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Cover Photograph: Civil jury reform, chronicled in David Gold's article, began in Nevada, where too many cases clogged the calendar in the Storey County Courthouse, shown here, and elsewhere in the state. (Photo by Lynn C. Stutz, 1989)

REFORMING THE CIVIL JURY IN THE NINETEENTH-CENTURY WEST: JURY SIZE AND UNANIMITY OF VERDICTS

DAVID M. GOLD

Despite the fundamental place of trial by jury in the American system of justice, constitutional scholars have virtually ignored the history of the civil jury. One reason for this default is the failure of the Supreme Court to incorporate the Seventh Amendment's guarantee of trial by jury into the due process clause of the Fourteenth Amendment. In their studies of constitutional rights, scholars have had the unfortunate habit of jumping from the adoption of the Bill of Rights in 1791 to the selective incorporation of the Bill of Rights into the Fourteenth Amendment in the twentieth century. The right to trial by jury in civil cases has suffered more neglect than most because there has been no dramatic incorporation by the Supreme Court to focus attention on it. Scholars have written important works about the colonial background of the civil jury and the adoption and original meaning of the Seventh Amendment, but the history of the civil jury in America since 1791 remains largely unexplored.¹

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¹David M. Gold, "State-Court Protection of Individual Rights: The Historians' Neglect," *Constitutional Commentary* 2 (1985): 419-24; Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal* 25 (1994): 946-52; David Bodenhamer, *Fair Trial: Rights of the Accused in American History* (New York, 1992), 158; Lawrence Meir Friedman, "Some Notes on the Civil Jury in Historical Perspective," *DePaul Law Review* 48 (1998): 201-20. Articles on the background and early history of the Seventh Amendment include

The dearth of historical studies does not mean that the nineteenth-century history of the civil jury was uneventful. Proposals to reform the civil jury system attracted a great deal of public notice after 1860 and received considerable attention in state constitutional conventions. Most of the discussion focused on two issues: the size of the common-law jury and the requirement that juries render unanimous verdicts. Efforts to reduce the size of the jury and to permit majority verdicts succeeded almost exclusively in the western states, where social and economic conditions combined with a general willingness to break with legal tradition to produce reforms that eastern states continued to resist until well into the twentieth century.

THE BEGINNINGS OF REFORM

Constitutional guarantees of trial by jury have usually been very general. The Seventh Amendment does not define *jury* or say how juries shall operate; it simply states that the "right to trial by jury shall be preserved." The New Jersey constitution of 1776, in a manner characteristic of the Revolutionary era, proclaimed that "the inestimable Right of Trial by Jury shall remain confirmed as a Part of the Law of

Matthew P. Harrington, "The Economic Origins of the Seventh Amendment," *Iowa Law Review* 87 (2001): 145–233; Stanton D. Krauss, "The Original Understanding of the Seventh Amendment Right to Jury Trial," *University of Richmond Law Review* 33 (1999): 407–83; Kenneth S. Klein, "The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial," *Ohio State Law Journal* 53 (1992): 1005–36; Charles W. Wolfram, "The Constitutional History of the Seventh Amendment," *Minnesota Law Review* 57 (1973): 639–747; Edith Guild Henderson, "The Background of the Seventh Amendment," *Harvard Law Review* 80 (1966): 289–337. The subsequent history of the civil jury has begun to receive some attention recently. See David M. Gold, "Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History," *Cumberland Law Review* 31 (2001): 287–309; Stephan Landsman, "The Civil Jury in America: Scenes from an Unappreciated History," *Hastings Law Review* 44 (1993): 579–619; Renee Lettow Lerner, "The Transformation of the American Civil Jury: The Silent Judge," *William and Mary Law Review* 42 (2000): 195–264; Douglas G. Smith, "The Historical and Constitutional Contexts of Jury Reform," *Hofstra Law Review* 25 (1996): 377–505. One recent article, following the traditional pattern for incorporated rights, barely gets beyond the eighteenth century before skipping to Supreme Court cases of the late 1890s. Richard S. Arnold, "Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials," *Hofstra Law Review* 22 (1993): 1–35.



Trial by jury usually meant the "unanimous verdict of twelve impartial men." (Illustration from *Harper's Weekly*, January 18, 1875)

this Colony, without repeal for-ever." The Ohio constitution of 1802 tersely declared that the right "shall be inviolate."²

The framers of the Seventh Amendment refused to elaborate on the civil jury because practice differed from state to state, but their concerns seem to have been more with federalism and the types of cases that could be heard by juries than with the composition and workings of the jury itself. Most Americans knew what the essential features of a jury trial were. "Do we not know the meaning of the term [trial by jury]?" asked Patrick Henry in 1788. It meant the "unanimous verdict of twelve impartial men." Although Henry might have added something about a jury of one's "peers" drawn from the neighborhood, his concise formulation encapsulated the chief characteristics of the common-law jury: unanimity, size, and impartiality.³

²U.S. Constitution, amend. 7; New Jersey Constitution (1776), art. 22; Ohio Constitution (1802), art. 8, sec. 8. Most of the state constitutions and draft constitutions cited in these notes may be found in William F. Swindler, ed., *Sources and Documents of United States Constitutions*, 12 vols. (Dobbs Ferry, N.Y., 1973–1988).

³Klein, "Myth," 1012–16; Krauss, "Original Understanding," 413–45; Bernard Schwartz, ed., *The Bill of Rights: A Documentary History* (New York, 1971), 2:808–809.

While no one has ever questioned the need for impartial juries, the other characteristics named by Henry caused controversy as early as the eighteenth century. Notwithstanding remarks to the contrary by the Supreme Court, twelve had been the magic number for the size of a trial jury since medieval times. An English treatise of 1665 pointed out that the number had Biblical sanction, as in the twelve tribes of Israel and the twelve apostles. Early American fundamental laws, such as the General Laws of New-Plimouth (1636), the Fundamental Constitutions of Carolina (1669), and the Concessions and Agreements of West New Jersey (1676), expressly required that juries have twelve members. There are rare examples of six-man juries in colonial times, but the number twelve was almost sacrosanct.⁴

The very first case in which a court declared a law invalid for violating a constitution may have been the one in New Jersey in 1780 in which the court struck down a statute allowing six-man juries. At the outbreak of the Revolution, the New Jersey legislature had passed a law providing for six-man juries in certain civil cases that grew out of trade with the British enemy. The state constitution, as noted earlier, guaranteed trial by jury, but it said nothing about the jury's size. However, New Jersey laws going back to the seventeenth century reflected the general belief that juries should not have fewer than twelve members. The court declared the trading-with-the-enemy act unconstitutional for violating the right to trial by jury.⁵

The requirement that jury verdicts be unanimous was likewise deeply entrenched in early American legal thought. The Fundamental Constitutions of Carolina allowed for majority verdicts in civil cases, but the almost universal rule in both civil and criminal actions demanded that the jurors all agree. The Supreme Court of Missouri expressed the opinion

⁴*Colgrove v. Battin*, 413 U.S. 149 (1973); William Holdsworth, *A History of English Law*, 17 vols., 7th ed., rev. (London, 1956–72), 1:324–25, 328; Arnold, "Trial by Jury," 11; Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York, 1997), 509–10, 515; H. Richmond Fisher, "The Seventh Amendment and the Common Law: No Magic in Numbers," 56 F.R.D. (1973) 507, 529–32; Smith, "Jury Reform," 426–28; *State v. McClear*, 11 Nev. 39, 47 (1876) ("the sacred number, twelve").

