To convey meaning, the legal historian must distinguish the representative cases from the merely idiosyncratic. Second, while lawyers and judges leave paper records of their activities, they cover their tracks. Lawyers tend to keep their clients' secrets; judges often cloak the motivations behind their decisions in legal rhetoric. Court proceedings might be public, but to a large extent lawyers and judges control to what extent that is so.

Lawrence H. Larsen's *Federal Justice in Western Missouri: The Judges, the Cases, the Times* succeeds in connecting cases to themes and in uncovering the motivations of decision-makers behind the cases. The book is a history of the Western District of Missouri, a history that begins in 1822 with Missouri's statehood and ends in the early 1960s. The district's early cases document a region under construction: land-grant, municipal-finance, and railroad rate and regulation cases dominate the dockets. The trials of Frank James (Jesse James's brother) and the Bald Knobbers, a frontier vigilante organization, portray the court's struggle to bring law and order to the region. Other cases provide perspectives on national moods. For example, Larsen's account of the "Temple Lot" case, an 1890s dispute over property considered sacred by rival religious organizations, colorfully conveys the then-prevailing anti-Mormon sentiment.

The second half of the book (beginning with chapters discussing the early part of this century) emphasizes the growth of the Western District as an institution and as an agent of change. Industrialization and commerce result in increasingly sophisticated cases. Larsen documents how, in training and temperament, the district judges (Arba Seymour Van Valkenberg, Albert L. Reeves, and Merrill E. Otis) respond to these changes. The judges work to standardize procedures, formalize legal training, and promote professional organizations. They also assume leading roles in confronting Kansas City's legendary public corruption.

Larsen not only succeeds in connecting cases to themes but tells stories of the people behind the cases, making effective use of diaries, letters, and newspaper articles to get beyond arid

case records. For example, one anecdote, drawn from a judge's recollections, neatly captures the tension within the federal judiciary over procedural guarantees in criminal law. Criticizing an Eighth Circuit judge's comparatively rights-oriented views in criminal cases, Van Valkenberg once remarked:

One must understand that Judge Walter Sanborn had been born and raised in the great state of New Hampshire; that he had attended and graduated from Daniel Webster's Dartmouth College; that when he was in college he and some of his classmates would go down to Boston and that on such occasions Dartmouth College students would get into some trouble with the Boston police force. . . . You must understand that when Judge Walter Sanborn wrote an opinion in a criminal case, he always had in the back of his mind that the defendant should be tried as one of those young Dartmouth College boys that got in trouble on a weekend frolic in Boston.

Larsen's chapter "The Breaking of the Pendergast Machine" shows the genre's narrative potential. Here, the author relates the almost prosecutorial role Otis and Reeves played in bringing the Machine to trial, and provides a setting rich with facts for Senator Harry Truman's charge that the two judges influenced the United States attorney by "brib[ing] him with bankruptcy fees." He also explains how the judges used hand-picked grand juries and inflammatory jury instructions to ensure indictments and guilty verdicts.

It helps that Larsen chose a good subject. As Justice Blackmun points out in his foreword to *Federal Justice in Western Missouri*, Missouri's central location has placed it at the edge of controversy. Its federal courts hosted important Civil War and Reconstruction-related cases—*Dred Scott v. Sandford*, for instance, began in a Missouri district court. Similarly, a national struggle over the proper role of the federal judiciary precipitated the impeachment trial of Judge James Hawkins Peck, Missouri's first district judge.

In this increasingly crowded field, Larsen has written a distinguished legal history. His background as a historian trains him to place events in context and within a narrative structure. His book is not a mere chronology of disconnected events, but a cohesive, anecdotal account of the important role one district court played in shaping a region.

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*No One Is Above the Law: The Story of Southern Iowa's Federal Court*, by George Mills and Richard W. Peterson. Des Moines: Historical Society of the United States Courts in the Eighth Circuit, 1994; 177 pp., illustrations, appendices, notes, bibliography; \$10.00, paper.

*No One Is Above the Law* is a series of biographical vignettes of all the judges who have served in the Southern Iowa Federal District Court since its creation. An introduction and a preface help to create the context, and the appendices list secondary court officials and employees. Photographs of past and present court buildings are also included.

Personal and professional information about each judge is reported. A mixture of cases is used to illustrate his career, sometimes causing the reader to think that a judge was more important as a practicing attorney or a judge of a lower court than on the federal bench. And sometimes this is confusing. It requires careful attention to determine whether these case examples are connected with the Southern Iowa District at all—in fact, the reader can never be sure whether George Mills and Richard Peterson's book is about the Southern Iowa District, or about the men who were appointed judges in that district. Either emphasis has its value, but perhaps the focus should be made clear at the beginning.

Some quibbles need to be mentioned. Dyersville, Iowa, was not named for Judge John James Dyer, but for James Dyer, Jr., an English immigrant who, with his father and uncle, owned the land where the town was built. The Homestead Act seems to be confused with the earlier Pre-Emption Acts (p. 28). One biographical sketch implies that a teenager in the 1920s earning 50 cents per day was underpaid, when it was acceptable income for the time and the age of the worker. And we may wonder (p. 101) why Harvard is referred to as "highfaluting" [*sic*] compared with several other institutions of higher learning.

