

# WESTERN LEGAL HISTORY

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*Cover Photograph:* Sarah Herring Sorin sits in her law office surrounded by the extensive law library built by her father, William Herring. [Courtesy of Arizona Historical Society, Tucson, #29361]



# JUDGE WEBSTER: "THERE IS SOMETHING SACRED ABOUT THE WORK OF THE COURT"

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JAMES G. NEWBILL

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**T**he tired eyes, sagging face, and muffled figure of retiring Judge John Stanley Webster bore only a faint resemblance to the young man he had been when he began his legal career forty years earlier. In an early photograph, his clear, youthful gaze and well-formed mouth, his neatly parted, thick hair, impeccable new suit, and starched white collar stand in sharp contrast to the obviously tired and physically weakened sixty-two-year-old judge who was retiring from the federal bench.

Even the briefest sketch of his life gives more than a hint as to the reasons for his appearance at his retirement. Webster's personal and professional lives had both been emotionally intense, especially in the first half of his career, when he was a prosecutor and then a congressman. It was his experience on the bench that he seemed to enjoy most and that gave him the most satisfaction.<sup>1</sup>

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<sup>1</sup>A quick caveat is necessary in this introduction. The original sources relating to Webster are scattered and often frustratingly thin. Except for one federal case, he would not be classified as a nationally prominent figure. But there is enough material, and his career was so varied, that one can discern personal facets of an interesting life and, perhaps of greater importance, how those facets reflect several vital regional and national issues of his day. As Thomas Babington Macaulay advised, the best history is based on those carefully selected facts that reveal the whole picture. I hope that the following detail reveals, without distortion, aspects of the man and some of the history of his time.

Lack of sources will not be a significant problem in the case of the more recent judges of the U.S. District Court, Eastern District of Washington, since the Eastern District of the Washington Historical Society is gathering detailed interviews with all the living active and retired judges and magistrates of this area.



Judge John Stanley Webster looked tired at the time of his retirement from the federal bench. (Courtesy of the Historical Photograph Collections, Washington State University Libraries)

John Stanley Webster was born on February 22, 1877, in Cynthiana, Kentucky. This small town on the south fork of the Licking River, in bluegrass country, held an important position as the county seat of Harrison County. In the early nineteenth century, it was the point of departure for locally built flatboats, which carried produce on the Licking north to the Ohio, then down the Mississippi to the New Orleans market. Cynthiana held minor distinction as one of the

towns where the young Henry Clay practiced law and also where two Civil War skirmishes were fought, the last resulting in the burning of most of the buildings in the town's center.<sup>2</sup>

Webster attended public schools, then Smith's Classical School for Boys. His eventual decision to train for the legal profession meant that he had to choose among three educational options: the common practice of "reading law" with an experienced attorney, attending the University of Louisville, or attending a law school outside of the state. In 1897, Webster chose the latter course, entering University of Michigan Law School, following the path of about a dozen other young Kentuckians of that era, including one of his fellow Cynthians. A measure of his success there is his election as president of his class, 1898 to 1899, foreshadowing his future in politics.<sup>3</sup>

Webster returned to Cynthiana and practiced law there until 1902 when, at the age of 25, he was elected prosecuting attorney of Harrison County.<sup>4</sup> Although his mother had been a Unionist, Webster's veteran father and most people in Harrison and neighboring counties were Democrats. In his later Washington State career, however, Webster would be a staunch Republican. Such a political shift was not particularly difficult, since both late nineteenth-century Kentucky Democrats and twentieth-century Republicans, at least after the Progressive Era, were on the conservative side of the political spectrum.

As a young prosecutor, Webster revealed outstanding skills. Not a single suit against the county was successful, and every case brought by Harrison County succeeded. He was vigorous and determined, and, not surprisingly, he gained public attention with his strong pursuit of controversial cases, such as those involving Kentucky's notorious "feudalists."

<sup>2</sup>Robert M. Peter, M.D., *History of Bourbon, Scott, Harrison, and Nicholas Counties, Kentucky* (Cincinnati, 1882), 247–48, 250–54. The town's name came from the combination of Cynthia and Anna Harrison, daughters of one of the eighteenth-century pioneers.

<sup>3</sup>"Webster File," Bentley Historical Library, University of Michigan. Letter to author from Karen L. Jania, assistant reference archivist, University of Michigan, January 6, 2000; letter to author from Kurt X. Metzmeier, reference systems librarian, University of Kentucky College of Law, February 1, 2000. Webster later served two terms as president of the Michigan Alumni Association of Spokane.

<sup>4</sup>There was a political dispute among the Democrats as to whether the county chairman could appoint Webster to fill the vacant position of prosecutor. The court finally ruled that Webster's name could be placed on the ballot, and he won. *The Log Cabin*, October 19, 1901.

Harrison County's feuding families had been involved in confrontations, violence, and even murder for years.<sup>5</sup> This phenomenon was part of eastern Kentucky's sordid experience with lawlessness and, at times, anarchy, which lasted from the end of the Civil War until 1912. The war inflamed the independent-minded Scotch-Irish farmers in the Appalachian foothills. As one historian describes the attacks, mayhem, and vendettas by various groups, "It would be difficult to distinguish between contending forces except that one murdered and plundered under the Stars and Stripes and the other under the Stars and Bars. . . . Kentucky had become a refuge for a mass of vicious bandits and cutthroats."<sup>6</sup>

After the war, political partisanship (Democrats v. Republicans/Fusionists), vigilantism, marauding gangs, deeply felt loyalties to clans—fueled sometimes by excessive consumption of whiskey—made eastern Kentucky one of the most violent regions in American history. One periodical indicated that there were more homicides in Kentucky in 1878 than in all of New England, Pennsylvania, and Minnesota.<sup>7</sup> Readers of other national publications probably were shocked to learn that Kentucky had more reported homicides in 1890 than any other state of the Union except the more populous New York.<sup>8</sup> The Hatfield-McCoy feud of Kentucky and West Virginia was becoming an American legend, but there were other, less famous feuds that were just as serious. One of these would eventually sweep young Webster into its vortex.

It began at the turn of the century with more than forty assassinations in a year's time in Breathitt County. Jackson, the county seat, was located about eighty miles southeast of Cynthiana. When two men were tried for one of the murders, troops had to surround the courthouse to maintain order. The result of the trial was a hung jury, 11–2 for conviction. The venue was moved to Cynthiana,<sup>9</sup> and J. Stanley Webster

<sup>5</sup>There were thirty "feudalist" murders in the county over a period of several months. *The Log Cabin*, August 22, 1903.

<sup>6</sup>Steven A. Channing, *Kentucky, A Bicentennial History* (New York, 1977), 127.

<sup>7</sup>*Nation*, quoted in Hambleton Tapp and James C. Klotter, *Kentucky: Decades of Discord, 1865–1900* (Frankfort, Ky., 1977), 400.

<sup>8</sup>Channing, *Kentucky*, 139, 153. See Robert M. Ireland, "Law and Disorder in Nineteenth-Century Kentucky," *Vanderbilt Law Review* 32 (1979): 281–304 for an analysis of the legal structure that promoted such lawlessness.

<sup>9</sup>Thomas D. Clark, *Kentucky: Land of Contrast* (New York, 1968) 218–22, 225. Also see L.F. Johnson, *Famous Kentucky Tragedies and Trials* (Cleveland, Ohio, 1922) 320–36.



John Webster returned to Cynthiana to practice law. In 1902, at the age of 25, he was elected prosecuting attorney of Harrison County. (Courtesy of the Historical Photograph Collections, Washington State University Libraries)

became an important member of the team of prosecutors at this second trial.

Although the senior prosecutors naturally were important at the trial, young Webster's passionate presentations were noted, especially his speech at the conclusion of the trial. In it he condemned the Breathitt County political clique and its corruption by declaring,

In the hereafter, when time shall be no more and the angel Gabriel shall come forth and blow the final blast, James Hargis and Ed Callahan [the political leaders supposedly behind the assassination] will read by the red fires of hell the story of the murder of James B. Marcum at the hands of this tool Curtis Jett.<sup>10</sup>

The nineteenth-century love of florid oratory is even better illustrated by Webster's peroration to the jury:

The trail of the serpent is apparent throughout the case. My zeal is for the defense of all courts of justice in our state, as well as for conviction in this case. They [the defendants] have dragged their slimy garments into our court, but I pray you, gentlemen, not to let their slime remain on our court which has been pure and undefiled. Several millions of people are looking upon Harrison County to see what it will do. I ask you to hang these murderers, and with that request and a supplication to God to witness my motives are pure in making the request, I submit the case to your hands.<sup>11</sup>

Eleven of the jurors argued for the death penalty, but one who, it was said, had a grudge against Webster held out for a life sentence. Rather than undergo a second mistrial, all finally agreed to life imprisonment.<sup>12</sup> Within a few years after the trial, the long era of feudalist anarchy and violence was over. A new generation, looking to develop the commercial and industrial base of Kentucky, knew that such lawlessness could no longer be tolerated.<sup>13</sup>

For J. Stanley Webster, the intensity of this trial—with its frightening threats against his life—combined with his own sensational divorce, caused such personal anxiety that he left Kentucky in 1906. He moved across the country to tiny Deer Park, Washington, near Spokane, to enjoy a more settled life of farming.

In 1906, Spokane was barely three decades old and rapidly growing as a result of a balanced economy of Palouse wheat, Idaho mining, flour mills, lumber, fruit, banking, and four

<sup>10</sup>*Ibid.*, 226.

<sup>11</sup>*The Log Cabin*, August 14, 1903.

<sup>12</sup>Clark, *Land of Contrast*, 227.

<sup>13</sup>Otis K. Rice, *The Hatfields and the McCoys* (Louisville, 1978), 116–17, and Channing, *Kentucky*, 160–63.



major railroads.<sup>14</sup> Webster's farming venture at nearby Deer Park did not last long, because he was quickly drawn into public service in bustling Spokane, which, like his Kentucky hometown, was the center of county government.

Fred C. Pugh, an old friend from the University of Michigan, was Spokane County's prosecuting attorney, and he persuaded Webster to serve as his deputy. From 1906 to 1908, Webster was Pugh's chief trial lawyer and, as such, developed a reputation as a tough prosecutor.<sup>15</sup>

In 1908, Acting Governor M.E. Hay appointed Webster a superior court judge—at thirty-one the youngest judge on the Washington bench. Also that year, Webster married Mary Gertrude Lathrum, originally of Oakesdale, a small wheat-farming community forty miles south of Spokane. She was the daughter of John Lathrum, longtime sheriff of Whitman County.<sup>16</sup>

Young Judge Webster's career was developing rapidly, but it would almost founder in the next two years as it became entangled in a scandal involving a local secret lodge, the Industrial Workers of the World "free speech" controversy, and allegations about Webster's earlier life in Kentucky.

In August 1909, the activities of a secret lodge called Panta Pantois (a corruption of "Pantages," the name of the building where the order met) were made public. City Police Commissioner Carl W. Tuerke was a "Pan Tan," as the members were called, and, evidently, he had not agreed with the group's motto, "One for all and all for one." He had refused to support two candidates for promotion in the Spokane Police Department. Tuerke was removed from the lodge, with Judge Webster handling that formality in a "cutting . . . sarcastic, biting" manner.<sup>17</sup> Tuerke went public, causing a local sensation. The mayor appointed an investigating committee, which reported that the two-year-old group had approximately seventy-five members, one-third of them public officials, including three superior court judges. The secret fraternity's activities had

<sup>14</sup>The railroads were advertising heavily in an attempt to lure easterners out to the Inland Empire. It is possible that Webster may have come to Spokane in response to that advertising. There are numerous histories of Spokane and the Inland Empire. The WPA guide (1941) contains helpful detail, Lucile F. Fargo's *Spokane Story* (1950) is well written, and *Spokane and the Inland Empire* (1991), edited by David H. Stratton, has a series of scholarly analyses of the area.

<sup>15</sup>Charles H. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991* (Pullman, Wash., 1992), 343.

<sup>16</sup>*Ibid.*, plus biographical introduction to the "Webster Papers" in the archives of the Washington State University Library.

<sup>17</sup>*Inland Herald*, May 15, 1910, 3.

been confined largely to political matters, and particularly to securing public office for its members . . . [and the organization] contains tendencies inherently dangerous to good government. Public officials wholly or partially procured through the activities of such a society can not be permanently free from the pressure of the special obligations thus created.<sup>18</sup>

Although the committee's report did not specifically mention earlier charges that Webster had received his judicial appointment as a result of the support of his fellow "Pan Tans," charges he had vigorously denied in a letter to the governor, the hint of political influence remained. The "Pan Tan" scandal resulted in the society's being disbanded that same year. Commissioner Tuerke was removed from office by his fellow commissioners in 1910, but his role in Webster's troubles was not over.

In the meantime, the "Wobblies" had come to town. The Industrial Workers of the World (I.W.W.) had been founded in Chicago in 1905 and, although never a large union, had attracted nationwide attention. Their opposition to capitalism, their unorthodox support of unskilled workers, their ready use of strikes, and their provocative street-corner organizing and oratory made the Wobblies both hated and feared.

Because of its history of labor conflicts, Spokane reacted strongly against aggressive labor tactics. A dangerous confrontation in 1894 with protestors in "Coxey's Army" had led to arrests and forced deportations of the protestors by rail. In that same year, the Pullman strike in Illinois spilled over into Spokane and nearby Sprague. The antilabor atmosphere was intensified by reaction to the programs and organizing efforts of both the Knights of Labor and the militant Western Federation of Miners.<sup>19</sup> Thus the activities of the radical I.W.W. in 1909 met solid resistance.

The I.W.W. had begun recruiting in Spokane in the fall of 1908, and by March 1909 had enrolled fifteen hundred members.<sup>20</sup> In October 1909, almost exactly when the "Pan Tan" scandal ended, the Wobblies attacked the use of unethical employment agencies that took advantage of migrant workers. Once the workers received their first checks and paid their

<sup>18</sup>*The Spokesman-Review*, October 3, 1909, 11. Also see issues of August 6, 7, 8, and 22.

<sup>19</sup>Carlos A. Schwantes, "Spokane and the Wageworkers' Frontier: A Labor History to World War I," in David H. Stratton, ed., *Spokane and the Inland Empire* (Pullman, Wash., 1991), 132-34.

<sup>20</sup>Helen C. Camp, *Iron in Her Soul: Elizabeth Gurley Flynn* (Pullman, Wash., 1995), 22.

fees to the employment agencies, they were fired. Then the fired workers were quickly replaced by new hires who owed agency fees. The bitter joke among the workers was "one man going to a job, one man on the job, and one man leaving the job."<sup>21</sup>

The I.W.W. took to the sidewalks, speaking out against these shady employment practices by "sharks." Because of a 1908 city ordinance forbidding this type of public speech, hundreds were arrested and jailed under tough conditions. Their fight for "free speech" produced criminal prosecutions, as well as several I.W.W. suits against the city for the overcrowded jail conditions and the poor treatment of prisoners. In this dispute, Judge Webster would play a small part that would earn him the hatred of the I.W.W. and its socialist allies.

The criminal case against I.W.W. organizer Charles Feligno and the famous Elizabeth Gurley Flynn went to the superior court and Judge Webster on appeal, a demurrer request. On December 21, Webster rendered a lengthy decision, denying the I.W.W. appeal. He reasoned that the purpose of the Spokane ordinance

was to prevent the gathering of large crowds in the streets of the city in the portion of the city where its business is congested . . . [and to allow] the fire department . . . to keep the streets reasonably free so that the fire apparatus may move from one portion to another without delay.

He added, "I can't see any constitutional question presented . . . because I know of no constitutional right it involves." He elaborated,

If it is possible for a large number of men to command by force and numbers to compel public officers to desist in their efforts to enforce the law it would be possible for a valid law to remain dormant because of the inability of the officers to enforce it. If it should be determined by a large number of prostitutes and whoremongers through-out the state of Washington and the United States that the statutes of the state of Washington against living with prostitutes is unconstitutional, therefore they should flock to this city to live together and in such numbers as to render it impossible

<sup>21</sup>Elizabeth Gurley Flynn, *The Rebel Girl: An Autobiography, My First Life, 1906-1926* (1955; reprinted New York, 1973), 106.

for the authorities to arrest them, then I say that that would be to make every unconstitutional ordinance but an invitation to come and do the very things sought to be prevented, and it is inconceivable that any such reason as that should be upheld by the court. The right of free speech is a sacred one, guaranteed to the citizens of this state by the constitution of the state. Like every other right of citizens of the state of Washington it must be understood in view of the limitations and restrictions placed upon it. . . . The right of free speech doesn't mean the right of any person at any time and under any circumstances to speak; the right of free speech presupposes the fact that a person is in the place where he has a right to be for that purpose.<sup>22</sup>

The I.W.W. reporter classed this reason as "judicial sophistry and vituperation," so it is no surprise that the Wobblies and their socialist allies so disliked Webster that some would take an active role in a public attack on him in a socialist newspaper.

The headline of the February 1910 issue of the *Chicago Daily Socialist* proclaimed, "Judge Is Flayed for His Record in His Home Town."<sup>23</sup> Underneath was a long article by Louis Duchez, who had traveled to Webster's hometown of Cynthiana. Duchez claimed that Webster, as a prosecutor in that Kentucky town, had secured and then sold, for his own profit, the confession of one of the men he successfully prosecuted for murder. The reporter also charged that Webster's divorce of his first wife was based on fabricated claims that she had committed adultery with her husband's law partner. At the very end of the long article, Duchez added, "I met Carl W. Tuerke, commissioner of police of Spokane, Wash., in Cynthiana recently,"<sup>24</sup> learning he was hunting up Webster's record."<sup>25</sup> Thus Tuerke becomes one of the common links between the "Pan Tan" scandal and Webster and the Wobbly "free speech" effort.

This article was quickly followed by an even longer one that Duchez wrote for the I.W.W. newspaper, *The Industrial Worker*. He introduced the piece by calling Webster "the most

<sup>22</sup>*Industrial Worker*, January 1, 1910, 1. By March, the Filigno conviction was thrown out (Flynn had been found innocent), Spokane eliminated its restrictive ordinances, the Wobblies dropped their lawsuits against the city, and the city revoked the licenses of nineteen of the thirty-one "shark" agencies. Camp, *Iron in Her Soul*, 24.

<sup>23</sup>*The Chicago Daily Socialist*, February 10, 1910, 1.

<sup>24</sup>Interestingly, the two were in the same hotel at exactly the same time.

<sup>25</sup>*The Chicago Daily Socialist*, February 10, 1910, 1.

willing and unscrupulous tool of the 'big business interests [and] . . . a crooked character of the first water . . .'" controlled by northwest lumber interests.<sup>26</sup>

These socialist and I.W.W. articles, with their exaggerated rhetoric, might have been ignored, except that Kentucky Judge J.J. Osborne, having read about the "Pan Tan" scandal, had contacted Tuerke and then had written to Washington Governor Hay, making strong accusations against Webster. In Spokane's highly charged atmosphere, the major local newspaper, *The Spokesman-Review*, gave the charges of Duchez and Osborne prominence in several issues, and the local bar association also took action. Webster had no choice but to defend himself.

Webster traveled to Cynthiana, seeking support for his claim of innocence. The Spokane bar formally investigated, first by attempting—and failing—to get information from Osborne, and then by sending an official delegate, Will G. Graves, to Cynthiana to investigate. Graves learned that Osborne had a grudge against Webster because of an earlier dispute, but again Osborne refused to say anything further about his written charges. When Graves contacted others, he found only criticism of Osborne and support for Webster, including a strong endorsement by ten of the thirteen attorneys in the local Harrison County Bar Association.<sup>27</sup>

The result of Graves' investigation was a long, detailed report to the Spokane bar, clearing Webster of all charges. In part, he concluded,

Most of those whom I met openly avowed their warm friendship for Judge Webster, speaking in terms of the highest esteem and regard. I found several, however, who because of differences in political faith (and they take such differences much more seriously in Kentucky than in Washington) or because of friction at some time arising, expressed themselves as not being friends of Judge Webster. I was told that in his practice Judge Webster was very aggressive, and that he had a high temper, and it is scarcely possible for a man of that temperament, particularly in the first years of his practice, to avoid creating some friction with those with whom he has dealings. Even those persons, however, who did not profess themselves to be warm friends of Judge Webster, spoke of him in the highest terms, saying that

<sup>26</sup>*Industrial Worker*, February 19, 1910, 4.

<sup>27</sup>*Log Cabin*, May 27, 1910.

his standing in the community was excellent and his conformity to the ethics of his profession undoubted.<sup>28</sup>

Upon receiving the Graves report, the Spokane Bar Association quickly and unanimously adopted the report clearing Webster. In a local newspaper, an entire page was devoted to the results, with the banner headline stretching across its seven-column page: "Bar Association Clears Judge Webster."<sup>29</sup> The young judge could now concentrate on his profession and one of his favorite community projects, Gonzaga College's proposed law school.

Gonzaga College had been founded in 1887. As it neared its twenty-fifth anniversary, its president, Father George Weibel, and his successor, Father Louis J. Taelman, promoted the addition of a law school as part of the evolution of the college into a university. Judge Webster gave his support to the project, agreeing to be one of the five members of the law school faculty. The prominence of these five earned them the sobriquet "Gonzaga's Million Dollar Faculty"<sup>30</sup>—quite an ironic title, since Webster and his colleagues received no pay. Webster quickly gained a reputation as a lecturer and orator. In a college publication, one of the law students wrote, "Judge Webster's lectures in Criminal Law are becoming more interesting, if it be possible, as we proceed. Without doubt Judge Webster has few equals as a lecturer."<sup>31</sup> A year later, another student described rather effusively Webster's oratorical abilities in court, praising "the splendor of his diction, the brilliancy of oratory, and the pleasant earnestness of his delivery."<sup>32</sup>

Webster's early and continuous association with the new law school and his reputation as a public speaker and a respected member of the community led Father James Brogan, the college's new president, to enlist Webster's aid in the campaign to get the Gonzaga Law School accredited by the state. At that time, the University of Washington was the state's only accredited law school. Webster readily agreed to help in this project. With Father Brogan he spoke to the

<sup>28</sup>*The Inland Herald*, May 15, 1910, 3, in the "Webster Papers," Washington State University Holland Library Archives, folder #0057, "Newspaper Clippings, 1909–1910."

<sup>29</sup>*Ibid.* Also see *The Spokesman-Review*, February 18, 1910, 5, for an article giving further details supporting Webster's actions in Cynthiana.

<sup>30</sup>Wilfred P. Schoenberg, S.J., *Gonzaga University: Seventy-five Years, 1887–1962* (Spokane, Wash., 1963), 214–35.

<sup>31</sup>*Gonzaga* 6:4 (January 1915): 229.

<sup>32</sup>*Ibid.* 8:1 (October 1916): 2.

Spokane Chamber of Commerce members, asking for their support, and then he testified at length before legislative committees in Olympia. At these committee hearings, he wore his Masonic pin prominently, to signal that he was not a Catholic and thus was not presenting a biased appeal for a Catholic institution. The small amount of public opposition to the Gonzaga proposal was based on religious sectarianism, and Webster wanted his appeal to be judged on its merits, rather than on religious prejudices. The accreditation legislation was overwhelmingly passed and was signed into law March 25, 1915.<sup>33</sup>

In June of that year, the thirteen members of the first graduating class of the new law school received their diplomas. The first doctor of laws, *honoris causa*, was fittingly conferred on Judge Webster.<sup>34</sup>

Webster's volunteer work for Gonzaga would end in 1916, when an opportunity came up for him to serve on the state's supreme court. In July, supreme court justice Frederick Bausman confirmed the rumor that he would resign before his term ended. Democratic governor Ernest Lister would need to appoint a replacement. Webster, anticipating the governor's announcement, had indicated his candidacy in January for the fall election to the supreme court. When the election drew closer, he traveled across the state, promoting his candidacy.<sup>35</sup> Ultimately he overwhelmed his opponent, Elihu F. Parker of Walla Walla, 60 percent to 40 percent, in the September primary, and he was unopposed in November.<sup>36</sup> Since Webster was due to begin his own elected term in January 1917, Judge Bausman urged Lister to appoint the Republican Webster for the few remaining weeks of Bausman's term. After the attor-

<sup>33</sup>Schoenberg, *Gonzaga University*, 230–33.

<sup>34</sup>*Ibid.*, 235. It was purely coincidental, but the law school's later acquisition of the "Webster Grade School" building, named for Daniel Webster and Noah Webster, has led some to mistakenly assume that the judge's pioneer work for Gonzaga is still being memorialized. It is not, but it would certainly be appropriate if the new law school building had his name on it. See Robin Bruce and Dani Lee McGowan Clark, "Webster Elementary School," Spokane Public Schools, n.d., from a February 16, 2000, fax to the author by Carol O'Brien, community relations director, Spokane Public Schools. Also, phone interview with Stephanie E. Plowman, Special Collections librarian, Foley Library, Gonzaga University, February 7, 2000.

<sup>35</sup>*The Spokesman-Review*, September 6, 1916, 10, reported that his campaign absences from the court in August and September required other superior court judges to fill in for him.

<sup>36</sup>His margin of victory in the subsequent election was even greater. V.O. Nicholson, *History of the Bench and Bar of Yakima County* (Yakima, Wash., n.d.), 16.

ney general's conclusion that it was legal, Webster was appointed to fill the vacated position, which he would hold until May 11, 1918.<sup>37</sup>

Webster later would take some pride in his accomplishment, as he revealed in a 1927 letter to a Kentucky judge: "I was . . . elected to the Supreme Court . . . by the largest plurality ever given a candidate for that office. I also enjoy the distinction of being the youngest man ever to occupy a place on that bench."<sup>38</sup>

Webster's decisions on the state's highest court were well reasoned and concise. Years later, superior court Judge Ralph E. Foley described Webster's service on the court: "He quickly established a reputation . . . for his ability to sift the wheat from the chaff in conference, and for the brevity and clarity of his printed opinions."<sup>39</sup> Webster wrote almost one hundred decisions and concurred with two hundred fifty others, with only one dissenting opinion, a 5-4 decision. Webster expressed his dissent in two sentences.<sup>40</sup>

Now public service called Webster at the national level. Webster and his Republican supporters believed that the Democratic incumbent, Congressman C.C. Dill, should be replaced. Dill had been one of the fifty members of the House of Representatives who had voted against the United States' entry into World War I. Webster would later write that Dill had failed his country in that great crisis [World War I]. . . . I was extremely reluctant to surrender my judicial office [on the supreme court] . . . but inasmuch as I was not able on account of my physical condition to enter the military service of my country, I felt I should at least do my full part in civil life, and my friends put the matter to me on the basis of patriotic duty.<sup>41</sup>

Dill's antiwar stand was so unpopular that it caused many influential Democrats to support Webster publicly.<sup>42</sup> In the fairly close race, Webster was victorious, becoming the first

<sup>37</sup>Charles H. Sheldon, *A Century of Judging* (Seattle, 1988), 82-83.

<sup>38</sup>Letter from Webster to Hon. John F. Hager, May 18, 1925, "Webster Papers," Washington State University Archives, folder #0007, "Correspondence, E-K, 1923-Jan 1, 1935."

<sup>39</sup>"Webster File," Washington State University Archives, folder #0001, "Biographical and Obituary Material."

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

<sup>41</sup>Letter from Webster to Hon. John F. Hager, Ashland, Kentucky, May 18, 1927, in *ibid.*, folder #0007, "Correspondence, E-K, 1923-Jan. 1, 1935."

<sup>42</sup>Kerry E. Irish, *Clarence C. Dill: The Life of a Western Politician* (Pullman, Wash., 2000), 41.



Republican representative from the recently created Fifth Congressional District.<sup>43</sup> Then his eligibility for a congressional seat was questioned because the Washington State constitution stated that judges are ineligible "for any other office or public employment" during the term for which they were elected (art. IV, sec. 15). Webster's friends pointed out, however, that the prohibition applied only to state positions, and members of Congress are federal officers.<sup>44</sup> Although Webster repeatedly claimed not to like politics, his virtually life-long public association with the Republican Party and his election to three terms in Congress indicated that this dislike existed only when he compared politics with his much-preferred activities as a judge.

In his first year as a congressman, Webster was confronted with legislative issues of national importance. In May 1919, his "yea" joined 303 others (ninety members were opposed) in the passage of a joint resolution for a constitutional amendment for women's suffrage. In July, the House vigorously debated legislation to establish a minimum wage of three dollars per day for many government workers such as janitors and clerks. Critics demanded that the legislation be expanded to include fourth-class postmasters, partially on the grounds that it would not be fair for "Negro" government workers to receive more money than rural white postmasters. Webster's vote helped the Republicans beat back the Democrats' amendments, and the bill finally passed overwhelmingly. In that same month, Webster joined the majority (287-100) in the passage of the Volstead Act. Later that year, President Wilson vetoed the bill in order to get it repassed without what he considered a technical problem. The House overrode the veto 175-55, Webster voting with the majority. Webster did not participate in the debates on any of these major issues, but he soon was busy representing his constituents, participating in committee work, and giving an occasional floor speech. In

<sup>43</sup>The state had not elected a Democrat to the House of Representatives since 1899. In 1914, Dill's upset election to the new Fifth District broke that pattern. Although he was reelected in 1916, Republicans still overwhelmingly dominated the state. Dill would be elected to the Senate in 1922 and 1928. Webster's margin of victory over Dill was 52.2 percent to 46.7 percent. His subsequent two victories were 58 percent to 42 percent and 49 percent to 45 percent (the Farmer-Labor candidate received 6 percent). Michael J. Dubin, *Washington State Congressional Elections, 1788-1997: The Official Results of the Elections of the 1<sup>st</sup> through the 105<sup>th</sup> Congress* (Jefferson, N.C., 1998), 421-49.

<sup>44</sup>"Special Collections," University of Washington Allen Library, Pamphlet File, "John B. Mitchell," N.979.719.

addition to the usual private bills that congressmen submit, he obtained an appropriation for a preliminary study of the Columbia Basin, argued for an Okanogan irrigation pumping system, secured the first appropriation for the study of the control of the White Pine blister disease, supported bridge repair, and worked hard on the important Committee on Interstate and Foreign Commerce. For a congressman with little seniority from a rural district in the northwestern part of the country, Webster's legislative work, if not spectacular, was certainly respectable. Webster's remarks on the floor of the House, sometimes editorially extended—as is still the custom—were carefully crafted, logical, and detailed. His legal experience is revealed in those well-organized speeches. However, his antilabor bias is clear.

His involvement in an extended debate in November 1919 over H.R. 10453, the "Esch" bill, is a good example of that bias. The bill was designed to provide for the termination of World War I control of railroads, and included procedures for the settlement of future disputes between railroads and their employees.<sup>45</sup> Webster introduced a long amendment to the bill that would make strikes illegal during required arbitration proceedings. His amendment also provided for financial judgments against any union or individual worker who participated in a strike during that period of basically compulsory arbitration.

He argued that unions should not be able to tie up vital railroad transportation and that "[n]o constitution, State or Federal, with which I am familiar, either expressly or impliedly guarantees to any man the right to strike." He added that there was a legitimate difference between an individual's right to cease his employment, "to quit work whenever it suits the individual for any reason or for no reason at all," and a strike, which was a group effort by a union against an employer. The common good of the people needed protection from such economic disruption.<sup>46</sup>

The oratorical skills that many associated with Webster are apparent in this appeal during the House debate on the Esch bill:

<sup>45</sup>This legislation was sometimes called the "Esch-Cummins" bill for Representative Esch and Senator Cummins. It was a response to the earlier "Plumb Plan" for the nationalization of the railroads, something labor strongly supported. Interestingly, Senator Miles Poindexter's vote in favor of Esch-Cummins would be one of the issues that Clarence Dill would use to upset the Republican incumbent in the 1922 election. Irish, *Clarence C. Dill*, 50–54.

<sup>46</sup>*Congressional Record*, 66th Cong., 1st sess., 1919, Pt. 8:8357.

Will we meet this situation like red-blooded Americans and write a statute in the books that will have some teeth in it, that will protect human life; that will prevent misery and suffering; that will make property secure; that will violate the rights of no man and cause no inconvenience to any law-respecting citizens, and that will guarantee the peace, quiet, and tranquility of the Nation?<sup>47</sup>

He concluded his long appeal by saying that proposed railroad boards of arbitration

will guarantee an uninterrupted transportation service. It will bring peace. It will prevent economic waste. It will establish . . . that the law is supreme and that no class shall be superior to the law. And unless I mistake the temper of the American people, nevermore will they consent to play the inconspicuous role of doormat for the shuffling feet of capital and labor as they struggle for individual gain at the expense of the general welfare [prolonged applause].<sup>48</sup>

Several days later in the debate, an opponent to Webster's amendment disagreed:

If the amendment of Judge Webster is adopted, you shackle and handcuff every laboring man so that if he should . . . decide not to abide by the decision of this proposed railroad board, then the employer can go into court and take his little home and everything else that he has [applause]. . . .<sup>49</sup>

Another was more harsh:

The substitute [Webster's amendment] of the gentleman from Washington is so un-American in principle as to be unworthy of serious consideration of this American Congress. Mr. Webster . . . is anxious, eager, and willing

<sup>47</sup>Ibid., 8358. Judge V.O. Nicholson, in his *History of the Bench and Bar of Yakima County*, 21, wrote that Webster "was, perhaps, the most eloquent man ever to grace the Bench in Eastern Washington. . . . He hypnotized his listeners with the beauty and perfection of his eloquence."

<sup>48</sup>Ibid., 8359.

<sup>49</sup>Ibid., 8483.

to place the chains of slavery on 2,000,000 railroad employees. . . .<sup>50</sup>

It should be noted that Webster did not respond in kind to these emotional and sometimes personal attacks. Congressmen on both sides of this debate made more than a few references to the supposed threats from the I.W.W., socialists, anarchists, Bolsheviki, the Russian Revolution, and the "Centralia Massacre."<sup>51</sup> The "Red Scare" of this period, which often is blamed on Attorney General A. Mitchell Palmer, was partly the result of congressional pressure on Palmer to get tougher with the "red threat." That theme appears in this congressional debate over labor and railroads. Although Webster probably agreed with those who voiced fear of the left and its supposed relationship to labor, his congressional debate did not reflect this.

A competing amendment, and one much less restrictive than Webster's, was passed 204-161 (Webster voting "no").<sup>52</sup> The complete bill was passed, again with Webster in opposition. On February 28, 1920, the final forty-six-page Transportation Act of 1920 became law.<sup>53</sup>

During the earlier committee hearings on the Esch bill, Samuel Gompers, president of the American Federation of Labor, testified as to the effect the bill might have on organized labor. Webster had questioned him about his position on strikes, and, a week later, Gompers wrote to Webster to explain his position. Gompers categorically asserted that no bill, whether it was constitutional or not,

<sup>50</sup>*Ibid.*, Pt. 9:8501.