⁵See Austin Scott, "Holmes v. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation," *American Historical Review* 4 (1899): 456–69, excerpted in Schwartz, *Bill of Rights*, 1:405–10. Some scholars have argued that *Holmes v. Walton* did not actually find the statute in question unconstitutional and that therefore it is not a precedent for judicial review. See, e.g., William Winslow Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, 1953), 2:948–52.

of American courts generally when it declared in 1822 that trial by jury meant that "the trial shall be by twelve men" and that "they must all agree in their verdict."⁶

Toward the middle of the nineteenth century, however, cracks began to appear in the concept of the jury as a twelve-man panel that spoke with a single mind. Delegates to the Michigan constitutional convention of 1835 and participants at a meeting of Jacksonian "friends of constitutional reform" in New York two years later questioned the need for twelve-man juries and unanimous verdicts, especially in civil cases.⁷ In the mid-1840s, New Jersey and Iowa became the first states to adopt constitutional provisions that permitted juries of fewer than twelve, although only in inferior courts. In 1848, the Supreme Court of Georgia suggested that civil juries be done away with altogether.⁸

It is not clear why these debates over the jury should have arisen when they did. However, a study of the criminal justice system in pre-Civil War Indiana by David J. Bodenhamer suggests one possible reason. Many Americans, especially Jacksonian Democrats, demanded that government be limited and inexpensive. To save money on jury selection, the Indiana legislature allowed individual counties to cut in half the number of potential jurors that a sheriff had to call for a term of court. If enough jurors satisfactory to both parties to a trial could not be found in this smaller pool, the

⁶Schwartz, *Bill of Rights*, 1:118; *Bank of Missouri v. Anderson*, 1 Mo. 244 (1822).

⁷Harold M. Dorr, ed., *The Michigan Constitutional Convention of 1835–36: Debates and Proceedings* (Ann Arbor, Mich., London, 1940), 281–82; *The Address, and Draft of a Proposed Constitution, Submitted to the People of the State of New-York, by a Convention of Friends of Constitutional Reform* (New York, 1837), 4 [art. 4, sec. 9]. Motions to allow majority verdicts had been made in New York as early as the constitutional convention of 1776–77, but they were overwhelmingly defeated. Charles Z. Lincoln, *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905: Showing the Origin, Development, and Judicial Construction of the Constitution* (Rochester, N.Y., 1906), 1:547.

⁸New Jersey Constitution (1844), art. 1, sec. 7; Iowa Constitution (1846), art. 1, sec. 9; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848). On the wording and purpose of the New Jersey provision, see the text below at note 28. A Georgia delegate to the federal constitutional convention had privately suggested abolishing the civil jury in 1788. "Notes of Major William Pierce on the Federal Convention of 1787," *American Historical Review* 3 (1898): 316. Some Federalists already held the jury in low regard at that time, and over the next three or four decades courts and lawyers developed various procedural devices to curtail the power of civil juries. Matthew P. Harrington, "The Law-Finding Function of the American Jury," *Wisconsin Law Review* (1999): 377, 399–400, 405–23.

sheriff would choose additional jurors from among the bystanders at court. The idea of bystander juries drew plenty of opposition. Some feared that "loafers and drunkards," idle fellows who had nothing better to do than hang around the courthouse, would wind up as jurors. Others warned that defendants would pack the courthouse grounds with their cronies on trial day. Perhaps proposals for smaller juries and nonunanimous verdicts grew out of a Jacksonian desire to cut down the size and cost of government without impairing the quality of juries. If smaller juries were allowed, resort to bystanders would be less frequent; if less-than-unanimous verdicts were allowed, then one or two loafers or drunkards would not be able to thwart justice, even if the twelve-man jury were retained.⁹

Whatever the reason, the fact is that by the middle of the nineteenth century, some Americans were willing to change some of the old, revered features of the jury. One of the earliest significant debates on jury reform occurred at the Kentucky constitutional convention of 1849. Delegate Thomas N. Lindsey proposed that the constitution allow civil juries of fewer than twelve and verdicts upon agreement of two-thirds of the jury in both civil and criminal cases. The traditional twelve-man jury held little attraction for Lindsey, who insisted that there was nothing "very cabalistic in the number twelve." Lindsey maintained that smaller juries would be more efficient and cheaper. Majority verdicts would also save money, he argued, because one dissenting juror would not be able to deadlock the jury and thereby cause a retrial of the case. The savings could then be used to reduce the public debt. Moreover, nonunanimous verdicts would be consonant with the American principle of majority rule. Lindsey pointed out that legislatures decided matters of great

⁹James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* (Bureau of National Literature and Art, 1910), 2:1327 (President Andrew Jackson's Sixth Annual Message to Congress); Lawrence Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (New York, 1989), 51-52, 57-59; David J. Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* (New York, 1986), 83-85. On bystander juries, see also Kevin J. Mullen, *Let Justice Be Done: Crime and Politics in Early San Francisco* (Reno, Nev., 1989), 136; Francis Lieber, *On Civil Liberty and Self-Government*, enl. ed. (Philadelphia, 1859), 236 n. 2. Bodenhamer's book is about the criminal justice system, but his comments about the criminal petit jury apply as well to the civil jury. See, e.g., *Indiana, Revised Statutes* (1843), ch. 50, sec. 14-15.

importance by majority vote. Why, then, he asked, should one juror be allowed to control the whole panel at a trial?¹⁰

Lindsey's proposals did not get very far. Opponents at the Kentucky convention praised the jury system in almost mystical tones, proclaiming it to be second only to the Bible in sacredness. Justice, they contended, should not be reduced to a matter of dollars and cents. Even one dissenting juror in a criminal case was evidence of reasonable doubt as to guilt, and it was better to let ninety-nine guilty defendants go free than to convict one innocent man.¹¹

Lindsey's recommendations for jury reform were ahead of their time for most Democrats and Whigs alike. A rather timid suggestion at the Ohio constitutional convention of 1850–51 that the constitution allow six-man juries wilted in the face of a stern rebuff from Simeon Nash, a prominent Whig lawyer and politician. "We all know what is a trial by jury," Nash thundered. The constitutional clause declaring the right to trial by jury inviolate "provides that this thing shall remain as it is. It puts an end to the tampering with the trial by jury."¹² The convention, dominated by Democrats, left the guarantee of trial by jury unaltered. Courts of the time, in Ohio and other states, reinforced this conservatism in their decisions. They conceded that the constitutional guarantee of trial by jury applied only to those types of cases in which juries had been required under the traditional common law of England; the guarantee did not extend to other tribunals, such as justice of the peace courts or statutory commissions to assess damages in eminent domain cases.¹³ However, judges insisted that

¹⁰*Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky* (Frankfort, Ky., 1849), 794–95 [hereinafter *Kentucky Debates*]. Lindsey himself was a Whig at the time of the convention, but his arguments in favor of small juries reflected widespread concerns in Jacksonian America, particularly among Democrats. On Lindsey, see *The Biographical Encyclopaedia of Kentucky of the Dead and Living Men of the Nineteenth Century* (Cincinnati, 1878), 265.