On a more substantive note, the career of Judge Martin Wade is not quite so illustrious as the author would have us believe, since some of his decisions during World War One were questionable in terms of their constitutionality. Several of them were cruel, and contrary to the spirit of justice, and it is simply not enough to state, "The judge's intense Americanism colored judicial proceedings in his courtroom, especially in World War I." If legal observers give Wade top grades for his constitutional scholarship, they must be constraining their true opinions.\*

\*For another view of Judge Wade's decisions, see Nancy Ruth Derr, "Iowans During World War I: A Study of Change Under Stress" (Ph.D. diss., George Washington University, 1979), 147-51, 153-56, 169.

Many cases of importance are described in *No One Is Above the Law*, whose greatest value lies in calling the reader's attention to notable decisions. These include that of Judge Dyer in the *Chouteau* case, which preserved the titles to land in a critical area of Iowa, and Judge McCrary's role in deciding the disputed presidential election of 1876. Judge Stephenson presided over the *Tinker* case, a decision of national importance in the matter of freedom of expression. Judge Hanson's ruling in the Williams murder conviction shows a tremendous stand on legal principle in the face of public vilification, while Judge Longstaff's decision set a judicial precedent in a sexual-harassment case brought by three women on a construction crew.

A special bonus in the book are the biographical sketches of two United State Supreme Court justices with Iowa connections—Justices Samuel Freeman Miller and Wiley Blount Rutledge, Jr. It is from an opinion written by Miller that the book's title is taken, an intriguing one that I hope will encourage many people to read it.

I recommend *No One Is Above the Law* for the reasons cited above, and also because it is both interesting and readable. It is relatively short, and the biographical profiles are just the right length for spare-time reading, one at a time. From it, Iowans and citizens from any other state can learn about the issues that affect the lives of all of us. Some understanding of how judges come to decisions, the pressures they face, and the difficulty of serving the cause of justice helps everyone to work within our legal system more effectively.

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Iowa City

*Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III* [trans. William Richards]. Lahainaluna, 1842; reprint, Green Valley, Nev.: Ted Adameck, 1994; 242 pp.; \$40.00, cloth.

The Hawaiian approach to law and order was originally based upon tradition, custom, the *kapu* (taboo) system, and the will of the governing *alii* (chief). All of this was conveyed orally, as there was no writing. After the contact with westerners beginning with Captain Cook in 1778, sailing vessels of British, French, and American registry stopped at Hawaii in increasing numbers, and for the next forty years the personnel of more than one hundred ships spent time mingling with the Hawaiian people at all levels of society. Several westerners stayed ashore to become permanent residents.

The result of these interminglings was a gradual undermining of the traditional customary prohibitions, culminating in the formal abandonment of the *kapu* system in 1819. American Protestant missionaries began to arrive in 1820, and their leaders (as well as some of the visiting notables from England and the United States) urged that the Hawaiian Kingdom adopt and proclaim laws directing the form of government and the conduct of the people.

King Kamehameha II and his queen, Kamamalu, left to visit England on November 27, 1823. The older chiefs who had gathered at Honolulu remained together for a few days to discuss the affairs of the nation. Probably as a result of their deliberations, an order was proclaimed on December 21 requiring a strict observance of the Sabbath. Six months later, after some riotous behavior at Lahaina, Queen Regent Kaahumanu ordered a proclamation of what amounted to a brief code of laws. With apologies to the original Hawaiian, the specifics may be rendered as follows: "There shall be no murder. There shall be no theft. There shall be no boxing or fighting. There shall be no drinking of rum or beer. The Sabbath shall be the sacred day of Jehovah. All of the people shall learn to read and write as soon as schools are established."

The first written laws had been published in Honolulu on March 8, 1822, as two notices for the purpose of stopping disorders caused by sailors on shore leave. One of these announced that any seaman "found riotous or disturbing the peace in any manner" would be immediately "secured in the Fort, where he or they shall be detained until thirty dollars is paid for the release of each offender." Masters of vessels were informed that all deserters would be returned to their respective commanders. No seaman could be left on shore without the permission of the king. The other notice announced that "any foreigner residing" in Hawaii "who shall be guilty of molesting strangers, or in any way disturbing the peace, shall on complaint be confined in the Fort, and thence sent from the Islands by the first conveyance."

Here we have echoes of Hawaii's most famous unwritten law, the Law of the Splintered Paddle, or *Mamalahoe Kanawai*, proclaimed by Kamehameha the Great in about 1783. It is usually translated as "Let the aged, men and women, and little children lie down in safety in the road."

The growth of trade created the necessity for legislation governing commerce. Thus the second printed law, dated June 2, 1825, was for the regulation of the port of Honolulu. Continuing behavioral difficulties were sometimes met with a return to ancient methods, as with the effective imposition in 1825 of a *kapu* on the promiscuous immorality that had sprung up in the

ports of Honolulu and Lahaina—so effective that sailors engaged in armed demonstrations against it.

The older chiefs were consulted in 1827, and on December 8 the results of their deliberations were printed and proclaimed. This was the beginning of formal legislation by the Hawaiian chiefs. A later improved penal code in five chapters was promulgated, again in consultation with the chiefs, on January 5, 1835.

The growing complexity of relationships between foreigners and the Hawaiian government, including treaties with foreign governments, the continuing increase in trade, and a mounting struggle between the older chiefs and King Kamehameha III created an unstable situation. The young king was just short of eleven years old when he ascended the throne, both his parents having succumbed to measles in July 1824, in London. By 1835, he was old enough to flex his royal muscles by announcing that "I alone shall rule with justice over all the land, make and promulgate all laws: neither the chiefs nor the foreigners have any voice in making laws for this country."