<sup>51</sup>In Centralia, Washington, just three days prior to this House debate, four unarmed veterans were shot by the I.W.W. and one Wobbly was hanged by a mob. See John McClelland's *Wobbly War: The Centralia Story* (1987) for a good description of this sensational event.

<sup>52</sup>*Congressional Record*, 66th Cong., 1st sess., Pt. 9:8599.

<sup>53</sup>*The Statutes at Large of the United States of America from May, 1919 to March, 1921: "Public Laws of the United States of America Passed by the Sixty-Sixth Congress, 1919-1921"* (Washington, D.C., 1921), vol. XLI, 469-74, for Title III of the law, "Disputes Between Carriers and Their Employees and Subordinate Officials." The law included subjects other than railroads, thus its forty-six-page length. Another, less important example of Webster's position was a debate that occurred two years later over compensation to railroads for any value lost due to war operation by the government. Webster wanted to expand the criteria to include "inefficiency of labor," a loophole his opponents believed would be unfairly used by the railroads to secure payments they did not deserve. Webster's efforts failed. See the *Congressional Record*, 67th Cong., 1st sess., 1921, Pt. 6:5469-70, 5488.

will deprive the right of free men from giving their service or withholding it; that no compulsory labor-slavery can in this day and time be enacted and enforced. . . . [N]o matter how much they [congressmen] and others . . . deplore strikes and lockouts, no matter how much any of us may do to try and avert . . . them, that an attempt to reinforce slavery—involuntary servitude—is neither a cure for nor an expedient method for strikes and lockouts. . . . [Y]our question was . . . hypothetical, one which I could have entirely declined to answer, much less be required to answer at all. I endeavored to be frank with you and the committee. . . . You stated that you intended to make an address to Congress, and if ever a Member of the House indicated opposition to labor you indicated it by your demeanor. . . .<sup>54</sup>

Webster had the Gompers letter printed in the *Congressional Record*, following it with his own three-thousand-word rebuttal. Legal expert that he was, Webster attacked Gompers' statements and his earlier committee testimony point by point, focusing on Gompers' position (or supposed lack of one) relative to strikes that might be prohibited by federal law. Webster ended his letter,

It is astounding to think that any fair mind will attribute to me hostility toward labor merely because I am not in sympathy with an individual, no matter how exalted his position may be, who hesitates openly to stand up and say, "I am an American citizen, amenable to the laws of my country. I believe in a government of law—not of class—and I shall at all times and under all circumstances render obedience to the constitutional laws of my Government, and will advise and encourage others to do likewise."<sup>55</sup>

Webster left Congress on May 8, 1923, to accept an appointment to the federal judiciary when President Harding promoted Frank Rudkin to the U.S. Court of Appeals. That year Webster wrote to Senator James Hamilton Lewis, explaining,

I found myself constantly yearning to get back to the wool sack, where definite questions are presented for consideration; where definite rules and processes are

<sup>54</sup>*Congressional Record*, 66th Cong., 1st sess., 1919, Pt. 7:6698–99.

<sup>55</sup>*Ibid.*

available in their solution; where politics and expediency are laid aside, and one's efforts are directed solely to make the award to him whose cause is just. Moreover, the independence prevailing in the Federal Judiciary is especially gratifying to me, for after all, the sole end of the courts as tribunals of justice is the enforcement of the law, uniformly and impartially, without regard to persons or places or the opinions of men.<sup>56</sup>

In his numerous "thank you" letters to those who had congratulated him on his appointment as a U.S. district judge, he repeated his dislike for the political pressures of elective office. However, over the next few years, not a few of his letters to friends contained details and advice about both local and national politics. As he readily admitted in a letter to Wilbert Weatherbee, "I am a dyed-in-the-wool Republican and the New Deal has not weakened my convictions in the least."<sup>57</sup>

If the impartiality of Webster's judicial position was not obviously violated by his Republican beliefs, serving on the federal bench did not in any way temper his strong dislike of radicals, especially the I.W.W. His formal denial of James Rowan's petition for a new trial to reclaim his citizenship papers clearly reveals this dislike. Rowan, admired by Wobblies as the "Jesus of Nazareth of the lumber yards of the Northwest," had been an aggressive organizer, was involved in the 1916 "Everett Massacre," and promoted the coastal lumber industry strike efforts during World War I. With other I.W.W. leaders, he served time in Leavenworth for violating the wartime espionage act, for which he and the other Wobblies were pardoned in 1923 by President Coolidge.<sup>58</sup>

Evidently, the Irish-born Rowan's citizenship papers were invalid because he had obtained them fraudulently. His request for restoration of the papers came before Webster, who strongly denied it, pointing out that Rowan never had stood when the national anthem was played, never had voted, and never had removed his hat in respect for the flag. According to Webster, Rowan considered the flag

<sup>56</sup>Sheldon, *The Washington High Bench*, 344.

<sup>57</sup>"Webster Papers," Washington State University Archives, folder #0011, "Correspondence, L-M, 1923-Jan. 1, 1935."

<sup>58</sup>Melvin Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Chicago, 1969), 362, 403, 430, 467. Other histories of the I.W.W. refer to Rowan, especially as the leader of a radical splinter group within the union.

just a piece of cloth. . . . Rowan never was entitled to become a citizen. . . . Of all the activities of those concerned with hindering the nation in the winning of the war from this section of the country, he was the ring-leader and champion. His attitude . . . is essentially that of an anarchist. . . . Too much blood has been poured out and too much treasure spent in setting up the flag to give its protection to men of Rowan's type. In all my experience I never have encountered a more dangerous man.

These comments appeared in a newspaper article that Governor Hay evidently had clipped and sent to him in 1926, for Webster replied with a short "thank you" for the clipping, commenting that "[j]udges should go on record against disloyalty and un-Americanism. Rowan is a bad egg, and I hope he will be deported. To say that he is a dangerous man states the case mildly."<sup>59</sup>

Webster's dislike of radicals was not limited to the left. In a letter to M.A.L. Rogers of Waterville, Webster wrote that a mutual friend's joining the KKK was an "egregious blunder. . . . The Ku Klux Klan, in my judgment, is essentially Un-American, and cannot hope for more than a temporary existence. Things that are fundamentally wrong cannot permanently endure."<sup>60</sup>

Webster exhibited a similar zeal in handling violations of Prohibition laws in the mid-1920s. In a letter to Senator Wesley Jones, he commented on the 1926 court term: "The bootleggers are finding that calling both unprofitable and unpleasant." Holding court in Yakima, he was "padlocking five places at Cle Elum . . . and issuing injunctions against nine others. . . . Conditions in Spokane since our last cleanup have materially improved but there is much important work to be done."<sup>61</sup>

By the 1920s, the I.W.W. was a shadow of its pre-World War I days, and Prohibition was an obvious failure. With the growing unimportance of those previously highly charged issues, J. Stanley Webster could focus on what he sincerely enjoyed: the law and the judicial process. However, in 1932 he became involved in one more flurry of political activity, when he was seriously considered for a position on the U.S. Court of Appeals, a position he clearly desired. Despite strong support from Washington's Senator Jones and extensive recommenda-

<sup>59</sup>Article (n.d.) and letter in "Webster Papers," Washington State University Archives, folder #0007, "Congratulations, E-K, 1923-Jan. 1, 1935."

<sup>60</sup>Ibid., folder #0014, "Correspondence, 1923-37, N-R."

<sup>61</sup>Ibid., folder #0009, "Jones, Hon. Wesley L., 1923-Jan. 1, 1935."



The U.S. Courthouse (with flag) presents an imposing facade as part of the Spokane Civic Center. (Courtesy of the Historical Photograph Collections, Washington State University Libraries)

tions from various local bar associations, his efforts to move up the judicial ladder failed. Apparently, a combination of politics and health problems led him, on October 30, to ask Judge William H. Sawtelle of the Ninth Circuit to remove his name from the list of nominees "in view of my state of health."<sup>62</sup>

After this disappointment, Webster's public legal career was devoted almost exclusively to his beloved work with the law. Eventually, his service as a federal judge totaled sixteen and one-half years, a record for the Eastern District of Washington.<sup>63</sup> During that long tenure, Webster gave each of the numerous cases that came before him, regardless of the subject or the status of the litigants, his full consideration. As he told one judge who visited him after he retired, "Never forget that there is no such thing as a small case; every case is entitled to the

<sup>62</sup>Ibid., folder #0016, "Correspondence S-Z, 1923-Jan. 1, 1935.

<sup>63</sup>This record is for active full-time judges in the district. Judge Justin L. Quackenbush served fifteen years of active work and is now on senior status, giving him a combined total of twenty years.



same consideration . . . no matter how much is involved or what particular matter may be up for consideration."<sup>64</sup>

Of the major cases he handled, the one with the greatest impact was a 1932 railroad taxation case.<sup>65</sup> The Northern Pacific and two other railroads sued for modification of property tax assessments for 1925–27, complaining that the property evaluations were grossly excessive and that unjust discrimination existed between counties as to that evaluation. Webster's forty-three-page decision was such a thorough analysis of the law, property evaluations, and tax assessments that the tax formula he devised would become known as the "Webster Formula." It would be cited in thirty-six subsequent cases, the last being a 1954 case before the supreme court of Florida.<sup>66</sup> One 1936 case contained this observation:

In the brilliant opinion of Judge Webster, . . . he had before him great masses of testimony upon which he based many of his conclusions and which led him . . . to conclude that effect should be given to the stock and bond values . . . to the extent of 40 per cent, to capitalization of income 40 per cent, and to reproduction cost or physical value 20 per cent.<sup>67</sup>

Decisions from 1938 and 1941 contained extensive quotations from the Webster decision.<sup>68</sup>

Throughout his adult life, Webster was plagued with poor health. A heart problem finally forced him to give up the "wool sack" on August 31, 1939.<sup>69</sup> However, he made one last brief and controversial appearance in a public capacity when, in November 1940, he accepted the position of president of the Western International Baseball League. Webster took seriously his obligation to try to turn the league into a financial success, handling his duties so conscientiously that one of the league's directors complained, tongue-in-cheek, that, in their meetings,

<sup>64</sup>Memorial service in Spokane, February 21, 1963 in "Webster Papers," Washington State University Library Archives, folder #0001, "Biographical and Obituary Material."

<sup>65</sup>*Northern Pac. Ry. v. Adams County*, 1 F. Supp. 163 (EDWA, 1932).

<sup>66</sup>There are no citations since that date because federal law established a different governmental structure for handling such taxes.

<sup>67</sup>19 F. Supp. 63 (D. N.J. 1936).

<sup>68</sup>79 P. 2d 25 (1938) and 116 P. 2d 832 (1941).

<sup>69</sup>To be replaced by Lewis B. Schwellenbach, who took office November 20, 1940.

Webster "won't even give us a chance to get a drink."<sup>70</sup> But the financial and personnel problems plaguing the Wenatchee Club created such dissatisfaction and criticism that Webster was forced into a sickbed, from which he sent telegrams of resignation in late February. His public careers were over.<sup>71</sup>

During most of his career, J. Stanley Webster was a blunt, intense man, who often found himself entangled in conflicts. As Benjamin H. Kizer said at Webster's memorial service,

This intensity of nature was part of his fiery temperament. . . . Further, he was highly sensitive, and . . . , if he was tactlessly opposed, he could, at times, break out in denunciation of the opposite course and of its advocate with a vehemence that could scorch his unhappy victim. This could happen to even a good friend of his, and these explosions of anger often left him badly shaken, as his wrath cooled, so that he could be seen sitting in silence, biting his nails, and giving evidence of his regret that he exploded. However, he was too proud to apologize, but would greet his victim at their next meeting with a richness of courtesy and warmth . . . that could swiftly erase . . . the wounds. . . .<sup>72</sup>

Of course, we have seen those occasions where his intensity and his language did not result in conciliation. The convicted Kentucky "feudalists," the blackballed and fired Carl Tuerke, and the jailed Wobblies probably did not forgive Webster easily for his role in their problems. But Kizer's characterization is partially borne out by a story told by Yakima attorney John Gavin in 1986. Gavin's first case as a young lawyer was before Webster, "a very strict authoritative guy. He was . . . very serious and didn't have much nonsense in his court." Gavin planned to make a delaying motion before Webster, but before he could start his argument, Webster said,

"This is a very auspicious occasion for me [as] . . . my next duty is to admit to practice a young lawyer named John Gavin . . . who is the grandson of Patrick Henry Winston who gave me a job when I first came to Spokane.

<sup>70</sup>*The Spokesman-Review*, January 16, 1941, 9. Also see *The Sporting News*, March 1941, for Webster's resignation story.

<sup>71</sup>*The Spokesman-Review*, November 18, 1940; January 4, 5, 6, 9, 11, 12, 13, 14, 1941; and February 26 and 28, 1941, contain articles.

<sup>72</sup>"Webster Papers," Washington State University Library Archives, folder #0001, "Biographical and Obituary Material."

His family I know well. . . . I regard it as quite an occasion and I'm going to adjourn court briefly and go back to chambers and I'm going to ask Mr. Gavin to come back and talk . . . [about] his family and our relationship." Gavin indicated he went back and Webster "greeted me like I was the second coming . . . and he wanted to do everything he could to help me along the way in the law practice . . . as my grandfather had helped him. . . . I walked out to the court and looked over at the other counsel . . . and I thought ' . . . You don't know what a bruising you are going to take, smart ass Seattle counsel; the judge is gonna just wipe up the floor with you.' So we got up . . . and I started to say something, and Webster said, 'Mr. Gavin, this is a motion for definite statement or for bill of particulars. I want to tell you right off that we don't give much attention to that kind of motion in my court. These are called dilatory motions . . . and in my court, my idea is to move it forward constantly and . . . rapidly . . . to its conclusion. This is nothing more than a dilatory motion and I should hear from you, but I'm not going to. I've read your motion and it's denied.'<sup>73</sup>

During his later years, this crustiness weakened. In Webster's final decisions as a full-time judge, he tempered justice with mercy as he granted probation to a sixty-year-old postmistress who had misappropriated and then repaid \$1,041, to a Methow Valley banker who had embezzled \$3,200 and repaid it, and to a Yakima WPA superintendent who had appropriated tools worth \$73. And at his own retirement ceremony, Webster concluded his thank-you speech with special appreciation to "the elevator man. He has been so kind and thoughtful. He has remained after hours so that I might not have to climb the long flight of stairs . . . and the char-woman who has kept my office so fresh and clean. God bless her also."<sup>74</sup>

If his manner was sometimes abrupt and forceful, Webster's ideas were clear and consistent. He was in favor of business,

<sup>73</sup>John Gavin, interviewed in Yakima, Washington, by Ms. Greta Bryan, December 9, 1986. Document provided by Judge Ray E. Munson (retired, Court of Appeals, Division III).

<sup>74</sup>*The Spokesman-Review*, September 1, 1939, 6. This vein of generosity was revealed again when his will was probated in 1963. From a fairly large estate, he bequeathed \$5,000 each to the Shriner's Hospital for Crippled Children, the Salvation Army, and the Volunteers of America. He also gave \$25,000 and \$15,000 to two nurses who had cared for him and his wife. Spokane County Archives, Will #74058.

against labor, against excessive government regulation, and against radicals (of the left or the right), and he often said so in his letters and speeches.<sup>75</sup> It should be noted that these strongly held positions were not unusual in that they often reflected the prevailing opinions of his day. His prosecution of the Kentucky "feudalists," although certainly opposed by some, represented the new generation's effort to bring Kentucky into a prosperous twentieth century. His opposition to organized labor was consistent with a general antilabor tradition in a nation where the highest proportion of workers belonging to unions reached only 35 percent shortly after World War II and has steadily declined since then. And, certainly, Webster's opposition to the radical Wobblies was exactly the same as that of most Americans. However, his support of the Prohibition laws and his dislike of most, if not all, of the New Deal did put him out of step with the country. But Webster's most consistent and perhaps most important position was his absolute dedication to the legal profession and the judicial process. He stated,

[T]he thing that I value most in life is the fact that I am a lawyer. It is a high distinction to my way of thinking. . . . There is something sacred about the work of the court—its . . . responsibility in dealing with homes, property, lives and justice in general. . . . And if there is a man who doesn't react to that responsibility, he isn't deserving of the responsibility that the legal profession carries.<sup>76</sup>

Few could doubt that Webster was a talented lawyer, prosecutor, and jurist, and a man deserving to be described as responsible.

Webster lived a quiet life in retirement, continuing his hobby of raising his beloved bulldogs, enjoying baseball and some fishing, but he had little contact with his colleagues. His wife, Mary, died in 1956 and was buried in the cemetery overlooking the little wheat town of Oakesdale. Webster, having sold his large, fine home in the lovely South Hill neighborhood, lived his final years alone in the dignified Roosevelt Apartments. As his busy past receded, his old health problems became increasingly critical. He died in Deaconess Hospital on December 24, 1962, and his ashes were interred

<sup>75</sup>See a nine-page typed speech he delivered on several of these subjects in "Webster Papers," Washington State University Library Archives, folder #0059, "Speeches: Government and Business," no date on the manuscript.

<sup>76</sup>*The Spokesman-Review*, September 1, 1939, 6.

beside his wife's grave. A modest stone marker stands over his grave with the dates and the simple inscription "Judge John Stanley Webster."



# HOW WILD WAS ARIZONA? AN EXAMINATION OF PIMA COUNTY'S CRIMINAL COURT, 1882–1909

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PAUL T. HIETTER

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On the morning of August 2, 1892, Thomas Graham was shot while taking a wagonload of barley to a local mill in Tempe, Arizona Territory.<sup>1</sup> He lived long enough to ensure himself a wretched death in the Arizona heat, but long enough, also, to identify his assassins. While waiting to die, Graham filed a formal complaint against Ed Tewksbury and John Rhodes.

A relationship that had begun as a friendship between the Graham and Tewksbury families in the summer of 1882 had, by 1887, degenerated into an infamous blood feud that threw much of Arizona's Tonto Basin into turmoil for nearly two years. The resulting Pleasant Valley War reportedly claimed the lives of between thirty and fifty people, including all three Graham brothers and three of the four Tewksbury brothers. It ended only after a band of vigilantes—"The Committee of Fifty"—executed three of the war's alleged participants. But even though the "war" was over in 1888, the blood vendetta continued until Ed Tewksbury killed Thomas Graham in 1892.<sup>2</sup>

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<sup>1</sup>Arizona Republican (Phoenix), August 3, 1892; Don Dedera, *A Little War of Our Own: The Pleasant Valley Feud Revisited* (Flagstaff, Ariz., 1988), 13–15, 217–23. Other witnesses reported seeing more than one gunman.

<sup>2</sup>Dedera, *A Little War of Our Own*, 27–39, 7, 191–202. For the most balanced and complete treatment of the feud, see Dedera. For a pro-Tewksbury version of events, see Clara T. Woody and Milton L. Schwartz, *Globe, Arizona: Early Times in a Little World of Copper and Cattle* (Tucson, Ariz., 1977). Earle R. Forrest, *Arizona's Dark and Bloody Ground* (1936; revised and expanded, 1952; reprinted Tucson, Ariz., 1984), is pro-Graham.

One major theme runs through most of the numerous narratives written about the conflict: Arizona's lawmen and courts were incapable of stopping it.<sup>3</sup> Don Dedera, author of the best book on the feud, even suggests that an important factor in Ed Tewksbury's decision to assassinate Graham was "the infinite impotency of Arizona law even as late as 1892."<sup>4</sup> The aftermath of Graham's murder underscores Dedera's assertion.

Approximately two weeks after Graham's death, Tewksbury surrendered to authorities. He was indicted by a grand jury during the next session of Maricopa County's district court. Six months later, the case was transferred to Pima County due to strong public sentiment against Tewksbury and fears of an attempt on his life.<sup>5</sup> After one week of hearing testimony and two days of deliberations, the Pima County jury returned a guilty verdict. Before Tewksbury could be sentenced, however,

<sup>3</sup>Many early writers erroneously regarded it as an example of conflict between sheep and cattle interests. Dedera, *A Little War of Our Own*, 106. More recently, Thomas Sheridan concentrated on the mutual hatreds of the participants, arguing that the struggle was an aberration and that "feelings ran too high to be fueled by a desire for profits alone." Thomas E. Sheridan, *Arizona: A History* (Tucson, Ariz., 1995), 139. Richard Maxwell Brown, a noted historian of American violence, places the war within what he describes as the "Western Civil War of Incorporation." According to Brown, the vigilantes who ended the feud were representatives of conservative, consolidating capitalistic forces that were sweeping through the West during the late 1800s. Members of the vigilante group viewed the lawlessness generated by the feud as an unacceptable threat to Arizona's economic order and, with the tacit approval of Arizona's territorial governor, took the law into their own hands. By placing the local event within the framework of regional history, Brown suggests that the origins and causes of the struggle were less significant than the forces that ended it. Brown, "Western Violence: Structure, Values, Myth," *Western Historical Quarterly* 24:1 (1993): 6, 11.

<sup>4</sup>Dedera, *A Little War of Our Own*, 19. Local historian Clara Woody wrote, "It was obvious that the courts had failed to end the feud. Not a single member of either faction had gone to prison." Quoted in Dedera, 187. In his history of the Arizona and New Mexico shrievalties, Larry Ball notes that the feud was one of many examples that "served to highlight the shortcomings of county law enforcement in frontier territories." Larry D. Ball, *Desert Lawmen: The High Sheriffs of New Mexico and Arizona, 1846-1912* (Albuquerque, 1992), 242.

<sup>5</sup>Dedera, *A Little War of Our Own*, 225-41, 248. Authorities quickly arrested and jailed John Rhodes the morning that Graham was shot. During the fourteen-day preliminary hearing that followed, Rhodes produced a reasonably solid alibi and was subsequently released. Although the Phoenix newspapers, which tended to be partial toward the Grahams, were outraged at Rhodes' release, the Tewksbury-leaning *Arizona Silver Belt* in Globe believed that Judge Husan's decision was "in accordance with the evidence." *Arizona Silver Belt* (Globe), August 27, 1892.



his lawyers declared that their client had never been asked to plead the matter of his guilt. Although Tewksbury probably had made a plea, it was never recorded, and, based on this technicality, the presiding judge was forced to set aside the conviction. A second trial in January 1895 resulted in a deadlocked jury. Faced with further expenses and the unlikelihood of a conviction, the prosecution dismissed charges against Tewksbury in March 1896.<sup>6</sup>

Numerous other crimes related to the feud also went unpunished, and, in fact, the Pleasant Valley War is only one of many examples of the ineffectiveness of criminal justice institutions in the West prior to 1900. For too long, however, popular writers and historians have been judging criminal behavior and criminal justice institutions within the context of extraordinary events. Incidents such as the Gunfight at the O.K. Corral in Tombstone, Arizona, conflicts such as New Mexico's Lincoln County War or Wyoming's Johnson County War; and outbreaks of vigilantism have all been used as evidence of the ineffectiveness of criminal justice systems in the West.<sup>7</sup> Since the mid-1970s, numerous scholars have

<sup>6</sup>After the case was transferred to Pima County, Tewksbury added Thomas Fitch, known throughout the West for his speaking ability, to the already-talented defense team. The strongest evidence against Tewksbury was Graham's dying declaration. Fitch focused most of his efforts on questioning the validity of the statement, suggesting that Graham's bitter hatred of Tewksbury, combined with the fact that he knew he was dying, may have caused him to accuse Tewksbury regardless of what had really happened. Richard E. Sloan, who presided over the trial, later recalled that Fitch presented his case with "all the fascination an able man . . . can weave about a theme involving a question of life or death." The two other lawyers on Tewksbury's defense team were A.C. Baker and Joseph Campbell. Both were highly regarded—and expensive. Defense costs were probably very high. Most contemporaries and later writers suspected that the Daggs brothers financed the trial. In 1886, the Tewksbury clan had established a business relationship with J.F., P.P., and W.A. Daggs based on sheep herding. This relationship, along with the fact that the Grahams were cattlemen, partly explains why the feud has often been portrayed as one between cattle and sheep interests. James Edward Wooden, "Thomas Fitch: The Restless Orator," *Arizoniana* 4:1 (1963): 37–41; Richard E. Sloan, *Memories of an Arizona Judge* (Stanford, Calif., 1932), 122–24; Dedera, *A Little War of Our Own*, 108–11; 248–50.

<sup>7</sup>Literature on the O.K. Corral is abundant. Paul Andrew Hutton provides an overview of Hollywood's numerous interpretations of the conflict that includes a useful bibliography of the gunfight's most famous protagonist, Wyatt Earp. See Hutton, "Showdown at the O.K. Corral: Wyatt Earp at the Movies," *Montana, The Magazine of Western History* 45:3 (1995): 2–31. According to most scholars, the best general overview of the gunfight is Paula Mitchell Marks, *And Die in the West: The Story of the O.K. Corral Gunfight* (New York, 1989). Marks describes events in Tombstone as "just one particularly bloody thread in a tangled skein of frontier animosities and intrigues that lent credence to the already burgeoning myth of the Wild

researched and written about crime and criminal justice in the United States. Many of these studies have been based on a systematic examination of the records of various law enforcement institutions in a given geographic area.<sup>8</sup> Aside from a number of studies of California's justice system, most of this scholarship has focused on communities in the East and Midwest.<sup>9</sup> As a result, most conclusions regarding crime and

West." Marks, 20. For the Johnson County War, see Helen Huntington Smith, *The War on Powder River* (1966; reprinted Lincoln, Neb., 1967). For an overview of literature on the war, see John D. McDermott, "Writers in Judgment: Historiography of the Johnson County War," *Wyoming Annals* (Winter 1993-94): 20-34. For the Lincoln County War, see Robert M. Utley, *High Noon in Lincoln: Violence on the Western Frontier* (Albuquerque, N.M., 1987) and Frederick W. Nolan, *The Lincoln County War: A Documentary History* (Norman, Okla., 1992). For vigilantism, see Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (New York, 1975) and H. Jon Rosenbaum and Peter C. Sederberg, eds., *Vigilante Politics* (Philadelphia, Penn., 1976). For a general list of violent episodes in the West, see Brown, "Violence," in *The Oxford History of the American West*, ed. Clyde A. Milner II, Carol A. O'Connor, and Martha A. Sandweiss (New York, 1994), 412-13.

<sup>8</sup>See, for example, Michael Hindus, *Prison and Plantation: Criminal Justice in 19th Century Massachusetts and South Carolina* (Chapel Hill, N.C., 1980); Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South* (New York, 1984); David J. Bodenhamer, "The Efficiency of Criminal Justice in the Antebellum South," *Criminal Justice History* 3 (1983): 81-95; Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* (New York, 1986); Craig B. Little, "The Criminal Courts in 'Young America': Bucks County, Pennsylvania, 1820-1860, with Some Comparisons to Massachusetts and South Carolina," *Social Science History* 15:4 (1991): 457-78; Eric H. Monkkonen, *Police in Urban America, 1860-1920* (Cambridge, England, 1981); Monkkonen, *The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1888* (Cambridge, Mass., 1975); David R. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887* (Philadelphia, 1979); Roger Lane, *Policing the City: Boston, 1822-1885* (Cambridge, England, 1967); Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1880* (Chapel Hill, N.C., 1989); Timothy Dodge, *Crime and Punishment in New Hampshire, 1812-1914* (New York, 1995).

<sup>9</sup>For California, see, for example, Lyle A. Dale, "Rough Justice: Felony Crime and the Superior Court in San Luis Obispo County, 1880-1910," *Southern California Quarterly* 76:2 (1994): 195-216; and "The Police and Crime in Late Nineteenth-Century and Early Twentieth-Century San Luis Obispo, California," *Western Legal History* 4:2 (1991): 203-23; Lawrence M. Friedman and Robert Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California 1870-1910* (Chapel Hill, N.C., 1981); Linda S. Parker, "Superior Court Treatment of Ethnic Charged with Violent Crimes in Three California Counties, 1880-1910," *Southern California Quarterly* 74:3 (1992): 225-46; Robert H. Tillman, "The Prosecution of Homicide in Sacramento County, California, 1853-1900," *Southern California Quarterly* 68:2 (1986): 167-82; John J. Stanley, "Bearers of the Burden: Justices of the Peace, Their Courts and the Law in Orange County, California, 1870-1907," *Western Legal History* 5:1 (1992): 37-68; Richard W. Crawford, "The White

criminal justice in the American West continue to be based on incidents like the Graham murder. Such studies invariably—and often erroneously—conclude that western law enforcement institutions were ineffective.<sup>10</sup> Moreover, with their focus on murders, stage robberies, and cattle rustling within the context of blood feuds and economic conflicts, they also create an incomplete picture of the frequency, types, and causes of crimes committed in the American West.<sup>11</sup>

Man's Justice: Native Americans and the Judicial System of San Diego County, 1870–1890," *Western Legal History* 5:1 (1992): 69–82. For notable exceptions to this trend outside California, see Clare V. McKanna, Jr., *Homicide, Race, and Justice in the American West, 1880–1920* (Tucson, Ariz., 1997); John R. Wunder, *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853–1889* (Westport, Conn., 1979); Robert R. Dykstra, *The Cattle Towns* (Lincoln, Neb., 1968); Roger D. McGrath, *Gunfighters, Highwaymen & Vigilantes: Violence on the Frontier* (Berkeley, Calif., 1984).

<sup>10</sup>For example, in the conclusion of his excellent narrative of the Lincoln County War, Robert Utley writes, "All over the American West, law and order suffered in youthful pioneer communities. . . . Peace officers tended to be too few and too ineffective to cope with the outlaws who gravitated to such tempting prey. . . . The courts were no more efficient, with judges and prosecutors of doubtful competence and juries unable or unwilling to apply justice evenly." Utley, 172–73. For a discussion of the uses and limitations of sensational cases, see Friedman and Percival, *The Roots of Justice*, ch. 7. For a recent example of the use of a sensational event as a framework in which to describe the routine—and effective—workings of Wyoming's 1909 criminal justice system, see John W. Davis, *A Vast Amount of Trouble: A History of the Spring Creek Raid* (Niwot, Colo., 1994). Also see Joel Samaha, "A Case of Murder: Criminal Justice in Early Minnesota," *Minnesota Law Review* 60:6 (1976): 1219–31.

<sup>11</sup>Some of the more oft-cited works that use violence as a means of reaching conclusions about crime and criminal justice include James Truslow Adams, "Our Lawless Heritage," *The Atlantic Monthly* (December 1928), 732–40; W.C. Holden, "Law and Lawlessness on the Texas Frontier, 1875–1890," *Southwestern Historical Quarterly* (October 1940): 188–203; Mabel A. Elliott, "Crime and Frontier Mores," *American Sociological Review* 9 (April 1944): 185–92; Wayne Gard, *Frontier Justice* (Norman, Okla., 1949); Fred Harrison, *Hell Holes and Hangings: The West's Territorial Prisons, 1861–1912* (New York, 1968); Joseph G. Rosa, *The Gunfighter: Man or Myth?* (Norman, Okla., 1968); Joe B. Frantz, "The Frontier Tradition: An Invitation to Violence," in *The History of Violence in America: Historical and Comparative Perspectives*, ed. Hugh Davis Graham and Ted Robert Gurr (New York, 1969), 127–54; Harry Sinclair Drago, *The Great Range Wars: Violence on the Grasslands* (Lincoln, Neb., 1970); Philip D. Jordan, *Frontier Law and Order: Ten Essays* (Lincoln, Neb., 1970).

Although W. Eugene Hollon, *Frontier Violence: Another Look* (New York, 1974) focuses primarily on violence, his study is a classic example of the dilemma faced by Western historians looking for information about crime and criminal justice. Prior to concluding that the West was relatively peaceful and orderly, Hollon devotes nine chapters to a variety of anecdotes that portray the West as violent and lawless. As Hollon indirectly suggests, sensational incidents are easy to find and describe—but they are poor sources of general conclusions about the West.

Lyle A. Dale, Lawrence M. Friedman, Robert V. Percival, and others have shown the folly of making broad generalizations about crime in the West based on sensational incidents. Collectively, their systematic examinations of court documents show that, at least between 1870 and 1910, California possessed a relatively effective criminal justice system. Studies of both urban and rural areas of California suggest that crime there was not particularly violent, nor was it a serious problem. Such conclusions contradict the image of the West as a violent and lawless place, but other western regions need to be examined before one can effectively revise conventional wisdom regarding crime and justice in the West.

Arizona Territory, one of many locales known for its apparently lawless past, provides an excellent opportunity to test conclusions based on sensational incidents.<sup>12</sup> The Tewksbury case dragged on for three years, and in the process it revealed a criminal justice system plagued by prosecution miscues, deadlocked juries, frequent delays, and high expenses. Instead of focusing on one case, however, a better method of drawing conclusions about crime and criminal justice in Arizona Territory is to examine a broad sample of criminal cases. First, though, a description of Arizona's criminal justice system will provide some needed background.

In February 1863, President Abraham Lincoln signed the Organic Act, which created Arizona Territory and the framework for its elective government and judicial system. Judicial power was vested in a supreme court, consisting of three judges, and various inferior courts to be created later by Arizona's elected legislature. Appointed by the president

<sup>12</sup>In 1916, for example, James H. McClintock produced a three-volume history that included three chapters of shootouts, lynchings, robberies, and other mayhem. In the conclusion to this carnage, he wrote,

In the listing of crimes of desperadoes, of lynchings and of hangings, the Editor would state that by no means has he tried to illustrate more than typical phases of border outlawry and crime. The lists in any particular intentionally are incomplete and it is possible that there have been passed over many events that might be considered worthy of notice. But enough undoubtedly will be found to show that to Arizona, as the scum of the ocean drifts toward its edge, came many of the worst of humanity, seeking a land without law or religion.