¹¹*Kentucky Debates*, 795–96.

¹²*Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850–51* (Columbus, Ohio, 1851), 2:326. On Nash, see Carrington T. Marshall, ed., *A History of the Courts and Lawyers of Ohio* (New York, 1934), 1:109.

¹³*Work v. State*, 2 Ohio St. 296 (1853); *Louisiana v. Frankford Plank Road Co. v. Picket*, 25 Mo. 535 (1857); *State v. Gutierrez*, 15 La. Ann. 190 (1860). For a debate on whether juries ought to be required in justice courts, see *Journal of the Constitutional Convention of the State of New Hampshire, December, 1876* (Concord, N.H., 1877), 100–112. See also Margreth Barnett, "The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims," *Hastings Law Journal* 35 (1987): 133–50.

in cases arising under the common law, juries had to be composed of twelve men and had to reach unanimous verdicts.¹⁴

THE FIRST PHASE OF REFORM IN THE WEST: 1864–79

After the Civil War, a movement to alter the size and unanimity rules gathered steam. The West, which showed a much greater propensity than the older eastern states to break with legal tradition,¹⁵ led the way. The breakthrough came in Nevada even before the war's end. The innovation was especially startling because it did not concern a reduction in jury size, for which the path had been somewhat prepared by New Jersey and Iowa, but unanimity. A New Hampshire statute of 1859 had provided for civil jury verdicts upon the concurrence of five-sixths of the jurors, but the state supreme court found the law unconstitutional in 1860.¹⁶ Nevada was the first state to implement majority verdicts successfully.

Nevada's primacy resulted in part from the desire of Republicans in Congress to admit another Republican state in time for the 1864 elections and to strengthen their hand in the fight over Reconstruction. Nevadans had not waited for a congressional enabling act to hold a convention and draft a constitution, but in January 1864 the voters rejected the proposed document. Pressure from Washington helped bring about another constitutional convention that same year.¹⁷

Jury reform in Nevada was not on the agenda of politicians in the nation's capital. Reform stemmed, rather, from the territory's need for law and order. Violence plagued the mining

¹⁴See, e.g., *Smith v. Mitchell*, 6 Ga. 458 (1849); *Work v. State*, 2 Ohio St. 296 (1853); *Cruger v. Hudson R.R. Co.*, 12 N.Y. 190 (1854); *Lincoln v. Smith*, 27 Vt. 328 (1855); *Opinion of the Justices*, 41 N.H. 550 (1860); *Vaughn v. Scade*, 30 Mo. 600 (1860).

¹⁵Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850–1912* (Westport, Conn., 1983); Jimmie Hicks, "The Frontier and American Law," *Great Plains Journal* 6 (1967) 53–69. Some of the selections in Bakken, ed., *Law in the Western United States* (Norman, Okla., 2000), discuss legal innovations in the western territories and states in open range, mining, water, and other areas of law. For a discussion of the literature of western legal history that touches on the question of whether there was or is a distinctive western legal culture, see John R. Wunder, "What's Old About the New Western History? Part 3: Law," *Western Legal History* 10 (1997): 85–116.

¹⁶*Opinion of the Justices*, 41 N.H. 550 (1860).

¹⁷Eleanore Bushnell and Don W. Driggs, *The Nevada Constitution: Origin and Growth*, 6th ed. (Reno, Nev., 1984), 22–23.

districts, and miners and vigilante committees meted out their own rough justice in the place of an effective criminal justice system. Chaos infected the civil side of the law as well, particularly in the new and unsettled area of mining law. Litigation over claims clogged the courts, and fights over mining legislation led to attacks, including at least one physical assault, on the judiciary.¹⁸

The misbehavior of mining companies in legal disputes induced delegates at the constitutional convention to authorize the legislature to permit verdicts in civil cases upon agreement of three-fourths of the jurors; the legislature would be able to change the rule and require unanimous verdicts, but only upon the approval of two-thirds of each house.¹⁹ The chronic failure of juries in mining cases to reach unanimous verdicts sometimes led the parties to agree in court that a majority could decide the case. But supporters of the proposal at the convention made no bones about their belief that mining companies tampered with juries to prevent adverse verdicts. "One man stands out," said Charles E. DeLong, the reform's chief spokesman, "and thus enables a company to continue in possession of a rich mine, administering its proceeds, and enjoying its revenue, to the detriment of the proper owners, all through the trickery, and dishonesty, perhaps, of that one man."²⁰

Getting a holdout could not have been difficult for the mining companies. Mark Twain, who complained that the jury system put "a premium upon ignorance, stupidity and perjury," described one Nevada jury of the early 1860s as a panel of "two desperadoes, two low beer-house politicians, three bar-keepers, two ranchmen who could not read, and three dull, stupid,

¹⁸Ronald M. James, *The Roar and the Silence: A History of Virginia City and the Comstock Lode* (Reno, Nev., 1998), 32–33, 60–67, 169–70; Bakken, "American Mining Law and the Environment: The Western Experience," *Western Legal History* 1 (1988): 221.

¹⁹Nevada Constitution (1864), art. 1, sec. 3. The same ideas on the civil jury appeared in the proposed constitution of 1863, which the 1864 convention adopted as a base document from which to work. *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada, Assembled at Carson City, July 4, 1864, to Form a Constitution and State Government* (San Francisco, 1866), 24 [hereinafter *Nevada Debates*]. There was precedent of a sort for majority verdicts in the *viva voce* decisions by which an assembly of miners sometimes decided legal disputes in the mining camps. Charles Howard Shinn, *Mining Camps: A Study in American Frontier Government* (New York, 1884), 125, 178.

²⁰Eliot Lord, *Comstock Mining and Miners* (1883; reprinted Berkeley, Calif., 1959), 103; *Nevada Debates*, 55.

human donkeys!" Twain's "fools and miscreants" may or may not have been responsible, but the fact is that many of the multitudinous lawsuits over mining rights that followed the discovery of the Comstock Lode and other gold and silver deposits ended in hung juries. In DeLong's own county of Storey, according to one later account, more than four thousand cases choked court calendars at the time, and repeated hung juries left major mining controversies undecided for years.²¹