The older chiefs had become accustomed to being consulted in a sort of council of chiefs, and were not about to acquiesce in the king's arrogation of all power to himself. They continued to meet and advise. The king began to be surrounded by Hawaiian advisers who were well educated and by missionary advisers who favored a more democratic government. A result of these influences and deliberations was a declaration of rights, which has been referred to as the Hawaiian Magna Carta, and of certain other laws, on June 7, 1839. These were in the nature of a civil code and were not intended to supersede the laws of 1835, which were a little criminal code.

By 1840 the laws of Hawaii and the organization of the Hawaiian government were in need of a more formal statement, which resulted in the Constitution of 1840, signed by the king and the premier after the council of chiefs had agreed. Though it was mainly descriptive of existing political institutions, it did create a representative body chosen by the people and a supreme court. Subsequent laws covered a wide array of subjects, including marriage and divorce, weights and measures, inheritance of lands, taxes, fishing, the making of roads, and specific crimes.

In 1842, this constitution, the subsequent laws, and some earlier ones still considered in force, were published together in both English and Hawaiian. The preface notes that the volume does not contain "the whole system of Hawaiian law, although it contains most of the printed statutes." This is the volume a reprint of which is now offered through the good offices of Ted Adameck.

The English translation of the official Hawaiian original is ascribed to the Reverend William Richards, one of a group of missionaries who reached Honolulu in 1823. Richards had been educated at Williams College, and after being stationed at Lahaina left the mission in 1838 to become an instructor to the Hawaiians in law, political economy, and the administration of affairs generally. He had the trust of the Hawaiian chiefs, and was proficient in the Hawaiian language. Before leaving Lahaina, he had translated seventeen books of the Bible, and four other works into Hawaiian.

According to the translator, some of the laws contained in the volume were first proposed by foreign visitors and commanders of vessels of war, some by foreign residents, and some by foreign consuls. "One or two" had been written by these people, but the "greatest proportion" were the result of study and advice from Hawaiian sources, including the House of Nobles and the House of Representatives. The influence of English and American sources is evident throughout, but each provision has its own Hawaiian flavor.

This reprint is a rare opportunity to complete one's library on the development of law in Hawaii. The Hawaiian version is especially valuable in demonstrating the ability of the Hawaiian language to accommodate concepts and expressions from a foreign one. The same English version appears as *The Laws of 1842 in Fundamental Law of Hawaii*, edited and indexed by Lorrin A. Thurston and published by the Hawaiian Gazette Company in 1904, but is itself in short supply.

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*On Appeal: Courts, Lawyering, and Judging*, by Frank M. Coffin. New York: W.W. Norton, 1994; 338 pp., notes, index; \$27.50, cloth.

Senior United States Circuit Judge Frank M. Coffin of Portland, Maine, has been a member of the Court of Appeals for the First Circuit for over twenty-five years. The candid glimpse he provides into our appellate process in *On Appeal* will enrich the lawyer and student, acclimate the legal historian and the law clerk, and give even the most experienced judge sentimental pause to reflect on our appellate system.

While Coffin's focus is the modern world of appellate practice, I found two chapters of particular interest to the legal historian. His treatment entitled "The Appellate World" is a succinct account of the evolution of the appellate process from the

Sixth Century Digest of Justinian through the English tradition and early American experience. He provides, as well, a brief appendix on what he calls "The Appellate Idea in History," in which he traces pre-Justinian origins in the ancient civilizations of Egypt, Mesopotamia, and the Hebrews to Greece and Rome and the Dark Ages.

After describing a typical calendar day of oral arguments in a federal appellate court, Coffin analyzes our broad appellate tradition from a historical perspective, presenting concerns of federalism and efficiency in straightforward terms. He pays due regard to the interrelationships of the state and federal courts, recognizing "the compelling importance of the state component of the binary star." While both systems face burgeoning and multifarious caseloads, the author highlights some of the burdens that state courts face, including the "inappropriateness of choosing judges by popular election," and forcefully reminding us that, unlike legislators and governors, judges have no constituents.

While Coffin does not purport to address the fundamentals of brief writing and oral argument exhaustively, the appellate practitioner would do well to read the chapters on those subjects. What "helps, irritates, and infuriates" the author is, as he suspects, "far from unique." The lawyer preparing for argument should ponder Coffin's characterization of oral argument as being something of a "creative disorder" in light of the delineated major functions of argument he discusses.

Coffin also nicely compares the models for post-argument judges' conferences in the Supreme Court, federal courts of appeals, and state appellate courts. His perception of how and why different cases are resolved should help counsel anticipate "the nature of some of these conferences."

On writing opinions, he is frank and thorough, and illustrates the competing pressures judges face to clear their dockets while ensuring that each case receives just consideration. Reasonable judges will disagree on methods. For example, when Coffin sees a polished bench memo from a law clerk, he confesses that he winces, thinking, "There goes a day or more that could have been spent on an opinion or scrutinizing a draft opinion of mine or a colleague." I, on the other hand, find a polished bench memo, if properly done, of tremendous assistance, thinking, "There was a day or more that was spent on the initial draft of an opinion." The point is that judges must constantly reassess their practices in the face of increased filings and unfilled vacancies and that, regrettably, modern judging forces the increased delegation of initial drafting to law clerks.

Coffin deems collegiality among appellate judges—an atti-



tude of intimacy, openness, respect, and understanding—to be of paramount importance. Noting the disagreements appellate judges have over significant issues, he believes that the “paradox of collegiality among independent peers is eminently worth thinking about, planning for, and struggling to maintain,” and “a guaranty of top judicial work.”