James H. McClintock, *Arizona: Prehistoric, Aboriginal, Pioneer, Modern; the Nation's Youngest Commonwealth Within a Land of Ancient Culture* (Chicago, 1916), 458–91. Also see Madeline Ferrin Paré, *Arizona Pageant* (Phoenix, Ariz., 1965), 191, 221–38; Marshall Trimble, *Arizona: A Cavalcade of History* (Tucson, Ariz., 1989), 166–83; Trimble, *Arizona: A Panoramic History of a Frontier State* (Garden City, N.Y., 1977), 262–68, 269–79, 307–11, 321–27.

to four-year terms, each supreme court justice had multiple duties and multiple jurisdictions. Besides serving on Arizona's supreme court, each was assigned to one of the territory's three judicial districts. Within their respective districts, the judges heard criminal and civil cases tried under both U.S. and territorial law. Cases tried under U.S. law were heard twice per year at one location within each district. Territorial cases were also tried twice per year, but at the county seat for the county in which the case originated. In 1884, for example, the first judicial district consisted of Pima, Pinal, and Graham counties. The justice for that district, William Fitzgerald, was required by law to hear cases arising under territorial law within each county in the first district twice that year. In addition, the U.S. cases were to be tried twice that year in one of the county seats within the district.<sup>13</sup>

U.S. district court cases were those arising under the U.S. Constitution and the federal laws. Although cases involving murder, robbery, or the theft of valuable property were sometimes tried here, for the most part most serious crimes were tried in the territorial district courts.<sup>14</sup> A cursory examination of U.S. district cases reveals that most cases involved selling liquor to Indians, smuggling, crimes against the U.S. mail, and adultery.<sup>15</sup> The eight cases tried in Tucson during the 1884 November term were fairly typical of the crimes tried under U.S. jurisdiction. Collectively, the cases involved smuggling cattle into the United States, stealing government property, cutting wood on government property, violation of postal law, violation of revenue law, and counterfeiting. Although the theft of government property landed Charles H. Sanford a term of one year's imprisonment at Fort Laramie, the smuggling, postal law, and wood-cutting convic-

<sup>13</sup>*An Act to Provide a Temporary Government for the Territory of Arizona*, U.S. Statutes at Large, 37<sup>th</sup> Cong., 3d sess., ch. 56 (1863); *Organic Law of Arizona*, U.S. Revised Statutes, reprinted in *Revised Statutes of Arizona Territory 1901* (Columbia, Mo., 1901), 78–81, 89–92; Henry P. Walker and Don Bufkin, *Historical Atlas of Arizona*, 2d ed. (Norman, Okla., 1986), 30, 36; John S. Goff, *The Supreme Court Justices, 1863–1912*, Arizona Territorial Officials, vol. 1 (Cave Creek, Ariz., 1975), 96–99.

<sup>14</sup>For an example of a particularly notable case appearing in the U.S. District Court, see Larry T. Upton and Larry D. Ball, "Who Robbed Major Wham? Facts and Folklore behind Arizona's Great Paymaster Robbery," *Journal of Arizona History* 38:2 (1997): 99–134.

<sup>15</sup>Norman E. Tutorow, *Preliminary Inventory of the Records of the Arizona Territorial Court* (Los Angeles, 1970), 16–17.

tions resulted in only twenty-four-hour stints in the county jail for the respective defendants.<sup>16</sup>

Overall, the U.S. district courts did not try most of the serious crimes committed in Arizona Territory.<sup>17</sup> This job fell to the territorial district courts held biannually in each county. For most of the period under study, territorial district courts tried all felonies and any misdemeanors whose punishment exceeded a three-hundred-dollar fine or one year in the county jail. In addition, the territorial courts served as courts of appeal from justice, probate, and the various municipal courts.<sup>18</sup> Most cases involving murder, serious assault, and theft of valuable property—the types of activities that, if widespread and unpunished, could give an area a reputation for lawlessness—were tried in the territorial district courts.<sup>19</sup>

Arizona's territorial district courts, however, are not the only areas that contain records of serious criminal activities. Each county was divided into justice of the peace (JP) precincts. Although these precincts mostly heard cases involving misdemeanors such as petit larceny, minor assaults, disturbing the peace, and drunk and disorderly conduct, they often were the first stop in the processing of felonies and of the few misdemeanors outside of JP jurisdiction. Criminal proceedings in Arizona Territory usually began with a complaint to the JP of the precinct in which the alleged crime occurred. After a complaint was filed, the JP conducted an investigation of the charge. If there were reasonable grounds to believe that the defendant in the complaint had committed the crime, the JP issued a warrant for his arrest. Then the lawman who made the arrest was required to present the defendant immediately in front of the JP for examination. After the examination, the JP decided whether the defendant should be discharged or held to answer for the charge during the next session of territorial district court. Regardless of the outcome of the JP examination, all documents arising from it were required to be filed with the territorial district court clerk.<sup>20</sup> District court prosecutions and their resulting records, then, mainly represented instances where—at a minimum—someone was arrested for

<sup>16</sup>*Arizona Daily Star*, December 7, 1884.

<sup>17</sup>Severity simply refers to the amount of punishment given for committing a crime.

<sup>18</sup>*The Compiled Laws of the Territory of Arizona, 1871* (Albany, N.Y., 1871), 55–57; *Compiled Laws, 1887*, 160; *Compiled Laws, 1901*, 567.

<sup>19</sup>*Compiled Laws, 1871*, 71–101.

<sup>20</sup>*Compiled Laws, 1871*, 103–117; *Compiled Laws, 1901*, 1311–25.

committing a felony or serious misdemeanor and was examined by a JP.

Although JP court records offer scholars the broadest overview of crime in Arizona, they are only marginally useful for comparisons with other studies of crime and criminal justice across time and space.<sup>21</sup> As one scholar recently noted, crime and punishment are variable in nature and depend on the interaction of community values.<sup>22</sup> This is particularly true if one adopts a sweeping definition of crime for analysis. The frequency with which crimes are prosecuted is often a reflection of a given community's desire to see those crimes prosecuted—especially crimes such as vagrancy, public drunkenness, prostitution, gambling, or disorderly conduct. The number of prosecutions for those crimes is as much a commentary on a community's tolerance for that type of behavior as it is a relative measure of how often those crimes are committed.<sup>23</sup> Numerous studies have demonstrated that most criminal conduct consists of less serious misdemeanors. A broad definition of crime would include these behaviors, but the varied definitions, social views, and prosecution rates of such crimes make regional comparisons difficult, if not impossible.<sup>24</sup>

However, the prosecution of serious crimes—while not totally immune—is comparatively less subject to the whims of society. Communities in the United States have usually viewed murders, deadly assaults, and theft of valuable property with a consistent level of concern. Thus, the frequency with which a criminal justice system prosecutes serious crimes is a potentially more accurate measure of the relative prevalence of those crimes than the rate of misdemeanor prosecutions is of less serious crimes.<sup>25</sup> Large numbers of

<sup>21</sup>Also, JP courts were not courts of record. As a result, JP records are not as complete as district court records.

<sup>22</sup>Joseph Willard Laythe, "Bandits and Badges: Crime and Punishment in Oregon, 1875–1915" (Ph.D. dissertation, University of Oregon, 1996), 9–10.

<sup>23</sup>For examples of this, see Roger Lane, "Crime and Criminal Statistics in Nineteenth-Century Massachusetts," *Journal of Social History* 2 (1968): 156–63; and Eugene J. Watts, "Police Response to Crime and Disorder in Twentieth-Century St. Louis," *Journal of American History* 70 (September 1983): 340–58.

<sup>24</sup>Laythe, "Bandits and Badges," 9–10.

<sup>25</sup>Ted Robert Gurr, "Historical Trends in Violent Crime: A Critical Review of the Evidence," in *Crime and Justice: An Annual Review of Research*, ed. Michael Tonry and Norval Morris (Chicago, 1981), 295–353. Gurr argues that the best means of analyzing crime for comparisons across eras and different jurisdictions is to focus on "the most serious offenses." Gurr, 298.

prosecutions for serious, violent crimes relative to other crimes, combined with low conviction rates, suggest a region in turmoil and burdened by an ineffective justice system—in short, a region that is “wild.” Thus, the best way to examine Arizona Territory’s criminal justice system is through the territorial district courts, where the most serious crimes were prosecuted. These courts comprise the only criminal justice system that can be compared usefully to other systems. This is the jurisdiction where the Tewksbury trials took place, and therefore is the logical place to challenge assumptions about the justice system that are based on sensational trials.

The Tewksbury trials occurred in Pima County’s territorial district court. The remainder of this study, then, will juxtapose assumptions about the criminal justice system that are based on those cases with an examination of the business passing through Pima County’s court between 1882 and 1909. The cases tried during this period are representative of the criminal activities prosecuted by the court, as well as the ability of the court to prosecute these activities during the decade or so before and after the Tewksbury cases.

Located in south-central Arizona along the Mexican border, Pima County was one of the first four counties carved out of Arizona Territory in 1864. Despite losing significant land area to the formation of other new counties, Pima County remained the most populous county in Arizona until 1890, and for the next two decades it ranked second only to Maricopa County. Tucson, the county seat, is located in the northeast section of Pima County along the Santa Cruz River. Throughout the period under study, Tucson contained at least half of Pima County’s population. Most of the other half lived in a string of communities on or near the river, extending from Tucson south to the Mexican border. Few significant settlements were situated to the west of Tucson other than a number of Papago Indian villages and isolated mining communities. The copper town of Ajo was the most notable of the latter. Located approximately 136 miles west of Tucson, Ajo was home to the first American-operated mine in Arizona, but it did not experience significant population growth until after 1900.<sup>26</sup>

Other than serving as a point of reference for the Tewksbury cases, Pima County works well for an examination of Arizona’s justice system for three reasons: First, the county contained a significant proportion of Arizona’s population

<sup>26</sup>Walker and Bufkin, *Historical Atlas of Arizona*, 30–33, 49, 61; U.S. Bureau of the Census, *Reports*, 1890, vol. 1, 60; Trimble, *Cavalcade*, 130–31.



during the period under study.<sup>27</sup> Second, Pima County possessed a diverse economy that included mining, agriculture, ranching, and, in Tucson particularly, commercial pursuits.<sup>28</sup> It was both rural and urban. As a case study, it provides a midpoint between the stereotypical extremes of crime often associated with mining boom towns and the equally stereotypical extremes of orderliness associated with agricultural areas. The third reason for studying Pima County is its racial diversity. Because it lay along the Mexican border and many of its settlements predated the arrival of Americans, Pima County contained a substantial Hispanic population. Of the 12,673 people tabulated in the 1890 census, approximately 40 percent were from Mexico—a number that does not include American citizens of Mexican descent who were born in Arizona.<sup>29</sup> Researchers have generated more precise figures for Tucson and have found that Hispanics accounted for 63.8 percent of the town's population in 1880 and 54.7 percent in 1900.<sup>30</sup> The ethnic conflict that often characterized relations between Hispanics and Anglos in the Southwest is well known.<sup>31</sup> One result of these conflicts was crime, particularly violent crime. An examination of Pima County provides a glimpse of crime and the operation of criminal justice in an arena that, based on its racial characteristics, potentially provided a formidable test of the system's ability to control crime.<sup>32</sup>

<sup>27</sup>Walker and Bufkin, *Historical Atlas of Arizona*, 61. Population of Pima County, all of Arizona Territory, and Percentage of Arizona Territory Population Living in Pima County by Decade:

	1880	1890	1900	1910
Pima	17,006	12,673	14,689	22,818
Total AZ	40,440	88,243	122,931	204,354
Pima %	42.1	14.4	11.9	11.2

<sup>28</sup>Thomas E. Sheridan, *Los Tucsoneses: The Mexican Community of Tucson, 1854–1941* (Tucson, Ariz., 1986), 86–87; C.L. Sonnichsen, *Tucson: The Life and Times of an American City* (Norman, Okla., 1982), 75–112.

<sup>29</sup>U.S. Bureau of the Census, *Reports*, 1880, vol. 1, 380; *Reports*, 1890, vol. 1, 610.

<sup>30</sup>Sheridan, *Los Tucsoneses*, 3.

<sup>31</sup>See, for example, Robert J. Rosenbaum, *Mexicano Resistance in the Southwest: The Sacred Right of Self-Preservation* (Austin, Tex., 1981); Albert Camarillo, *Chicanos in a Changing Society: From Mexican Pueblos to American Barrios in Santa Barbara and Southern California: 1848–1930* (Cambridge, Mass., 1979).

<sup>32</sup>Sheridan, *Los Tucsoneses*, 87–90. For examples of violence, see Sheridan, note 30.

From 1882 to 1909, Pima County's District Court processed approximately 2,220 cases.<sup>33</sup> For this study, information was taken from court records and/or registers of actions from all cases in four-year, alternating blocks until 1900. For cases after 1900, information came from every fourth case in four-year alternating blocks. The end result was a 938-record database that included, among other information, the defendant's name, the crime he or she was charged with, and the case outcome. The cases after 1900 were weighted to enable comparisons with the earlier cases; therefore the sample being analyzed is statistically equivalent to 1,436 cases. Crime and outcome information was unavailable for eighty-eight cases, and twenty-seven other cases represented multiple prosecutions of the same crime. By analyzing the remaining 1,321 cases, we can gain a clearer understanding of the territorial district court's activities and the types of crimes that were committed and prosecuted during the years before and after the Tewksbury cases.

The bulk of the caseload (see Table 1.1) consisted of prosecutions for serious crimes. Approximately 92 percent of

**Table 1.1**  
**Pima County District Court Activity, 1882–1909**

	Frequency	Percent
Prosecutions	1,044	79.0
Contempt	119	9.0
Appeals/Activity from lower courts	110	8.3
Habeas corpus	35	2.6
Change of venue	13	1.0
Total	1,321	100.0

<sup>33</sup>The database used for this study is part of a larger sample of court cases assembled for dissertation research. Information was pieced together through an examination of court records and registers of action for Pima County between 1882 and 1909. Arizona, Pima County, District Court, *Criminal Case Files, 1882–1909* (Arizona State Archives, Phoenix); Arizona, Pima County, District Court, *Criminal Registers of Action, 1882–1909* (Arizona State Archives, Phoenix).

these were felonies—crimes for which punishment was imprisonment in the Yuma Territorial Prison. The remaining prosecutions were misdemeanors too serious to be tried in front of a justice of the peace or instances where the defendant was originally charged with a felony, but was found guilty of a misdemeanor. Contempt cases were surprisingly numerous, but most simply involved formal charges against witnesses who failed to appear for a trial. The large number of contempt cases is primarily a reflection of Pima County's peculiar record-keeping during the 1890s. Throughout Arizona Territory, contempt proceedings generally did not produce a new case, but instead were recorded with the case in which a witness failed to appear. Contempt cases are treated separately here to avoid inflating the frequency of serious crimes and to provide a more accurate means of comparison with other studies.<sup>34</sup> Appeals from lower courts, such as justice-of-peace courts and recorders courts, accounted for nearly all other cases. A small percentage were requests for a writ of habeas corpus and changes of venue.

By setting aside the latter three categories, we can focus on the prosecutions of felonies and serious misdemeanors originally sent to district court. This permits an examination of serious crime and the operation of the criminal justice system in Pima County. We start by subdividing the cases into basic types of crime (see Table 1.2).<sup>35</sup> Surprisingly, in spite of the violent reputation of the American West, the largest proportion of crimes were property crimes, and they were prosecuted roughly 24 percent more often than crimes against persons. The remaining cases—14.8 percent of the prosecutions—were

<sup>34</sup>An increase in unknown cases occurs during the same period in which contempt cases increased. Thus it is reasonable to assume that many of the missing cases stemmed from contempt charges.

	1882–1885	1890–1893	1898–1901	1906–1909	Total
Unknown crime	9	49	14	16	88
Contempt cases	0	51	32	36	119

<sup>35</sup>Joel Brentice Bishop, the first major American theorist of criminal law, divided crimes into eleven major groupings. David J. Bodenhamer, in his study of criminal justice in Marion County, Indiana, compresses these groupings into five categories: crimes against persons, crimes against property, crimes against morality, crimes against public order, and crimes against legal order. Friedman and Percival compress the categories even further, combining legal (or regulatory) and public order crimes for their analysis of felonies. The only regulatory crimes processed in Alameda County's superior court were appeals from lower courts or misdemeanor indictments. This study copies Friedman's and Percival's categorization scheme. Friedman and Percival, *The Roots of Justice*, 135–37; Bodenhamer, *The Pursuit of Justice*, 193, note 24.

**Table 1.2**  
**Pima County Prosecutions by Category, 1882–1909**

	Frequency	Percent
Against property	505	48.4
Against persons	384	36.8
Against legal/public order	108	10.3
Unknown category	24	2.3
Against morality	23	2.2
Total	1,044	100.0

crimes against legal order, public order, and morality. A close look at the subcategories of prosecutions shows that the most common property crimes and the most common crimes overall were grand larceny and other forms of theft. (see Table 1.3) The most common crimes against persons were various forms of assault, such as assault to kill and assault with a deadly weapon. Out of all the serious crimes prosecuted, only 7.3 percent were homicides. Most of these were murders in the first or second degree (see Table 1.4). The remaining 27.6 percent were prosecuted as manslaughters.

Although court cases are an inadequate measure of actual crime, they are evidence of the relative numbers of criminal cases that have traveled through the justice system. An underlying assumption of this study is that when a relatively high number of cases occurs in a given category, a relatively large amount of this type of activity has actually occurred and is regarded as serious enough to warrant prosecution.<sup>36</sup> At least one historian describes the era under study, the 1890s in particular, as one in which "shooting, murder, rape and robbery continued to get newspaper headlines" in Tucson, the Pima County seat.<sup>37</sup> But these data suggest that violent crimes were not the most prevalent criminal activities in Pima County between 1882 and 1909. Modern studies have shown

<sup>36</sup>Little, "The Criminal Courts in 'Young America,'" 460–61.

<sup>37</sup>Sonnichsen, *Life and Times*, 129–33.

**Table 1.3**  
**Pima County Prosecutions by Subcategory, 1882–1909**

	Frequency	Percent
Property		
Larceny/Theft	210	20.1
Burglary	138	13.2
Against property—other	129	12.4
Forgery/Counterfeiting	28	2.7
Person		
Assaults	235	22.5
Homicides	76	7.3
Robbery	37	3.5
Rape	25	2.4
Against persons—other	11	1.1
All other		
Against legal order	82	7.9
Against public order	26	2.5
Unknown category	24	2.3
Against morality	23	2.2
Total	1,044	100.0

**Table 1.4**  
**Homicides Prosecuted in Pima County, 1882–1909**

	Frequency	Percent
Murder and murder 1 <sup>st</sup> degree	43	56.6
Murder, 2 <sup>nd</sup> degree	12	15.8
Manslaughter	21	27.6
Total	76	100.0

that actual crime rates are at least two to three times higher than those reported to police, and that people generally report crimes against property half as often as violent crime.<sup>38</sup> Reporting of crime tends to be related to the seriousness of the offense; as one scholar writes, "Offenses which inflict bodily harm are and probably have always been more threatening to most people than has property crime."<sup>39</sup> Thus, although it is risky to project conclusions about modern crime reporting onto the period under study, one could infer that Pima County residents reported a lower percentage of property crimes than violent crimes. If this was so, actual violent crime probably occupied an even lower percentage of total crime than was reflected in the court cases. Whether one accepts this assertion or not, the court cases reveal that, as a proportion of crime, violent transgressions were not chronic problems in Tucson or Pima County.

In sorting the cases by category, we have begun to chip away at the image of deadly violence that a focus on sensa-

<sup>38</sup>Charles E. Silberman, *Criminal Violence, Criminal Justice* (New York, 1978), 607–17; Friedman and Percival, *The Roots of Justice*, 28, 149–50; Scott Boggess and John Bound, "Did Criminal Activity Increase during the 1980s? Comparisons across Data Sources," *Social Science Quarterly* 78:3 (1997): 726; Gurr, "Historical Trends in Violent Crime," 298; Howard Zehr, "The Modernization of Crime in Germany and France, 1830–1913," *Journal of Social History* 8 (1975): 119.

<sup>39</sup>Gurr, "Historical Trends in Violent Crime," 296.

tional events tends to convey. Nonetheless, the quantification of violence is still problematic.<sup>40</sup> The court cases themselves offer one way of defining or describing violent crime, but we still need a consistent measure of violent crime relative to other crimes in order to be able to compare one era or region to another. In his study of German and French courts, Howard Zehr suggests such a method by creating a mix analysis ratio of prosecutions. Mix analysis demonstrates how cases are apportioned among various crime categories.<sup>41</sup> For Pima County, we applied a mix analysis to measure the balance between the two most commonly prosecuted crimes—crimes against persons and crimes against property. The ratio of these categories, hereafter known as the theft-to-violence ratio (TVR), indicates the percentage of the two categories that was composed of violent crimes.<sup>42</sup> Pima County's TVR for the period under study was 43.2. A TVR over 50 would indicate that violent crimes were proportionately more prevalent than property crimes. The index, then, confirms our suspicion that the prevalence of violent crime in Pima County was exaggerated. But how does Pima County's TVR compare to other areas of the country? Perhaps Pima County was not as violent as the image suggests, but still more violent than other places. One advantage of the TVR is that it allows the balance between property crimes and violent crimes to be compared across time and space using a single index. Rates of violence are compared to rates of property crimes within the same area, thus reducing some of the distortions caused by different criminal justice systems and varying definitions of crime.<sup>43</sup> Lawrence Friedman's and Robert Percival's study of Alameda County, California, is particularly useful for comparative

<sup>40</sup>For an annotated bibliography of the debate over violence in the West, see McGrath, *Gunfighters, Highwaymen & Vigilantes*, 261–71; also see Brown, "Historiography of Violence in the West," in *Historians and the American West*, ed. Michael P. Malone (Lincoln, Neb., 1983), 234–58. For an example of the debate, see the recent exchange between Robert R. Dykstra and Clare V. McKanna, Jr.: McKanna, Jr., "Alcohol, Handguns, and Homicide in the West: A Tale of Three Counties, 1880–1920," *Western Historical Quarterly* 26:4 (1995): 455–82, 477; McKanna, Jr., *Homicide, Race, and Justice in the American West, 1880–1920* (Tucson, Ariz., 1997), 7–8; Robert R. Dykstra, "Field Notes: Overdosing on Dodge City," *Western Historical Quarterly* 27:4 (1996): 510, note 25.

<sup>41</sup>Zehr, "The Modernization of Crime," 122. For a use of this index, also see Little, "The Criminal Courts in 'Young America.'"

<sup>42</sup> $TVR = 100 \times [\text{crimes against persons}] / [\text{crimes against persons} + \text{crimes against property}]$

<sup>43</sup>Zehr, "The Modernization of Crime," 122.

purposes. It covers almost the same time period as this study, and the tables they created provide the information necessary to construct a TVR. California's superior courts were the original courts of jurisdiction for virtually the same types of crimes as Arizona's territorial district courts.<sup>44</sup> Both courts heard felonies and a small number of misdemeanors outside the jurisdiction of lower courts. Friedman and Percival concluded that between 1880 and 1910 Alameda County's population "was in no real, imminent danger from serious and violent crime," and that property felonies were far more common than felonies of personal violence.<sup>45</sup> Alameda County was an example of a region unburdened by violent crime, and a TVR of its court cases would reflect this condition, thus providing a more precise means of interpreting Pima County's TVR.

Between 1880 and 1910 Alameda County's TVR was 30.8, a figure substantially lower (by 29 percent) than Pima County's index of 43.2. At first glance, then, it appears that although Pima County experienced a lower proportion of violent crime relative to property crime, it still experienced more violence than Alameda County. These figures lend support to the conclusion that Arizona Territory—at least Pima County—experienced greater violence than more settled and stable areas such as Alameda County. One would assume that the violence in Pima County was attributable to the relative recency of its frontier era; in 1882, the criminal justice system had been in operation for only seventeen years, Indian depredations were still common, and the railroad—both a symbol and a source of stability—had connected Tucson to the outside world for only two years.<sup>46</sup> But, if we compute the TVR of both counties in increments over time, the results are surprising.<sup>47</sup> During the 1880s and early 1890s, the TVRs were similar. During the late 1890s, however, the TVR for Pima County begins to climb relative to Alameda County and reaches a high of 50 from 1906 to 1909—almost twice as high as Alameda County's TVR from 1900 to 1910. Pima County was relatively more violent, but only during and after the late 1890s. Thus, if Pima County was more violent than Alameda County, it was not because of the recency of its frontier days.<sup>48</sup>

<sup>44</sup>Friedman and Percival, *The Roots of Justice*, 40–41.

<sup>45</sup>*Ibid.*, 27, 310.

<sup>46</sup>Sonnichsen, *Life and Times*, 102.

<sup>47</sup>Alameda County data computed from tables in Friedman and Percival, *The Roots of Justice*, 136–37.

<sup>48</sup>Violent crime prosecutions also increased as a proportion of population in Pima County—from 13.6 per 10,000 population in the early 1890s to 22.4 per 10,000 population during the mid to late 1900s.



An examination of the defendants accused of violent crimes partly explains this tendency toward increased violence in Pima County at the turn of the century. Of the 384 cases involving violent crimes, 372 of the defendants were either Anglo or Hispanic. The percentage<sup>49</sup> of Hispanic defendants charged with violent crimes relative to Anglos charged rose in the 1890s—despite the fact that the percentage of Hispanics in the general population began to decrease during the same time period. With a relative decrease in population came a loss in status and influence. Discrimination increased, and Hispanics were pushed to the economic and political margins. Overrepresentation of Hispanics as defendants in cases involving violence may have been a reflection of their eroding economic and social status in Pima County.<sup>50</sup> Perhaps the steady decline in status caused turmoil within Hispanic communities: In the vast majority of violent cases where the defendant was Hispanic, the victim was also Hispanic. Whatever the reason for Pima County's rising TVR, it is clear that it cannot be blamed on a frontier environment. Moreover, the fact remains that, aside from perhaps the four-year stretch between 1906 and 1909, Pima County did not appear to have a particular problem with violent crime.

The most exaggerated violent crime was murder. Homicides constituted a small proportion of the criminal prosecutions in Pima County, and an even smaller proportion of all the court's business. Scholars have used homicide both as a measure of violence and as a means of analyzing justice systems in the American West. One advantage of using homicide data is that official records concerning the taking of human life are generally considered a better measure of the "true" incidence of homicide than records for less serious crimes are of their respective crimes.<sup>51</sup> The main problem with using homicide data is that homicide was a relatively infrequent crime. Its rate of occurrence was highly variable over the short run, especially in small localities. In addition, a violent act was classified as homicide only, of course, if the victim died, and the life-or-death outcome depended less on the violent act itself than on the availability of lethal weapons, the proximity to medical facilities, and, in some cases, plain luck.<sup>52</sup>

<sup>49</sup>Anglo count may include a small number of African Americans. Hispanic count may include a small number of Hispanicized Indians.

<sup>50</sup>Sheridan, *Los Tucsoneses*, 111–30; Sonnichsen, *Life and Times*, 145–46.

<sup>51</sup>Gurr, "Historical Trends in Violent Crime," 299; Zehr, "The Modernization of Crime," 121.

<sup>52</sup>Gurr, "Historical Trends in Violent Crime," 300–301; Zehr, "The Modernization of Crime," 122; Dykstra, "Field Notes," 507–11.

Any thorough examination of violence and criminal justice ought not to rely solely on the crime of homicide. It simply constituted too small a proportion of violent crimes in a given area and of all crimes prosecuted. Clare V. McKanna, Jr., has recently shown that court records, particularly criminal indictments, undercount the actual number of homicides. In his study of Gila County, Arizona, between 1881 and 1920, McKanna examined coroners' records and found 214 cases where one human being killed another. These inquests resulted in 137 criminal indictments, suggesting that indictments undercount actual cases of homicide by nearly 40 percent.<sup>53</sup> If we increase the number of homicide indictments found in the Pima County sample by 40 percent, however, we find that if all cases of homicide—including lynchings, "legal" homicides committed by law officers, and other killings where the investigation ended with the coroner's inquest—the percentage of homicides reflected in the court cases would increase less than 2 percent.<sup>54</sup> In short, homicide would still be a small proportion of all crimes committed, even if we assumed that criminal indictments undercount actual homicides—criminal and non-criminal—by 40 percent.

Besides being relatively infrequent, homicides are unique crimes due in part to the magnitude of the transgression. As the publicity surrounding the Tewksbury trials demonstrated, the cause of a death and the assessment of responsibility for it can easily put any justice system under stresses not present in the prosecutions of other crimes.<sup>55</sup> A brief examination of vigilantism in Arizona underscores the uniqueness of homicide. In forty-four documented instances between 1859 and 1920, Arizona witnessed a breakdown in formal criminal justice that resulted in the extralegal executions of seventy men.<sup>56</sup> Detailed information is available for thirty-four of these incidents, which led to the deaths of forty-nine men. Forty-two of the lynchings were responses to homicides, two to attempted homicide, four to rustling, and one to theft. Of

<sup>53</sup>McKanna, *Homicide, Race, and Justice*, 17, 137.

<sup>54</sup>It rises from 7.3 percent to 8.5 percent. Total homicide cases for the Pima County sample were 76. Sixty-two resulted in indictments. If we increase indictments by 40 percent, the result is 88.9 hypothetical indictments, which would account for 8.5 percent of the total prosecutions.

<sup>55</sup>George Fletcher, *Rethinking Criminal Law* (Boston, 1978), 341. See chapters 4 and 5 for a discussion of the uniqueness of homicide. As Fletcher argues, part of homicide's uniqueness is that the causing of death is widely believed to be an evil in itself.

<sup>56</sup>Ball, *Desert Lawmen*, 381–82.

the four executions for rustling, three were associated with the Pleasant Valley War.<sup>57</sup> No lynchings occurred in Pima County during the period under study,<sup>58</sup> and, in general, citizens in Arizona rarely took the law into their own hands. But, when they did, it was nearly always connected with a homicide. Few other crimes could strain the justice system enough to warrant a breakdown of official criminal procedure. Moreover, even when the system was operating properly, the passions unleashed by a homicide were bound to influence the outcome of a case. The negative impact of racial discrimination and the advantages or disadvantages of a given defendant's socioeconomic status were bound to be exacerbated within the context of a murder trial. Homicides were simply too infrequent as a percentage of overall crime and too traumatic to be used as the sole basis of general conclusions regarding the criminal justice system.

Relying on sensational incidents like the Tewksbury trials falsely emphasizes the frequency and importance of homicides and other personal violence, but it also suggests that convictions were rare—even in the face of substantial evidence against the defendant. In the past, historians have tended to draw conclusions about justice systems in the American West from the results of sensational trials. A better method of assessing the effectiveness of the court system is to examine the conviction rate of a broad cross-section of court cases. In his study of justice systems in Massachusetts and South Carolina, Michael Hindus argues that in order to interpret verdicts, we must make some general assumptions: first, that prosecutors desired convictions and that prosecutions were initiated with probable cause; and second, that the "wholesale railroading" of innocent defendants was extremely infrequent. Conviction rates do not reveal the actual behavior of defendants, but based on these assumptions they do show how the criminal justice system functioned.<sup>59</sup>

The criminal cases processed in Pima County between 1882 and 1909 resulted in a seemingly low overall conviction rate of

<sup>57</sup>David Lawrence Abney, "Capital Punishment in Arizona, 1863–1963" (M.A. thesis, Arizona State University, 1988), 215–17. Abney relies primarily on newspaper records for documentation of extralegal executions. As Ball's data demonstrate, there were probably other occurrences of vigilantism that were undocumented by the Arizona press.

<sup>58</sup>A quadruple lynching reportedly occurred in San Xavier in August, 1881. Ball, *Desert Lawmen*, 382.

<sup>59</sup>Hindus, *Prison and Plantation*, 89–90. Also see Bodenhamer, *The Pursuit of Justice*.

34.1 percent for the 1,044 prosecutions (see Table 1.5). The conviction rate was a little higher for violent crimes (35.9 percent) and crimes against property (39 percent). Crimes against legal/public order and morality had significantly lower conviction rates, but they represented relatively fewer cases and, for the most part, different concerns.

Although the overall conviction rates were less than 50 percent, the cases were simply instances where a crime allegedly occurred, a complaint was filed with a justice of the peace, and a suspect was arrested. The first level of prosecution was the JP, and his primary responsibilities in felony cases were to determine if an actual crime was committed and to eliminate false accusations. After eliminating the approximately 20 percent of cases that never progressed beyond the JP, we have a subsample of 826 prosecutions in which it is probable that a crime was committed and that the correct perpetrator was arrested. Now the conviction rate increases, but it still

**Table 1.5**  
**Conviction Rate by Crime Category for Pima County,**  
**1882-1909**

		Not Found Guilty	Guilty	Total
Property	Count	308	197	505
	%	61.0	39.0	100.0
Person	Count	246	138	384
	%	64.1	35.9	100.0
Legal/ Public order	Count	96	12	108
	%	88.9	11.1	100.0
Morality	Count	20	3	23
	%	87.0	13.0	100.0
Unknown	Count	18	6	24
	%	75	25	100
Total	Count	688	366	1,044
	%	65.9	34.1	100.0

seems low at 43 percent. Hindus refers to this rate as the "effective" conviction rate.<sup>60</sup> By definition it is the ratio of convictions to *all* cases that reach grand or petty juries. According to Hindus, it is an excellent measure of a criminal justice system, because it takes into account many elements of the system, such as the conduct of grand juries that vote against an indictment and prosecutors who elect not to proceed in a case.

Studies of Massachusetts, South Carolina, and Bucks County, Pennsylvania, include effective conviction rates for their respective locales. Collectively, the heavily industrialized and urban state of Massachusetts, the plantation-dominated and slaveholding state of South Carolina, and semirural Bucks County encompass many of the diverse socioeconomic and population characteristics found in the United States in the nineteenth century. Thus, they represent a point of comparison for Pima County. As Table 1.6 shows, the effective conviction rate for Pima County was substantially lower than that of Massachusetts, about the same as that of Bucks County, and significantly higher than South Carolina's rate.<sup>61</sup> If we equate the efficiency of a given justice system with effective conviction rates, at first glance we can tentatively conclude that Pima County's system was not particularly ineffective at prosecuting and convicting criminals.

A second measure of a court's efficiency is known as the "simple" conviction rate, which is the ratio of convictions to the total number of trial verdicts. This rate is a useful means of analyzing effectiveness because it measures the degree of harmony among the criminal justice system's different components—law, police, juries, and judges.<sup>62</sup> In terms of record-keeping and the trial's function within the system, it is also the most consistent element of criminal procedure over time and space. And, of course, the Tewksbury cases were examples of trials, not simple court cases. When compared to South Carolina, Massachusetts, and Bucks County, Pima County's simple conviction rate of 63.8 percent appears a little low, thus lending some credence to criticism of frontier criminal justice systems. But differences in court record-keeping, court jurisdictions, and definitions of crime, as well as the varied methodology of scholars make comparisons of judicial systems

<sup>60</sup>Hindus, *Prison and Plantation*, 90.

<sup>61</sup>Data from this table are drawn from Hindus, *Prison and Plantation*, 65, 91; Little, "The Criminal Courts in 'Young America,'" 465, 471; and Friedman and Percival, *The Roots of Justice*, 173, 182.

<sup>62</sup>Hindus, *Prison and Plantation*, 90.

**Table 1.6**  
**Effective and Simple Conviction Ratios**  
**of Selected Regions**

Region	Effective Conviction Ratio	Indictment Conviction Ratio	Simple Conviction Ratio
Massachusetts, 1800–60	65.8	n.a.	85.9
Bucks County, Pennsylvania, 1800–60	48.3	n.a.	74.5
South Carolina, 1800–60	30.9	n.a.	71.5
Pima County, Arizona, 1882–1909	43.0	58.7	63.8
Alameda County, California, 1880–1910	n.a.	64.0	54.0

extremely difficult. The studies compared above, for example, included numerous misdemeanors, which typically yielded higher conviction rates than felonies, in part because of the less severe nature of the crimes and punishments.<sup>63</sup> As mentioned earlier, a vast majority of the prosecutions in Pima County were for felonies. Thus we could expect its simple conviction rate to be a bit lower than the other three regions. From this perspective, Pima County's simple conviction rate compares reasonably well to those of South Carolina and Bucks County. Still, for comparative purposes it would be best to find a jurisdiction that was more similar to Pima County and/or a study that distinguishes between misdemeanor and felony conviction rates.