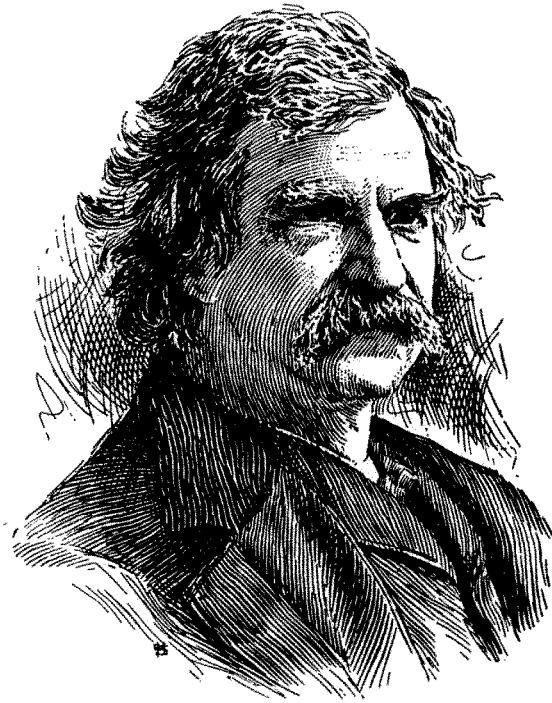
Beyond the problem of jury-tampering, proponents and opponents of the measure essentially repeated the arguments that had been made at the Kentucky convention of 1849. DeLong's opponents denounced his proposal as a dangerous experiment, unprecedented in the United States, but their opposition was half-hearted. Unable to muster much in the way of principle, they maintained that the people were attached to the existing system and that it was not worth risking defeat of the constitution in the ratification vote over a measure of "doubtful propriety." After the delegates voted down his motion to strike the three-fourths language, Thomas Fitch moved to allow the legislature to override it by a simple majority instead of two-thirds of each house. This motion failed too. Fitch and his allies did secure a victory, however, when they defeated a motion, made to "expedite the administration of justice," to extend the three-quarters rule to misdemeanor cases.²²

After the war, jury reform moved forward at a quickened pace. The example of Nevada proved potent in several subsequent state constitutional conventions.²³ Traditionalists continued to rail against innovations that threatened the "palladium of liberty," but they could no longer claim that

²¹Mark Twain, *Roughing It*, in *The Innocents Abroad; Roughing It* (New York, 1984), 783; Lord, *Comstock Mining*, 134–35; I.W. Hart, ed., *Proceedings and Debates of the Constitutional Convention of Idaho, 1889* (Caldwell, Idaho, 1912), 1:150 [hereinafter *Idaho Debates*]. A Nevada newspaper editor wrote in 1863, "During the present and coming terms of the district court in this city twenty-five or thirty cases of the greatest importance, involving property valued to-day at probably not less than \$50,000,000, will be reached. In three cases out of five the juries will fail to agree, and the remaining two will be re-heard or appealed to the supreme court of the Territory and from that tribunal to the Supreme Court of the United States, there to remain subject to the assessments of a coming generation." Lord, *Comstock Mining*, 134. See also James, *Roar and Silence*, 60–67.

²²*Nevada Debates*, 56–58. The official report of convention proceedings does not record any debate on Fitch's majority-override proposition; perhaps the delegates feared that mining companies had too much influence in the legislature.

²³See the text at notes 36, 49, and 55.



Mark Twain (Samuel Clemens) complained that the jury system put "a premium upon ignorance, stupidity and perjury."

innovations were unprecedented. At the same time, bottom-up and top-down skepticism toward the common-law jury converged. As the Nevada convention debates show, there existed a widespread, popular feeling that the great corporations that had come to dominate western economic and political life were manipulating juries for their own benefit. The legal profession, meanwhile, was becoming more highly organized, more elitist, less democratic, and increasingly disenchanted with the common-law jury of amateurs;²⁴ legal commentators,

²⁴On the importance of corporations in the nineteenth-century West, see Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York, 1982), 20–23. On changes in the legal profession, see Lawrence M. Friedman, *A History of American Law*, rev. ed. (New York, 1985), 606–20, 648–53; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989), 211–25; Robert Stevens, *Law Schools: Legal Education in America from the 1850s to the 1980s* (Chapel Hill, N.C., 1983), 20–111; Gerard W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn., 1984).

when not deriding the jury altogether, began to offer support to the reform movement.²⁵ Eastern states proved resistant to reform, but the West had both a readiness to tinker with legal traditions²⁶ and, with approaching statehood, splendid opportunities to do it.

In 1876, Colorado became the first state to allow for juries of fewer than twelve in all civil cases. By that time, the constitutions of at least five other states authorized the use of small juries in lower courts, variously described as inferior courts, courts not of record, or justice of the peace courts.²⁷ As noted above, nineteenth-century courts recognized that common-law juries had never been required in inferior courts, so six-man juries did not necessarily infringe on the constitutional right to trial by jury. The need for constitutional amendments arose from the expansion of the jurisdiction of justices of the peace by state legislatures. The argument ran as follows: The right to a jury trial extended to all the same actions at common law as when the state constitution was adopted. If the jurisdiction of a justice of the peace at the time of adoption was limited to cases involving, say, twenty dollars or less,

²⁵"The Changing Role of the Jury in the Nineteenth Century," *Yale Law Journal* 74 (1964): 190-92; J.H. Hopkins, "Trial by Jury," *Albany Law Journal* 19 (1879): 469-70; William L. Scott, "Should Trial by Jury in Civil Cases Be Abolished?" *American Law Review* 20 (1886): 661-79; "Unanimity of Juries," *Central Law Journal* 3 (1876): 170; "Unanimity of Juries," *Albany Law Journal* 7 (1873): 209; Francis Lieber, "The Unanimity of Juries," *American Law Register*, n.s., 6 (1867): 727-32; Robert Y. Hayne, "Shall the Jury System Be Abolished?" *North American Review* 139 (1884): 348-55; Robert C. Pitman, "Juries and Jurymen," *North American Review* 139 (1884): 10-11; Matthew P. Deidy, "Trial by Jury," *American Law Review* 17 (1883): 401-404. Lieber had been advocating majority verdicts since 1853, Deidy since 1876. Francis Lieber, *On Civil Liberty and Self-Government* (Philadelphia, 1853), 1:257-58; Deidy, "Trial by Jury," 398 n. 1.

²⁶Friedman, *History*, 363-70.

²⁷Illinois Constitution (1870), art. 2, sec. 5; Iowa Constitution (1846), art. 1, sec. 9; Iowa Constitution (1857), art. 1, sec. 9; Missouri Constitution (1875), art. 2, sec. 28; Nebraska Constitution (1866), art. 1, sec. 5; Nebraska Constitution (1875), art. 1, sec. 6; New Jersey Constitution (1844), art. 1, sec. 7. West Virginia empowered the legislature to permit juries of fewer than twelve in appeals from justice courts, but in the justice courts themselves, there were to be no juries in civil cases. West Virginia Constitution (1872), art. 3, sec. 13. An amendment to section 13 in 1880 deleted the language concerning juries on appeal and provided for six-man juries in justice courts. South Carolina's first proposed Reconstruction constitution of 1865 would have allowed the legislature to determine the number of jurors in inferior and district courts (art. 9, sec. 7). A district court was to be an inferior court established to hear all cases, civil or criminal, involving persons of color as parties (art. 3, sec. 1). Congress rejected the instrument. The next constitution (1868) omitted any reference to jury size.

then the right to a common-law jury of twelve extended to actions in which the amount in controversy exceeded twenty dollars. A law increasing the justice's monetary jurisdiction was therefore unconstitutional if it did not provide for a jury of twelve. This was the reasoning behind New Jersey's pioneering amendment in 1844. Although the amendment itself empowered the legislature to authorize six-man juries in civil disputes involving no more than fifty dollars, without mentioning any particular courts, the delegates adopted it so that the legislature could increase the jurisdiction of justices of the peace to that amount.²⁸