In his three chapters on judging appeals, he ponders the constitutional role of the judicial branch in our national government, and the spectrum of cases our branch must decide. While the nature of this material might lend itself to more diverse perspectives among judges than what preceded, common themes, like the judge’s sense of “judicial nerve,” should strike a common chord.

The appellate advocate should read and study *On Appeal*. Coffin does not conceal his belief that “the more an appellate advocate knows about the work ways and thought ways of appellate judges, the more effective an advocate he or she will be.” I have asked all of my recent law clerks to read this book at the start of their clerkships. The insight it provides can enhance “the vitalizing contribution of the clerkship institution” from day one. The book is both a delight and a reminder for judges—a delight in the shared values and experiences of judging, and a reminder that the challenges ahead warrant constant and renewed vigilance.

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*We, The Jury: The Jury System and the Ideal of Democracy*, by Jeffrey Abramson. New York: Basic Books, 1994; 224 pp., appendix, notes, index; \$25.00, cloth.

As one of the most prominent jury trials of the century recently unfolded, American had occasion to reflect on the merits and shortcomings of trial by jury. This timely book serves to nourish and structure such reflections. While submitting that the jury system “exposes the full range of democratic vices and virtues,” Jeffrey Abramson argues cogently that some of the vices can be ameliorated and that, in any event, the rewards of jury trials are well worth the risks.

The benefits of the jury system, he believes, are consonant with those of democracy itself. Trial by jury reflects the egalitarian principles of democratic society and its faith in the common sense of lay citizens. But Abramson observes quite rightly that the demands and pressures of jury service differ from those

imposed by other democratic institutions. The citizen-juror, for example, who exercises power directly rather than conferring it upon an elected representative, must engage in a dialogue with the other jurors, and must reveal to them his or her decision instead of retreating into the privacy of the polling booth. These unique pressures afford unique opportunities. In the author's words, the jury's ultimate purpose is "to act as the common conscience of the community." Not only can jury service give the individual a stronger sense of identification with the common weal, but it can serve as a medium through which citizens instruct each other in the meaning of justice, enabling civil society to mediate the relationship between the individual and government.

So far we can recognize, in essence, the ideals of late-eighteenth-century western liberalism, enshrined in the American Constitution as well as in the creation of trial by jury in France. Yet Abramson departs from these ideals in one crucial respect. Readily acknowledging that all of us are shaped by our experiences as members of a particular race, gender, religion, social class, or age cohort, he argues that juries are enriched rather than weakened by this diversity. Thus he applauds the Jury Selection and Service Act of 1968 and the Supreme Court decision in *Taylor v. Louisiana* (1975), which enjoined the representation of minority groups on the jury lists. Likewise, he supports recent Supreme Court rulings that forbid the use of peremptory challenges on the basis of race or gender.

In contrast, trends in jurisprudence that restrict the deliberative powers of the jury elicit the author's disapproval. Especially eloquent are his support for the principle of unanimous verdicts and his opposition to the view, advanced by a Supreme Court majority in 1972, that jury deliberations would be unaffected if this principle were abandoned. Abramson also opposes the strict separation of act and law in twentieth-century jurisprudence. While recognizing the dangers of jury nullification, he argues that "the conscience of the community" would be served if the courts formally endowed the criminal jury with a power that it already holds informally: to set aside the law to acquit a defendant. The author also advocates the abolition of peremptory challenges, regarding them as a cover for discriminatory exclusions. All of these reforms are justified as a means of enriching the quality of jury deliberations.

What ties the book together thematically is the author's admiration for the ideals that shaped the infancy of the American jury and his belief that these ideals can be applied usefully in contemporary law. Abramson submits that the jury should be envisioned not as a collection of "interest groups" but as a body whose very dependence on dialogue and compromise

helps us learn from our own diversity and achieve a common understanding of justice. Indeed, the greatest contribution of *We, The Jury* is to identify the political and philosophical issues that inform current debates on the jury system. Whether we agree with his proposals, we can admire the vision that animates them and applaud his meticulous research, fluid writing, and enthusiasm for this venerable institution.

Robert Allen  
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*Essays on English Law and the American Experience*, edited by Elisabeth A. Cawthon and David E. Narrett. College Station: Texas A&M University Press, 1994; 135 pp.; \$24.50, cloth.

Despite the title of this book, its only acknowledgment that there was any English law other than the common law comes from a brief reference to the law merchant and an endnote about Chancery law in the last chapter. No mention is made of the ecclesiastical and urban courts and the local and feudal courts that continued to exist after Henry II had established courts to administer the law affecting the king's peace. There is only brief mention of the Roman law once taught in England's universities, and admiralty law is not covered. This book confines itself to the common law and only to a few of its substantive aspects. American changes from English common-law procedures are not covered at all.

Nor is there much discussion about what the common law was in England. Richard Hamm writes that the common law is the "unwritten law" made by courts, lawyers, and judges in cases (not legislation and administrative rules), and that it began when kings issued charters creating royal courts and acknowledged the authority of ancient customs (p. 4). Calvin Woodward writes: "The common law actually developed in the cracks between the *authority* of law ('ancient custom') and all other *forms* of law, including the king's will" (p. 134). Elisabeth Cawthon writes that the common law became the law that was nurtured by the Inns of Court. In due time in England legislation superseded much of the old common law.