Because of its time period and jurisdiction similarities, the Alameda County study once again provides a sound basis for

<sup>63</sup>For an example of the higher conviction rate for misdemeanors, see Bodenhamer, *The Pursuit of Justice*, 134.

comparison with Pima County. In addition, it includes conviction rates for indictments—a gauge of conviction rates that falls between the effective and simple conviction rates. As Table 1.6 shows, the 58.7 percent conviction rate of Pima County indictments was comparable to the 64 percent conviction rate for felony indictments/informations in Alameda County from 1880 to 1910. An examination of prosecutions by category (see Table 1.7) reveals that the most commonly committed crimes resulted in prosecutions with the highest conviction rates. Prosecutions for crimes against both property and persons in Pima County concluded with very similar rates of approximately 60 percent. Besides similar conviction rates, both counties achieved their convictions in a similar manner: Approximately 40 percent of all indictments in Pima and Alameda counties went to trial. In Alameda County, 54 percent of the cases heard by a jury resulted in convictions—a lower percentage than Pima County's simple conviction rate of 63.8 (see Table 1.6). Thus, if we compare similar jurisdictions where the prosecution of misdemeanors is infrequent, we find that Pima County's simple conviction rate is typical of a stable justice system between 1880 and 1910.

The major difference between the two counties was the number of guilty pleas. In Alameda County, approximately 40 percent pleaded guilty, whereas in Pima County nearly 23 percent of the indictments ended with guilty pleas.<sup>64</sup> Another major difference between the two counties was image: Historians, popular writers, and contemporaries point to the Pleasant Valley War as an example of Arizona's general lawlessness; Alameda County is not burdened by such an image. Although only ten years older than Pima County, Alameda County in 1880 was mostly urban, settled, and "no longer on the edge of civilization." By the 1890s, the county's population was 93,874—more than all of Arizona Territory. And, as noted earlier, serious and violent crime was not a problem in Alameda County.<sup>65</sup>

Despite clear differences in image, both areas produced similar conviction rates for indictments and jury trials, demonstrating that, from 1882 to 1909, Pima County, Arizona Territory, possessed a rather effective legal system. Tentative comparisons of conviction rates in other jurisdictions help support this conclusion. Moreover, it is clear from comparisons with Alameda County that violent crime was not a significant problem in Pima County—particularly prior to 1900.

<sup>64</sup>Friedman and Percival, *The Roots of Justice*, 173.

<sup>65</sup>Friedman and Percival, *The Roots of Justice*, 27; Walker and Bufkin, *Historical Atlas of Arizona*, 61.

**Table 1.7**  
**Outcomes of Indictments by Crime Category**  
**in Pima County, 1882-1909**

			Not Found Guilty	Guilty	Total
Crimes by category	Property	Count	123	197	320
		%	38.4	61.6	100.0
	Person	Count	92	138	230
		%	40.0	60.0	100.0
	Legal/ Public order	Count	26	12	38
		%	68.4	31.6	100.0
	Morality	Count	5	3	8
		%	62.5	37.5	100.0
	Unknown	Count	5	6	11
		%	45.5	54.5	100.0
	Total	Count	251	356	607
		%	41.4	58.6	100.0

Pima County's justice system was far from perfect. But sensational incidents like the Tewksbury trials lead us to focus on these imperfections, thus creating an impression of a justice system unable to combat crime. In addition, such incidents tend to exaggerate the prevalence of violent crime. By placing extraordinary events within the larger context of the justice system, we find that endemic violence and lawless-



ness were an exception. An examination of the court cases shows a far more effective justice system and much less violent crime than one would infer from an examination of the Tewksbury murder trials. More importantly, it demonstrates that conclusions based on homicide, sensational trials, and notorious events offer an incomplete picture of crime and justice in the West.

**Table 1.8**  
**Outcomes of Jury Trials in Pima County, 1882–1909**

	Frequency	Percent
Not found guilty	97	36.2
Guilty	171	63.8
Total	268	100.0



# SARAH HERRING SORIN: ARIZONA'S FIRST WOMAN LAWYER

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JACQUELYN GAYLE KASPER

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**O**n a cold November Saturday in 1892, members of the bar and prominent local citizens filled the courtroom of the Tombstone Courthouse. They gathered to witness not a sensational criminal trial but an open court examination of someone desiring to practice law in the territory of Arizona. Three well-known attorneys conducted the questioning of the would-be lawyer who stood before them. She was a tall, blond, poised, very pretty young woman, a schoolteacher, who proceeded to distinguish herself with honors in her responses. Her name was Sarah Inslee Herring, and she became Arizona's first woman lawyer.

Sarah's professional life differed from the lives of contemporary sister attorneys in other states in the way in which it began and developed. Many women sought a place in the law because of their own need for achievement,<sup>1</sup> their love of the discipline,<sup>2</sup> or their desire to provide legal assistance to women, the poor, and the disadvantaged.<sup>3</sup> Sarah's entrance into the law, however, arose from a family tragedy—the untimely death of her brother. Most aspiring women lawyers encountered opposition from the legal education system and the male bar,<sup>4</sup>

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<sup>1</sup>100 Years of Women, 1892–1991, NYU School of Law (New York, 1991), 6.

<sup>2</sup>Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present* (New York, 1986), 13.

<sup>3</sup>Susan Dianne Rice, "Pioneers Aided Women, the Poor and Disadvantaged," *Los Angeles Daily Journal*, November 9, 1992, p. 10.

<sup>4</sup>Morello, "Women's Entry into the Legal Profession," *American University Law Review* 32 (1983): 623–26; Virginia G. Drachman, "Entering the Male Domain: Women Lawyers in the Courtroom in Modern American History," *Massachusetts Law Review* 77 (1992): 44–45.

but Sarah's legal career, intertwined with her father's, benefited from his contacts and influence. In spite of the burdens brought by this partnership, and in spite of an inauspicious entry into the profession, Sarah excelled in the law, in legal research and drafting, and in legal reasoning and oral argument. In her practice she handled complex cases that arose in small towns in the still "wild and woolly" Southwest. Sometimes these cases took her to Washington, D.C., for appellate work at our nation's highest court. The demands of practicing law often controlled her life, but Sarah struggled hard to balance work with marriage, as women still do today. This remarkable woman was respected and successful not only in a male-dominated profession but also in the specialty of mining law.

Sarah matured from a pretty young schoolteacher into a handsome, assured lawyer of strong character. She wore her hair in the fashion of the day, neatly coiled in a knot at the back of her head, with short curls framing her face. Her dress was described as "plain." In the office she wore white, high-necked shirtwaists, with a pin or brooch at the neck, and a dark skirt; in the courtroom she favored a dark dress or suit.

Sarah was uniquely prepared for a career in the law, more so than most women attorneys in the late nineteenth century. She grew up listening to her lawyer father discourse about issues and cases, and observing his life as a New York legislator and later as an Arizona delegate to the 1891 Constitutional Convention. He was also an eloquent speaker at many civic and Republican events.

Ten years of teaching honed Sarah's skills at organization, preparation of presentations, and control of settings. While other sister attorneys took special courses in the art of public speaking to erase a "high-pitched nervous-sounding" voice that carried little conviction in a courtroom,<sup>5</sup> Sarah had shaped her voice by listening to her father's oratory and had cultured it to authoritative effectiveness in the classroom. She studied law for a year with her father and then went on to acquire a prestigious eastern law degree before beginning practice in Arizona.

Sarah had wide interests and well-defined opinions about the issues of the day and was known to engage in spirited discussions, especially about education. She liked to say she stood for what was "right and good." To contemporaries, the fact that she was not a supporter of woman suffrage was surprising and curious, but Sarah considered her activity as a

<sup>5</sup>Marion Weston Cottle, "The Woman Jury Lawyer," *Women Lawyers' Journal* 1 (May 1911): 4.



Sarah Herring matured from a pretty young schoolteacher into a handsome lawyer. (Courtesy of the Department of Library, Archives and Public Records, Phoenix, Arizona)

woman lawyer something entirely different from the participation of women in lawmaking and elections.<sup>6</sup> Her father, on the other hand, was a strong advocate of woman suffrage. Her own admission to practice is ironic, since the equal rights and pro-woman suffrage views of attorneys participating in her licensure probably benefited her. A grassroots effort arose early in

<sup>6</sup>Richard E. Sloan, *History of Arizona*, vol. 4 (Phoenix, Ariz., 1930), 204.

her career to draft her as a candidate for district attorney for Cochise County on the Republican ticket. If she would consent to run, said *The Prospector*, she could "easily capture the nomination and as easily be the favorite of the voters,"<sup>7</sup> but she did not pursue the office.

Like many other westering women who found new roles outside the traditional places of women through economic necessity or the liberating egalitarianism of the frontier West,<sup>8</sup> Sarah appeared to have few regrets about entering the profession of law. Clearly she was a woman who wanted it all—marriage, her own home, children, and meaningful work—but fate intervened and propelled her into a life of high achievements and heavy responsibilities. Because she had no children, one author related, she was able to devote all of her time to the law.

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## THE EARLY YEARS

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Born January 15, 1861 in New York City, Sarah was the first of five children.<sup>9</sup> Her father, William Herring, first taught school and then, after obtaining a law degree from Columbia University, practiced law and served in the New York State

<sup>7</sup>Reported in *Tucson Citizen*, October 3, 1898.

<sup>8</sup>Sources on westering women include Susan Armitage and Elizabeth Jameson, *The Women's West* (Norman, Okla., 1987); Dee Brown, *The Gentle Tamers: Women of the Old West* (Lincoln, Nebr., 1958); Dorothy Gray, *Women of the West* (Lincoln, Nebr., 1976); Sarah L. Myres, *Westering Women and the Frontier Experience, 1800–1915* (Albuquerque, N.Mex., 1982); Ruth Moynihan, ed., *So Much to Be Done: Women Settlers on the Mining and Ranching Frontier* (Lincoln, Nebr., 1990).

<sup>9</sup>Biographical sources on Sarah include *Historical and Biographical Record of the Territory of Arizona* (Chicago, 1896), 549–50; Sloan, *History*, 203–4; *Arizona Women's Hall of Fame* (Phoenix, Ariz., 1989), 27–28; Mary Rose Duffield, interview by the author, Tucson, Ariz., July 6, 1995; Christopher Carroll, interview by the author, Tucson, Ariz., July 24, 1995; Carroll papers, Tucson, Ariz.; Franklin Papers, Ellinwood Papers, University of Arizona Library, Tucson. Newspaper sources, important because many dates in the above books are incorrect, include *Arizona Daily Gazette*, January 30, 1895; *Arizona Daily (Weekly) Star*, January 21, 1893, July 22, 1898, April 16, 1906, May 11, 1914; *Arizona Enterprise*, November 24, 1892; *Daily Silver Belt*, December 20, 1912, January 24, 1913, May 1, 1914; *Tombstone Epitaph*, November 29, 1891, November 20, 1892; *Tombstone Prospector*, November 19, 1892, July 2, 1903, November 6, 1913, May 1, 1914; *Tucson Citizen*, October 3, 1898, January 7, 1914.

legislature.<sup>10</sup> In 1880 he inherited the "Neptune Mine" and other claims, and moved with his wife and two youngest children to Mule Gulch Mining Camp, later the town of Bisbee, in southeastern Arizona Territory to develop his promising mining properties.<sup>11</sup> Sarah stayed in New York and taught school until her younger brother Howard graduated from high school; they and sister Mary joined the rest of the family in 1882.

Apache Indians were raiding throughout Arizona, New Mexico, and northern Mexico in the 1880s,<sup>12</sup> and in Bisbee the Herrings experienced an Indian scare. Sarah's youngest sister Henrietta later related that, alerted that Indians were in the area, the family boarded their buggy to go to a nearby house for collective defense. The Swedish maid and cook, hysterical with fear, finally joined the others, but not until she had put on every stitch of clothing she owned and had tied large pillows around herself so she would be bulletproof.<sup>13</sup>

The mining properties showed some of the highest copper ores yet found in the area, but William Herring's venture capital was soon depleted. He sold the claims and moved the family to Tombstone, where he began a career as one of Arizona's most eminent lawyers of the territorial period. An impressive orator and a physically imposing man at six feet tall and 250 pounds, William Herring would come to play a significant role as a territorial statesman. He served as attorney general, delegate to the 1891 Constitutional Convention, president of the territorial bar, and chancellor of the territorial university.

The family arrived in Tombstone just as the demand for law and order and for protection of persons and property was attracting dedicated sheriffs and federal officers to the town. Their presence gave stability to a town that previously had

<sup>10</sup>Biographical sources on William Herring include John S. Goff, *The Adjutants General, Attorneys General, Auditors, Superintendents of Public Instruction and Treasurers, Arizona Territorial Officials*, vol. 5 (Cave Creek, Ariz., 1991), 72–77; Sloan, *History*, 203; *Historical, Biographical Record*, 548–50; *Arizona Bulletin*, August 26, 1898; *Tombstone Epitaph*, November 6, 1880, April 28, 1881, July 14, 1912, July 21, 1912; *Tombstone Prospector*, April 20, 1881, September 17, 1890, October 3, 1890.

<sup>11</sup>For Bisbee history, see Lynn R. Bailey, *Bisbee, Queen of the Copper Camps* (Tucson, Ariz., 1983); Carlos A. Schwantes, *Bisbee: Urban Outpost on the Frontier* (Tucson, 1992).

<sup>12</sup>For Arizona history, see Thomas Sheridan, *Arizona: A History* (Tucson, Ariz., 1995); Jay J. Wagoner, *Arizona Territory 1863–1912: A Political History* (Tucson, Ariz., 1970).

<sup>13</sup>*Bisbee Daily Review*, January 20, 1957.

drawn gamblers and gunmen from all over. After Ed Schieffelin discovered immensely rich silver deposits in 1879, the prospecting and mining boom was on and the town of Tombstone was born. The community rushed to development, soon becoming the largest town in Arizona Territory, with nearly twelve thousand inhabitants by 1882. Strong buildings were erected of brick, adobe, and wood frame, and the new, imposing two-story brick courthouse, handsomely gabled and trimmed in white, with a jail and a hanging yard, was regarded as one of the finest buildings in the territory, symbolizing Tombstone's desire for ordered justice. The streets swarmed with miners, cowboys, businessmen, ladies of culture, and women from the "red light" district. Saloons and gambling houses were open day and night. The nearby mines operated continuously on three shifts. Tombstone prospered. Newspapers like the *Nugget*, the *Prospector*, and the *Tombstone Epitaph* kept the citizenry informed of the news of the world as well as the latest stage holdups and Indian attacks.<sup>14</sup> In 1884, the town had seventeen practicing lawyers, the largest contingent in the territory and one-fourth of the Arizona legal community.<sup>15</sup>

Keeping the peace came at a high price for the Earp brothers after the famous gun battle at the OK Corral with the Clantons and the McLowerys. Vengeance and retaliation followed with the murder of Morgan Earp and the near-assassination of Virgil. Wyatt Earp, jailed for shooting the suspected gunman and then released on a writ of habeas corpus by attorney William Herring, rode out of town.

Sarah taught in the adobe school, then the two-story wooden schoolhouse, and served as principal (1884–86)<sup>16</sup> and librarian (1891).<sup>17</sup> Some of the students were grown boys who wanted to receive some education. It was not uncommon to have eighteen- or nineteen-year-olds in the lower grades, since students were ranked by their level of learning, not necessarily

<sup>14</sup>For history of Tombstone, see Douglas Martin, *Tombstone's Epitaph* (Albuquerque, N.Mex., 1951); John Myer Myers, *The Last Chance: Tombstone's Early Years* (New York, 1950); Odie Falk, *Tombstone: Myth and Reality* (New York, 1972); John Pleasant Gray, *When All Roads Led to Tombstone: A Memoir*, ed. and annotated by W. Lane Rogers (Boise, Idaho, 1998); Walter Noble Burns, *Tombstone: An Iliad of the Southwest* (New York, 1929).

<sup>15</sup>James M. Murphy, *Laws, Courts and Lawyers Through the Years in Arizona* (Tucson, Ariz., 1970), 157–58.

<sup>16</sup>Matia McClelland Burk, "The Beginnings of the Tombstone School, 1879–1893," *Arizona and the West* 1 (1959): 249–50.

<sup>17</sup>*Tombstone Epitaph*, July 19, 1891.



their age.<sup>18</sup> After the Earp-Clanton shootout, many students rushed outside to see the dead men in the street despite warnings from teachers to remain in the classrooms. After such "lawless behavior," teachers ordered pupils to leave their six-shooters at home, or the pistols would be confiscated until the end of the year.<sup>19</sup>

Lack of financial support plagued the school, resulting in periodic closings. Sometimes teachers were paid with vouchers. Sarah received a check for \$64 and a voucher for \$25 after a brief closure and reopening of the school in 1886.<sup>20</sup> In 1888, she received a commendation, signed by the governor, from the Territorial Board of Education. In her spare time, she wrote poetry and short stories, took rides on her horse Button, played piano and all the popular parlor card games with family and friends, and generally enjoyed Tombstone's social life.<sup>21</sup>

The Herring law office was a family firm, with Howard practicing law and handling the business in his father's absence. Sarah's sister Bertha was stenographer, notary, and administrator of probate cases. The law firm handled a wide variety of legal work, as revealed in the pages of their "Record Books."<sup>22</sup> The issues ranged from criminal defense for murder, burglary, robbery, and forgery to probate, guardianship, divorce, negligence and damages, adverse claims, land grant claims, and mining claims. Representation of railroad and mining companies brought an emphasis on corporate issues. These involved incorporation and dissolution, acquisitions and mergers, accident and negligence cases, and taxation and miners' strikes.

The "Law Library Account" in one Record Book lists the statutes, codes, reports, and treatises acquired for the firm's library, along with their costs. The *Revised Statutes of Arizona*, 1887 cost \$10, a sixty-four-volume set of *American Decisions* \$286, and Parson's *The Law of Contracts* was \$10. Treatises were obviously important, judging from the number of titles purchased. This reflects the need by lawyers in the last half of the 1800s for more authoritative secondary works because of the proliferation of case law.<sup>23</sup>

<sup>18</sup>Burk, "Tombstone School," 255.

<sup>19</sup>*Ibid.*, 252.

<sup>20</sup>*Ibid.*, 254.

<sup>21</sup>Sarah's and her family's activities were described in Carl Chafin, trans. and ed., *The Private Journal of George Whitwell Parsons*, vol. 2 *The Tombstone Years 1879-1887: Post-Earp Era* (Tombstone, Ariz., 1997), various pages.

<sup>22</sup>"Record Book" 1881-1888 (I) and 1899-1908 (II), William Herring files, Franklin Papers. Missing is the "Record Book" for 1889-98.

<sup>23</sup>Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York, 1985), 624.

An entry in one Record Book reveals the physical demands of conducting a law practice in the still-developing Southwest at the turn of the century. On December 17, 1900, trustees William Herring and Thomas Sorin and notary Bertha Herring began a six-day roundtrip to re-execute a deed. Traveling first by train from Tucson to Cochise Station, they drove two days by wagon, staying at ranches at night. Then they packed horses and rode five miles up Bonita Canyon in the Chiricahua Mountains to the "Queen of Sheba" mine, where they obtained the signatures of Mary and Thomas Bridger.

Howard's untimely death on November 1, 1891, at the age of twenty-seven, profoundly affected the family and touched the community of Tombstone deeply.<sup>24</sup> Visiting the dentist to have several teeth extracted, he requested that cocaine be administered to deaden the pain. After the dentist pulled three or four teeth, Howard fell out of the chair in spasms and died on the floor. Attempts to revive him by the dentist and doctor were unsuccessful, and the family's arrival was described later as heartrending. There was a tremendous outpouring of sympathy from the community for the loss of this young man who was so well liked and of "marked ability for one of his years." The dentist, fearing William Herring's legal vengeance, fled to Mexico.

William Herring was serving as attorney general at that time, a position not highly paid, so he, like many other officeholders, was forced to practice law also in order to make a living.<sup>25</sup> Three weeks after Howard's death, the *Tombstone Epitaph* announced that Sarah had resigned from teaching to assist her father in his law office.<sup>26</sup> The gap left in the family's firm upon Howard's death had propelled Sarah into the legal profession.

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## LEARNING THE LAW

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Sarah studied law with her father, and one year later applied for a license to practice in the First Judicial District Court in Tombstone. According to the *Revised Statutes of Arizona* (1887) "any person desiring to obtain a license to practice law could apply."<sup>27</sup> "He" must be a "resident of the Territory for at

<sup>24</sup>*Tombstone Prospector*, November 2, 1891.

<sup>25</sup>Murphy, *Laws, Courts*, 31.

<sup>26</sup>*Tombstone Epitaph*, November 29, 1891.

<sup>27</sup>"Attorneys at Law," Title V, Sec. 101, *Revised Statutes of Arizona* (Prescott, Ariz., 1887).

least six months, . . . of 21 years of age," and possess "a good reputation for moral character and honorable deportment."<sup>28</sup> When anyone submitted an application, the presiding judge convened a three-person committee to conduct an examination in open court of the applicant's knowledge of the law.<sup>29</sup> Judge Richard Sloan appointed attorneys C.S. Clark and Allen English, and Judge W.H. Barnes to the examining committee for Sarah.<sup>30</sup> Her impressive knowledge of the law probably constituted sufficient grounds for the committee to interpret the statutory language "he" broadly to include "she." An observer reported, "Miss Herring answered all questions [and] propounded in an intellectual manner" in a "most rigid examination, which she passed with the most distinguished honors."<sup>31</sup> Undoubtedly, her father's influence in legislative and legal circles, her respected position in the community as a teacher, and the recent events in Tombstone were factors contributing to the approval of her application. On November 21, 1892, Judge Richard Sloan signed the certificate of Sarah's admission to practice.<sup>32</sup>

This was a propitious time to assert a woman's equal rights, since two of the four attorneys involved in Sarah's examination staunchly supported woman suffrage. At the 1891 Constitutional Convention, Judge Barnes introduced a petition for female suffrage to be incorporated into the constitution, but in the end it was not adopted.<sup>33</sup> Judge Richard Sloan, also a supporter of equal rights for women, was a friend of Josephine Hughes, the leading suffragette in the territory and wife of later Governor L.C. Hughes.<sup>34</sup> The views of Clark and English on the subject are unknown. Woman suffrage in Arizona arrived by initiative petition after statehood in 1912.<sup>35</sup>

<sup>28</sup>Ibid.

<sup>29</sup>Ibid.

<sup>30</sup>*Arizona Enterprise*, November 24, 1892.

<sup>31</sup>*Tombstone Epitaph*, November 20, 1892.

<sup>32</sup>Carroll papers. The examination was held Saturday, November 19, and the certificate was signed on the following Monday.

<sup>33</sup>*Journals of the Constitutional Convention for the State of Arizona, Convention Convened Sept. 7, 1891 and Adjourned Oct. 3, 1891* (Phoenix, Ariz., 1891), 21.

<sup>34</sup>Richard E. Sloan, *Memories of an Arizona Judge* (Palo Alto, Calif., 1932), 239.

<sup>35</sup>Constitutional Amendment "Article VII, Suffrage and Elections" was approved by a majority of voters (13,442 for; 6,202 against) at the November 5, 1912, general election and was proclaimed by the governor on December 5, 1912. Arizona Session Laws, 1913. For historical review, see Thomas Laueran, "De-sexing the Ballot Box: The History of Woman Suffrage in Arizona, 1883-1912" (typescript, Arizona State University, 1973); Evelyn Amanda McGee, *History of Woman Suffrage [sic] in Arizona* (manuscript #32930, Arizona Historical Society, Tucson).

On January 12, 1893, upon a motion, the Supreme Court of Arizona admitted Sarah to practice before its court.<sup>36</sup> At almost thirty-two years old, she signed the Supreme Court's official Roll of Attorneys.<sup>37</sup> Arizona became the twenty-sixth state or territory to admit a woman to the profession of law; it was the fifth of the Ninth Circuit states following California (1878), Washington (1885), Oregon (1886), and Montana (1890).<sup>38</sup>

Announcing Sarah's achievements under a headline "The World Moves," the *Arizona Weekly Star* said she was a genuine heroine who

[has] stepped out into the professional arena, blazing a path for women in Arizona to higher and wider fields for the exercise of their talent. She has asserted her divine right to use the brain, courage, and energy given her. She has thrown down the gauntlet to the sterner sex in asserting the right of woman to enter the race of life on equal terms with man. It was a courageous step, taken by a courageous lady, and henceforth many other of our young women will follow in her path.<sup>39</sup>

In actuality it would be twenty years before another woman lawyer, Alice Birdsall, made an impact on Arizona's legal scene. Alice practiced briefly with Sarah and became best known as a court reporter of Arizona Supreme Court decisions.<sup>40</sup> Beatrice Hopson signed the Roll of Attorneys in 1903 but apparently never practiced in Arizona.

In 1880, women lawyers in the U.S. numbered about 200<sup>41</sup>; the number rose to 558 by 1910, but women lawyers comprised only 1.1 percent of attorneys nationwide.<sup>42</sup> One theory about the early resistance of men to women entering the legal field is that it related to the close association between power and law in our society. Medicine, on the other hand, was more forgiving of women who wished to become physicians because

<sup>36</sup>*Arizona Weekly Star*, January 21, 1893.

<sup>37</sup> "Roll of Attorneys, Supreme Court, Territory of Arizona, United States of America," 7.

<sup>38</sup>See Morello, *Invisible Bar*, 37-38; Virginia Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge, Mass., 1998), 251-53; The Women's Legal History Project at [www.stanford.edu/group/WLHP](http://www.stanford.edu/group/WLHP).

<sup>39</sup>*Arizona Weekly Star*, January 21, 1893.

<sup>40</sup>Sloan, *History*, vol. 3, 246-47.

<sup>41</sup>Drachman, "Male Domain," 44.

<sup>42</sup>Cynthia Fuchs Epstein, *Women in Law*, 2d ed. (Urbana, Ill., 1993), 4; Drachman, *Sisters*, 253-54.

medical practice was viewed as an extension of their nurturing role.<sup>43</sup> Another theory is that competition for the acquisition of wealth was at the root of discrimination against women lawyers. A monopoly by the few ensured preservation of their privileges and benefits.<sup>44</sup> But many male lawyers believed that the courtroom, where sordid elements of the community and "unclean issues" were encountered, was no place for a lady. A woman's sensitive nature and delicate constitution made her unfit for the confrontations and rigors of trial work. On the other hand, some men feared a woman lawyer's seductive power over an impressionable male jury. She might sway their minds to ignore the law and the facts to acquit the guilty and reward the undeserving.<sup>45</sup>

As a result, the male bar often followed strict statutory interpretation and legislative intent in order to exclude females. This forced women to work long and hard to secure legislation permitting them to apply for admission, or to take their cases to court. For example, an Illinois district court admitted Myra Bradwell and certified her in 1869 to practice law. A license was not granted, though, because of her legal disability, as a married woman, to contract. The U.S. Supreme Court affirmed the decision upon appeal, but in 1890 the state granted licensure on its own to Myra Bradwell.<sup>46</sup> In California, Clara Shortridge Foltz was admitted to practice in 1878 but not until she had successfully lobbied into law a provision allowing women equal educational opportunities and the right to practice law. One of her desires was to attend Hastings Law School. Unfortunately, court enforcement of the new law came too late in her career for her to take advantage of the reforms she had fought for.<sup>47</sup> In Montana, after studying with a lawyer, Ella Knowles Haskell successfully lobbied legislators to change a state statute prohibiting women from practicing law; she was admitted to the bar in 1889.<sup>48</sup> A Colorado district court swore in Mary Thomas, but she had to petition the state

<sup>43</sup>Morello, *"Invisible Bar"*, x-xi.

<sup>44</sup>Epstein, *Women in Law*, 80.

<sup>45</sup>Drachman, "Male Domain," 44.

<sup>46</sup>Morello, *Invisible Bar*, 14-18. See also Jane M. Friedman, *America's First Woman Lawyer: A Biography of Myra Bradwell* (Buffalo, N.Y., 1993).

<sup>47</sup>Barbara Allen Babcock, "Clara Shortridge Foltz: 'First Woman,'" *Arizona Law Review* 30 (1988): 673-717; "She Blazed the Trail," *Los Angeles Daily Journal*, Oct. 7, 1993.

<sup>48</sup>Gayle C. Shirley, *More Than Petticoats: Remarkable Montana Women* (Helena, Mont., 1995), 71.

supreme court for her name to be entered in the Roll of Attorneys. Her request was granted in 1891.<sup>49</sup>

Although Sarah Herring's informal study of law with her father secured her a license, she decided to acquire a more formalized education and enrolled in New York University's School of Law. Very few schools admitted females as law students at that time, but NYU actually encouraged women to enroll.<sup>50</sup> The school actively recruited prospective students and graduated the first three women in 1892.<sup>51</sup> Eminent professors such as Henry Wynans Jessup and Dean Austin Abbott taught NYU's varied course of study.<sup>52</sup> There were lectures, case study and statute analysis, moot court every Friday, and opportunities for studying litigation.<sup>53</sup> All areas of legal study stressed thorough research.<sup>54</sup>

Like many law students, Sarah felt overwhelmed by the quantity and complexity of legal studies. In a letter home to her father, she shared her feelings and frustrations about life in the classroom:

Tues. bef Thanks., 1893

My dear Daddy—

. . . We have a real property quiz down at the University to-night. Courtesy and dower. I *despise* both subjects, but the thing that drives me distracted is a conditional limitation—a term that Tideman, our Professor, employs in one sense, and Washburn in another. . . . I suppose I'll get it all clear in my mind someday, but to hold on to so many new things, all at the same time, is difficult. Alden comes in the last part of the afternoon and reviews us on

<sup>49</sup>David L. Erickson, "Mary Thomas: Colorado's First Woman Lawyer," *Colorado Lawyer* 21 (1992): 669–73.

<sup>50</sup>Schools that opened their doors to women law students included Union College of Law in Illinois (Northwestern), University of Iowa, University of Michigan, Boston University, and Hastings Law School. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill, N.C., 1983), 92. By 1920, NYU had graduated 303 women, far more than any other institution, including Washington College of Law, which was founded in 1898 specifically to train women lawyers. Phyllis Eckhaus, "Restless Women: The Pioneering Alumnae of New York University School of Law," *New York University Law Review* 66 (1991): 1996–2013.

<sup>51</sup>Theodore Francis Jones, ed., *New York University, 1832–1932* (New York, 1933), 272.

<sup>52</sup>*Ibid.*, 260–61.

<sup>53</sup>*Ibid.*, 247–49, 256.

<sup>54</sup>*Ibid.*, 264–65, 269.

Common law pleading, and *that* is the trial of my existence. . . . I like Abbott's lectures on the Code. We have a peaceful time then, as he doesn't ask us questions.<sup>55</sup>

Sarah received her L.L.B. in 1894 with honors.<sup>56</sup> She was fourth in her class of eighty-six, which included three women.<sup>57</sup> At the time, she was one of the few women lawyers in the country with an outstanding academic legal education.<sup>58</sup> The women who graduated from NYU Law School in the early years, said a later alumnae report, combined a "passionate commitment to their communities with a desire to develop a sense of self-worth and individual achievement."<sup>59</sup>

In a letter home to her family, in which she described seeing young fellows riding in Central Park, Sarah wrote that if she only had her horse, she'd show them a thing or two! "New York is very gay and bright," she wrote in another letter, "but I wouldn't live here permanently for anything. The west has spoiled us. The houses are positively oppressive—not inside, but I mean that when you're in the street you feel as if there was nowhere to go."<sup>60</sup>

Sarah returned to Tombstone to practice with her father and other attorneys, and to specialize in mining law. Not unlike the situations of other successful early women lawyers, Sarah's affiliation with her father helped her build up a clientele. In Indiana in the 1890s, Antoinette Leach worked in the office of a male lawyer for three years before securing her own place of business.<sup>61</sup> Hortense Wood, admitted to practice in Texas in 1910, practiced with her husband Judge Ward,<sup>62</sup> and in Utah two women graduates of eastern law schools found employment in the offices of their fathers.<sup>63</sup>

<sup>55</sup>Carroll papers.

<sup>56</sup>*General Alumni Catalogue of New York University, 1833–1906: Law, Graduate, Pedagogy, Veterinary, Commerce and Collegiate Division Alumni* (New York, 1906), 61.

<sup>57</sup>*Historical, Biographical Record*, 549.

<sup>58</sup>See Drachman, *Sisters*, 37–166; Morello, *Invisible Bar*, 39–107.

<sup>59</sup>*100 Years of Women*, 6.

<sup>60</sup>Carroll papers.

<sup>61</sup>James E. Farmer, "Women in the Law: A Centennial Legacy of Antoinette Dakin Leach," *Res Gestae* 37 (Sept. 1993): 108.

<sup>62</sup>Barbara Bader Aldave, "Women in the Law in Texas: The Stories of Three Pioneers," *Saint Mary's Law Journal* 25 (1993): 290.

<sup>63</sup>Carol Cornwall Madsen, "Sisters at the Bar: Utah Women in the Law," *Utah Historical Quarterly* 16 (Summer 1993): 219.

Clara Shortridge Foltz found clients almost immediately, thanks to influential friends and publicity as the first woman lawyer in California.<sup>64</sup>

Women practicing mining law in the late 1800s were quite rare, as might be expected. Women lawyers, in fact, were not encouraged to become specialists at all, and when they did, it was only after a long general practice. "Anyone who does [become a specialist] is going to hamper and cripple herself very materially," warned one contributor to the *Women Lawyers' Journal*.<sup>65</sup> In 1870, Esther Morris served as justice of the peace in South Pass Mining Camp, Wyoming Territory. Although she had no legal training, none of her judicial decisions during her eight months in office were reversed on appeal.<sup>66</sup> Clara Shortridge Foltz specialized in mining law in Denver at the turn of the century.<sup>67</sup>

In November 1894, Sarah belatedly received her salary of \$15 for September and \$25 for October. Amounts varied thereafter from \$6 to \$47.50 per month, in draws of \$1 to \$10 at a time.<sup>68</sup> Her earnings during the rest of her career are unknown.

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### SEAVERNS V. WELCH

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The proliferation of silver mining operations in Tombstone and copper mining in Bisbee brought an enormous amount of litigation at its peak, keeping more lawyers busy in Tombstone, the county seat, than in any other town in the territory.<sup>69</sup> If a lawyer practiced in Tombstone, he handled some aspect of mining law, as well as criminal defense, land-title conflicts, and homesteads.<sup>70</sup> Negligence and personal injury actions were noticeably rare. But it was just such a case in which Sarah made her initial appearance with her father before the territorial supreme court on January 19, 1895. Leading members of the bar, councilmen, prominent citizens, women supporters, and the press attended the event.