The use of small juries in courts of general jurisdiction presented a clearer obstacle to reformers because the courts adamantly insisted that the common-law jury guaranteed by the state constitutions was a jury of twelve. An Indiana statute permitted the parties in civil cases to agree to a jury of not less than three, and some courts held that even without statutory authority the common law permitted trials by fewer than twelve jurors if the parties consented. To provide for small juries without the consent of the parties, however, existing constitutions had to be amended or new constitutions adopted.²⁹

The idea of small juries had been around in the West for some time. In the mining camps, before the organization of official courts, the miners often tried civil cases with juries of six. Colorado's first draft constitution, proposed for the territory of Jefferson in 1859, would have permitted the legislature to fix a number below twelve for juries in inferior courts.³⁰

Delegates at the 1875–76 Colorado convention, called to draft a constitution in preparation for statehood, displayed a marked willingness to disregard tradition. One proposal would have allowed the legislature to do away with civil juries

²⁸*Rutherford v. M'Fadden* in Ervin H. Pollack, ed., *Ohio Unreported Judicial Decisions Prior to 1823* (Indianapolis, Ind., 1952), 71–93; New Jersey Constitution (1844), art. 1, sec. 7; New Jersey Writers' Project of the Work Projects Administration, ed., *Proceedings of the New Jersey State Constitutional Convention of 1844* (Trenton, 1942), 171–72. Some courts held that the monetary jurisdiction of justices of the peace could be increased if the parties had a right to a jury trial on appeal. See, e.g., *Morford v. Barnes*, 16 Tenn. 444 (1835).

²⁹Indiana, *Revised Statutes* (1852), art. 17, sec. 308; *Norval v. Rice*, 2 Wis. 22 (1853). The cases typically involved the withdrawal of a juror and the agreement of the parties to continue the trial with the remaining eleven jurors. See, e.g., *Murphy v. Commonwealth*, 58 Ky. 365 (1858); *Cowles v. Buckman*, 6 Ia. 161 (1858) [dictum]; *Cravens v. Gant*, 18 Ky. 117 (1825); *Vaughn v. Scade*, 30 Mo. 600 (1860).

³⁰Shinn, *Mining Camps*, 125, 184; Draft Jefferson Territory Constitution (1859), art. 1, sec. 8. There was no hard and fast rule in the camps. Miners used juries of six, twelve, twenty-four, or even the whole assembly of their fellows.

altogether; another would have provided for juries of either six or twelve, with the smaller juries having to render unanimous verdicts and the larger ones deciding cases by a simple majority. The published proceedings of the convention do not record debates or the vote totals on motions, but neither of these proposals seems to have gotten far. On the other hand, there were no motions to preserve the traditional twelve-man jury. Ultimately, the convention decided to let the legislature fix the number of jurors at less than twelve, with no required minimum.³¹

Nebraska and Texas also held constitutional conventions in 1875. Both agreed to allow small juries in county courts, which had limited jurisdiction but were courts of record. The published proceedings of the Nebraska convention are not very informative. The report of the committee on the bill of rights authorized the legislature to provide for juries of fewer than twelve in inferior courts, as did the existing state constitution of 1866. As adopted, however, the new constitution allowed for small juries in courts "inferior" to the district courts. These included county courts, which had jurisdiction over guardianship, probate, and other matters as prescribed by law, subject to a monetary jurisdictional limit of one thousand dollars in civil actions. The constitution explicitly denominated county courts as courts of record. Whether the delegates gave any thought to their decision to allow small juries in courts of record is impossible to tell from the sketchy account of proceedings.³²

The published proceedings of the Texas convention are fuller but only marginally more enlightening on the question of jury reform. Again there were resolutions to permit smaller juries and majority verdicts. The judiciary committee recommended that verdicts be rendered upon the agreement of nine out of twelve jurors in both civil and misdemeanor cases in district courts, which were courts of general jurisdiction. The committee also decided on six-man juries in county courts, which were courts of record but near the bottom of

³¹*Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado: Together with the Enabling Act Passed by the Congress of the United States and Approved March 3, 1875: the Address to the People Issued by the Convention, the Constitution as Adopted and the President's Proclamation* (Denver, 1907), 70, 60, 210, 378; Colorado Constitution (1876), art. 2, sec. 23.

³²Addison E. Sheldon, ed., *Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention Assembled in Lincoln, June thirteenth, 1871* (York, Neb., 1905-1907), 3:539; Nebraska Constitution (1875), art. 1, sec. 6 and art. 6, sec. 16. Notwithstanding the title, the *Official Report* includes the journal of the 1875 convention.

the judicial ladder. One of the minority reports agreed with the committee regarding county court juries. However, it said nothing about juries in district courts, thereby tacitly urging the retention of twelve-man juries and unanimous verdicts. Another minority report offered an alternative article on the judiciary that said nothing at all about jury size or unanimity. But this second minority report did attack the majority's "dangerous innovations" with regard to juries, fearing that they would "endanger the existence of these time-honored institutions."³³

Overall, however, the Texas delegates seem to have paid relatively little attention to jury size and unanimity. The judicial article generated much heated debate over the structure of the court system, the terms and salaries of judges, the efficiency and economy of the judiciary, and other issues that together swamped the issues of size and unanimity. In the end, the convention approved the judiciary committee's recommendation that the district courts, with general jurisdiction, retain the twelve-man jury, while county courts would have juries of six.³⁴

The first great convention debate over juries after the Nevada convention took place in California in 1878. California had grown rapidly since the discovery of gold at Sutter's Mill thirty years before. Mining corporations had replaced individual fortune-seekers and small partnerships as the chief producers of gold. Great manufacturing and railroad corporations dominated the economic and political life of the state. Economic hardships in the mid 1870s aggravated the sense of frustration felt by many industrial workers, laborers, and farmers with their inability to control their fate. In 1877, workers in San Francisco, led by the fiery Irish immigrant Denis Kearney, organized a radical workingmen's party dedicated to the redistribution of wealth, the elimination of cheap Chinese immigrant labor, and close regulation, if not complete eradication, of corporations. The established political parties and more conservative elements of society, frightened by the popularity of the workingmen's movement, fought hard to keep Kearney from controlling the upcoming constitutional convention. The workingmen dominated the San Francisco delegation and claimed one-third of the total convention

³³*Journal of the Constitutional Convention of the State of Texas: Begun and Held as the City of Austin, September 6th, 1875* (Galveston, Tex., 1875), 63, 81, 85, 191, 410–11, 419–22, 456. See also Seth Shepard McKay, ed., *Debates in the Texas Constitutional Convention of 1875* (Austin, Tex., 1930).