The American retreat from the common law, according to Hamm, began when constitutions were written, making the sovereign people rather than custom the foundation of the law. Craig Evan Klafter's interesting chapter, "The Americanization of Blackstone's Commentaries," demonstrates how the strong influence of Blackstone was reinterpreted or countervailed. The adoption of codes furthered the retreat.

The chapter on fencing law illustrates that American courts went back to English common law precedents when it suited their purposes. Endnotes refer to the articles by Grady McWhiney and Forrest McDonald on the Celtic origins of Southern grazing practices.

The aim of the book is to show the relationships between socioeconomic and legal change by examining how and why Americans utilized the English common law or departed from it. Unlike William E. Nelson's *Americanization of the Common Law*, which focused on Massachusetts between 1760 and 1830, *Essays on English Law and the American Experience* takes a more general approach. Since it grew out of the Walter Webb Memorial Lectures at the University of Texas at Arlington, Cawthon's chapter on workers' compensation law focuses on Texas and Yashude Kawashima's chapter deals with "Fence Laws on the Great Plains, 1865-1900."

On the subject of relationships between law and society, Thomas P. Slaughter's "The Politics of Treason in the 1790s" shows how Americans reworked the English law, reflected in the federal Constitution's treason clause, to cope with the fierce political struggles in the new republic. Cawthon's chapter competently outlines the evolution from master/servant to employer/employee assumptions behind the legal treatment of on-the-job injuries. She summarizes the roles of the fellow-servant and assumption of risk rules, and of contributory negligence doctrine, in limiting employers' liability. She then describes English and American efforts to give more protection to workers. Special circumstances in Texas resulted in the restatement of some ancient English ideas. Because this is a book of essays, we are not given much detailed description of how the laws affected specific categories of workers.

The contributing authors vary in rank, from research fellow and assistant professor to full professor. As the preface says, each of them "has an academic background in both United States and English history as well as other areas of comparative history and law." Except for Calvin Woodward (who teaches law), they teach in history departments.

The book provides a sampler and does not pretend to be exhaustive in its coverage. It does make some readable and interesting contributions to our knowledge about the influence of English law on American law. Much more remains to be said, of course, about relationships between socioeconomic and legal changes.

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*Lawmen and Desperadoes: A Compendium of Noted, Early California Peace Officers, Badmen and Outlaws, 1850-1900*, by William B. Secrest. Spokane: Arthur H. Clark, 1994; 344 pp., illustrations, bibliography, index; \$37.50, cloth.

William B. Secrest's *Lawmen and Desperadoes: A Compendium of Noted, Early California Peace Officers, Badmen and Outlaws, 1850-1900*, is obviously a labor of love. As its title indicates, it is about law and order in frontier California. Containing fifty-four sketches about good guys and bad, the book is adorned with wonderful old photographs and illustrations, some from Secrest's own collection.

If you have a favorite character from California's criminal history, it will be easy for you to look him up, since each chapter describes the exploits of one man (no women are featured) and the chapters are arranged in alphabetical order. You will learn where and when your protagonist was born and how and when he reached California. You will read about his career on one side or other of the law, and you will learn the date and place of his death—if it is known.

The end of each chapter is accompanied by a list of principal sources. Secrest has compiled his information from original material, including newspaper articles and records from San Quentin and Folsom prisons. He has also included an extensive bibliography.

However, *Lawmen and Desperadoes*, despite the wealth of facts contained between its covers, lacks perspective. The reader will discover, for instance, that Tiburcio Vasquez "was a thorn in the side of California lawmen for nearly 20 years" and read a list of his known exploits, but will not learn about the underlying society. There is no discussion of California's economic or social climate, what these characters may or may not have been like, no analysis of why the badmen became bad in the first place. Secrest does not appear to notice that all the lawmen had northern European surnames while a number of the outlaws' names were Hispanic, much less discuss why that was. You will learn the bare bones of individual lives, but to flesh them out with historic context you must look elsewhere.

Another difficulty is the literary style: Secrest needs a better editor. The writing is wooden, cliché-ridden (the phrase "died with his boots on" is used several times), and sometimes unconsciously funny, as in the opening line about "Rattlesnake Dick" (Richard A. Barter) which reads, "A native of Canada where he was born." Unfortunately, these shortcomings make for a tough read.

If you need superficial information about colorful figures

in California's history, this book might be useful. If your children are fascinated with crime stories of the Old West, they will love it. If, however, you want a serious treatment of California history, *Lawmen and Desperadoes* is not the book for you.

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Pasadena

*Legal Research: Historical Foundations of the Electronic Age*, by George S. Grossman. New York: Oxford University Press, 1994; 384 pp., illustrations, notes, index; \$45.00, cloth; \$18.95, paper.

At a time when an abundance of legal research and legal writing texts incorporates research sections, one must ask whether George Grossman's *Legal Research: Historical Foundations of the Electronic Age* is simply yet another legal research manual of the "how to" genre, albeit disguised as a legal history treatise. Or does it break from the mold of legal research text and more resemble a classical analytical work of legal history, as exemplified by Baker's *Introduction to English Legal History*, Wilson's *Historical Foundations of the Common Law*, and Friedman's *History of American Law*, to mention just a few?

The answer is critical, for understanding the character of the work is crucial to the reader's benefitting from its underlying thesis. Grossman's hypothesis is quite multilayered as he addresses the development of legal information and how this knowledge could, and should, be used with the emergence of the "digital electronic media." By advocating a traditional examination of the past to prevent future mistakes, he suggests that all those involved with legal information, whether users or private- and public-sector publishers, must become more aware of many intertwined issues, including preservation, duplication, accuracy, and so on. History demonstrates these issues either as being resolved successfully and needing to be continued, or as being failures needing to be corrected in the new information age.