<sup>64</sup>Babcock, "First Woman," 698-99.

<sup>65</sup>"Miss Rembaugh Strikes from the Shoulder," *Women Lawyers' Journal* (May 1911), 1.

<sup>66</sup>D. Gray, *Women*, 79.

<sup>67</sup>Babcock, "First Woman," 674.

<sup>68</sup>Herring files, Franklin Papers.

<sup>69</sup>Murphy, *Laws, Courts*, 157-58.

<sup>70</sup>*Ibid*, 158. Many lawyers themselves had interests in mining ventures.



In *Seaverns v. Welch*,<sup>71</sup> an injured miner named Michael Welsh obtained a judgment of \$5,000 in the district court against his employers, who appealed the decision. Sarah's closing argument on behalf of Seaverns was masterfully effective, as the *Arizona Daily Gazette* so colorfully related:

The grave and learned judges had no time to study their sensations over the entirely novel spectacle as Miss Herring enlisted their attention immediately and chained it to the end of her able argument. . . . [S]he began her presentation of her case coolly, systematically, distinctly, and thus continued till she had covered the whole field under discussion. The judges listened most attentively, and not one in the audience permitted his attention to flag. With consummate art she reserved her strongest point for the last, this being that the injured miner. . . [instead of] receiving the damage complained of through his employer's responsibility, had actually brought it upon himself by his own act.<sup>72</sup>

Instead of knocking down a rock in an unsteady timbered stope (horizontally excavated area) by hammer and gad (pointed wedge with parabolic sides) as directed, in a dangerous area the miner was quite familiar with, he used a pick. This brought down the whole mass of material at once, crippling him for life.

Seasoned lawyers said Sarah Herring's statement of law was absolutely correct, her summary of facts was uncontradicted, and her appellate brief was presented in a convincing form. One able practitioner remarked that he had never been enthusiastic over woman suffrage, but he could not check his "admiring tribute to brains, no matter what shoulders they ornamented."<sup>73</sup> He admitted frankly that Sarah Herring had surpassed him and many of his male colleagues in argument. The Arizona Supreme Court reversed the lower court's ruling, then later modified and remanded for a new trial. Regrettably, the final disposition of the case is lost to history. When the courthouse was transferred from Tombstone to Bisbee in 1931, many old court files and public records were left behind and

<sup>71</sup>5 Az 115, 81 P 1128 (1896). Apparently, a mistake was made by the court reporter in spelling "Welch," since original documents indicate the name "Welsh."

<sup>72</sup>Quoted in *Historical, Biographical Record*, 549.

<sup>73</sup>*Ibid.*, 500.

later discarded, thrown into an abandoned mine shaft;<sup>74</sup> the *Welch* case apparently was one of those.

Apart from the notoriety of Sarah's court appearance, *Seaverns v. Welch* was significant in Arizona's developing tort law regarding a master's liability for injuries to a servant and also regarding the fellow-servant rule. The previous master-servant liability case, *Lopez v. Central Arizona Mining Company*,<sup>75</sup> where falling rock caused a miner's fatal injuries, was brought under the wrongful death statute. In *Hobson v. New Mexico and Arizona Railroad Company*,<sup>76</sup> the prior fellow-servant case decided at the supreme court level, in which a careless teamster employed by the railroad company to haul timber was injured by the acts of an intoxicated locomotive engineer, the court was basically undecided. In the split decision, fully half were in dissent.

Nationally, in the last part of the nineteenth century, with the arrival of railroads and industrialization, torts became the most rapidly changing area of law,<sup>77</sup> and practicing law became even more complex. Accident rates kept increasing. By the turn of the century, more than thirty thousand deaths and two million injuries—one-fourth in serious disability—occurred each year.<sup>78</sup> Railway injuries doubled between 1889 and 1906.<sup>79</sup> In California, where tort law in the 1850s represented 9.7 percent of the supreme court docket, by the 1880s it had exploded to 51 percent.<sup>80</sup>

Conditions in hard-rock mines were tough and extremely dangerous. Falling rock and ground were the primary causes of most fatal accidents and practically all minor injuries.<sup>81</sup> The vast majority of accidents stemmed from carelessness on the part of the miners or the companies. This was due to deficient timbering, lack of backfilling, blasting accidents, falls from ladders and down shafts, and asphyxiation from the gas generated by decomposing ore.<sup>82</sup> Even the most careful miner stood

<sup>74</sup>According to W. Lane Rogers, Barry Goldwater and historian Barry Fireman attempted to rescue the documents, but water filled the shaft and destroyed all papers. Gray, *When All Roads*, 43, f52. The Herring "Record Book" covering this time period is missing.

<sup>75</sup>1 Ariz. 464, 2 P 748 (1883).

<sup>76</sup>2 Ariz. 171, 11 P 545 (1886).

<sup>77</sup>Friedman, *History*, 482.

<sup>78</sup>*Ibid.*

<sup>79</sup>*Ibid.*

<sup>80</sup>Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, Nebr., 1991), 89–90.

<sup>81</sup>Otis E. Young, Jr., *Western Mining* (Norman, Okla., 1970), 157.

<sup>82</sup>Mark Wyman, *Hard Rock Epic* (Berkeley, Calif., 1979), 120–21.

a 50 percent chance of sustaining an injury on the job, and veteran miners were often absentminded and suffered mishaps.<sup>83</sup> Many who faced the danger every day became inured to it and took unwise risks. Safety inspections by the companies were few or nonexistent and there were few rules for accident prevention; miners were presumed to know how to do their job. Safe working conditions could be difficult to ensure in mines where workmen created their own workspace and constantly changed it. Not until accident rates interfered with production rates, or the demands of workers for safer working conditions brought state and federal inspections and regulations, did companies make changes.

The common law of liability was well settled in three doctrines, but applying these rules to very hazardous situations caused laws to be wildly divergent from state to state.<sup>84</sup> Under the doctrine of assumed risks, employees were supposed to know the dangers of the job and thus had no legal right to compensation from an employer for injuries sustained. If an employee was injured partly by his own negligence, under the doctrine of contributory negligence, even if the major portion of the negligence lay with the employer, compensation would be denied. Under the fellow-servant rule, an employer was not responsible for injuries that an employee received due to the carelessness or negligence of another employee, with an exception for the employee known to be negligent but nevertheless retained. Even if an injured miner was able to get his case into court, the odds against his winning were great. The mining companies won most of the suits.<sup>85</sup> Further, because most cases were complex, blame often was difficult to determine. A dichotomy developed between the law as declared by the courts and decisions made by juries based more on circumstances than the law.<sup>86</sup>

*Seaverns v. Welch* reflected all these problems. Attorneys were confused, and the court misstated the law of master-servant liability. The verdict, though based on incorrect jury instructions, reflected a jury's sympathy for the plaintiff.<sup>87</sup> Welsh's own admission following the accident was that it was

<sup>83</sup>Young, *Western Mining*, 157.

<sup>84</sup>W.F. Bailey, *The Law of the Master's Liability for Injuries to Servant* (St. Paul, Minn., 1894), iii-iv; Wyman, *Epic*, 124. For a comprehensive analysis, see "The Question of Blame," in Wyman, *Epic*, 118-45.

<sup>85</sup>Wyman, *Epic*, 123.

<sup>86</sup>W.F. Bailey, *Master's Liability*, iii-vi; Wyman, *Epic*, 124.

<sup>87</sup>Actually there were two lower court trials with two different juries.

his own fault.<sup>88</sup> He did not build up the bulkhead as he was told to do, despite the quantity of wood handy, and he did not use a gad to split up the boulder and make it lighter. Sarah's extensive brief of seventy-eight pages of points, authorities, and errors argued her position persuasively. It also served as a document to educate attorneys and judges about the state of the law on these issues.

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## LAW PRACTICE AND MARRIAGE

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By the turn of the century, copper was in growing demand. As a result, increased prices matched the high-grade ore being mined in Bisbee, most notably at the "Copper Queen" mine. The town saw its population increase from fifteen hundred in 1890 to more than six thousand by 1900.<sup>89</sup> In Tombstone, on the other hand, the boom gave way to bust as flooded mine shafts, a falling silver market, and, finally, labor strikes dried up production and business in the stores.<sup>90</sup> During its heyday from 1879 to 1886, the town had supported hundreds of teamsters, woodcutters, and millworkers, as well as miners, producing \$20–30 million of silver. The population of close to ten thousand in 1883 plummeted to only 1,875 by 1890.<sup>91</sup> "Tombstone was getting so small then," said Sarah's sister Henrietta. "We were about the last family to leave. Father told us all to vote on whether to move to Tucson or Phoenix. Everyone voted on Tucson except me. I wanted to stay in Tombstone. . . ."<sup>92</sup>

In September 1896, the Herring family moved to Tucson, now the largest town in the territory, with ten thousand residents. They occupied one of the fine homes on Main Street, where the prosperous and prominent citizens lived.<sup>93</sup> William Herring furnished his new law office handsomely, filling it with a very comprehensive law library. By 1898 his book collection boasted eighteen hundred volumes and was considered to be the most extensive private law library in

<sup>88</sup>Brief for Appellants at 41–43, *Welch* (No. 445), quoting witness testimony.

<sup>89</sup>L.R. Bailey, *Bisbee*, 55; Sheridan, *Arizona*, 161–86.

<sup>90</sup>Sheridan, *Arizona*, 152–60.

<sup>91</sup>Symposium of the History of Mining in Arizona, *History of Mining in Arizona*, vol. 1 (Phoenix, Ariz., 1988), 23.

<sup>92</sup>*Bisbee Daily Review*, January 20, 1957.

<sup>93</sup>Janet Ann Stewart, "The Mansions of Main Street," *Journal of Arizona History* 20 (1978): 201.

Arizona.<sup>94</sup> The library contained volumes and complete runs of titles not held by the territorial library in Phoenix, the only other law library of consequence. Sadly, on September 18, 1898, a great fire broke out, consuming several businesses, including the Herring law office. Only one-sixth of the law library was rescued; the rest was lost to the flames, and Herring had no insurance. William Herring estimated the loss at \$6,000, in addition to irreplaceable legal papers.<sup>95</sup> He established a new office a few blocks away and rebuilt the law library gradually over time. Fortunately, for such needs law publishers frequently offered replacement volumes at half price to their good customers.<sup>96</sup>

On July 21, 1898, at the age of thirty-seven, Sarah married noted rancher and newspaperman Thomas Sorin, fifteen years her senior, in the parlor of her family's home.<sup>97</sup> A former proprietor of the *Tombstone Epitaph*, the famed newspaper of the Southwest, Tom was a highly regarded authority on the mineral resources in the area.<sup>98</sup> He was in charge of Arizona's impressive mineral exhibit at the 1893 Chicago World's Fair.<sup>99</sup> Sarah's father later wrote, "On that day we gained a son [but] we lost our daughter who was our associate at our profession's work and always our wise and prudent counselor."<sup>100</sup>

The Sorin ranch was located north of Tombstone in Middlemarch Canyon in the Dragoon Mountains, where Tom had interests in several copper mines. The ranch was a source of great pleasure to Sarah, with its rugged hills of desert grasses, sagebrush, cacti, and—her favorite—juniper trees. The property included plenty of well water and fifty planted fruit trees bearing apples, peaches, and pears. For the first five years, Sarah lived at the ranch, coming into Tucson to handle legal business, "counsel" with her father, and consult with other attorneys on cases. After a while, though, she spent most of her time at the Herring home and worked in the firm now known as Herring and Sorin (1903), because Tom was away from the ranch on business much of the time.<sup>101</sup> According to

<sup>94</sup>*Arizona Daily Citizen*, September 19, 1898.

<sup>95</sup>*Ibid.*

<sup>96</sup>Ellinwood Papers.

<sup>97</sup>*Arizona Daily Star*, July 22, 1898; *Arizona Gazette*, July 22, 1898.

<sup>98</sup>Bruce Hilpert, "Arizona Goes to the Fair: The World's Columbian Exposition of 1893," *Arizona and the West* 25 (1983): 270.

<sup>99</sup>*Ibid.*, 270–76.

<sup>100</sup>Carroll papers.

<sup>101</sup>*Arizona Daily Star*, May 1, 1914.



Sarah Herring married Tom Sorin in July 1898 and took pleasure in the rugged hills of desert grasses, sagebrush, cacti, and juniper on his ranch north of Tombstone. (Courtesy of the Arizona Historical Society, Tucson, #77647)

family oral history, a child was stillborn early in the marriage.<sup>102</sup> The couple had no other children.

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## PRACTICING MINING LAW

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Early in her career, Sarah helped mitigate a settlement in an intriguing civic case, the "affair of the Military Plaza."<sup>103</sup> The Military Plaza, which originally housed the troops that protected the Presidio of Tucson in the 1860s, had been deeded by the U.S. government to the city in 1872, in trust for the use of its citizens. In 1900, city officials decided to subdivide the plaza and sell off the lots. This angered many residents who preferred that a public park be created at that location. In protest, one citizen "jumped a claim" on the choicest lot, erecting a primitive cabin big enough for a cot and a chair. The matter went to court, with Sarah and her father representing the "claim jumper," and a settlement was reached quietly in a

<sup>102</sup>Duffield interview.

<sup>103</sup>*Tucson Daily Citizen*, March 1, 2, 5, and 7, December 7, 1900; *Martin v. Hoff*, 7 Ariz. 247, 64 P 445 (1901).

closed courtroom. The property became the site of Armory Park and the new Carnegie Library.

Interestingly, three months after Sarah's marriage, father and daughter appeared on opposite sides of the courtroom in *McElwee v. Tombstone Mill and Mining Company*.<sup>104</sup> Sarah successfully secured a writ of execution for more than \$8,000 for her client McElwee against the mining company. But for the most part, Herring and Sorin were very much in partnership. Their cases represented a cross-section of issues in early mining law in Arizona.

*U.S. v. Copper Queen Consolidated Mining Company*,<sup>105</sup> a case that was contested for years, concerned the legality of timber cut on public mineral lands and supplied to the mining company. "The Queen company won a clean victory over the big United States," said the *Bisbee Review* on March 28, 1900, and "much of the credit . . . is due to the fine legal ability of this eminent lady [Sarah]." When *Copper Queen* was appealed to the U.S. Supreme Court, Sarah drafted the respondent's brief and assisted her father in his successful argument.

*Taylor v. Burns*<sup>106</sup> also went to the U.S. Supreme Court. In an action to quiet title to three mining claims, the interpretation of a sales agreement went under scrutiny. In a standing-room-only territorial courtroom,

[m]uch anxiety was manifested to hear Attorney Sorin. . . . Mrs. Sorin is at perfect ease in a courtroom and commands the respect of both judge and jury and wins the admiration of the bar for the graceful manner in which she handles her case; she is never at a loss for authorities, being so thoroughly prepared as to have references at her fingers' end, and no matter how complicated the issue, she possesses that happy felicity of elucidation that most generally wins for her client a favorable verdict. . . .<sup>107</sup>

Both the territorial and U.S. Supreme Courts found for Herring and Sorin's client Thomas Burns.

*Old Dominion Copper Mining Company v. Haverly*<sup>108</sup> was a contest between patents. It was land acquired under home-

<sup>104</sup>"Record Book" II.

<sup>105</sup>7 Ariz. 80, 60 P 885 (1900), 185 US 495 (1902).

<sup>106</sup>8 Ariz. 463, 76 P 623 (1904), 203 US 120 (1906).

<sup>107</sup>*Tombstone Prospector*, July 25, 1903.

<sup>108</sup>11 Ariz. 241, 90 P 33 (1907).

stead, then a mineral patent granted by the U.S. Land Office, versus a patent for a mining claim within the homestead boundaries. The Land Department acknowledged Old Dominion's right to the property acquired by purchase from the homesteader. The court decreed that decisions of the Land Office regarding the character of land are conclusive and binding upon the courts.

*Work v. United Globe Mines*<sup>109</sup> was a quiet title action involving the "Big Johnny" mine and the "Old Dominion" mine. It was an important victory affirmed for the mining company and its parent company, Phelps Dodge Corporation, by the U.S. Supreme Court. The *Women Lawyers' Journal* in December 1913 reported Sarah's argument to be "one of the most brilliant ever presented to that court by a woman."

Other mining cases involved defense of a patent application for a copper mine against an adverse claim,<sup>110</sup> property damage resulting from a mining company's broken dam,<sup>111</sup> the secret issuance of stock in a mining corporation by promoters to themselves,<sup>112</sup> and a dispute over a sales commission in an uncompleted option contract.<sup>113</sup> Many mining companies formed railroad companies and created spur lines in order to transport ore from the mines to smelters or to cross-country lines. Railroad company issues included liability of a watchman for injuries to a guiltless trespasser,<sup>114</sup> damages from a railroad's operation through a homesteader's land,<sup>115</sup> and dissolution of one railroad company and incorporation of another.

"Mine taxation cases"<sup>116</sup> occupied much of Sarah's and William Herring's attention from 1899 to 1909. In each county, most property was assessed at figures that were at

<sup>109</sup>12 Ariz. 339, 100 P 813 (1909), 231 US 595 (1914).

<sup>110</sup>*Kepler v. Becker*, 9 Ariz. 234, 80 P 334 (1905).

<sup>111</sup>*Hoefeld v. Detroit Copper Mining Co.*, 13 Ariz. 429, 115 P 1123 (1911).

<sup>112</sup>*Hughes v. Cadena De Cobre Mining Co.*, 13 Ariz. 52, 108 P 231 (1910).

<sup>113</sup>*Warnekros v. Bowman*, 14 Ariz. 348, 128 P 49 (1912).

<sup>114</sup>*Cochin v. El Paso & Southwestern Railroad Co.*, 13 Ariz. 259, 108 P 260 (1910).

<sup>115</sup>*Donohoe v. El Paso & Southwestern Railroad Co.*, 11 Ariz. 293, 94 P 1091 (1908).

<sup>116</sup>*Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of Arizona*, 9 Ariz. 383, 84 P 511 (1906), 206 US 474 (1907); *Territory of Arizona v. Board of Supervisors of Yavapai County, Arizona*, 9 Ariz. 405, 84 P 519 (1906); *Globe Mines v. Gila County*, 12 Ariz. 217, 100 P 774 (1909); *Old Dominion Mining and Smelting Company v. Gila County*, 12 Ariz. 224, 100 P 777 (1909); and *Arizona Commercial Copper Company v. Gila County*, 12 Ariz. 225, 100 P 777 (1909).



least half their value, but traditionally the mines were assessed at a significantly lower amount, around 8–10 percent.<sup>117</sup> The administration of Governor Joseph Kibbey attempted to correct this imbalance by increasing the assessments of mines, particularly the big mines that were making substantial profits.<sup>118</sup>

In Cochise County, the assessments on patented mines increased 1,500 percent and on unpatented mines 1,000 percent.<sup>119</sup> The assessed value of patented mines jumped from approximately \$233,000 to more than \$3,500,000, with the Copper Queen's share at nearly \$850,000.<sup>120</sup> Through a defect in the law, nonproducing mines were also assessed at the increased rate. Newspapers predicted bankruptcy and ruin for individual miners and small mining companies, since fully two-thirds of the mines in Cochise County fell into this category.<sup>121</sup> Of the several resulting lawsuits, the most noted is *Copper Queen Consolidated Mining Company v. Territorial Board of Equalization*<sup>122</sup> which was appealed to the U.S. Supreme Court, where Justice Oliver Wendell Holmes upheld the board's action. As a result, the legislature enacted the "Bullion Law" in 1907, differentiating between productive and nonproductive mines and claims, and fixing the value for assessment by the market value of any ore extracted.

Late June 1906 brought yet another challenge to Herring and Sorin when they received a letter from the superintendent of the Detroit Copper Mine in Morenci warning of an impending labor strike rumored for July 1.<sup>123</sup> Both the attorneys and the mine operators had reason for concern: A dangerous miners' strike in June 1903 had required the militia, the U.S. Army, and the Arizona Rangers to keep the peace.<sup>124</sup> In that

<sup>117</sup>Joseph Kibbey, "Biennial Message of Joseph H. Kibbey, Governor of Arizona to the Twenty-fourth Legislative Assembly Beginning January 21, 1908" (Phoenix, 1907), 27.

<sup>118</sup>*Ibid.*, 28.

<sup>119</sup>*Copper Queen*, 9 Ariz. 388, 84 P 516.

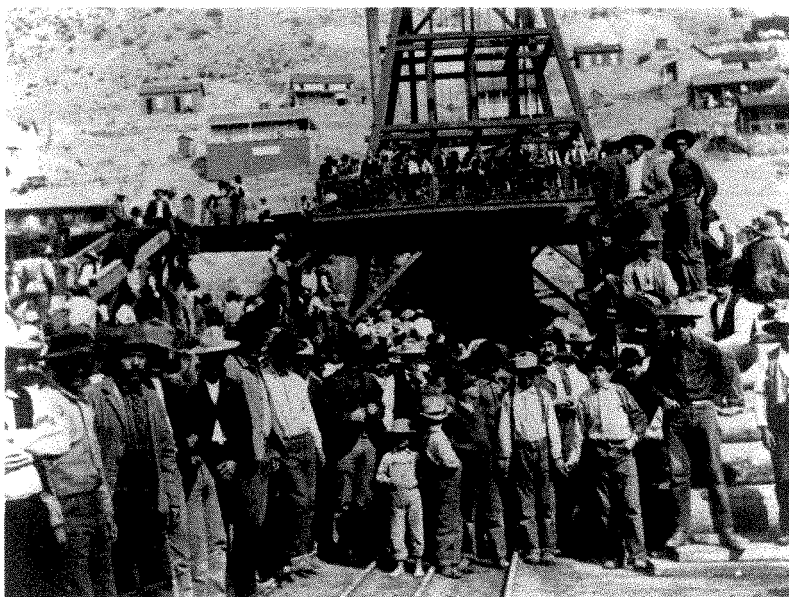
<sup>120</sup>*Ibid.*, 388–89, 516–17.

<sup>121</sup>*Bisbee Daily Review*, August 25, 1905.

<sup>122</sup>Although the plaintiff was a large corporation, the suit in effect represented the small mine owners who could not afford legal counsel on their own.

<sup>123</sup>Ellinwood Papers.

<sup>124</sup>Sheridan, *Arizona*, 172–73; Wagoner, *Arizona Territory*, 384–89; Wyman, *Hard Rock Epic*, 224. For newspaper coverage, see *Arizona Silver Belt*, June 4, 11, and 18, 1903. For history of Arizona mining labor conflict, see James W. Byrkit, *Forging the Copper Collar: Arizona's Labor Management War 1901–1921* (Tucson, 1982).



During a miners' strike in 1903 that required the militia, the army, and the Arizona Rangers to keep the peace, Herring and Sorin and attorney W.F. Shelly filed an injunction to keep the miners from interfering with the property of the Detroit Mining Company. (Courtesy of the Arizona Historical Society, Tucson, #58785)

case, Herring and Sorin and attorney W.F. Shelly had filed an injunction against more than two hundred striking miners and agitators to keep them from interfering with the property of the Detroit Mining Company.<sup>125</sup> Now, three years later, the attorneys devised a plan to avert another strike, enlisting the aid of attorney E.E. Ellinwood in Bisbee. Sarah took the train to Globe, one hundred miles away, and Ellinwood proceeded to the site of the mine at Morenci, 130 miles distant. He wired her the essential facts for the complaint enjoining 219 defendants, which she presented to the judge for a writ. Sarah sent a skeleton bond to the mine superintendent for his signature, then proceeded to the county seat in Solomonville eighty miles away to file the complaint and to have the summons issued. She obtained signatures of sureties on the injunction bond, filed it, and put the writ in the hands of the sheriff, thus averting another potentially dangerous miners' strike.

For Sarah, 1905 and 1906 proved to be the most demanding and stressful years. During that time, she and her father had five cases before the territorial supreme court, as well as the

<sup>125</sup> *Arizona Silver Belt*, June 18, 1903.

*Taylor v. Burns* appeal to the U.S. Supreme Court,<sup>126</sup> which required a long trip to Washington, D.C. And immediately upon their return, the threatened miners' strike occurred. On September 28, 1906, William Herring wrote to Ellinwood:

I do not think that Mrs. Sorin should have any more work for sometime to come. She withdraws to her home under the advice of her physician who insists that she shall take a complete rest, and I myself feel greatly the need of a [respite] for a few weeks.<sup>127</sup>

Other attorneys in Tucson engaged in substantial practices in mining law, although they did not hold themselves out as specialists like Sarah.<sup>128</sup> Land and cattle companies were almost as strongly represented as mining companies, since raising cattle was the second biggest industry in Arizona. Attorneys handled land grant claims, Indian claims cases, transfer of real estate, and quiet title actions. Probate and estate, debt collection and attachment, business transactions for local merchants, divorce, and defense of criminal misdeeds to property and person were also their work. Money was scarce and fees could be difficult to collect from clients after legal advice and assistance had been provided. One attorney, after repeated letters to his client regarding an unpaid bill of \$150, resorted to attachment of his client's cattle.<sup>129</sup> Corporations and companies were generally diligent in paying accounts; in some cases, they paid monthly salaries for in-house counsel.

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## THE U.S. SUPREME COURT AND LATER YEARS

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On April 16, 1906, the date of the filing of the *Taylor v. Burns* brief, William Herring submitted a motion for the admission of Sarah to practice before the U.S. Supreme Court. Accompanied by Belva Lockwood, the first woman admitted in 1879, Sarah became the twenty-fourth woman to be admit-

<sup>126</sup>As usual, the appellees' brief by Herring and Sorin was quite long at forty-one pages, extensively referencing the trial record and citing authorities; the appellant's brief by attorney Eugene Ives was seventeen pages.

<sup>127</sup>Ellinwood Papers.

<sup>128</sup>Franklin Papers, Ellinwood Papers, Francis Hereford Papers, John Mason Ross Papers, University of Arizona Library, Tucson.

<sup>129</sup>Hereford Papers.

ted to practice before the highest court.<sup>130</sup> Seven years later, on November 6, 1913, Sarah made legal history when she appeared as the sole counsel in a case before the U.S. Supreme Court: She was the first woman lawyer to argue a case unassisted or unaccompanied by a male attorney.<sup>131</sup> The case was *Work v. United Globe Mines*, and Sarah won her appeal.

In 1913, after her father's death, Sarah moved to the town of Globe and established a law office near Old Dominion Mining Company headquarters, where she was serving as counsel.<sup>132</sup> Newly admitted Alice Birdsall joined her in the same building, and Sarah became a mentor to the second practicing woman lawyer in what was now the state of Arizona. Alice Birdsall would later comment on the spirit of equality that prevailed between the sexes in Arizona. "Men and women participate in most activities indiscriminately and without thought of sex lines," she said. Of course, this was typical of many other western states as well.<sup>133</sup>

Four months after receiving the U.S. Supreme Court's decision in *Work*, Sarah died of pneumonia or influenza on April 30, 1914, at the age of 53.<sup>134</sup> Two weeks before, she had been in excellent health and had gone to the Tombstone Courthouse for probate of her father's estate. Unfortunately, the previous guest who had occupied her hotel room had died from a contagious ailment, which she seems to have caught.<sup>135</sup> Tom Sorin was inconsolable at the sudden death of his wife and sat, through the night before the funeral, weeping near her casket. In loving tribute he printed a commemorative folder containing two poems written by Sarah, setting type himself, and he carved a juniper branch on her gravestone. Sarah was buried in Evergreen Cemetery in Tucson near her parents. Tom Sorin died at his ranch in 1923 and lies buried next to her.

<sup>130</sup>"Women Admitted to Practice," Supreme Court Library files, from Records of the Supreme Court, United States, National Archives. Belva A. Lockwood, Washington, D.C., was admitted March 3, 1879, on motion of Mr. A.C. Riddle. For history of early admittees, see Mary L. Clark, "The First Women Members of the Supreme Court Bar, 1879-1900," *San Diego Law Review* 36 (1999): 87-136.

<sup>131</sup>*Tombstone Prospector*, November 6, 1913; *Tucson Citizen*, January 7, 1914.

<sup>132</sup>*Daily Silver Belt*, December 20, 1912, January 24, 1913.

<sup>133</sup>*Women Lawyers' Journal* 9 (October-December 1919): 6.

<sup>134</sup>*Arizona Daily Star*, May 1, 1914; *Tombstone Prospector*, May 1, 1914; *Daily Silver Belt*, May 1, 1914. Newspapers report Sarah died from pneumonia, but family history recounts influenza as the cause.

<sup>135</sup>Duffield interview.

Sarah's brief will, written June 16, 1903, in the midst of the dangerous confrontational miners' strike at Morenci and one month after her mother's early death from pneumonia, was prophetic: "I, Sarah H. Sorin, being of sound and disposing mind and memory, and mindful of the uncertainty of human life . . . do make this instrument, written in pencil on this piece of notepaper, my last will and testament."<sup>136</sup> She named her "beloved husband" as executor and left all personal and real property to him, including a wagon, a buggy, two horses and harnesses, sixty-five range cattle valued at \$1,500, and nine patented mining claims of nominal value.<sup>137</sup> The law library, valued at \$3,500, contained books bequeathed to her by her father, and furniture and books she had acquired since his death in 1912, valued at another \$250.<sup>138</sup> Tom sold the cattle, and the library and office furniture were purchased by the firm of Ellinwood and Ross, successors to Sarah as counsel to Old Dominion Mining Company.<sup>139</sup>

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## THE WOMAN BEHIND THE LAWYER

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It is unlikely that Sarah would have become a lawyer if her brother had not died suddenly and left a vacancy in her father's law office. There is no evidence that she had a passion for the law that would have propelled her, on her own, to seek admittance to practice. Sarah was an opportunist. She saw the advantage of turning a waning teaching career, with fewer students and an uncertain salary each year, into a new challenge and career, although she was driven in large part by economic necessity.<sup>140</sup> If her brother had lived, she would have remained a teacher and likely would have married earlier, since she had many beaux, including Tom. William Herring could have filled his son's place by partnering with someone else, but that would have meant sharing part of the revenue from the business at a time when he needed the income to support his family. Besides, most Tombstone lawyers were

<sup>136</sup>Probate Record No. 630, Superior Court, Cochise County.

<sup>137</sup>*Ibid.*

<sup>138</sup>*Ibid.*

<sup>139</sup>*Ibid.*

<sup>140</sup>Many women lawyers previously were teachers but found that role unfulfilling, too confining, overworked, and underpaid. See Drachman, *Sisters*, 50.

known to spend as much time in the saloons as in the courthouse, occasionally carrying their inebriated state into the courtroom.<sup>141</sup>

For the first few years of practice, Sarah was perceived as her father's "other son." On her first appearance before the territorial supreme court (*Welch*), the *Arizona Daily Gazette* in 1895 reported,

Particularly pleasing was his daughter's triumph to Col. Herring. Some years ago he lost a favorite son Howard, who was growing up in the law to help his father. . . . Since then, with the ebbing years, a daughter has trained herself by arduous, patient study, to fill that office chair which the loved son strove to occupy, and some of the old grief, perhaps, has been absorbed in the new pride that now must fill the paternal heart.<sup>142</sup>

Sarah's quest for a law degree could have been an initial step to distinguish herself from her brother, who had no such diploma. More likely, it reflected her esteem for education and her desire to acquire credentials that would ensure acceptance by the bar and the public.

Sarah's courtroom appearances showcased her mental agility and her knowledge of legal procedure. She had no patience for an opponent's subterfuge and sly maneuvering, and directly confronted it. In her reply brief in *Welch*, she called attorney Stilwell's efforts a "fraud upon the court," among other very direct phrases. Lawyers quickly abandoned any early misconceptions of her as a mild-mannered schoolmarm, regarding her instead as a savvy and worthy opponent.

Sarah and her father had a special closeness all their lives. He was her champion supporter, with immense pride in her achievements, but his reliance on her was a tie from which she never really escaped, even after his death. As executor of his estate, she appeared in court for the last time two years after his death to counter a longstanding creditor's claim. A New York client and friend had invested \$2,820 in William Herring's early mining ventures, but had seen no profits nor repayment.<sup>143</sup>

<sup>141</sup>For a lively account about attorneys on "Rotten Row," see C.L. Sonnichsen, *Billy King's Tombstone: The Private Life of an Arizona Boom Town* (1942; reprinted Tucson, Ariz., 1972).

<sup>142</sup>*Arizona Gazette*, January 30, 1895.

<sup>143</sup>*Daily Silver Belt*, May 1, 1914.

As the first woman lawyer in Arizona, Sarah bore a certain burden of notoriety. The press diligently reported on her courtroom appearances and followed her comings and goings. Sarah understood the role of leadership that her unique position brought, and she handled it well. In fact, she was quite proud of her status. When the Supreme Court instituted a new *Roll of Attorneys* to replace the former volume, Sarah resigned in 1900 *nunc pro tunc*, "now for then" (1893), ensuring her place in territorial history.<sup>144</sup> She was the first woman lawyer to join the territorial bar in 1902.<sup>145</sup>

Unfortunately, for an intriguing, accomplished woman who was such a significant player in the history of Arizona and the U.S. Supreme Court, few personal writings of Sarah's survive to reveal the woman behind the lawyer. She kept no journal, and only a half-dozen personal letters are keepsaked by family. She died in her prime, before she had time to share reminiscences and recollections. Other early women lawyers related their stories, such as Clara Foltz, who penned *The Struggles and Triumphs of a Woman Lawyer* when she was in her sixties,<sup>146</sup> and Belva Lockwood who published *My Efforts to Become a Lawyer* when she was fifty-seven.<sup>147</sup> Sharlot Hall, a contemporary of Sarah's, served as territorial historian, traveling throughout Arizona interviewing pioneers and early settlers, but she apparently never interviewed Sarah.<sup>148</sup>

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## CONCLUSION

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As the first woman in Arizona to step across the legal gender barrier, Sarah met the challenge of practice in a male world with competence, dedication, brilliance, and hard work. While other women were supporters of woman suffrage and actively worked for the cause, Sarah effected change through the courts. Highly intelligent, dedicated to her family, an independent wife, Sarah was a lawyer of impressive ability. The high quality of her research and writing about complex issues survives to give testimony to the drama of her court-

<sup>144</sup>See f37.

<sup>145</sup>Duffield interview.

<sup>146</sup>Babcock, "First Woman," 674.

<sup>147</sup>*Lippincotts Monthly Magazine*, February 1888, reprinted in Marlene Stein Wortman, ed., *Women in the Law: from Colonial Times to the New Deal*, vol. 1 (New York, 1985), 259-65.

<sup>148</sup>Sharlot Hall Papers, Sharlot Hall Historical Society Library, Prescott, Arizona.

room presentations. She was a formidable opponent who undoubtedly presented a challenge to other lawyers.