³⁴Texas Constitution (1876), art. 5, sec. 17.

delegates. Although the workingmen could not shove a new constitution down the throats of the capitalists, as they had threatened, many other delegates who deplored the workingmen's violent rhetoric and long-range goals nevertheless agreed with them on the need for reform.³⁵

The California convention argued long and vociferously over jury size and unanimous verdicts in both civil and criminal trials. More than one delegate held up Nevada as a model. One even declared that Californians had already expressed themselves on the need for jury reform since most Nevadans had come from California. Most of the arguments for and against unanimous verdicts had already been aired in Kentucky, Nevada, and elsewhere: on the pro side, that the jury system had worked well, that there was no public clamor for change, that innovations on the tried and true were dangerous; on the con side, that there were too many hung juries and retrials, that the requirement of unanimity cost the state and the litigants too much money, that it was too easy to buy a single juror, that the majority ought to rule on juries as elsewhere. The question of jury size also brought forth familiar arguments based on tradition, logic, experience, and expense.³⁶

More surprising than the prominence of jury-related issues at the California convention was the depth of animosity toward the jury system in general. For Republican lawyer Walter Van Dyke, the best reason for allowing three-fourths verdicts was that parties would not then demand jury trials; they only did so now, he declared, in the hope that one stubborn juror would cause a mistrial. Radical attorney Volney E. Howard thought juries were both incompetent and "deficient in integrity." James Caples offered a resolution to abolish juries altogether.³⁷

If the jury system could not be gotten rid of, contended critics, then at least it ought to be made less of a burden on the citizens. The wealthy, the corporations, the monopolists, declaimed Howard, demanded jury trials and then manipu-

³⁵Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention 1878-79* (Claremont, Calif., 1930; reprinted, New York, 1969), 5-31.

³⁶*Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878* (Sacramento, 1880-81), 1:250-59, 294-302 [hereinafter *California Debates*]. All but two of the delegates to the 1864 Nevada constitutional convention had come from California. Bushnell and Driggs, *Nevada Constitution*, 25.

³⁷*California Debates*, 138, 295-96.

lated them by easily "purchas[ing] one man out of twelve." Van Dyke told of the solitary juror who had prevented a verdict for a widow whose husband had been killed through the negligence of a railroad employee. The proposal to allow majority verdicts, he declared, "is in the interest of the poor who are seeking justice, and who must encounter the rich antagonist on the other side." Delegates contended that citizens "resort[ed] to every expedient" to avoid jury duty, for it meant being "dragged off to serve on juries for weeks and weeks without compensation." The jury system, maintained another member of the convention, was an "oppression upon the poor and middle classes," who often abandoned their rights due to the expense of litigation.³⁸

These attacks on the jury as an instrument of the wealthy did not go unchallenged. Patrick Reddy, who spoke often at the convention on behalf of mining interests, defended the jury as the shield of the poor and middle classes against "the encroachments of the rich and powerful." He recognized the proposals to do away with unanimous verdicts and to reduce the size of the panel as steps toward the eventual elimination of the jury. (It took no great acumen to come to this conclusion, given the radical rhetoric of the jury's critics.) When the jury is gone, he warned, "then let the corporations come in and put a man on the bench that suits them, with their overshadowing power which has been talked about, and they can readily accomplish whatever they may desire." And Reddy had a warning for the well-to-do: the prevailing political corruption indicated that the rich themselves might soon need the protection of the jury.³⁹

Reddy's arguments, however heartfelt, did not address the specific proposals of the reformers, except the one to abolish the jury. One ardent defender of unanimous verdicts acknowledged that the existing system did not produce true unanimity anyway. Verdicts on damages usually represented compromises among the jurors, he conceded, "compromises sometimes disgraceful to themselves." But nonunanimous verdicts would only make such shameful verdicts more common "because then you have less men to bring over," with no concern about more principled holdouts. Such half-hearted defenses proved unavailing; the convention voted in favor of three-fourths verdicts in civil cases. With regard to jury size, the committee of the whole at one point voted to allow the legislature to set the number, but in the end the convention

³⁸*Ibid.*, 301, 295–97.

³⁹*Ibid.*, 300–301.

settled on retaining twelve unless the litigants agreed to a lesser number.⁴⁰

THE SECOND PHASE OF REFORM IN THE WEST: 1885-95

Louisiana quickly followed California's lead by allowing the legislature to provide for majority verdicts in civil cases.⁴¹ A decade would pass before constitutional jury reform took effect anywhere else. Then the admission of seven western states in seven years reinvigorated the movement. Five of the new states authorized majority verdicts in civil cases. All provided for small juries in inferior courts; one fixed the size of civil juries in courts of record at eight, and another permitted the legislature to provide for small juries in all civil cases.⁴² Outside the West, only Minnesota and Kentucky instituted constitutional jury reforms during this period (1889-96).⁴³

California gave reformers momentum, particularly with regard to the unanimity of verdicts. With three states having adopted majority verdicts, reformers could now appear as sensible men who appealed to experience rather than as radical innovators relying on untested reason. At the South Dakota constitutional convention of 1885, the committee on the bill of rights proposed to allow three-fourths verdicts in civil cases. Conservatives objected on the grounds that this was a largely speculative experiment and that Congress might not approve a constitution that deviated from the tried and true. Reformers pointed out in reply that three other states had already adopted the change.

⁴⁰*Ibid.*, 302-303, 258; California Constitution (1879), art. 1, sec. 7.

⁴¹Louisiana Constitution (1879), art. 116. Unfortunately, the convention journal did not record the debates. *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana Held, in New Orleans, Monday, April 21, 1879* (New Orleans, 1879).

⁴²Montana Constitution (1889), art. 1, sec. 23; North Dakota Constitution (1889), art. 1, sec. 7; South Dakota Constitution (1889), art. 6, sec. 6; Washington Constitution (1889), art. 1, sec. 21; Wyoming Constitution (1889), art. 1, sec. 9; Idaho Constitution (1889), art. 1, sec. 7; Utah Constitution (1895), art. 1, sec. 10. Idaho, Montana, South Dakota, Utah, and Washington authorized majority verdicts in all civil cases. Utah provided for eight-member civil juries, and Wyoming allowed the legislature to fix the size of civil juries.

⁴³Minnesota Constitution (1857) art. 1, sec. 4 (amended 1890); Kentucky Constitution (1891), sec. 248.

One delegate noted that he had actually practiced law in one of those states and that the change had brought "great satisfaction." Reformers made the usual arguments that majority verdicts prevented control of the verdict by one or two men and sped up justice. The delegates ultimately rejected the recommendation of the bill of rights committee and omitted any mention of majority verdicts.⁴⁴

The work of the South Dakota convention of 1885 had no immediate practical results because Republicans and Democrats, each controlling one house of Congress, squabbled over the admission of western states that might give one party or the other an edge. However, when Congress finally agreed on the nearly simultaneous admission of four states in 1889, a new South Dakota constitutional convention adopted the committee recommendation of 1885 and authorized the legislature to permit majority verdicts in civil cases.⁴⁵

Three of the other five states that held constitutional conventions in 1889 also permitted majority verdicts. In one of the two holdouts, Wyoming, the subject inspired no debate.⁴⁶ The North Dakota convention, after a bit of debate that focused rather narrowly on the wisdom of majorities, also rejected majority verdicts. In Washington, on the other hand, the reform sailed through the convention with only token opposition, perhaps because Washingtonians were used to the idea by then; their draft constitution of 1878 had required only a three-fourths majority for civil verdicts. After hearing from federal district judge Matthew P. Deidy of Oregon in favor of majority verdicts, the delegates em-

⁴⁴*Dakota Constitutional Convention Held at Sioux Falls, September, 1885* (Huron, S.D., 1907), 131, 283–84, 288–89; Draft South Dakota Constitution, art. 2, sec. 6 (1885).