Grossman focuses on the development of legal information through the broad categories of case law, legislation, administration, treatises, and legal periodicals. Each topic has a chapter devoted to it, with the exception of administration, which has a separate chapter for "Administrative Publications in England" and "Administrative Publications in the United States." The other chapters are divided into English and United States sec-

tions, each containing the author's discussion and the accompanying readings with which he elaborates upon his premises.

Overall, Grossman's comments hold the readings together with a succinct and critical narrative that places the source of information in its historical, legal, and political context. These comments, though in summary form, expertly establish a sense of the legal profession's needs at a given moment and of how these needs for information in turn have driven the development of the information sources. For example, in the chapter "Legislation in England," the author's note titled "The Early Stages of Legislation" has brief descriptions of ancient law, Roman law, civil law, and Anglo-Saxon law. These are followed by a reading from F.W. Maitland's *Constitutional History of England*. Although obviously not designed to be comprehensive, the notes do serve either to provide a quick refresher or to indicate an area where the reader should seek additional information. However, because of their brief nature, unintended inferences sometimes occur. In the civil law section, comments about the codification process "enacted by Justinian—together known as *Corpus Juris Civilis*"—might lead the reader to think that the *Corpus Juris Civilis* came from Justinian rather than first appearing as a title for the complete edition of his work over a thousand years later, in 1583.

As valuable as the notes are (one could gain considerable insight from them alone), the readings by a cross-section of authorities buttress Grossman's positions. One of my few quibbles with the work relates to the absence of footnotes with the readings. Their inclusion would have enhanced the book's usefulness in bibliographic research, even though that was not the author's primary purpose.

The true value of *Legal Research: Historical Foundations of the Electronic Age* requires that it be read completely rather than simply gone through in a kind of chapter surfing. Without such a reading, its epilogue would be wasted. This would be a pity, since the chapter's note and its reading selection, "The Substantive Impact of Technology," advance ideas that challenge the core concepts and practices of the legal information gathering and dissemination processes. As Grossman puts it, "Like the revolutions sparked by Gutenberg's press in the fifteenth century, new forms of communication can alter the substance of the law, the fabric of society, and the very makeup of the human mind."

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*Legal Research in California*, by John K. Hanft. 2d ed. San Francisco: Bancroft Whitney, 1996; 351 pp., appendices, index; \$35.00, paper.

Traditionally, the process of legal research has consisted of an analytical assessment, a search, and an application, all of which are ineffectual if the researcher cannot identify the necessary information and learn how that information is to be applied. It is from this perspective that I review Hanft's *Legal Research in California*, one of the most recently published books on the topic available today.

Hanft describes his book as "a basic legal research guide with two intended functions: (1) as a textbook, it is designed to introduce students to the fundamental concepts and standard publications used in California legal research, [and] (2) as a reference book, it is designed to provide practitioners with quick answers to common questions about legal research and law practice in California." Hanft's two-pronged approach succeeds in this second edition of his book, which describes techniques in bibliography and research in an effective, complementary fashion. Improved graphics and a clear type style enhance the book's general readability, instructional utility, and ready-reference value. Hanft focuses on law materials in California, tangentially covering those at the federal and national levels as well.

As with the first edition, organization is an area in which *Legal Research in California* shines; the text is divided into chapters, each of which covers a broad research topic, and the chapters are subdivided into sections, which are effectively linked by cross-references to related material in other parts of the book. The alphabetical index is sufficiently technical for the practitioner yet topically general enough for the student or legal novice to use with ease. Of particular use to practitioners and law students is chapter 13, "Resources in Major Practice Areas," wherein a wide range of primary and secondary materials for almost twenty different practice areas is comprehensively presented in an easy-to-use format. The author also includes separate chapters devoted to the legal materials produced by each branch of government, including local government sources, which have previously been a flimsy area for bibliographic control.

Hanft's coverage of multimedia legal research sources has been strengthened in this current edition, and the balance of online vs. manual sources is effective. However, while he has expanded the chapter on computerized research to include Internet resources and reference to major guides for online research, his discussion does not fully apprise the reader of the



possible pitfalls in relying solely on online utilities for legal research. This is important, for researchers must be able to evaluate the credibility of information they obtain, regardless of its source or ease of acquisition. Here, areas of concern include the authority, scope, currency, bibliographic control, and security of the database system involved, and not merely the exclusion of graphic material or pagination to match the original print copy, as Hanft suggests. Although the author himself describes the presentation of material in this book as "illustrative, not definitive," he should have stressed the importance of initial database selection (using *Gales Directory of Databases*, or a similar source) and database training, especially for Lexis or Westlaw, before researchers attempt to search online. Vender representatives and/or monographs such as *Using Computers in Legal Research: A Guide to Lexis and Westlaw*, by Wren and Wren, are useful references for the knowledgeable researcher but not effective substitutes for initial preparation and training.