In 1985, the Arizona Women's Hall of Fame honored Sarah by admitting her to their roster of notable women achievers in Arizona's history. The Arizona Women Lawyer's Association inaugurated an annual Sarah Sorin Award in 1999, to recognize and honor an outstanding woman lawyer in the state. Sarah Herring Sorin was an extraordinary role model for Arizona women lawyers. She inspired Lorna Lockwood, who became the first woman chief justice of the Arizona Supreme Court in 1965.<sup>149</sup> Lockwood in turn inspired Justice Sandra Day O'Connor, appointed in 1981, the first woman on the U.S. Supreme Court.<sup>150</sup>

<sup>149</sup>Thomas A. Jacobs, "Justice Was a Lady: A Biography of the Public Life of Lorna E. Lockwood" (manuscript, Arizona Historical Society, Tucson, 1985), foreword by Justice Sandra Day O'Connor.

<sup>150</sup>*Ibid.*



# A CAULDRON OF ANGER: THE SPRECKELS FAMILY AND REFORM OF CALIFORNIA COMMUNITY PROPERTY LAW

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CHARLOTTE K. GOLDBERG<sup>1</sup>

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When the California sweetheart  
Speaks the vows which make her wife,  
She into a contract enters  
Which involves all things in life,  
For the state declares, in substance,  
Equity is not its plan,  
That the woman is, through marriage,  
Not the equal of the man.<sup>2</sup>

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## INTRODUCTION

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**I**n family law, a common phenomenon is the use of the legal system to vent deep-seated animosities among family members. When the cauldron of family anger boils over, the heat is felt first in offices of attorneys and then in trial courts. Sometimes the steam rises to the highest level and produces a precedent that shapes the law for generations.

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<sup>1</sup>The author extends special thanks to Donna Schuele and the American Legal History Study Group at the Huntington Library for their help and guidance.

<sup>2</sup>Martin J. Boutelle, *Community and Separate in California: A Transformation of the Statutes from the Commonness of Prose to the Seldomness of Verse* (Pasadena, Calif., 1914).

Wealthy families such as the Spreckels family spare no expense in hiring the best attorneys to argue the law. The California Supreme Court decision in the 1897 case bearing the Spreckels name<sup>3</sup> solidified doctrines regarding community property, some persisting to this day, and served as a significant deterrent to reform of married women's community property rights.<sup>4</sup> Additionally, the litigation of this case stands as a prime example of a bitter family quarrel, exacerbated by the litigants' enormous wealth.

Ostensibly, the case involved the community property rights of Anna Spreckels, wife of sugar magnate Claus Spreckels. The holding limited a wife's right to consent to gifts her husband made of community property. In 1891 the California Legislature had attempted to expand those rights,<sup>5</sup> but the court refused to apply the law retroactively to community property acquired prior to enactment of the statute. Thus the court "stripped the amendment of 1891, designed to protect married women, of much of its force."<sup>6</sup>

In reality, Anna Spreckels and her rights were merely the legal backdrop for the wrathful wrangling between her husband and their sons. The drama played out first in the lawyers' offices and ultimately before the California Supreme Court. The supreme court settled the family dispute, but in the process determined that a wife's right to control community property during marriage would stand for many years as only a shadow behind her husband's complete dominance over community property.

The statute interpreted in the *Spreckels* case was passed amid a flurry of bills in March 1891. It was the very first law

<sup>3</sup>*Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897). Another case involving the Spreckels children, *Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537 (1916), also involved community property issues.

<sup>4</sup>Just as in the East, through a restrictive interpretation of legislation the California Supreme Court created a "stumbling block" to reform. See Norma Basch, *In the Eyes of the Law* (Ithaca, N.Y., 1982), 202-3, but see James W. Ely, Jr., book review, *UCLA Law Review* 31 (1983): 294, 298-99. See also Richard H. Chused, "Late Nineteenth-Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislature," *American Journal of Legal History* 19 (1985): 3 (Oregon reform of married women's property law). See generally Michael Grossberg, *Governing the Hearth* (Chapel Hill, N.C., 1985), 290-307.

<sup>5</sup>Act of March 31, 1891, ch. 220, 1891 Cal. Stat. 425. Earlier, a wife was granted the right to will her separate property, Act of March 20, 1866, ch. 285, §1, 1865-66 Cal. Stat. 316, and the right to manage her separate property, 1 Codes and Statutes of California §5162, at 595 (Hittell 1876).

<sup>6</sup>116 Cal. 348-49, 48 Pac. 231; the court also limited the statute by holding in another *Spreckels* case that a husband's gifts made without his wife's written consent would not be considered absolutely void after his death. *Spreckels*, 172 Cal. 784, 158 Pac. 540; Orrin K. McMurray and Jackson W. Chance, Comment, "Community Property: Effect of Gift of Community Property without Wife's Consent," *California Law Review* 18 (1929): 400, 403.



Although the *Spreckels* case supposedly involved the community property rights of Anna Spreckels, in reality, her rights were merely the legal backdrop for the angry legal battle between her husband and their sons. (Courtesy of the Society of California Pioneers)

that gave a wife some measure of control over disposition of a couple's community property during marriage. Although the new law did not warrant special attention from the popular press, the legal community was soon alerted to its significance. As the *Los Angeles Daily Journal* headline proclaimed, "Wives Must Sign." The article continued,

A very important amendment to §172 of the Civil Code was passed by the last Legislature. As it directly affects the transfer and title of much real property, the section is printed below entire, the italics showing the added portion:

Section 172. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; *provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife in writing, consents thereto.*<sup>7</sup>

The 1891 statute was the first legislative attempt to grant a wife management and control of community property during marriage. Prior to that amendment, the husband alone controlled community property during marriage. The wife's interest in community property had been characterized as "a mere expectancy" that materialized only upon divorce or death.<sup>8</sup>

<sup>7</sup>*Los Angeles Daily Journal*, April 17, 1891. This law concerning consent to gifts of community property during marriage remains in effect today in slightly different form. The present version of the statute applies to community personal property only. Cal. Fam. Code §1100(b) (West 1992). Spouses must join in the sale, conveyance, or encumbrance of community real property. Cal. Fam. Code §1102(a) (West 1992).

<sup>8</sup>In fact, one judge doubted that "a happier phrase could have been devised to express the interest of the wife in the community." *Spreckels*, 116 Cal. 347, 48 Pac. 231. One of the most strident female reformers, Marietta Stow, commented, "Expectancy is intangible. It is like the sparkling bubbles upon the beach, which the next wave laps up and they are seen no more." Mrs. J.W. Stow, *Probate Confiscation and the Unjust Laws Which Govern Woman* (San Francisco, 1876), 74. She viewed a wife's expectancy very differently from the California Supreme Court's view: "The wife has no legal power to restrain the husband from endorsing notes for Tom, Dick, and Harry . . . and he—the husband—must add his quota to the accumulating pile of such unconscionable moneygrasps." *Ibid.*, 67–68. See Donna C. Schuele, "In Her Own Way: Marietta Stow's Crusade for Probate Law Reform Within the Nineteenth-Century Women's Rights Movement," *Yale Journal of Law & Feminism* 7 (1995): 279; "Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California," *Western Legal History* 7 (1994): 245, 277–80. See generally Reva B. Siegel, "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 7 (1994): 1073, 1169–70.

The husband's total control over the community property during marriage could produce a very unhappy outcome for a wife—her "expectancy" might never materialize. The husband could give away all the community property during the marriage, leaving none for the wife upon divorce or death. In other words, the husband was not only the manager of the community property but the actual owner. The 1891 statute took a first step toward ameliorating this obviously unfair situation by requiring a wife's written consent to gifts made from community property.<sup>9</sup>

In the prior legislative session in 1889, a similar bill had been introduced to amend Civil Code §172 to require a wife's written consent to gifts of community property. Powerful Los Angeles Senator Stephen M. White, who was also president of the senate, had introduced the bill early in the session, and it had passed, but it died in the assembly.<sup>10</sup> In the next legislative session, Senator Frank McGowan, a supporter of woman's suffrage, introduced Senate Bill 120 to amend Civil Code §172. This time the bill passed at the end of the session and was signed by the governor.<sup>11</sup> At the time, this statute was not the main project of the movement advancing married women's rights; during the 1891 legislative session, the movement was directed primarily toward obtaining voting rights for women.<sup>12</sup>

Even though the law requiring a wife's consent to gifts of community property was etched in statutory stone in 1891, the judiciary and most married couples did not accept the law. There is little doubt that the prevailing consensus was that the husband should have primary control over disposition of community property during marriage. The major legal issue in the *Spreckels* case was the status of gifts made without the

<sup>9</sup>It was not until 1975 that California permitted control of community personal property by either spouse. The consent requirement regarding gifts was retained but now changed from "wife's" consent to "spouse's" consent. Cal. Civ. Code §5125(a)(b), now Cal. Fam. Code §1100(a)(b) (West 1992). See Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," *UCLA Law Review* 24 (1976): 1. See also Carol S. Bruch, "Management Powers and Duties under California's Community Property Law: Recommendations for Reform," *Hastings Law Journal* 34 (1982): 229.

<sup>10</sup>S.B. 113, introduced by Senator White and referred to The Committee on the Judiciary. 1889 *Senate Journal* 38, January 11, 1889. By February, the *Chronicle* reported that only fifty senate bills had passed out of 495 introduced; only ten had passed in the assembly. "The Legislature—The Work Done in Half a Session," *San Francisco Chronicle*, February 3, 1889.

<sup>11</sup>Senator McGowan introduced the bill on January 13. It was passed in the senate on February 24. The assembly passed it on March 24.

<sup>12</sup>In the 1891 legislative session, the senate passed a bill giving women the right to vote.

wife's consent. The gift in question was made by patriarch Claus Spreckels to his youngest son Rudolph. To anyone with knowledge of the Spreckels family, it would have been obvious that "Sugar King" Claus Spreckels would not have consulted his wife Anna or sought her consent to any gift.<sup>13</sup>

What, then, was the background of the struggle over this gift to Rudolph? Why did Claus give his son a gift in 1893 and then try to rescind it two years later? Clearly, the legal contest was not about Anna's lack of consent.<sup>14</sup> Instead it is the story of an attempt by ruthless San Francisco businessman Claus Spreckels to use the legal system to vent his anger against his two younger sons, Gus and Rudolph.<sup>15</sup>

The case involved valuable stock that Claus tried to regain after Rudolph supported Gus in a dispute with their father. Claus ultimately reconciled with his sons, but not before the acrimonious family dispute had played itself out publicly in the courts and newspapers. In 1897 the California Supreme Court doused the legal fires swirling around Claus' gift of community property to Rudolph. But as a result, under the precedent created, married women for many years retained only a spark of control over community property.

<sup>13</sup>Claus Spreckels was indeed the king of sugar refining, holding a monopoly on the industry in California and Hawaii. See William W. Cordray, "Claus Spreckels of California" (Ph.D. diss., University of Southern California, 1955). However, this appellation was not always meant to be a compliment. In fact, the *San Francisco Chronicle* called him "Sir Claus" and other terms in order to emphasize the hold he had on the sugar plantations in Hawaii. See Jacob Adler, *Claus Spreckels: Hawaii's Sugar King* (Honolulu, 1966), 29–30. He was also called "His Royal Saccharinity," "Sir Silvergelt," and "Herr Von Boss." Ibid. Other terms used by the *San Francisco Chronicle* included "Lord Sugar Barrel," "Sir Claus," "Sir Claws." *Postscript to the San Francisco Newsletter*, June 27, 1885, pp. 7–8. These titles were particularly pointed, considering the fascination of San Francisco society with royalty. See Doris Muscatine, *Old San Francisco* (New York, 1975), 366. The *San Francisco Chronicle* articles in 1884 concerning Claus' sugar interests in Hawaii ultimately led to his son Adolph's shooting its publisher, Michael De Young.

<sup>14</sup>Anna Christina Mangels Spreckels, who was born in 1830, knew Claus when they were children in Germany. "Death Comes to Mrs. Spreckels," *San Francisco Chronicle*, February 16, 1910. After Claus sent for and married Anna in New York, "they were never separated, save for a few weeks at a time, as the exigencies of business made it necessary." Ibid. Anna accompanied Claus on business trips back to Germany when Claus traveled there to learn the techniques of sugar refining. In 1865, the family visited Germany for eight months. Claus studied the raising and refining of sugar beets. Cordray, "Claus Spreckels of California," 11–12. Their marriage was a traditional one in that Claus was the breadwinner and Anna was the homemaker.

<sup>15</sup>Gus' full name was Claus Augustus Spreckels. When Claus, Jr., reached adolescence, his father insisted that he choose to be called either August or Gus to avoid confusion and misdirected mail from junior's female admirers.

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FAMILY BUSINESS, FAMILY TROUBLES

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The fuel for the Spreckels family feud was wealth. Although Claus Spreckels did not come to California seeking gold in 1856, everything he touched seemed to turn into it. His first commercial endeavor in San Francisco was a brewery, but he soon turned to sugar refining, with operations in Hawaii and California. His business acumen, techniques for success, and contributions to the economic growth of San Francisco and California are well documented.<sup>16</sup>

Claus Spreckels' business savvy was admired even by his detractors. Muckraker Lincoln Steffens described the family traits: "able and independent, fearless financially, ruthless in pursuit of a purpose and cocksure of ultimate success."<sup>17</sup> Claus once said, "I never yet have gone into anything unless I could have it all my own way."<sup>18</sup> It is not surprising that, with such an attitude, Claus was a father who expected success and who demanded absolute loyalty from his children. All four sons—John, Adolph, Gus, Rudolph—started out in Claus' businesses at an early age and were heavily involved in his financial endeavors over the years. Eventually, he turned over the day-to-day management of his businesses to his two older sons, John and Adolph.<sup>19</sup>

The Spreckels family was close knit not only because of the family business but also because of a tragic history. The

<sup>16</sup>See, e.g., Cordray, "Claus Spreckels of California"; see also Alfred S. Eichner, *The Emergence of Oligopoly* (Baltimore, 1960), 86–92, 152–73.

<sup>17</sup>Lincoln Steffens, *The Mote and the Beam: A Fact Novel* 36 (Seattle and London 1907), describing Rudolph Spreckels' qualities as "a Spreckels."

<sup>18</sup>*The Builders of a Great City*, 317 (San Francisco Journal of Commerce Publishing Co., 1891). See also Cordray, "Claus Spreckels of California," 11.

<sup>19</sup>John Deidrich, the Spreckels' first child, was born in Charleston, South Carolina, on August 16, 1853. H. Austin Adams, *The Man, John D. Spreckels* (San Diego, 1924), 43. He followed in his father's footsteps, but in another California city, San Diego. Adolph Bernard was the Spreckels' first son to be born in San Francisco and the most notorious of the four. Born in 1857, he was educated in San Francisco, except for about two years spent in Europe. There he studied in Hanover with his older brother John. John went to work for his father at age eighteen, Rudolph started working in the Philadelphia sugar plant at seventeen, and Gus had his father's power of attorney at twenty-one. Cordray, "Claus Spreckels of California," 224.

The family businesses included the California Sugar Refinery, the Oceanic Steamship Company, John D. Spreckels & Brothers, and the Hawaiian Commercial & Sugar Company. Much of the litigation from 1893 to 1895 involved untangling the children's interests in these businesses. By 1897, most of the Spreckels' interests were handled by John and Adolph. Cordray, "Claus Spreckels of California," 122.

Spreckels' fifty-six-year marriage produced twelve children, but only five survived to adulthood. Of the survivors, John, the oldest, was born in 1853, Adolph in 1857, and Gus in 1858. But it was not until 1870 that Emma was born, followed by Rudolph in 1872. Particularly tragic were the deaths of three children within a two-month period in late 1863 and early 1864.<sup>20</sup> In 1869, the family spent eighteen months in Germany, ostensibly to allow Claus to recuperate from a "serious brain disorder" caused by "prolonged strain on his faculties, due to continual overwork."<sup>21</sup> However, it is doubtful that Claus suffered from overwork since he seemed to thrive on business; it is more likely that the strain was produced by the death of several Spreckels children during the time between the births of Gus and Emma.

For the Spreckels family, most social occasions were family oriented.<sup>22</sup> On birthdays, they all gathered together. It was on eldest son John's birthday one year that Claus began his habit of giving money to his children. Earlier Claus had offered John an interest in the family business for \$13,000 of stock, but at the time John only had \$3,000 in cash. The deal was struck when Claus accepted John's note for \$10,000. At the birthday party, Claus apologetically gave John a "piece of paper" as a gift. It turned out that the paper was the \$10,000 note returned without a signature.<sup>23</sup>

John Spreckels entered the family business at age eighteen by working in all the departments of his father's California sugar refinery. In 1874, at age twenty-two, he was sent to train the superintendent of the Spreckels refinery in Hawaii. Around that time, John also undertook his first independent business enterprise: He built a ship called the Claus Spreckels, which he used to transport sugar from Hawaii to San Fran-

<sup>20</sup>Birth and death records indicate that a son Henry was born in 1854, a daughter Anna Gesina in 1860, a son Louis Peter in 1862, and more sons in 1864, 1866, 1868, and 1874. Henry died at age nine, Anna Gesina at age three, and Louis Peter at sixteen months. *Daughters of the American Revolution, Vital Records from the San Francisco Daily Bulletin (1855-68) (1870-74)*.

<sup>21</sup>Cordray, "Claus Spreckels of California," 16-18.

<sup>22</sup>The Spreckels family did not entertain extensively in the city. Cordray, "Claus Spreckels of California," 227-29. However, they did maintain a summer home, purchased in 1872 and bordering the Aptos River, which they called the Aptos Ranch. *Ibid.*, 172. The wharf there was enlarged so that ocean-going schooners could be loaded with sugar. The family also used the ranch for lavish entertaining, having built a hotel, an outdoor dancing pavilion, cottages, a race track, and a polo field. *Ibid.*, 224. The most famous guest to be entertained at the ranch was King Kalakaua of Hawaii, who visited the U.S. mainland in 1881. *Ibid.*

<sup>23</sup>Adams, *The Man, John D. Spreckels*, 79-81.



cisco. From this start, he organized John D. Spreckels and Brothers, a shipping and importing business. John's younger brother Adolph was a copartner in this business, and they remained devoted to each other throughout their lives. Gus later became a partner. In 1881, the brothers and their father also organized the Oceanic Steamship Company.<sup>24</sup>

Adolph was involved in both his brother's and his father's businesses. In addition to being one of the "brothers" in John D. Spreckels and Brothers, he worked in his father's California sugar refinery and, at age twenty-one, became secretary of the Hawaiian Commercial and Sugar Company, another of his father's businesses. Claus and some other business associates had organized that company in 1878 to capitalize on the Spreckels' growing interest in importing and refining Hawaiian sugar. In addition to appointing Adolph secretary, Claus made twenty-year-old Gus a director.<sup>25</sup>

Gus, born one year after Adolph in 1858, was included in most of the family businesses.<sup>26</sup> At first, he followed in the footsteps of his older brothers and entered the family sugar business, starting as a clerk in his father's California sugar refinery as a teenager. Later he was promoted to assistant secretary and then secretary. Obviously pleased with his son's progress, Claus gave him \$10,000 for his twentieth birthday.

Rudolph, the youngest son, was born on New Year's Day in 1872. Like his brothers, he started in the family business at an early age. When he was seventeen, Claus gave him the choice of college, a trip around the world with his tutor, or entry into business. Rudolph knew the right answer and soon was sent to help his brother Gus at the family sugar refinery in Philadelphia. There he experienced first hand the ruthlessness of the era's business world. While learning the techniques of sugar refining, he witnessed the tactics—including sabotage and industrial espionage—employed by the Sugar Trust to fight the Spreckels' incursion on the East Coast.<sup>27</sup>

<sup>24</sup>Ibid., 66–68; Cordray, "Claus Spreckels of California," 39–40.

<sup>25</sup>*Postscript to the San Francisco Newsletter*, 4. After Claus had acquired water rights to land he had bought or leased on Maui, he formed the Hawaiian Commercial Company for the purpose of planting and processing sugar cane. Cordray, "Claus Spreckels of California," 39–40.

<sup>26</sup>"Son Against Father," *San Francisco Chronicle*, April 7, 1895. The *Chronicle* referred to Gus as C.A., presumably to distinguish him from his father, Claus. They also referred to the other brothers by their initials, A.B. and J.D. Ibid.

<sup>27</sup>Rockwell D. Hunt, *California and Californians* (Chicago, 1926), 148; Lincoln Steffens, *The Upbuilders* (Seattle and London, 1909), 252.

At the time, Claus was embroiled in a fight with the Sugar Trust over his holdings in California. The trust had a monopoly on sugar on the East Coast and was determined to drive Claus out of the refining business on the West Coast. Claus, never one to falter in the face of competition, attacked the enemy on their own turf. In May 1888, while John was left in charge of the sugar business in San Francisco, the rest of the family accompanied Claus to Philadelphia, where he supervised the construction of his new refinery. After its completion in December 1889, the family returned to San Francisco. Although Adolph purportedly had some initial involvement with the Philadelphia refinery, it was Gus who took over as vice president and general manager in June 1890.<sup>28</sup>

The struggle with the Sugar Trust continued with episodes of sabotage at the Philadelphia refinery and vigorous competition until an agreement was reached in April 1891 between Claus and the Sugar Trust's officers, Harry O. Havemeyer, president; Theodore Havemeyer, vice president; and John E. Searles, treasurer. Gus had rejected an earlier deal that would have given the officers of the trust a controlling interest in the Philadelphia refinery; the final agreement gave them a minority interest and netted Claus a handsome profit, while \$2,250,000 went to the corporation.<sup>29</sup>

The disposition of that \$2,250,000 was the flash point for the fire that consumed the family's peaceful relations and became the turning point in the relations between Claus and his younger sons Gus and Rudolph. The fire smoldered until April 5, 1895, when Gus sued his father for slander. The main accusation was that Gus had embezzled \$250,000 received from the Sugar Trust deal. Family relations deteriorated even further when the younger children, Emma and Rudolph, became estranged from their father.

Emma Spreckels, the only daughter to survive to adulthood, was twelve years younger than brother Gus. Emma was the

<sup>28</sup>"Son Against Father," *San Francisco Chronicle*; Cordray, "Claus Spreckels of California," 82, 95. The refinery was a corporation, capitalized with \$5 million in stock. Claus owned \$4,999,600 worth of the stock. Gus held one-quarter of the remaining \$400 in ownership interest. The other stockholders were Lewis Spreckels, Peter A. Smith, and Charles Watson, each owning \$100 in stock. Cordray, "Claus Spreckels of California," 85 n. 2.

<sup>29</sup>Cordray, "Claus Spreckels of California," 96-98. One author attributes the split between Claus and Gus to a disagreement about the trust's influence over the management of the Philadelphia refinery. Eichner, *The Emergence of Oligarchy*, 168. Claus' surplus investment was \$2,750,000. Cordray, "Claus Spreckels of California," 98. In 1892, the remainder of the stock was sold to the trust, with Claus receiving \$5.5 million. Eichner, *The Emergence of Oligarchy*, 172.

recipient of many gifts from her father, including stocks and bonds worth about \$1.5 million in 1897 and the Spreckels' Punahou mansion in Hawaii.<sup>30</sup> It was Emma's secret marriage on December 30, 1896 that aroused her father's ire and caused her estrangement from her parents. At age twenty-seven, she eloped to San Jose with Thomas Watson, a man nearly twice her age. Watson was an English grain merchant and a personal friend of the Spreckels family who dined at their home and played card games with Claus. The friendship was so close that Claus and his wife were accustomed to calling him by his first name. Although "[a]s one of the heirs to the Spreckels millions it might have been expected that her wedding would be supereminently the social event of the season . . . [t]here were no bridesmaids, no elaborate wedding trousseau, no costly presents, no guests, no wedding breakfast, no reception."<sup>31</sup>

The groom denied that "the wedding did not meet the approval of the parents or other members of Mrs. Watson's family," but the newspapers reported that Claus had opposed the marriage and "upon [his] chiding her for her seeming ingratitude in marrying against his wishes, she decided to give up her fortune."<sup>32</sup> In fact, she transferred back to her father gifts of property, including the mansion in Honolulu. The only property she retained was the "fine modern block on Market street known as the Emma Spreckels building and the lot on which the building stands . . . valued at \$600,000 and more and the annual revenue is about \$30,000."<sup>33</sup> Reportedly "savagely angry," Claus refused to see his daughter after the wedding and regarded his new son-in-law as a fortune hunter. The ostracism by the Spreckels family and their friends forced the Watsons to leave San Francisco for Lower Kingsford, England.<sup>34</sup>

Rudolph, too, received both his father's gifts and his wrath. In 1893 Claus gave him five thousand shares in the Hawaiian property, the Paauhau Plantation Company. Later, when Rudolph sided with Gus against their father, Claus attempted to rescind this gift of stock. The legal basis for rescission was

<sup>30</sup>"The Spreckels Still Unrelenting," *San Francisco Chronicle*, January 7, 1897; "Returns Father's Property," *New York Times*, March 15, 1897. In 1914, the mansion was dismantled and rebuilt in another part of Honolulu. It burned down in 1954. Adler, *Claus Spreckels*, 257.

<sup>31</sup>"Emma Spreckels Married Secretly," *San Francisco Chronicle*, January 3, 1897. "The Spreckels Still Unrelenting," *San Francisco Chronicle*.

<sup>32</sup>"She Renounces a Fortune," *New York Times*, January 7, 1897.

<sup>33</sup>"Returns Father's Property," *New York Times*. "The Spreckels Still Unrelenting," *San Francisco Chronicle*.

<sup>34</sup>"Daughter Sues Spreckels," *New York Times*, July 15, 1903.

that the gift had been without his wife's written consent as required by the 1891 statute.<sup>35</sup>

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### TANGLING AND UNTANGLING FAMILY CONNECTIONS

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The 1897 case of *Spreckels v. Spreckels*,<sup>36</sup> involving the gift of stock to Rudolph, can be traced to the friction between his older brothers Adolph and Gus. Although there is some evidence that Adolph may have resented Gus' role in the family business prior to 1891, the precipitating incident involved the sale of part of the Spreckels' sugar refinery in Philadelphia in April 1891. The refinery was a corporation, but Claus owned almost all the stock. As vice president and general manager of the refinery, Gus received and was responsible for the proceeds of the sale, \$2.25 million. At that time, Claus was in Europe.

When Claus returned, Gus met him at the steamer in New York and together they went to Philadelphia. There, Adolph joined them in an informal meeting about the disposition of the proceeds from the sale. Without referring to any books or notes, Gus was able to account for most of the funds.

"As I gave my father the figures," [Gus] continued, "my brother, A.B. Spreckels, looked over the paper, saying: 'What has become of it? What has become of it? I don't see what has become of the money.' I asked him if he thought I had embezzled some of it. My father said he had no such thought, and that he was satisfied with my account."<sup>37</sup>

Even though Claus seemed to be satisfied with this initial accounting, Adolph later informed Gus that their father wanted Adolph to investigate further and that a detailed statement was necessary. Angered by his brother's accusation, Gus proffered his resignation to his father in a letter dated November 24, 1891, stating, "I can no longer remain in an office to be thrown in contact with him [Adolph], who is evidently determined to put me under a cloud and bent on blackening me in your eyes in order that we might part with an unfriendly feeling." In closing, Gus expressed his "best of

<sup>35</sup>"Fighting His Sons," *San Francisco Chronicle*, May 21, 1895.

<sup>36</sup>116 Cal. 339, 48 Pac. 228 (1897).

<sup>37</sup>Quoted from Gus' deposition, as reported in "Son Against Father," *San Francisco Chronicle*.



Friction between brothers Adolph (pictured above) and Gus led to the 1897 case of *Spreckels v. Spreckels*. (Courtesy of the Society of California Pioneers)

feeling" toward his father with the hopes that "in time you will see things in a different light."<sup>38</sup>

Gus resigned at the end of 1891 and departed for Europe. In February 1892, J. Clem Uhler, secretary of the Spreckels

<sup>38</sup>Letter of November 24, 1891, offered at Gus' deposition and reported in "Missing Money," *San Francisco Chronicle*, April 10, 1895.

Sugar Refining Company of Philadelphia, sent a statement of accounts to Claus and followed it with a letter in May 1892, accounting for the allegedly embezzled \$250,000. The most startling fact to emerge was that \$150,000 of the money was used to pay a "draft of A.B. Spreckels." Perhaps, by accusing Gus of embezzling, Adolph was able to deflect his father's attention from how the unaccounted-for money was actually used.<sup>39</sup>

The accusations of embezzlement occurred in 1891, but the family dispute between Claus and Gus did not explode until four years later, when Gus filed a slander suit against his father. After returning from his European trip, Gus apparently tried to clear his name with his father by bringing a signed statement of accounts to San Francisco in January 1893. However, the statement was signed only by Adolph, on behalf of Claus, and Claus later denied ever having seen it. Adolph, it seems, impeded Gus' efforts at reconciliation with their father.<sup>40</sup>

Between 1891 and 1895, the rift between Gus and Adolph widened to include the other Spreckels brothers. John sided with Adolph when Gus was "retired" from the firm of John D. Spreckels and Brothers early in 1892 by a buyout of his interest in the firm. The brothers felt that Gus should have been grateful to receive one-third of the profits, since in their view he had contributed neither money nor time to the business.<sup>41</sup>

Hostility between Gus and the family increased in 1893 when rumors reached San Francisco that he was having dealings with the Sugar Trust. Gus was actually exploring the possibility of setting up another sugar refining venture in Philadelphia to compete with the trust. He met with the trust's John Searles but later revealed that Searles had tricked him into not competing. Claus, John, and Adolph, however, thought the worst of Gus, believing that he was blackmailing the trust by

<sup>39</sup>"The Sugar Trust," *San Francisco Chronicle*, April 11, 1895; offered at Gus' deposition and reprinted in "Missing Money," *San Francisco Chronicle*; offered at Claus' deposition and reprinted in "Claus Spreckels Declined to Answer," *San Francisco Chronicle*, May 7, 1895; offered at Claus' deposition and reprinted in "Claus Spreckels Declined to Answer," *San Francisco Chronicle*; letter of J. Clem Uhler, May 6, 1892, offered at Claus' deposition and reprinted in *San Francisco Chronicle*, *ibid*.

<sup>40</sup>*Ibid*. At Claus' deposition in the 1895 slander suit, he declined to answer most questions asked by Gus' attorney, Henry Ach. In his answer to one question, he denied being shown any statement of accounts.

<sup>41</sup>"The Spreckels Row," *San Francisco Chronicle*, November 26, 1893.

threatening to expose the details of the Philadelphia refinery sale, which were the subject of a pending anti-trust case, *United States v. E.C. Knight*.<sup>42</sup>

In November 1893, when his father and brothers John and Adolph moved to deprive Gus of his interest in the Hawaiian Commercial and Sugar Company, another family enterprise, Rudolph entered the fray on Gus' side. Although Gus wanted to maintain his interest in that company by taking legal action, it seems he did not want the family rift to become public. Consequently, when the suit was filed, an associate, H.M. Wooley, who owned fifty shares, was named as plaintiff. The case settled about six weeks later. Under the settlement agreement, Gus became owner of the Hawaiian Commercial and Sugar Company, gaining \$2,000,000 worth of property.<sup>43</sup>

Until that time, Rudolph had not been involved in his father's and older brothers' disputes. In April 1893, he had accompanied his parents to Hawaii, and his father had given him five thousand shares of Paauhau Plantation stock in July. It is clear, however, that Rudolph supported Gus in his lawsuit against Hawaiian Commercial. After the settlement, not only did Rudolph become one of the directors of Hawaiian

<sup>42</sup>In the slander suit, Claus' attorney Shortridge asked Gus about the incident, implying that Gus was blackmailing the Sugar Trust. "The Sugar Trust," *San Francisco Chronicle*, *ibid.* Dealings with the trust were often done in secret. For instance, Claus did his best to conceal the final sale of the Philadelphia refinery from inquisitive reporters. Eichner, *The Emergence of Oligarchy*, 173-74; 156 U.S. 1 (1895). The suit was initiated on May 2, 1892 and the trial opened on January 19, 1894. Eichner, *The Emergence of Oligarchy*, 176-80. Thus 1893 was a sensitive time for Claus, whose Philadelphia refinery was a defendant in the lawsuit.

<sup>43</sup>Claus held a \$700,000 Hawaiian Commercial bond. When the interest on the bond was not paid in October 1893, a special meeting of the stockholders was held. Claus "pointed out that to discharge his liability and to provide for necessary expenses an assessment of \$5 a share would have to be levied." "The Spreckels Row," *San Francisco Chronicle*. The assessment was levied, and the company ended up buying back almost all the outstanding stock. Gus owned 990 shares of stock, even though it was held in Claus' name. After John and Adolph paid the \$5 assessment on those shares, they refused to transfer the stock to Gus. He then offered to reimburse the brothers for the money they had paid on the assessment if they would transfer the stock to his name. When they refused, he sued Claus and his brothers "on the theory that they had conspired together to defraud him of his rights in the premises." "All Trouble Ended," *San Francisco Chronicle*, January 6, 1894. See also Jacob Adler, "The Spreckelsville Plantation: A Chapter in Claus Spreckels' Hawaiian Career," *California Historical Society Quarterly* 33 (March 1961): 41-44.

Commercial; he also pledged his father's gift of stock to secure the purchase of the company.<sup>44</sup>

Although one newspaper article opined that "for some inexplicable reason" Rudolph had sided with Gus,<sup>45</sup> it is not surprising that Rudolph supported Gus' lawsuit and joined him in this new venture. After all, they had worked together in Philadelphia. Rudolph also must have known that Gus was wrongly accused of embezzlement and that Gus would not have joined or blackmailed the Sugar Trust. Gus' and Rudolph's alliance exacerbated the already escalating family feud. In December 1894, Claus vented his rage against both of them by trying to undermine the settlement of the Hawaiian Commercial lawsuit and the financial stability of Gus' Hawaiian Commercial Company.

Now Claus attempted to regain control of the stock Rudolph had pledged to secure the Hawaiian Commercial settlement. Although the attempt ultimately failed, it surely cemented the relationship between Gus and Rudolph. It also deepened Gus' animosity toward other members of the family and led to his decision to make some waves in another family enterprise, the Oceanic Steamship Company, which was owned by Claus and John D. Spreckels and Brothers. Gus appeared at the annual stockholders' meeting in January 1895 demanding the right to vote his share, but he was rebuffed. Three months later, he brought an action for a writ of mandamus to compel a stockholders' meeting. Both John and Claus clearly considered Gus' aggressive actions provocative. John indicated that he believed Gus' action was not in good faith but was brought to "vex and harass the other stockholders."<sup>46</sup>

The next step in the escalating conflict was an interview Claus gave to a *San Francisco Examiner* reporter a week after Gus filed for the writ. Claus had not known about the action

<sup>44</sup>"All Trouble Ended," *San Francisco Chronicle*; *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 274, 45 Pac. 329-30 (1896).