⁴⁵South Dakota Constitution (1889), art. 6, sec. 6. The committee on the bill of rights at the 1889 convention, which recommended three-quarter verdicts in civil cases, reported that it was readopting the bill of rights of the previous proposed constitution. *South Dakota Constitutional Convention Held at Sioux Falls, July, 1889*, (Huron, S.D., 1907), 132. However, as already noted, the 1885 convention apparently rejected the committee proposal to allow majority verdicts.

⁴⁶There was very little discussion of the Declaration of Rights in general. See *Journal and Debates of the Constitutional Convention of the State of Wyoming. Begun at the City of Cheyenne on September 2, 1889, and Concluded September 30, 1889* (Cheyenne, 1893), 718–28. Article 1, sec. 9 of the Wyoming Constitution seems to have been copied almost verbatim from article 1, sec. 23 of the Colorado Constitution of 1876.

powered the state legislature to provide for civil verdicts by the agreement of nine or more jurors.⁴⁷

The more extended debates over majority verdicts at the Montana and Idaho conventions reveal the underlying concerns in those states for order, the protection of property, and popular control of corporations. It may be that Montana's history of violence made the question of jury unanimity more urgent than in Wyoming or North Dakota. Violence and vigilantism had ruled the mining camps in the 1860s and the cattle ranges in the 1880s. One delegate argued that the difficulty of securing convictions encouraged the formation of vigilante committees. He moved to permit two-thirds verdicts in criminal cases as a way to make convictions more likely and thus to protect innocent people from vigilantes. Opponents of majority verdicts seem to have thought it more important to concentrate their energies on this proposal than on a similar one for civil juries, and the motion lost by a margin of three to one. Reformers, meanwhile, voiced the usual complaints about the ability of one or two corrupt or biased men to hang a jury, pointed out that majority rule prevailed in Congress and appellate courts, and cited the advice that Judge Deidy gave at the Washington convention. The convention finally agreed to apply the two-thirds rule to misdemeanor and civil cases.⁴⁸

⁴⁷*Official Report of Proceedings and Debates of the First Constitutional Convention of North Dakota Assembled in the City of Bismarck, July 4th to Aug. 17th, 1889* (Bismarck, 1889), 361–63 [hereinafter *North Dakota Debates*]; Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention 1889 with Analytical Index* (Seattle, 1962; reprint, Buffalo, 1999), 510; *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles* (Buffalo: William S. Hein, 1999), 3–54, 4–57; Draft Washington Constitution, art. 5, sec. 8 (1878); *Proceedings and Debates of the Constitutional Convention Held in the City of Helena, Montana, July 4th, 1889 to August 17th, 1889* (Helena, 1921), 264–65 (referring to Deidy at the Washington convention); Washington Constitution (1889), art. 1, sec. 21. There may not have been much debate on jury-related issues at the 1878 Washington convention. The generally sparse report of the proceedings in the *Walla Walla Union* occasionally indicates controversy by referring to “[m]uch hauling, pulling and sharp shooting,” “lengthy discussion,” and the like, but although there was at least one amendment to section 8 of the Declaration of Rights, there is no hint of disputation over the jury provision. “Washington’s First Constitution, 1878,” *Washington Historical Quarterly* 9 (1918): 213–14.

⁴⁸Michael P. Malone, Richard B. Roeder, and William L. Lang, *Montana: A History of Two Centuries*, rev. ed. (Seattle, 1991), 78–82, 163; *Montana Debates*, 264–67; Montana Constitution (1889) art. 3, sec. 23. Public opinion in favor of majority verdicts in civil cases may have dampened the ardor of opponents at the Montana convention. In 1869, the Montana legislature had passed a law allowing civil verdicts upon agreement of nine or more jurors, only to have the Supreme Court of the territory promptly declare it unconstitutional as a violation of the Seventh Amendment. *Kleinschmidt v. Dunphy*,

At the Idaho convention, both proponents and opponents of majority verdicts adverted to the Nevada example, perhaps because Idaho shared with Nevada the confusion over mining claims and the consequent litigation. Advocates of reform argued in distinctly populist tones. They pointed to the numerous mining cases that had choked the courts in Nevada, where "hung jury after hung jury" had been caused by men who had been put on the jury for that purpose. They railed against lawyers as beneficiaries of constant retrials and against the rich who could afford all this litigation. They remarked on the Cincinnati riot of a few years earlier—a result, they claimed, of popular frustration with a mistrial caused by one juror—and they insisted that the people were tired of the traditional system.⁴⁹

Conservatives in Idaho fought back more vigorously than elsewhere. They dismissed the precedents of Nevada, a "weak" and "run down" state, and of California, where Denis Kearney and his "fools" had influenced the 1878 constitutional convention. Delegate W.B. Heyburn defended the unanimous verdict as "the strong arm of the law that stands between the weak and the strong, between rich and poor, between oppressed and oppressor." Behind the high-flown rhetoric, reminiscent of the praise heaped on the jury by colonial Americans in the 1760s and 1770s, lay a fear for the security of property. Majority verdicts, said Heyburn, might result in "economic and speedy injustice"; economy and speed were no arguments for the deprivation of property. Another avowed conservative maintained that the traditional jury had "stood the test of time" and could be relied on to protect property rights, which were "as sacred as liberty." In the end, however, the convention agreed on three-quarter verdicts in civil cases.⁵⁰

1 Mont. 118 (1869). A constitutional convention of 1884 then gave the legislature the authority to provide for majority verdicts in civil cases, but Congress rejected the constitution. Draft Montana Constitution (1884), art. 1, sec. 23. And as the 1889 convention debated, the Montana Bar Association endorsed majority verdicts. Bakken, *Rocky Mountain Constitution Making, 1850–1912* (New York, 1987), 28.

⁴⁹Robert Laxalt, *Idaho: A Bicentennial History* (New York and Nashville, Tenn., 1977), 105–107; *Idaho Debates*, 1:150, 223–24, 226, 157. The Cincinnati riot resulted from popular disenchantment with the criminal justice system. The immediate cause was not a hung jury but a lenient verdict. Joseph Michael Schwening, "A Frightful and Shameful Story: The Cincinnati Riot of 1884 and the Search for Order" (M.A. thesis, The Ohio State University, 1996), 31–37.

⁵⁰*Idaho Debates*, 232–33, 153, 158–59; Idaho Constitution (1889), art. 1, sec. 7.