Nonetheless, the new *Legal Research in California* is a good first stop for inexperienced legal researchers who have defined the information they need and must find and apply it to their own research projects. I recommend it for law students, paralegals, and beginning legal practitioners. Researchers from a non-legal background (or lawyers venturing into an unfamiliar area of law) will find the book useful for identifying helpful sources, which may then be used in conjunction with more general treatises such as *Fundamentals of Legal Research*, 6th ed. (and its companion volume, *Legal Research Illustrated*), by Jacobstein, Mersky, and Dunn, to learn more about the procedural aspect of legal research. Those needing a generalized (i.e., non-state specific), illustrated treatment of the subject should consult *Legal Research in a Nutshell*, 5th ed., by Cohen and Olson. Researchers looking for a more comprehensive methodological treatment of legal research in California are referred to Daniel W. Martin's excellent book, *Henke's California Law Guide*, 3d ed., a recent update of the bibliographic standard in this field. In sum, Hanft's new *Legal Research in California* has much to offer, and its permanent value is to be found in its contribution to other texts in the field of legal research.

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*Doing Oral History*, by Donald A. Ritchie. New York: Twayne Publishers, 1994; 265 pp., appendix, notes and references, bibliography, index; \$26.95, cloth; \$14.95, paper.

Donald Ritchie's book, *Doing Oral History*, doesn't disappoint. The cover tells us that the book provides "Practical advice and reasonable explanations for anyone" on subjects ranging from starting an oral-history project through presenting oral history. Ritchie delivers on all fronts, and indeed the emphasis of this book is where it claims to be, on the *doing*.

Ritchie delivers on more than one level, however, and thus *Doing Oral History* avoids the less lively aspects of how-to books as a genre. To illustrate his points, he draws on examples taken from his vast experience in the field. In addition, the book abounds with concrete examples taken from the work of colleagues, each example interesting for its content as well as for the point it serves to make.

The book is full of practical advice, but it is the quality of gems such as the following in the first chapter that keeps it so readable: "Memories start with the initial perception. Interviewees speak from their own points of view, and no two will tell a story exactly alike. Not everyone had a clear picture of what happened, understood what it meant, or felt self-assured enough to accept responsibility. The contradictory tales told in the classic film *Rashomon* (1951) represent the tellers' differing impressions, self-images, and self-delusions, but not poor memories" (p. 13). Later in the same chapter comes a practical lesson: "The oral historian conducting even a subject-oriented project should seriously consider expanding the scope of the questions to record as much as possible about each interviewee's life."

*Doing Oral History* is the right place for the newcomer to the field, as is aptly demonstrated by the advice on such basics as the importance of testing equipment in advance, and the need for extra tape, batteries, and an extension cord. The notes and references are full of information, making the book equally appropriate for the experienced oral historian looking for resources. One example of this is the chapter on teaching oral history, which directs the reader to many sources that eliminate the need to reinvent the wheel when taking oral history to the classroom.

In a few instances, those who have conducted and processed oral-history interviews will take issue with Ritchie's advice, but, given the scope of material offered, these are of minor significance. The author suggests audit-editing the tapes; given unlimited resources and time, this is a good idea, but it doesn't address such things as cost considerations, the experience of

the transcriber, and difficulties presented by the tape, such as the interviewee's speaking style or technical problems affecting the quality of the transcription. Another possible minor point of disagreement is Ritchie's advice to decline to interrupt an interview when something is off the record. Other issues such as rapport and trust should be addressed, but his point is well taken, and those of us who practice oral history know that such judgments are difficult to make, and that we may never know the ultimate wisdom of our choices.

None of these points detracts from Ritchie's success in tackling a large subject. *Doing Oral History* offers us a thoughtful treatment on a much-beloved subject. It encourages the novice, and offers those with experience useful definitions, such as, "An interview becomes an oral history only when it has been recorded, processed in some way, made available in an archives, library or other repository, or reproduced in relatively verbatim form as a publication. Availability for general research, reinterpretation, and verification defines oral history" (p. 5). Ritchie addresses concerns head-on, offers valuable observations, defines uncommon terms, and provides practitioners and newcomers with useful information. His book is a welcome addition to the field, and one to which I have already referred several enthusiastic individuals.

Leah McGarrigle  
University of California, Berkeley

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#### BRIEFLY NOTED

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*The American West in the Twentieth Century: A Bibliography*, edited by Richard W. Etulain with Pat Devejian, Jon Hunker, and Jacqueline Etulain Partch. Norman: University of Oklahoma Press, 1994; 456 pp., index; \$65.00, cloth.

As the twenty-first century approaches, western historians have increasingly turned attention to the twentieth century, as this extensive (though not exhaustive) bibliography demonstrates. Divided into twelve major categories, including one entitled "Constitutional and Legal History, Violence, and Extralegal Developments," this is an excellent place to begin any study of the American West's twentieth-century history, legal or otherwise.

*The Trans-Mississippi West 1804-1912, Part I, A Guide to Records of the Department of State for the Territorial Period*, compiled by Robert Kvasnicka. Washington, D.C.: National Archives and Records Administration, 1993; 131 pp., appendices, index; \$12.00, paper.

*The Trans-Mississippi West 1804-1912, Part II, A Guide to Records of the Department of Justice for the Territorial Period*, compiled by Robert M. Kvasnicka. Washington, D.C.: National Archives and Records Administration, 1994; 128 pp., appendices, index; \$12.00, paper.

Covering the period from the Louisiana Purchase to the admission of New Mexico and Arizona to the Union, these volumes are indispensable for researching federal records in the National Archives relating to the American West. Each record group is described in some detail, often with explanations as to the documents' arrangement. Appendices list the records' availability on microfilm at regional archives.

*Researching Western History: Topics in the Twentieth Century*, edited by Gerald D. Nash and Richard W. Etulain. Albuquerque: University of New Mexico Press, 1997; 232 pp., index; \$50.00, cloth; \$24.95, paper.