<sup>45</sup>"C.A. Spreckels Is Thwarted," *San Francisco Examiner*, May 18, 1895.

<sup>46</sup>Gus had earlier transferred his stock to C.S. Wheeler, who was on the board of directors. According to John, the stock had not been retransferred to Gus in the time period provided by the company by-laws. The meeting then adjourned without officers having been elected. One hour later, the directors met, declared the position of Director Wheeler vacant, and elected Claus to fill his position. "He Could Not Vote," *San Francisco Chronicle*, May 4, 1895; "The Spreckels Row," *San Francisco Chronicle*. Gus lost this case when Superior Court Judge Seawell denied his petition for a writ of mandamus. The judge ruled that if the directors failed to call a stockholders' meeting, it was within the power of the stockholders, not the court, to compel a meeting. "To Remain in Office," *San Francisco Examiner*, June 4, 1895.



until the reporter told him. Enraged, Claus told the reporter his son was an "ingrate," and continued,

I never whipped him in my life, but I feel like going out and cowhiding him now. This is a piece of blackmail—that is what it is. He is trying to force himself upon us in that company when he knows we do not want him there. That boy cannot bulldoze me that way. He and his younger brother are trying to beat me out of two millions of dollars, but they will never do it.<sup>47</sup>

Claus could not contain his anger: "I have kept silent about this thing long enough—just because it is in the family . . . [h]e has tried to make me out a thief, he and Rudolph, and I'll stand it no longer." Claus "was grand in his white storm of rage," and called Gus "a dishonor to my family, a villain and worse." He accused Gus of lying, wasting money in his business, and taking \$250,000 in the Philadelphia refinery deal. His final words were, "I will show the people how those boys will die in the gutter and why they ought to."<sup>48</sup>

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### THE SLANDER SUIT

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Gus, infuriated by his father's words, took a most audacious action: He filed a lawsuit against his father for slander on April 5, 1895. In the month that followed, both Gus and Claus were deposed. The *Chronicle* followed every move in the case and published verbatim most of the questions and answers of both parties. Gus' deposition occurred on April 6, 9, and 10 at the offices of Claus' attorneys, Delmas and Shortridge. Gus was accompanied by his own attorney, Henry Ach of the firm Ach and Rothschild, and Rudolph. The first session of Gus' deposition was conducted by D.M. Delmas, subsequent ones by S.M. Shortridge. Adolph attended all the sessions on Claus' behalf.

The second session of Gus' deposition produced startling evidence. First came the statement of accounts prepared by Secretary Uhler that explained in minute detail the disposition of \$2.25 million. Adolph denied ever having seen the accounting statement before that day. Next came the letter of November 24,

<sup>47</sup>"Claus Spreckels' Hot Wrath," *San Francisco Examiner*, March 24, 1895. The \$2 million refers to the Hawaiian Commercial deal.

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

1891, in which Gus proffered his resignation. The final session of Gus' deposition explored the charge that Gus had blackmailed the Sugar Trust. In fact, when he explained what had happened, it was the Sugar Trust that had bested Gus. Gus' deposition testimony seriously damaged Claus' claim that his own remarks, particularly the charge of embezzlement, were true.<sup>49</sup>

Claus' deposition was scheduled for a little over three weeks later, on May 6. In counseling Claus, attorney Delmas must have advised him to put up a smoke screen, both literally and figuratively. The *Chronicle* commented that the commissioner recording the deposition "endeavored to keep pace with the rapid consumption of cigars on the part of the defendant [Claus] by sending up clouds of smoke from a cigarette." With Claus and his son John seated on one side of the table and sons Gus and Rudolph on the other, the scene must have been tense. Claus was very uncooperative,<sup>50</sup> declining to answer most of the hundreds of questions propounded by Gus' attorney.

Henry Ach's rapid-fire questioning eventually aroused Claus' ire. Of the few questions that Claus did answer, the most interesting concerned his correspondence with Gus about the \$250,000. Claus stated that he had never received the November 24, 1891, letter in which Gus tendered his resignation and explained his strained relations with Adolph. With other questions, Ach implied that Adolph had read the letter aloud to his father but had omitted the portion concerning Gus' inability to work with Adolph and his accusation

<sup>49</sup>The headline in the *Chronicle* read, "Missing Money. Sensation in the Slander Suit. Young Spreckels Gives an Accounting. An Important Document Is Produced. Speedy Adjournment after the Surprise. A Letter in Which One Brother Denounces the Other—Charges of Blackmail," *San Francisco Chronicle*, April 10, 1895; "The Sugar Trust," *San Francisco Chronicle*. Gus in later years blamed the Sugar Trust for his family problems. "Lays Family Split to the Sugar Trust," *New York Times*, July 26, 1911. Gus' revelations were, as the *Chronicle* stated, "of general interest to the public. Those who felt so disposed could listen to a page in the history of trusts, how they are created and how competition is killed." "The Sugar Trust," *San Francisco Chronicle*. Attorney Shortridge insinuated that Gus had approached John Searles and asked "to be taken care of, or if not, that [he] would make disclosures hurtful" to the trust. *Ibid.* But Gus explained that, at that time, he, with the backing of some investors, was considering opening a refinery in Philadelphia to compete with the trust. When Gus mentioned that possibility to Searles, he offered Gus a chance to profit by joining a pool investing in American Sugar Refinery stock. Gus then abandoned the Philadelphia project, but Searles later reneged on the investment pool. Gus considered "his action contemptible. I arose from my seat, left the office and have never seen Mr. Searles from that day." *Ibid.* Thus Searles had tricked Gus into dropping his plans to compete.

<sup>50</sup>"Claus Spreckels Declined to Answer," *San Francisco Chronicle*.

that Adolph was trying to damage Gus in their father's eyes. Ach also intimated that Adolph had withheld the statement of accounts from his father, and that he had tried to turn the father against the younger son. After several more questions from Ach insinuating that Claus was trying to ruin Gus and Rudolph, the old man exploded, "It is a pack of lies. I never said such a thing. I am an honorable man. What do you mean by fixing up a lot of questions like that? They are a lot of lies."<sup>51</sup>

During the questioning, Ach produced the Uhler letter of May 6, 1892, which explained what had happened to the \$250,000. He then revealed that \$150,000 of that money was used to pay a draft drawn by Adolph.<sup>52</sup> But Claus was not capable of cool reflection at this time; only much later did he lose confidence in Adolph. After further questioning, Ach ended the session, with an agreement by Claus' attorneys that the matter of their client's declinations be submitted to the court of Judge Daingerfield.<sup>53</sup>

Judge Daingerfield heard the case on May 10, just days after Claus' deposition. Claus' attorney, D.M. Delmas, argued that the questions were improper, irrelevant, and an invasion of his client's private affairs. When Henry Ach explained the relevance of the questions, the judge accepted his argument and scheduled an additional hearing.<sup>54</sup>

That hearing never took place. Claus was scheduled to leave on a business trip to Europe on Friday, May 17, and certainly wanted to avoid another session with Henry Ach. Also, the filing deadline for answering the complaint expired that same day. In a surprise move, Claus settled the lawsuit, instructing his attorneys to accept the judgment and pay the three hundred dollars in damages requested in the complaint.<sup>55</sup>

Gus and attorney Ach considered the "confession of judgment" an acknowledgment of the slander against Gus. Gus also reported that negotiations were under way toward settling the lawsuit and perhaps reaching a reconciliation. Gus had offered to sell his stock in the Oceanic Steamship Company and to hold a meeting in which he and Rudolph would reconcile with their parents in exchange for the filing of an answer in which Claus would deny the slander under oath. The

<sup>51</sup>Ibid.

<sup>52</sup>Adolph's main interests in the early 1900s were racehorses, boats, and women. Bernice Scharlach, *Big Alma* (San Francisco, 1990), 21.

<sup>53</sup>"Claus Spreckels Declined to Answer," *San Francisco Chronicle*.

<sup>54</sup>"The Spreckels Case," *San Francisco Chronicle*, May 11, 1895.

<sup>55</sup>"Will Sue His Sons," *San Francisco Chronicle*, May 18, 1895.

negotiations continued on the afternoon of Friday, May 17, but seem to have been a ruse to allow Claus to depart San Francisco that day. Even after the confession of judgment was filed around 4 p.m., Delmas appeared in Judge Daingerfield's court about 4:30 and continued to question the relevance of Ach's questions until 6 p.m., "without disclosing to the court that he was uselessly wasting the time."<sup>56</sup>

So ended the slander lawsuit filed by Gus against his father, but not the spate of litigation between father and sons. Claus, who felt that he had silently borne humiliation at the hands of his sons in their various lawsuits, instructed his attorneys to sue both Gus and Rudolph. He intended to ask Gus for an accounting of all the money he had received and disbursed while holding his father's power of attorney. Against Rudolph he planned to file suit to recover the Paauhau Plantation Company stock that he had given him only two years earlier.<sup>57</sup>

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### RETALIATION AGAINST RUDOLPH

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Claus left instructions with his lawyers, Delmas and Shortridge, to retaliate against Rudolph. Fearing that they also could, at some point, become the targets of Claus' anger, the attorneys sought to calm his temper by recovering the stock given to Rudolph in 1893. To do this, they turned to community property law, alleging that Claus and Anna had owned the stock as community property and that Claus had "voluntarily, and without consideration and without the consent of his wife, the other plaintiff, transferred [the stock] as a gift to the defendant."<sup>58</sup> The complaint plainly did not reflect the realities of the Spreckels' marriage: Claus handled all community property alone and was not in the habit of consulting his wife regarding gifts.

The theory of recovery was based on the amendment to Civil Code §172 enacted in 1891, which required a wife's written consent to gifts of community property.<sup>59</sup> Before that date, the husband had "management and control of the community property, with absolute power of disposition, other

<sup>56</sup>The headline even read "A Full Vindication," *San Francisco Chronicle*, May 19, 1895.

<sup>57</sup>"Will Sue His Sons," *San Francisco Chronicle*.

<sup>58</sup>*Spreckels v. Spreckels*, 116 Cal. 340, 48 Pac. 228, 228 (1897).

<sup>59</sup>See note 5.

than testamentary, as he has of his separate estate."<sup>60</sup> After the trial court rejected this theory, Claus appealed, renewing the argument that the current law made Anna's written consent a requirement.<sup>61</sup>

Rudolph's attorneys, Ach and Rothschild, mounted a three-pronged attack on the 1891 amendment. First, they argued that amendments to the code were not retroactive unless expressly declared so by the legislature. The corollary to this argument was that the law at the time of the marriage contract controlled disposition of property, or, alternatively, any legislative changes to the law would be an unconstitutional impairment of a vested property right. Second, they argued that "the wife has no voice in the conduct of its affairs; she consequently has no vested or tangible interest in the community property. The title to such property vests in the husband and for all practical purposes he is regarded as the owner." Third, because the wife's interest in community property was a "mere expectancy," "the conclusion is inevitable, from the mere statement of the proposition, that she is not only not a necessary party to, but is improperly joined in, any action suit, or proceeding concerning community property."<sup>62</sup>

Claus' attorneys assumed, without presenting an argument, that the 1891 amendment applied to the gift made in 1893. Their main arguments presented a different view of the spouse's interests in the community property and the necessity of joining the wife as a party to the lawsuit. First, the husband, according to their view, was "the mere managing head, agent, and trustee of the property of the community" whose powers were "conferred upon him solely by the legislature." The implication was that if the legislature conferred those powers, it could modify them. Second, the wife had a half interest in the common property that was characterized as "a present, definite, and certain interest, which becomes absolute at his death." Thus, during the marriage, the husband must act for the "best interests of the community," and if a gift impairs the community or the wife's rights, the gift is, "at the option of the wife, voidable." Therefore, it was imperative that a wife not only be a party to a proceeding, but also be able to redress the wrong of an improper gift:

<sup>60</sup>Act of April 17, 1850, ch. 103, §9, 1849-50 Cal. Stat. 254, codified as Civil Code §172 in 1872.

<sup>61</sup>"Rudolph Spreckels Defeats His Father," *San Francisco Chronicle*, March 24, 1897.

<sup>62</sup>*Spreckels v. Spreckels*, 36 L.R.A. 498-99 (1897). In this version of the case, the attorneys' main arguments and citations are included.

It would ascribe inconceivable folly to the legislature to imagine that they promulgated a law by which they gravely said to the husband: You shall not give away the community property. Still if you choose to do so, there is no power on earth but yourself to prevent you. Your wife, for whose protection this enactment is made, cannot prevent you.<sup>63</sup>

If that were the case, Claus' attorneys argued, it would put gifts made without the consent of the wife "under complete legal protection."<sup>64</sup>

Claus' attorneys made a serious mistake by failing to address the question of retroactivity of the 1891 amendment. The supreme court chose the retroactivity issue as the simplest way to validate the gift to Rudolph, thus avoiding the difficult issue of remedying an improper gift. Moreover, the court seized this opportunity to expound on the extent of the husband's control of community property. The effect was to stymie legislative reform for many years. The court's view of married women's property reform emerged in its statement that "the operation of the amendment must be confined, *at least*, to community property acquired after its passage."<sup>65</sup> There was some support for this view in the 1859 case, *Ingoldsby v. Juan*, in which the California Supreme Court asserted that marital property statutes operate only on "future transactions and matters," and that the "[l]egislature had no power to affect marital relations or rights fixed by law previously."<sup>66</sup>

Rudolph's attorneys had argued for even greater delay in implementation of the 1891 amendment. They asserted that the rights of the spouse were controlled "by those provisions of law which were in force at the time the [marriage] contract was made, and in relation to property, by the laws as they stood when the [marriage] contract was consummated."<sup>67</sup>

<sup>63</sup>*Ibid.*

<sup>64</sup>*Ibid.*

<sup>65</sup>*Spreckels*, 116 Cal. 349, 48 Pac. 231 (*italics in original*).

<sup>66</sup>*Ingoldsby v. Juan*, 12 Cal. 579–80 (1859). The statute in question provided that it applied only to "such property as shall be hereafter acquired." Strict application of the statute would have voided the wife's conveyance of her separate property, but the court held that the conveyance "in equity and practical effect" was in compliance. *Ibid.* at 579. Also, the clear language of the statute prevented retroactive application. *Ibid.* at 580.

<sup>67</sup>*Spreckels*, 36 L.R.A. 498. The foremost authority on retroactivity at the time acknowledged that the nonretroactivity of statutes "was constantly met by exceptions introduced to preserve the force of *remedial laws*," but as far as marital rights were concerned, constitutional protection is extended "when the right taken or abridged is a right to property." William P. Wade, *A Treatise on the Operation and Construction of Retroactive Laws* iii (St. Louis, 1880), 213. Hence, the majority of the opinion was devoted to characterizing the spouse's rights to community property.

Since the court decided that the amendment applied only to property acquired after its enactment, it was "unnecessary to consider . . . that the amendment violates the obligation of a contract."<sup>68</sup> If the court had chosen to accept their more drastic argument, the amendment would have applied only to marriages consummated after its enactment. That would have slowed reform to a crawl, leaving every husband married prior to 1891 in complete control of the disposition of community property for the duration of the marriage.

If Claus' attorneys had been able to foresee the outcome of the case, they might have mounted an argument on the retroactivity issue. They could have argued that the 1891 amendment was not retroactive at all: It applied only to future transactions and matters, that is, to *gifts* that a husband made after enactment of the amendment. If the court had accepted that argument, it still could have validated the gift to Rudolph, following the reasoning of Chief Justice William J. Beatty, who concurred in the majority opinion. First, Judge Beatty declared that Claus would have no right to recover a gift that he himself made. Second, the wife, who would be the only person who had a right to complain, could not "maintain an action to revoke the gift until she ha[d] been injured by it." That injury could be ascertained only on divorce or at the husband's death, when the wife's share of the community property was determined, or possibly during the marriage, if the wife would lose her means of support. But, Justice Beatty concluded, in this case there was no "present or prospective injury to her," and therefore the gift was valid. In other words, the case could have been determined on much narrower grounds, without the necessity of limiting the application of the amendment.<sup>69</sup>

Although both the majority and concurring opinions accepted the proposition of Rudolph's attorneys that the wife's community property interest was a "mere expectancy" that came to fruition only when the marriage was dissolved by death or divorce, prior case law on this issue was not so clear. Ironically, the cases that supported the "mere expectancy" concept that severely limited a wife's interest in

<sup>68</sup>*Spreckels*, 116 Cal. 349, 48 Pac. 231.

<sup>69</sup>*Ibid.* at 350, 48 Pac. 231-32 (Beatty, C.J., concurring). Chief Justice Beatty saw clearly that Anna's rights were not in jeopardy and was farsighted enough to anticipate what questions would arise in the future when the amendment would apply. *Dargie v. Patterson*, 176 Cal. 718, 169 Pac. 361 (1917) (wife's claim after her husband's death extends only to one-half that she would receive as survivor).

community property were intended to protect, not limit, those interests. The two major California Supreme Court cases, *Beard v. Knox*<sup>70</sup> and *Godey v. Godey*,<sup>71</sup> involved situations more typical than those related to the Spreckels gift. In both cases, the wife's interest in the community property would have been jeopardized if the husband's disposition of the community property were upheld. In *Beard*, the husband, who died with an estate of community property valued at \$12,000, willed only \$500 to his wife, leaving the residue to their daughter. The court held that the wife's interest was "present, definite and certain which becomes absolute at his death"; therefore, a will could have no effect on that interest, one-half of the community property.<sup>72</sup> In *Godey*, the spouses had divorced, but the husband had omitted in his complaint any mention of community property. The wife then sued to recover her share of the community property and to request an injunction to prevent the husband from disposing of the property. The court held that the rendering of the divorce changed the status of the parties: The husband "lost the exclusive control and somewhat absolute power to dispose of the community property," and the wife was able to sue to enforce her rights.<sup>73</sup> From these two cases, both of which protected a wife's interest, it was inferred that a wife's rights to community property arose only at dissolution of the marriage by death or divorce.

The acceptance of the "mere expectancy" concept shows both the predominant mindset of the late 1800s in California and the remarkable influence that a particular phrase can have, especially when it is uttered by a chief justice with the stature of Stephen J. Field. Field spoke those momentous words in the 1860 case *Van Maren v. Johnson*.<sup>74</sup> Again, the decision was intended to protect the wife's interests, in that case from creditors. The case involved a debt Mrs. Johnson incurred before her marriage, and the question was whether the debt should be paid out of the community property. Since the statutes spoke only to the liability of separate property, the court had to decide the liability of the community property for the debt. Falling back on distinctly "common law" reason-

<sup>70</sup>5 Cal. 252 (1855).

<sup>71</sup>39 Cal. 157 (1870).

<sup>72</sup>*Beard*, 5 Cal. 256.

<sup>73</sup>*Godey*, 39 Cal. 164.

<sup>74</sup>15 Cal. 311 (1860).



ing,<sup>75</sup> the court concluded that creditors can reach the community property because "the title to that property rests in the husband."<sup>76</sup> That meant, according to Chief Justice Field, that the husband had absolute power over the property and the wife's interest was "a mere expectancy, like the interest which an heir may possess in the property of his ancestor."<sup>77</sup> Although the decision was intended to protect the wife's interest, the concept that stuck was "mere expectancy," a phrase often repeated in other cases and in commentaries.<sup>78</sup> The supreme court in *Spreckels* adopted the concept with a vengeance, with Justice Temple doubting that "a happier phrase could have been devised."<sup>79</sup>

The court devoted most of its opinion to explaining that prior to the 1891 amendment, the husband had a vested right in the community property, which gave him "all elements of ownership, and the wife none." That made the husband the "absolute owner" of the community property.<sup>80</sup> Ultimately, the court decided that it would be unconstitutional to divest

<sup>75</sup>"In the end, the common law was made the basis of jurisprudence. . . . [L]egislative and judicial machinations led California's marital property regime to function more like a common law scheme modified by married women's property acts." Schuele, "In Her Own Way," 262-63. "The courts have tended to interpret community property by common law concepts, especially by the control of property that the husband has under the common law." William Q. DeFuniak, *Principles of Community Property* (Chicago, 1943), 309.

<sup>76</sup>Id. (emphasis added). "Community property is all property which stems from the labor of either spouse during the marriage, irrespective of . . . the condition of title." Prager, "The Persistence of Separate Property Concepts," 6. "The concept of 'title' is foreign to a community property system, where ownership is determined by tracing to the source of an acquisition rather than by determining whose name is on the deed or other instrument of conveyance." William A. Reppy, Jr., "Retroactivity of the 1975 California Community Property Reforms," *Southern California Law Review* 48 (1975): 977, 944.

<sup>77</sup>Ibid.

<sup>78</sup>E.g., *Packard v. Arellanes*, 17 Cal. 538 (1861) ("So long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity"); *Godey v. Godey*, 39 Cal. 164 (1870) ("It is true that the interest of the wife . . . has been termed 'a mere expectancy'; but . . . ); *Greiner v. Greiner*, 58 Cal. 119 (1881) ("The interest of the wife . . . was a mere expectancy"). Richard A. Ballinger, "Wife's Interest Mere Expectancy in California," *A Treatise on the Property Rights of Husband and Wife, Under the Community or Ganancial System*, §77 (Seattle and San Francisco, 1895); DeFuniak, *Principles of Community Property*, 307.

<sup>79</sup>*Spreckels*, 116 Cal. 347, 48 Pac. 230.

<sup>80</sup>Ibid. at 342, 48 Pac. 229. One explanation of the court's preoccupation with the scope of the husband's right was that they viewed his power over gifts "as itself a property interest . . . whether or not W had any proprietary interest in the property H gave away." Reppy, "Retroactivity," 1061.

the husband of those rights by legislative amendment. Despite these pronouncements, the court had to deal with earlier precedent, *Smith v. Smith*, which suggested that "the law . . . will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife." In that divorce case, the husband had used community funds to build a house on land he had purchased with separate property. He also conveyed the property to his children from a prior marriage. The court held that his attempt to deprive "the wife of her interest . . . must be held ineffectual against the assertion of her claim."<sup>81</sup> Thus it seems clear that, under *Smith*, a wife had some "claim" at divorce against a husband who tried to defeat her "one-half" interest. In addition, the 1881 case of *Greiner v. Greiner* had suggested that a wife's interest might be enough to prevent a "threatened" fraudulent transfer.<sup>82</sup> Yet the court in *Spreckels* asserted that, in relation to any attempts to find that the wife had some property right, "[it] will be universally admitted that so far there has been a complete failure in this respect."<sup>83</sup>

Even though the court rejected the proposition that a wife had a property interest during marriage, an expert on community property law of the 1890s advocated protection for the wife during marriage against a husband's misuse of community property. Judge Richard Ballinger, in his definitive *Treatise on Community Property* published in 1895, acknowledged the husband's power over the community property, but only where "there exists no intention to defraud the wife." Ballinger considered the husband the "legally constituted agent of the marital partnership," who

must not act, however, beyond the scope of his authority, but should be held to a strict accounting to the community for a legal and honest exercise of the powers reposed in him. He should not be allowed to needlessly encumber or dissipate the estate, or absorb it for his personal use; and . . . his conduct and administration of its effects should be free from any taint of

<sup>81</sup>*Smith v. Smith*, 12 Cal. 225 (1859) (J. Field, delivering opinion).

<sup>82</sup>*Greiner v. Greiner*, 58 Cal. 121 (1881) Husband Jacob had sought a divorce from wife Caroline. She alleged in a separate action that Jacob had transferred some notes and mortgages to others in an attempt to cheat and defraud her. Jacob and Caroline reconciled, and the court below refused to allow her action to go forward. The supreme court reversed, based on a trust theory, with dicta regarding a wife's interest in community property.

<sup>83</sup>*Spreckels*, 116 Cal. at 344, 48 P. at 229.

fraud or unfairness as against the rights and interests of his consort.<sup>84</sup>

Judge Ballinger suggested various possible remedies for the wife: reimbursement from the husband's separate property, recovery of a fraudulent conveyance, and even equitable protection.<sup>85</sup> He indicated his high regard for Justice Merrick's concurrence in *Greiner v. Greiner* by quoting it:

I do not think that a husband has the right to give away common property to the injury of or in fraud of the wife, nor do I think that she must wait until the community is dissolved before attempting to redress the wrong. His right to manage and dispose of the community property must be exercised in endeavors to preserve or use it for their common benefit, not to give it away.<sup>86</sup>

Thus there were some rumblings both before and after passage of the 1891 amendment that a wife had some right to control the husband's management of the community property.

The court rejected any concept of an accounting during marriage: "[T]he husband owes no duty to the community or the wife either" beyond "suitable maintenance" for her and children. Although it did not deny that a husband has moral obligations to his wife, the court asserted that under the law he has the power to dissipate the community property "in visionary schemes or in mere whims." Thus any suggestion that a wife had a right, much less a remedy, for the husband's actions was soundly rejected by the *Spreckels* court.<sup>87</sup>

Finally, the court accepted Rudolph's attorneys' argument that the wife could not even be a party to an action to recover community property. Because the 1891 amendment "does not give her a right of action," the court concluded that the general rule controlled: Wives cannot be joined as plaintiffs to recover community property during marriage.<sup>88</sup> Thus, procedurally, married women were precluded from even filing a

<sup>84</sup>Ballinger, "Wife's Interest Mere Expectancy," §83, at 122-23.

<sup>85</sup>*Ibid.* at §§85-86, at 125-26. An earlier commentary recognized that, "[i]n California there seems to be no certain, well-defined mode of preventing such action on the part of the husband." Horace G. Platt, *The Law as to the Property Rights of Married Women* (San Francisco, 1885), §36, at 118.

<sup>86</sup>*Greiner*, 58 Cal. 123-24, quoted in Ballinger, "Wife's Interest Mere Expectancy," §87, at 127.

<sup>87</sup>*Spreckels*, 116 Cal. 345, 48 Pac. at 230.

<sup>88</sup>*Id.* at 349, 48 Pac. 231.

lawsuit, which "must have discouraged many an adventurous litigant from attempting to set aside such gifts," as later commentators noted.<sup>89</sup> Although it found that the gift to Rudolph was valid, the court in many ways limited the legislature's nascent attempt at reform. It not only established the principle that amendments to community property laws do not apply retroactively, but also emphatically declared that during marriage the husband was the absolute owner of community property, and the wife had no control of it whatsoever.

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### REACTION AND REFORM

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Reaction to the *Spreckels* case came swiftly. The day after the supreme court decision, the *San Francisco Call* carried the following headlines: "Some New Law for California Married Women. Wives Declared to Have No Right in Community Property . . . A Startling Definition of the Duties and Obligations of a Husband by the Supreme Court."<sup>90</sup> The thrust of the article was that married women "will no doubt be surprised to learn that their rights and interests in community property are practically mythical and that the husband may spend it pretty much as he pleases, all of which is news to married men and women." Commentators recognized that the *Spreckels* case had in essence gutted the 1891 amendment: "The decision . . . practically stripped the amendment of 1891, designed to protect married women, of much of its force."<sup>91</sup> Even the staid *California Jurisprudence* opined that "judicial interpretation . . . deprived [the amendment] of much of its effect."<sup>92</sup> Susan Westerberg Prager, former dean of UCLA's School of Law, offers a withering assessment of the *Spreckels* court:

<sup>89</sup>Orrin K. McMurray and Jackson W. Chance, Comment, "Community Property: Effect of Gift of Community Property without Wife's Consent," *California Law Review* 18 (1929): 400, 403.

<sup>90</sup>March 24, 1897. The *Call* was owned by John Spreckels, so it is not surprising that their reaction to the case was negative; however, the article mainly concerns married women's rights. The *Chronicle* suggested that the decision "might not have the support of Susan B. Anthony and Rev. Anna Shaw." "Rudolph Spreckels Defeats His Father," *San Francisco Chronicle*.

<sup>91</sup>Orrin K. McMurray and Jackson W. Chance, "Community Property: Effect of Gift of Community Property without Wife's Consent," *California Law Review* 18 (1929): 403.

<sup>92</sup>3 Cal. Jur., 10 Year Supplement §20, at 496 (1926-33). DeFuniak, *Principles of Community Property*, 306-10.

"[T]he California Supreme Court moved to emasculate the statute, essentially by denying that it represented *any* inroad into the doctrine that the wife had no interest beyond the potential of receiving some portion of the community on termination of the marriage."<sup>93</sup>

The most potent contemporary criticism of the *Spreckels* decision was leveled by the United States Supreme Court in the 1900 case of *Warburton v. White*, and the 1911 case of *Arnett v. Reade*.<sup>94</sup> Both involved the issue of retroactive application of Washington and New Mexico community property laws, respectively, to property acquired prior to their enactment. In *Warburton*, the court rejected the *Spreckels* view of the husband's interest in the community property:

"It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community property acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband."<sup>95</sup>

The court would not consider the *Spreckels* case, being "unable to perceive [its] pertinency" and therefore saw no need "to review or consider it."<sup>96</sup> In *Arnett*, the court rejected the "mere expectancy" concept. Although the court noted that the issue had "fed the flame of juridical controversy for many years," it concluded that "it is very plain that the wife has a greater interest than the mere possibility of an expectant heir . . . she has a remedy for an alienation made in fraud of her by her husband."<sup>97</sup> In both cases, the court approved retroactive application of legislative reforms intended to increase protection of married women's rights.<sup>98</sup>

<sup>93</sup>Prager, "The Persistence of Separate Property Concepts," 50.

<sup>94</sup>176 U.S. 484 (1900); 220 U.S. 311 (1911).

<sup>95</sup>*Warburton*, 176 U.S. 497.

<sup>96</sup>*Id.* The court distinguished *Spreckels* as a case dealing with the husband's powers during marriage rather than the rights of the spouses at death.

<sup>97</sup>*Arnett*, 220 U.S. 319–20.

<sup>98</sup>"[I]t was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife jointly." *Warburton*, 176 U.S. 490 (explaining the change in intestacy statutes). "And as she was protected against fraud already, we can conceive of no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land." *Arnett*, 220 U.S. at 320 (explaining the change requiring both spouses to join in conveyances of real property). See generally Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850–1912* (Westport, Conn., 1983), 30–32.

The misconception regarding the wife's interest can be traced to a mistranslation of Febrero's treatise on Spanish law, *Bienes Gananciales*.<sup>99</sup> Justice Abbott, in a lengthy and stinging dissent to the lower court's opinion in *Arnett v. Reade*, thought that the heart of the controversy over the husband's interest in community property was the meaning of the Spanish word "dominio." The translation, "dominion," was incorrectly interpreted to mean "ownership" rather than "right of control and disposition."<sup>100</sup> Many other commentaries on Spanish law indicated that the wife had a "proprietary interest."<sup>101</sup> Thus, Justice Abbott concluded that unless the wife had an interest beyond a mere expectancy, "the very expression 'community property' is a misnomer . . . all the learned treatises on it are little better than waste paper, and the celebrated chapter on the natural history of Iceland 'Concerning Snakes' might have been substituted for them with great gain in brevity and not much loss in substance." Clearly, Justice Abbott approved of the New Mexico legislation in question, which he found to be "a wise and beneficent measure of public policy which confers on the wife the power to protect herself and her children, to some extent, against the improvidence, caprice, or purposely harmful conduct of the husband. . . ." Thus he concluded that the "express will of the legislative branch" should not be thwarted. His view, with less rhetoric, was adopted by the U.S. Supreme Court in *Arnett*.<sup>102</sup>

Yet the potent ideas of *Spreckels* persisted in California for many years. The California Supreme Court did not face the gift issue again until 1916 in another case involving the *Spreckels*

<sup>99</sup>"It is undoubtedly unfortunate that of all the commentators upon the Spanish law Febrero should have been relied upon . . . and the consideration of his views, however mistakenly interpreted, given an undue prominence and carried down the years through successive cases." DeFuniak, *Principles of Community Property*, 277. Josef Febrero is described as "a minor figure of the eighteenth century . . . [s]ince he was not a lawyer himself, his career is not distinguished by those accomplishments found in the lives of other writers who were members of the legal profession." *Id.*, appendix 2, at 29. See also Peter L. Reich, "The 'Hispanic' Roots of Prior Appropriation in Arizona," *Arizona State Law Journal* 27 (1995): 649 [Arizona courts intentionally misstated Hispanic water law]; "Mission Revival Jurisprudence: State Courts and Hispanic Water Law since 1850," *Washington Law Review* 69 (1994): 869 [state judges in California, New Mexico, and Texas intentionally misinterpreted Spanish and Mexican water law].

<sup>100</sup>*Reade v. De Lea*, 95 Pac.131, 140 (Supreme Court of Territory of New Mexico 1908) (J. Abbott, dissenting). This is the lower court opinion in *Arnett v. Reade*.

<sup>101</sup>*Id.* DeFuniak, *Principles of Community Property*, 270-94 [outlining in detail other commentaries re the wife's ownership].

<sup>102</sup>*Id.* at 141, 145.

family. In that case, the court still persisted in limiting the wife's rights by declaring that a husband's gifts made without the wife's written consent would not be considered absolutely void after his death.<sup>103</sup> The legislature, in 1901 and 1917, enacted provisions to limit the husband's power over community property during marriage, but the nonretroactivity of community property legislation still deterred full implementation of the changes.<sup>104</sup> It was not until 1927 that the legislature explicitly overturned the "mere expectancy" doctrine:

"The respective interests of husband and wife in community property during continuance of the marriage relation are *present, existing and equal* interests under the management and control of the husband. . . . This section shall be construed as defining the respective interests and rights of husband and wife in community property."<sup>105</sup>

The "mere expectancy" phrase, first uttered in the 1860 *Van Maren* case and reiterated with great force in the 1897 *Spreckels* case, finally was put to rest eighty-seven years later.

After the *Spreckels* decision, the nonretroactivity principle remained in place for the next sixty-eight years.<sup>106</sup> In 1965, in *Addison v. Addison*, the California Supreme Court reversed the trend by applying California's quasi-community property

<sup>103</sup>*Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537 (1916); *Spreckels*, 172 Cal. 784, 158 Pac. 540. "Vastly more damaging to any effort to restrict the husband's power, however, was a later decision involving the Spreckels family property, which concluded that the 1891 statute did not affect the mere expectancy doctrine. . . ." Prager, "The Persistence of Separate Property Concepts," 50.

<sup>104</sup>The 1901 act stated that the husband could not convey or encumber home furnishings or wearing apparel of the wife without the consent of his wife. Act of March 23, 1901, ch. 190 [1901] Cal. Stat. 598. Cal. Fam. Code §1100(c) (West 1992). The 1917 act stated that wives must join in real property transactions. Act of May 23, 1917, ch. 583 [1917] Cal. Stat. 829-30. Cal. Fam. Code §1102 (West 1992).

<sup>105</sup>Act of April 28, 1927, ch. 265, §1 [1927] Cal. Stat. 484. Cal. Fam. Code §751 (West 1992).

<sup>106</sup>E.g., *Estate of Frees*, 187 Cal.156, 201 Pac. 114 (1921) [statute changing definition of community property not retroactive]; *Stewart v. Stewart*, 199 Cal. 341, 249 Pac.2d 208 (1926) [law at time of acquisition of property controls]; *Estate of Drishaus*, 199 Cal. 374, 249 Pac. 517 (1926) [inheritance tax statute at time of death applies]; *McKay v. Lauriston*, 204 Cal. 567, 269 Pac. 523 (1928) [wife's right to make testamentary disposition of community property not retroactive]; *Trimble v. Trimble*, 219 Cal. 346, 26 Pac.2d 480 (1933) [husband's gifts made prior to amendment giving wife testamentary disposition valid]; *Estate of Thornton*, 1 Cal. 2d 5-6, 33 Pac.2d 1, 3 (1934) [quasi-community property statutes unconstitutional deprivation of vested property rights if applied to property acquired prior to becoming domiciled in California]; *Boyd v. Oser*, 23 Cal. 2d 620, 145 Pac.2d 312, 316 (1944) [income from community property acquired prior to date of amendment not subject to wife's testamentary disposition].

statute retroactively. Although the court claimed that the statute was not applied retroactively because it only changed a couple's rights upon divorce, the statute *did* apply to property acquired prior to the date of the enactment.<sup>107</sup> The *Addison* court explained that "the state has a very substantial interest" in the "fair and equitable distribution of marital property," which justifies changing a spouse's property rights upon divorce. Thus the court concluded that any deprivation of a vested property right was constitutional.<sup>108</sup>

In 1975, complete equality of husband and wife in management and control of community property during marriage became a reality. In a comprehensive overhaul of prior law, the California Legislature amended the statutory provision at issue in the *Spreckels* case by changing the required written consent to community property gifts from "wife" to "spouse."<sup>109</sup> This change represented the legislature's final triumph over antiquated ideas of a wife's rights of management and control. Noted expert in community property law Professor William Reppy, Jr., declared that *Spreckels* was dead: "born 1897; died 1927; buried 1975. R.I.P." Professor Reppy also argued forcefully that retroactive application of the equal management scheme would be constitutional.<sup>110</sup> In 1976, in *Marriage of Bouquet*, when the California Supreme Court applied retroactively a statute intended to equalize spousal rights, it was widely believed "that retroactive application would be the rule rather than the exception."<sup>111</sup>

<sup>107</sup>62 Cal. 2d 569-70, 399 Pac.2d 904, 43 Cal. Rptr. 104 (1965); 399 Pac. 2d 904, 43 Cal. Rptr. 104. Barbara Brudno Gardner, Note, "Marital Property and the Conflict of Laws: The Constitutionality of the 'Quasi-Community Property' Legislation," *California Law Review* 54 (1966): 252; Stephen M. Tennis, Note, "Retroactive Application of California's Community Property Statutes," *Stanford Law Review* 18 (1966): 514.

<sup>108</sup>*Addison*, 62 Cal. 2d 566-67, 299 Pac.2d 902, 43 Cal. Rptr. 102; 299 Pac.2d 902, 43 Cal. Rptr. 102.

<sup>109</sup>See Carol S. Bruch, "Management Powers and Duties under California's Community Property Law: Recommendations for Reform," *Hastings Law Journal* 34 (1982): 229; Cal. Civil Code §5125(a)(b). Now Cal. Fam. Code §1100(a)(b) (West 1992). See *supra* note 12.

<sup>110</sup>Reppy, "Retroactivity," 1128.

<sup>111</sup>*Marriage of Bouquet*, 16 Cal. 3d 586, 546 Pac.2d 1372, 128 Cal. Rptr. 428 (1976). The statute in *Bouquet*, Cal. Civil Code §5118, now Cal. Fam. Code §771 (West 1992), changed the law regarding earnings and accumulations of the spouses while they lived separate and apart. Prior to the amendment, a wife's earnings were her separate property but the husband's were community property. The amendment provided that earnings and accumulations of *both* spouses were separate property. Barbara Flagg, "Respecting Reliance: A Standard for Due Process Review of Retroactive Community Property Legislation," *Community Property Journal* 14 (1985): 14, 15.



Yet the retroactivity issue did not die. In the 1980s, in two major cases, *Marriage of Buol* and *Marriage of Fabian*, the court resuscitated the *Spreckels* doctrine, finding that retroactive application was an unconstitutional deprivation of vested rights. In both cases, retroactive application of new community property legislation would have affected adversely the wives' interests at divorce.<sup>112</sup> Because the state interest in retroactive application was not substantial enough to outweigh reliance on prior law, the court held retroactive application unconstitutional.<sup>113</sup> So began a ten-year battle between the state legislature and the supreme court over retroactivity of those particular statutes. It was settled at last in 1995 when the California Supreme Court had the final say regarding retroactivity in *Marriage of Heikes*.<sup>114</sup> In an opinion written by Justice Kathryn Werdegar, one of the three women sitting on the California Supreme Court, the *Spreckels* doctrine was reaffirmed. The court refused to apply the statutes in question to property acquired prior to the date of enactment where vested property rights were involved.<sup>115</sup> There is immense irony in the fact that all the recent supreme court cases involving retroactivity were resolved in favor of protecting a wife's right—the exact opposite of the result in the *Spreckels*

<sup>112</sup>39 Cal. 3d 754, 705 Pac.2d 355, 218 Cal. Rptr. 32 (1985); 41 Cal. 3d 442, 715 Pac.2d 254, 224 Cal. Rptr. 334 (1986). In those cases, the legislature had expressly intended to apply Cal. Civil Code §§4800.1 and 4800.2, now Cal. Fam. Code §§2581 and 2640 (West 1992), to "proceedings not yet final." In both cases, the trial court decisions that favored the wives were on appeal.

<sup>113</sup>Because neither wife would have had the remotest chance to comply with the law while the cases were on appeal, the court held that none of the proffered state interests such as uniformity and consistency were sufficient to disturb settled expectations regarding the property in question. *Buol*, 39 Cal. 3d 760–64, 705 Pac.2d 360–62, 218 Cal. Rptr. 36–39; *Fabian*, 41 Cal. 3d 447–51, 715 Pac.2d 257–60, 224 Cal. Rptr. 337–40.

<sup>114</sup>A detailed description of the battle is beyond the scope of this article. A brief description of the history of the controversy over §§4800.1 and 4800.2 is found in *Marriage of Heikes*, 10 Cal. 4th 1215–21, 899 Pac.2d 1351–56, 44 Cal. Rptr. 2d 157–62 (1995). See William A. Reppy, Jr., "Applying New Law to Pre-Enactment Acquisitions—Must Prior Law Be 'Rankly Unjust'? part I," *Community Property Journal* 14 (1988): 1; part II, *Community Property Journal* 15 (1989): 1; Arthur G. Woodward, Comment, "The 1986 Amendments to California Civil Code Sections 4800.1 and 4800.2: Irreconcilable Differences Between the Legislature and the Court?" *Pacific Law Journal* 20 (1988): 97; Charlotte K. Goldberg, "Split Decisions," *Los Angeles Daily Journal*, June 22, 1995; Viu Spangler, Note and Comment, "Happily Settled Ever After: *In Re Marriage of Heikes* and Retroactivity," *Whittier Law Review* 18 (1997): 339.

<sup>115</sup>10 Cal. 4th at 1225, 899 Pac.2d at 1357–58, 44 Cal. Rptr. 2d 158, 163–64.

case itself.<sup>116</sup> Retroactivity of community property legislation remains a live issue today, addressed routinely by both the legislature and the courts. Although the *Spreckels* holding regarding retroactivity seemed at the time to be minor compared to the articulation of the "mere expectancy" concept, that doctrine retains vitality to the present day.

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## FAMILY RECONCILIATION

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The *Spreckels* court definitively established that retroactive application of community property statutes was an unconstitutional deprivation of vested property rights, but the court could not repair the rift within the Spreckels family, which was to continue for many years.<sup>117</sup> In a striking photograph of

<sup>116</sup>In *Buol*, retroactive application of the statute would have meant that the wife's separate property would have been considered community property. In *Fabian*, retroactive application would have meant that the husband would have received reimbursement of a separate property contribution in derogation of the wife's community property interest. In *Hilke*, 4 Cal. 4<sup>th</sup> 215, 841 Pac.2d 891, 14 Cal. Rptr. 2d 371 (1992), where retroactive application was allowed, it meant that the property was characterized as community property, thus allowing the deceased wife's children to inherit her share. In *Heikes*, as in *Fabian*, retroactive application would have meant the husband would have received reimbursement of a separate property contribution in derogation of the wife's community property interest.

<sup>117</sup>Even though Claus and Anna reconciled with their younger children and provided for them in their wills, the animosity and legal battles between the older brothers John and Adolph, and their younger siblings Gus, Rudolph, and Emma, continued after Claus' death on December 26, 1908, and Anna's death on February 15, 1910. *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371 (1912). Gus and Rudolph sought return of Claus' gifts, made before the 1906 earthquake, to the older brothers. "Spreckels Fight Again in Court," *San Francisco Chronicle*, December 22, 1911. They used the same legal weapon that their father had used against Rudolph: that Claus had given the gifts to John and Adolph without Anna's written consent. Anna's will had intentionally omitted John and Adolph because

I do not desire my said two sons or any of their issue to take any part of my estate. This I do for the reason that my deceased husband, Claus Spreckels, prior to his death had already given and advanced to my said sons a large part of his estate, and for other reasons satisfactory to me.

*Spreckels v. Spreckels*, 172 Cal. 787, 158 Pac. 541 (1916). That provision of the will was particularly significant because it settled the major legal issue of whether she had consented in writing to Claus' gifts. According to the supreme court, that provision represented the statutorily required written consent to her husband's gifts. *Id.* at 788, 158 Pac. 542.

San Francisco after the great 1906 earthquake, the completely gutted Claus Spreckels Building that towers over the rubble<sup>118</sup> can be regarded as a metaphor for Claus Spreckels himself—still a tower, but with his fortune and family relations in a shambles. Having already suffered a stroke in 1903, Claus must have felt that the earthquake was another blow against him. His glorious edifice was nothing but a shell; his home was destroyed by fire. His fortune was reduced to \$10 million. He was not on speaking terms with his three younger children.<sup>119</sup>

During the period from 1896 to 1904, Claus had given favored sons John and Adolph gifts of approximately \$13 million each.<sup>120</sup> In 1906, at the age of seventy-eight and in declining health, he had little chance of recouping his former wealth. More than ten years had passed since the heated 1895 litigation, and perhaps now was an appropriate time for

That *Spreckels* case also established principles important to the development of community property law. First, gifts made by the husband during his life are voidable at the wife's option after his death. *Id.* at 784, 158 Pac. 540. The court found that Anna had ratified and confirmed those gifts rather than exercising her right to void them. *Id.* at 788, 158 Pac. 542. Second, the court resolved the issue unanswered in the 1897 case between Claus and Rudolph: whether a husband could revoke a gift he had made without the consent of his wife. The court had avoided that issue in 1897 by refusing to apply the 1891 statute retroactively. Because the property given to John and Adolph was acquired after 1891, the court was compelled to answer the question. It did so in the negative. His gift does not "confer upon him, in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property." *Id.* at 782, 158 Pac. 539. Thus the battle over the Spreckels' estate ended in 1916, eight years after Claus' death.

<sup>118</sup>Many photographs were taken of this San Francisco skyscraper, before, during, and after the earthquake. Eric Saul and Don Donevi, *The Great San Francisco Earthquake and Fire* (Millbrae, Calif., 1981), 2, 13 (before), 39, 57, 60, 63 (during) 105, 110–11, 122, 124, 128, 141 (after). The Spreckels Building, also known as the Call Building, was not razed but rebuilt. It was remodeled in 1938; its dome was replaced with six floors of offices. *Id.* at 128. After World War II the whole exterior was covered with slabs of white marble and it was renamed the Central Tower. William Bronson, *The Earth Shook, the Sky Burned* (San Francisco, 1986), 177.

<sup>119</sup>"Claus Spreckels Very Ill," *New York Times*, November 21, 1903. The illness of the man "who is regarded as the richest man on [the west] coast" made front-page news on the other coast. *Id.* In San Francisco, John characterized Claus' condition as a "slight attack of paralysis" and said that he was only suffering from cold, "a trifling matter." "Spreckels' Illness Not a Serious Matter," *San Francisco Chronicle*, November 21, 1903; Scharlach, *Big Alma*, 26.

<sup>120</sup>The gifts of real property included the Spreckels sugar ranch, the Spreckels Sugar Company plant, and Western Beet Sugar Company. The personal property included shares in the Pajaro Valley Railroad, California Sugar Refinery, Oceanic Steamship Company, Hakaian Plantation, Hilo Sugar Company, and San Francisco Gas and Electric. "Spreckels Fight Again in Court," *San Francisco Chronicle*.



The Spreckels home on Van Ness Avenue in San Francisco was destroyed by fire in the earthquake of 1906. (Courtesy of the Society of California Pioneers)

reflection. Adolph was managing the Spreckels sugar interests in San Francisco now that John was increasingly involved in San Diego, but Adolph's interests often strayed from business to breeding racehorses and attending the racetrack almost daily. This probably distressed Claus, a man driven to pursue business. Even more disturbing was the fact that while John was becoming a grandfather, Adolph remained one of San Francisco's most eligible bachelors. John was the only one in the family who knew about Adolph's relationship with the flamboyant Alma De Brettville (he disapproved of it), but Adolph's bachelorhood at age forty-nine must have troubled Claus and Anna.<sup>121</sup>

On the other hand, Rudolph had developed into the type of businessman whom Claus respected. A millionaire at age twenty-six, Rudolph had become successful without Claus' help. Moreover, before the earthquake, he had concurred with Claus' opposition to overhead trolley lines and had proved himself in competition in the San Francisco utilities business.

<sup>121</sup>Eventually, Adolph married Alma Emma Charlotte Cordray le Normand de Brettville, "Millionaire and Artist Married," *San Francisco Chronicle*, June 8, 1908. Her life is chronicled in Scharlach's biography, *Big Alma*. Adolph died suddenly on June 28, 1924 at the age of 67. "A.B. Spreckels Dies Suddenly at S.F. Home," *San Francisco Chronicle*, June 28, 1924.



The imposing Call Building, also called the Spreckels Building, on Market Street in San Francisco was later gutted by the 1906 earthquake and stood as a metaphor for Claus Spreckels' life. (Courtesy of the Society of California Pioneers)

After the earthquake, father and son reconciled. According to Rudolph, Claus came to him and explained that age and a reassessment of the older Spreckels brothers had caused him to change. According to the older brothers, it was Rudolph who influenced his father. Whatever the impetus, the reunion

of Rudolph and his father also led Claus to reconcile with Gus and Emma.<sup>122</sup>

It is impossible to know what occurred in private family discussions, but Rudolph undoubtedly tried to convince his father that he was mistaken about Gus. The blame could have been squarely aimed at the Sugar Trust, and, in fact, Gus testified in 1911 that the trust had written to Claus "that I [Gus] was mismanaging the business, and brought about a break between my father and my brother and myself."<sup>123</sup> Rudolph was wise enough to know that it might have been counterproductive to blame Adolph. He also probably reasoned that since John and Adolph had already received gifts totaling almost \$26 million, it would be fair to demonstrate a change in attitude by splitting the remaining \$10 million estate among the three younger children.

Rudolph was probably most concerned about Emma. The friction between her and her parents had ceased when her marriage to Thomas Watson ended with his death in 1904. By 1906 she had remarried, but her financial situation may have been precarious. With the backing of Anna, Rudolph probably had little difficulty convincing Claus to reconcile with Emma and to provide for her after his death.<sup>124</sup>

<sup>122</sup>Rudolph is most famous for his participation in the graft investigations in San Francisco in the early 1900s. He was featured in a book called *The Upbuilders* written by muckraking journalist Lincoln Steffens. The book was published in 1909 and describes Rudolph as a "business reformer." Steffens, *supra* note 26, at 244. Steffens glorified Rudolph as a millionaire businessman who should be respected for his willingness to fight political corruption. *Id.* at 276. Gus and Rudolph were able to revive the Hawaiian Commercial and Sugar Company. It was a losing business at that time, but Rudolph took charge, cut out "neglect, mismanagement, extravagance and stealing," *id.* at 255, and within a year the company made a profit. Hunt, *California and Californians*, 148. This was accomplished despite Claus' efforts to limit Rudolph's access to capital. "Rudolph Defeated," *San Francisco Chronicle*, April 9, 1895. They sold the company for a large profit in 1898. Hunt, *California and Californians*, 148; Kevin Starr, *Inventing the Dream* (New York, 1985), 242–46; see Oscar Lewis, *San Francisco: Mission to Metropolis*, 2d ed. (New York, 1980), 207–14.

<sup>123</sup>"Lays Family Split to the Sugar Trust," *New York Times*.

<sup>124</sup>The only reference to Anna's role is one paragraph at the end of a *Los Angeles Times* article:

[D]uring the estrangement between father and children their mother, Mrs. Anna C. Spreckels, was anxious to bring them together so that the cast-off sons and daughter might participate in the joint wealth of her husband and self, share and share alike. It is intimated that the reconciliation between Claus A., Rudolph and Mrs. Ferris and their father was a direct result of the efforts of their mother.

"Late Sugar King's Vast Estate Again in Court," *Los Angeles Times*, December 22, 1911.

The reconciliation between Claus and Gus took place sometime after the earthquake. As Gus described it,

"[N]ot long before my father died, he sent for me and told me that he had discovered his mistake and was sorry. He said it was the biggest mistake of his life, and to rectify it as far as possible he intended to make me the executor of his will. He did that."<sup>125</sup>

Claus' will was redrawn in New York on May 11, 1907. Rudolph and Gus were made executors. Upon Anna's death the estate was to be split among the three younger children. The date of Emma's reconciliation with her parents is unclear, but she did visit her mother just three weeks before Anna's death. Rudolph and Gus were at their mother's bedside when she died. The bitter and the sweet combined in the Spreckels family saga: The bitter loss of fortune in the 1906 earthquake ultimately led to the sweet reunion of Claus and Anna with their children.

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## CONCLUSION

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The Spreckels family history is an outstanding example of family quarrels escalating into extended litigation. Unfortunately, it almost destroyed the relationship between Claus and Anna Spreckels and their younger children. It took an earthquake and one son's determination before a reconciliation could be brokered between the aging parents and those children.

Unfortunately, after the parents' deaths, bitter battles continued between the two factions: John and Adolph against Rudolph, Gus, and Emma. Because of the family's wealth and the depth of emotion involved, they hired the best attorneys to pursue their opposing interests. The cases were sorted out by the courts and ultimately were resolved fairly under the circumstances. The byproduct of the Spreckels family struggle and the ensuing litigation was community property law that remains tremendously important today.

<sup>125</sup>"Lays Family Split to the Sugar Trust," *New York Times*.





## BOOK REVIEWS

*Immigrants in Courts*, edited by Joanne I. Moore. Seattle: University of Washington Press, 1999; 276 pp., illustrations, appendices, notes, index; \$19.95, paper.

*Immigrants in Court* begins with the story of an eighteen-year-old "Mixtec" who served four years in prison before his murder conviction was overturned. The defendant, who spoke an indigenous Indian dialect, was mistakenly given a Spanish-speaking interpreter. The miscarriage of justice was corrected only when several language and translation errors were brought to light. The overall impact of increasing numbers of immigrants on the judicial system is self-evident. Defendants, unable to speak or read English, try to explain their situation to judges who themselves are unable to communicate in the defendant's language. Compounding the problem is the pressure placed on court interpreters who must translate difficult legal concepts from one tongue to another, many times without any real assurance that what is being said is being understood.

From this perspective, *Immigrants in Court* is a useful study guide for judges, attorneys, and court administrators who struggle to ensure that, on the one hand, each defendant receives fair and thorough consideration and, on the other, that the system processes its large volume of cases. The book's theme is eloquently set forth in the foreword by Washington Supreme Court Justice James M. Dolliver, who explains how the concerns of interpreters were brought to the attention of that state's Interpreter Administrative Committee. A product of various contributors and focus groups nationwide, *Immigrants in Court* is a resource that can help the legal community understand immigrants' cultural and linguistic backgrounds.

At the heart of the book is a set of essays describing the culture and legal systems of five significant ethnic groups: Chinese, Mexicans, Muslims, Russians, and Vietnamese. The authors deserve praise for adequately summarizing in a condensed, readable form what is obviously a mountain of material and jurisprudence. They also include discussion of the interplay of federal immigration law and state criminal proceedings, the point being that immigrants may be subject to deportation or loss of resident status even for a misdemeanor conviction or if made the subject of civil domestic violence

orders. The appendices contain a set of criminal rights forms with translations and a Code of Professional Responsibility for Interpreters. Laudable too is the recent effort to establish interpreter training and certification courses, although, according to the authors, only the federal government and some seventeen states currently have such programs.

From all these sources the reader learns how subtle the communication process can be. On the surface, a defendant may appear uncooperative and evasive, making little eye contact with the judge or jury. Then we discover that in the defendant's Vietnamese culture, avoiding eye contact is a sign of deference, not an admission of guilt. Bridging the communication gap can be especially troublesome when the court explains constitutional rights, the right to counsel, bail, and trial procedures, all concepts that may not exist in the defendant's country of origin.

A statistic mentioned in the book is instructive: On any given day, more than 150 different languages are spoken in the United States. Society and culture move rapidly in comparison to a legal system that is, by design, slow, methodical, and deliberate. In the face of such a changing world, whether our courts can meet the challenge of providing meaningful justice to our diverse citizens is the next question.

Hon. George T. Anagnost  
Peoria, Arizona

*An Unlikely Revolutionary: Matsuo Takabuki and the Making of Modern Hawaii*, by Matsuo Takabuki, assisted by Dennis M. Ogawa, with Glen Grant and Wilma Sur. Honolulu: University of Hawaii Press, 1998; 237 pp., illustrations, index, \$12.95, paper.

The name Matsuo Takabuki is normally linked with the powerful and controversial Bishop Estate, the largest private landowner in the Hawaiian Islands and one of the wealthiest charitable trusts in the United States. Established by the will of Princess Bernice Pauahi Bishop, the Bishop Estate runs the Kamehameha Schools exclusively for the benefit of Native Hawaiian children. Takabuki served as a trustee of the Bishop Estate for roughly twenty-one years from 1972 until his retirement in 1993.

Of course, there is more to Takabuki's life and career than just his lengthy association with the Bishop Estate. This book makes that clear. Indeed, the book is strongest when it discusses Takabuki's life before he became a trustee. Takabuki

was born in 1923 on a sugarcane plantation on the North Shore of Oahu to poor Japanese immigrants, when Hawaiian statehood was still thirty-six years away.

Like other second-generation Japanese-Americans, or *nisei*, Takabuki's life was changed by World War II. At the outbreak of the war, he was an undergraduate at the University of Hawaii and working as a civilian clerk for the army at Fort Armstrong. He eventually joined the famous 442nd Regimental Combat Team, an all-*nisei* volunteer unit that fought in some of the fiercest battles of the European Theater.

Upon returning from the war, many *nisei* veterans took advantage of the GI Bill to pursue professional or graduate education, and Takabuki was no exception, earning a law degree from the University of Chicago. In 1949, he passed the Hawaii bar exam.

After practicing law for three years, Takabuki was elected to the board of supervisors of the city and county of Honolulu in 1952. He would continue to serve on the board until he lost the 1968 election. During this period, a "revolution" took place in island politics: the rise of the Democratic Party in the years leading up to statehood in 1959. The book describes these changes in reasonable detail.

One of the strengths of *An Unlikely Revolutionary* is its firsthand account of the economic changes that were taking place in the islands during the 1950s and 1960s, notably the growth of tourism. Moreover, Takabuki's law practice involved him in a number of real estate transactions that gave him a keen sense of taxes and finance. This background would serve him well when he became a trustee of the Bishop Estates. Indeed, he has often been viewed as a financial wizard who has helped make the estate the major player it is today.

The book begins to disappoint with what should have been its strongest section, chapter 5, entitled "The Nisei Trustee of the Bishop Estate," which is not as detailed as it should have been. However, Takabuki does describe the controversy surrounding his 1972 appointment by the supreme court of Hawaii as one of the five trustees. The prospect of a Japanese-American trustee for a Native Hawaiian institution led to protests and even death threats against him.

Over the years, the trustees have been the object of much criticism. Although Takabuki provides fair justifications for the Bishop Estate's reluctance to sell land to tenants under lease-to-fee conversion programs and for its policy of accepting only Native Hawaiian children into Kamehameha schools, his handling of other issues is unsatisfactory. These include matters such as the high compensation for trustees, investments that some find too risky, the questionable practice of

trustees investing personal money alongside estate funds in certain investments, and the allegations that trustees have not spent enough on the estate's beneficiaries, the relatively small number of Native Hawaiian children who are able to attend the Kamehameha schools. Takabuki has escaped the controversy and investigations which have dogged the estate's trustees in recent years.

The later chapters contain a certain amount of "filler," as do the six appendices containing speeches Takabuki gave on various occasions. Although some of Takabuki's remarks about, say, doing business in Asia are interesting, there is little that is new here. Incidentally, he criticizes Hawaii's regulatory environment to the extent that he sounds like a Republican rather than a lifelong Democrat. In sum, perhaps Takabuki was an unlikely revolutionary after all.

Damien P. Horigan  
Pusan, South Korea

*Against the Vigilantes: The Recollections of Dutch Charley Duane*, edited by John Boessenecker. Norman: University of Oklahoma Press, 1999; 240 pp., illustrations, notes, bibliography, index; \$27.95, cloth.

Few individuals who participated in the 1851 and 1856 San Francisco vigilance movements are as notorious as "Dutch" Charley Duane. Twice banished from the city of San Francisco and the state of California, Duane was branded a reckless criminal and strong arm for unscrupulous rouge politicians. Yet Duane contributed to the advancement of the city by serving as chief engineer of the Fire Department and by his zealous opposition to the policies of the vigilance committees. This edited and annotated compilation of his memoirs is a fascinating firsthand account of the San Francisco vigilance movements.

Boessenecker uses his skills as an attorney and historian to inform the reader of the context of this primary source. His fifty-page introduction is well researched and informative, and adds significantly to the understanding of Duane's recollections. Boessenecker argues that historians have rarely examined the backgrounds of individuals who were persecuted by the vigilance committees to see if they were truly worthy of punishment. He notes that very few criminals lived to write memoirs, and those who did rarely chose to, while important members of the vigilance committee did. He disagrees with historians who believe that the movement was

based on antidemocratic, anti-Irish, and anti-Catholic sentiment. Boessenecker states that in order to understand a vigilance movement, we must examine the crime that spawned it. The criminals of the 1851 movement were violent offenders and manipulators of the justice system. The criminals who spawned the 1856 committee were vicious ballot stuffers who served corrupt politicians. Boessenecker provides ample information to show the nature of the criminal element in both movements, and he does so in a fair and balanced manner. He includes twelve biographies of the most notorious criminals involved with the movement. Careful reading of Duane's memoirs and the biographies gives credence to the view that the vigilance committees had good reason to punish these men.

Those interested in the politics of the time will find this book hard to set down. Duane's life seems more like a work of fiction, destined for a theater near you. He was an election rigger, politician, fire chief, gambler, saloon-keeper, gunfighter, bare-knuckle boxer, and land squatter. Duane received his education from New York street hooligans and Tammany Hall political thugs. He was a member of a volunteer fire department that was nothing more than an organized gang. Duane received recognition and notoriety from Tammany Hall elites when he calmed a riot at an opera house. Boessenecker notes that a strong duty to honor and pursue riches governed his life. So when Duane heard of the easy fortunes to be made in California, he left for San Francisco, where he found several new opportunities.

"Dutch" Charley immediately associated himself with other Tammany Hall immigrants and made himself very useful to Democratic political boss David Broderick, who employed Duane and others like him to ensure the advancement of his own political agenda. Duane's close association with Broderick (who became a senator) afforded him privileged treatment by city authorities: He consistently received minor punishments for violent crimes. Banishment by the Vigilance Committees diminished Duane's political power and his freedom to commit acts of violence; the pressure caused him to return to New York. Years later, Duane sued members of the committee for loss of property. He spent several years fighting squatters, and his recollections denote the trouble it took to do so. Boessenecker's book could have been expanded to include the case details of Duane's legal attempts to regain control of his property.

Boessenecker has created a model example for edited primary-source legal material. His attention to the many facets of the time period, his historiography, and his ability to

present fairly both sides of an issue make this book enjoyable and informative. Those interested in moving beyond a one-volume study of the San Francisco vigilance movements will benefit by reading this book.

Timothy Lee Miller  
Anaheim, California

*In God's Country: The Patriot Movement and the Pacific Northwest*, by David A. Neiwert. Pullman: Washington State University Press, 1999; 384 pp., illustrations, notes, index; \$19.95, paper.

If I were to recommend one book to someone who wanted a solid and readable overview of the right-wing American Patriot movement, I would point that person to journalist David Neiwert's *In God's Country*. Although it is a regional account that focuses on the Pacific Northwest, the basic ideology and underlying motivations of the Patriot movement apply to Patriots nationwide.

Neiwert himself is an Idaho native, which lends a personal touch to his interviews and historical musings. He grew up in the Pacific Northwest, has family there still, and remains connected to the land and its people. In that vein, I found chapter 8, "A Hard Land," to be the true soul of this book, since it best expresses Neiwert's roots as he describes the hardscrabble existence of southwestern Idaho's residents (including his grandparents) and the ways in which an unforgiving land can push people into the conspiracy-laden twilight of Patriot beliefs.

Thus an important part of Neiwert's analysis is his attempt to understand what makes people—mostly white men—join groups that are anti-government and usually anti-Semitic, racist, and sexist. After all, these men could be his friends or neighbors. They could be *our* friends or neighbors. Through his interviews and observations, Neiwert skillfully reminds us that no matter the dark and twisted path a Patriot treads, he is nonetheless someone's brother, husband, son. And that makes his involvement in a right-wing extremist group all the more frightening and tragic.

Neiwert deals with individuals as well as with groups, providing a variety of examples of Patriot activity and beliefs. The Patriot movement, as Neiwert defines it, is "an American political ideology based on an ultranationalistic and selective populism which seeks to return the nation to its 'constitutional' roots—that is, a system based on white Christian male

rule. Its core myth is that such a reactionary revolution will bring about a great national rebirth, ending years of encroaching moral and political decadence wrought by a gigantic world conspiracy of probably Satanic origins" (p. 4).

In his analysis, Neiwert includes the Freeman, the Militia of Montana, the Washington State Militia, and individuals such as Colonel James "Bo" Gritz (the man who talked Randy Weaver into surrendering) and Calvin Greenup, a Montana rancher who refused to pay his taxes or surrender his bankrupt ranch. Neiwert also includes an introductory chapter on earlier twentieth-century rightist groups in the Northwest. Most readers will have heard of the Ku Klux Klan, but how many know that William Dudley Pelley's 1930s neo-Nazi Silver Shirt Legion also operated in the region? By including this historical information, Neiwert provides a link from the past that will give readers a sense that American rightist activity has deep roots and that 1990s manifestations are nothing new, although the motivations for joining differ.

Neiwert relies on an effective variety of primary and secondary sources, including his own interviews with members of Patriot groups, reporters, law enforcement officials, and friends and family of Patriots. He also uses trial testimonies and newspapers in his analysis, thus providing differing perspectives on the movement, its members, and the northwestern communities they adversely affect.

I found a few errors that do not detract from the overall excellent presentation and analysis, but should be noted nonetheless. On page 31, Neiwert provides brief biographical information about some of the more visible members of the Patriot movement, including Gene Schroder, who is based in Campo, Colorado. On page 277, Neiwert uses Schroder's full name, Eugene. But on page 173, Schroder appears as Eugene Schroeder (sic) of Nebraska. On page 75, Neiwert states that Elisheba Weaver (white separatist Randy Weaver's third daughter) was born in 1992 when in fact she was born in October 1991. The correct date appears on page 65.

Aside from these quibbles, David Neiwert and Washington State University Press have provided a superb account of the American Patriot movement and the tragedy its ideology engenders in the people who seek answers to very real problems in its folds. *In God's Country* should be required reading for anyone interested in American rightist activity and, quite frankly, for law enforcement agencies. Neiwert humanizes rightist believers without finding excuses for their violent (potential or otherwise) actions. He leaves us instead with a

profound sense of sadness that anyone could choose the Patriot movement as a solution to local and national problems.

Evelyn A. Schlatter  
Albuquerque, New Mexico



## 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.

Bakken, Gordon. "Conversations with Bernard Witkin," *California Supreme Court Historical Society Yearbook* 4 (1998-99).

Beres, Linda D., and Thomas D. Griffith. "Did 'Three Strikes' Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report," *Loyola of Los Angeles Law Review* 32:1 (November 1998).

Bowman, Frank O., III, and Stephen L. Sepinuck. "'High Crimes & Misdemeanors': Defining the Constitutional Limits on Presidential Impeachment," *Southern California Law Review* 72:6 (September 1999).

Bradley, Ed. "Fighting for Texas: Filibuster James Long, the Adams-Onís Treaty, and the Monroe Administration," *Southwestern Historical Quarterly* 102 (January 1999).

Brown, Susan Jane M. "Striking the Balance: The Tale of Eight Ninth Circuit Court of Appeals Sales Cases," *Environmental Law* 29:3 (Fall 1999).

Clay, Karen B. "Property Rights and Institutions: Congress and the California Land Act of 1851," *Journal of Economic History* 59 (March 1999).

Clow, Richmond L. "The Anatomy of a Lakota Shooting: Crow Dog and Spotted Tail, 1879-1881," *South Dakota History* 28:4 (Winter 1998).

Combs, Mariel J. "United States v. Washington: The Boldt Decision Reincarnated," *Environmental Law* 29:3 (Fall 1999).

Cornell, Saul. "Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary* 16:2 (Summer 1999).

Firmage, Edwin B. "Reflections on Mormon History: Zion and the Anti-Legal Tradition," *Dialogue* 31 (Winter 1998).

Fisher, Andrew H. "'This I Know from the Old People': Yakama Indian Treaty Rights as Oral Tradition," *Montana: The Magazine of Western History* 49 (Spring 1999).

Forbes-Boyte, Kari. "Litigation, Mitigation, and the American Indian Religious Freedom Act: The Bear Butte Example," *Great Plains Quarterly* 19 (Winter 1999).

Hanft, John K. "A Model for Legal Research in the Electronic Age," *Legal Reference Services Quarterly* 17:3 (1999).

Higginbotham, Don. "The Second Amendment in Historical Context," *Constitutional Commentary* 16:2 (Summer 1999).

King, James Winston. "The Legend of Crow Dog: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act," *Vanderbilt Law Review* 52:5 (October 1999).

Kozinski, Alex. "Closed Chambers: The First Eye-Witness Account of the Epic Struggles inside the Supreme Court," *Yale Law Journal* 108 (January 1999).

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