In nine original essays, noted scholars suggest research opportunities and perspectives on such topics as economic, political, cultural, urban, and environmental history as well as gender studies. Legal history is subsumed under many of these topics, but never clearly addressed as a subject for study in its own right. Still, legal historians can use these essays to stimulate their own lines of inquiry.

*The Sourcebook of Federal Courts: U.S. District and Bankruptcy*, edited by Carl R. Ernst. 2d ed. Tempe, Ariz.: BRB Publications, 1996; 640 pp., \$35.00, paper.

This handy reference tool provides an overview of the structure of the federal courts, how they manage their case records, and how federal court records can be searched, including by electronic access. The main section of the guide profiles the district and bankruptcy courts in each state, explaining how cases are indexed and listing addresses, telephone numbers, and fees. County maps accompany each state, indicating which district court has jurisdiction.

*The Sourcebook of County Court Records*, edited by Carl R. Ernst. 3d ed. Tempe, Ariz.: BRB Publications, 1997; 560 pp., \$36.00, paper.

This comprehensive guide provides quick access to more than 6,700 civil, criminal, and probate courts that have jurisdiction over the more significant cases under state law. Each court structure in the fifty states is profiled, and detailed descriptions are given for the courts within each county. A cross-reference at the end of each state entry provides access to the appropriate county court by city name. Fees, telephone numbers, addresses, and discussion of online access make this a time-saving research aid.

*A Dictionary of Modern Legal Usage*, by Bryan A. Garner. 2d ed. New York: Oxford University Press, 1995; 953 pp., \$65.00, cloth.

Offering more than simple definitions, this dictionary will aid lawyer and layman alike in clarifying legal language. Definitions abound, but so do explanations of grammar and semantics, with the goal of making legal writing more direct—an admirable and necessary aim.



## ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

AALL Citation Formats Committee, "The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Case Citation," *Law Library Journal* 89:1 (Winter 1997).

Alschuler, Albert W., "Rediscovering Blackstone," *University of Pennsylvania Law Review* 145:1 (November 1996).

Berring, Robert, "On Not Throwing Out the Baby: Planning the Future of Legal Information," *California Law Review* 83:2 (March 1995).

Bintliff, Barbara, "From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age," *Law Library Journal* 88:3 (Summer 1996).

Biscardi, Francine, "The Historical Development of the Law Concerning Judicial Report Publication," *Law Library Journal* 85:3 (Summer 1993).

Brown, Louis M., "Lawyering Decisions: New Materials for Law Libraries to Collect," *Law Library Journal* 87:1 (Winter 1995).

Burbank, Stephen B., "The Past and Present of Judicial Independence," *Judicature* 80:3 (November-December 1996).

Cohen, Eileen B., "Teaching Legal Research to a Diverse Student Body," *Law Library Journal* 85:3 (Summer 1993).

Daly, Gail M., "Bibliographic Access to Legal Research Databases Reconsidered," *Law Library Journal* 87:1 (Winter 1995).

Danner, Richard A., "Facing the Millennium: Law Schools, Law Librarians, and Information Technology," *Journal of Legal Education* 46:1 (March 1996).

Diamond, Valerie Frances, "Women in Law, A Novel Approach, 1980-1996: An Annotated Bibliography of Selected Works of Fiction Featuring Women in the Legal Profession," *Legal References Services Quarterly* 16:1 (1997).

Eisenberg, Theodore, and Kevin M. Clermont, "Courts in Cyberspace," *Journal of Legal Education* 46:1 (March 1996).

Feldman, Stephen M., "From Premodern to Modern American Jurisprudence: The Onset of Positivism," *Vanderbilt Law Review* 50:6 (November 1997).

Fritz, Christian G., "Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate," *Hastings Constitutional Law Quarterly* 24:2 (Winter 1997).

Goldberg, Perry M., and Marci Rothman Goldberg, "Putting Legal Research into Context, A Nontraditional Approach to Teaching Legal Research," *Law Library Journal* 86:4 (Fall 1994).

Goodwin, Alfred T., "How the Supreme Court Employs Inferior Courts as Messengers," *Oregon Law Review* 75:3 (Fall 1996).

Haigh, Richard, "What Shall I Wear to the Computer Revolution? Some Thoughts on Electronic Researching in Law," *Law Library Journal* 89:2 (Spring 1997).

Kalman, Laura, "Border Patrol: Reflections on the Turn to History in Legal Scholarship," *Fordham Law Review* 66:1 (October 1997).

Keane, Peter G., "The Jury: Some Thoughts, Historical and Personal," *Hastings Law Journal* 47:5/6 (July/August 1996).

Lynch, Michael J., "An Impossible Task but Everybody Has to Do It: Teaching Legal Research in Law Schools," *Law Library Journal* 89:3 (Summer 1997).

Mongelli, William D., "De-Mystifying Legal Research for Prisoners," *Law Library Journal* 86:2 (Spring 1994).

Parrish, Jenni, "A Guide to American Legal History Methodology, with an Example of Research in Progress," *Law Library Journal* 86:1 (Winter 1994).



Ray, Laura Krugman, "Judicial Fictions: Images of Supreme Court Justices in the Novel, Drama, and Film," *Arizona Law Review* 39:1 (1997).

Sanders, Sandra, "Arizona's Public Records Laws and the Technology Age: Applying 'Paper' Laws to Computer Records," *Arizona Law Review* 37:3 (1995).

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