On the question of the size of civil juries, the six western constitutional conventions of 1889 came to divergent conclusions without significant debate. The Dakota convention of 1885 had heard arguments for reducing the size of civil juries in all courts, but reformers had had little precedent to draw upon, and the delegates had voted to permit small juries only before justices of the peace. The 1889 South Dakota convention simply readopted the 1885 bill of rights, apparently without debate.⁵¹ The Montana and Wyoming conventions both borrowed heavily from the 1876 Colorado constitution; both, like Colorado, left the size of civil juries to legislative discretion.⁵² Washington backed away from an earlier draft and allowed the legislature to establish small juries only in inferior courts. In North Dakota, the report of the committee on the preamble and bill of rights gave the legislature authority to set the number at less than twelve "in civil cases and courts not of record," but the committee of the whole changed "and" to "in." The published proceedings of the

⁵¹*South Dakota Constitutional Convention Held at Sioux Falls, July 1889* (Huron, S.D., 1907), 145. At the time of the 1885 convention, only Colorado permitted small juries in courts of general jurisdiction. A constitution drafted in Washington in 1878 would have allowed the legislature to set a lesser number than twelve for all civil juries, but this instrument never went into effect. Draft Washington Constitution (1878), art. 5, sec. 8; John T. Condon, ed., "Washington's First Constitution, 1878," *Washington Historical Quarterly* 10 (1919): 57, 63.

⁵²On borrowing in Montana, see Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, Conn., 2001), 2-4. A proposed Montana constitution of 1884 would have allowed the legislature to establish the size of civil juries by law. Draft Montana Constitution (1884), art. 1, sec. 23. The 1889 constitution gave the legislature this power by implication when it authorized the parties in civil actions to agree to a number of jurors that was less than the number prescribed by law. Montana Constitution (1889), art. 3, sec. 23. In fact, the legislature quickly set the number at twelve, except by agreement of the parties or in trials before a justice of the peace. Wilbur F. Sanders, ed., *The Complete Codes and Statutes of the State of Montana in Force July 1, 1895 Together with the Constitutions of the United States and of the State of Montana with the Amendments Thereto* (Helena, 1895), 770 (Code of Civil Procedure §§ 224, 225). Under a similar provision in the current constitution, the legislature has given judges the discretion to use juries of six when the relief demanded is under \$10,000. Montana Constitution (1972), art. 2, sec. 26; *Montana Code Annotated*, § 3-15-106.

convention do not indicate whether the change was a policy decision or simply the correction of a clerical error.⁵³

The delegates at the Idaho convention wrangled a bit over the size of civil juries. Reformers recited the routine arguments that the number twelve was an accident of history and that jury size was a matter of economy. They won applause by damning the conservatism of lawyers and calling for reform of the legal profession. However, an undaunted lawyer observed that important mining cases would in any event go to federal court, where juries consisted of twelve members and the system of jurisprudence was better. Despite the populist flavor of the convention, the conservatives won this battle. The convention adopted the (probably unnecessary) California compromise of authorizing juries of fewer than twelve upon consent of the parties.⁵⁴

The last great debate over jury size and unanimity in the nineteenth-century West occurred in Utah in 1895, when Utahns tried for the fifth time to frame a constitution in anticipation of statehood. A draft constitution of 1872, following the Nevada model, provided for three-fourths verdicts in civil cases, with the legislature having the power to require unanimous verdicts by a two-thirds majority in each house. An 1887 draft constitution reverted to the "inviolability" of trial by jury, but a few years later the territorial legislature passed a law providing for three-fourths verdicts. (The territorial supreme court, disagreeing with the high courts of other western territories, upheld the law, but in a long-delayed case decided after statehood, the U.S. Supreme Court declared the Utah territorial statute unconstitutional under the Seventh Amendment.) Despite this history and the successes of western reformers in 1889, conservatives led by Charles S. Varian refused to yield without at least posting their protests. They may have been motivated as much by fear for the very survival of the jury system as by the specific reforms proposed. The jury system, announced one delegate, was "venerable with age and deserves the same respect that a broken-down old wall covered with ivy demands." But even Varian conceded defeat on

⁵³Washington Constitution (1889), art. 1, sec. 21; *North Dakota Debates*, 158, 184.

⁵⁴*Idaho Debates*, 154–55, 221; Idaho Constitution (1889), art. 1, sec. 7.

unanimous verdicts early in the game and reserved his fire for proposals to reduce the size of the jury.⁵⁵

According to Varian, the recent tendency "towards abolishment of the entire jury system" sprang from the great corporate interests, who often controlled the judges. He and other defenders of the common-law jury insisted that the individual citizen "should be given the right which his father had and their fathers before him, to demand . . . that his claim should be decided by twelve men coming from his own people, in touch with humanity, and representing its thought." They asserted that an agreement among twelve different men, with twelve different points of view, was more reliable than agreement by a smaller number. Varian, rebutting the argument that smaller juries would save the taxpayers money, demanded a fairer tax system that would tax the "property of corporations and money loaners, as well as the property of the resident farmers and others."⁵⁶

Proponents of reform took pains to distance themselves from "this money power, this corporate greed." They denied that smaller juries would somehow benefit corporations. The real problem, they asserted, was that supporters of the old ways were "retrograde," out of step with "progress and the spirit of the age" and with western advances in "the science of civil liberty and of governments." If Americans had always adhered to precedent, reformers declared, they would never have created a free republic.⁵⁷

Underlying Varian's opposition to change in the civil jury was his fear that reformers really wanted to do away with the jury system altogether. As in the case of his counterparts in California seventeen years earlier, Varian had legitimate cause for concern. The same delegate who thought it "retrograde" to insist on a jury of twelve objected to clinging to "some work of the past . . . when . . . it has lost its usefulness." He refrained from urging small juries in criminal cases only because the people were "not educated up to this matter," and his remarks

⁵⁵Draft Utah Constitution art. 1, sec. 3 (1872); Draft Utah Constitution, art. 1, sec. 3. (1887); *Hess v. White*, 9 Utah 61 (1893); *Carroll v. Byers*, 4 Ariz. 158 (1894); *Kleinschmidt v. Dunphy*, 1 Mont. 118 (1869); *Bradford v. Territory*, 1 Okla. 366 (1893); *American Pub. Co. v. Fisher* 166 U.S. 464, 465 (1897); *Utah Debates*, 260-61.

⁵⁶*Utah Debates*, 261, 274, 297. Some delegates who agreed that concurrence by twelve jurors was more reliable than agreement among fewer men nevertheless supported the idea of verdicts upon agreement of nine jurors. *Ibid.*, 274.

⁵⁷*Ibid.*, 287, 277, 288-89.



The Seventh Amendment does not define *jury* or say how juries shall operate; it simply states that the "right to trial by jury shall be preserved." (Illustration from the Ninth Judicial Circuit Historical Society collection)

leave the impression that only the prospect of failure kept him from moving for abolition of the jury altogether. Another, bolder delegate claimed that the recent New York constitutional convention had decided to keep juries at twelve because the politicians and their cronies among the delegates could dispense jobs as jurors without having to pay out of their own pockets. There was less chance of corruption with well-trained, well-paid judges, said Charles Carrol Goodwin, than in any number of men "who sit around court houses to get a job at two dollars a day."⁵⁸

Varian stood little chance of defeating the "spirit of the age," but he argued that the convention should at least leave the matter of jury size to the legislature rather than fix it in the constitution. However, the convention forged ahead with a uniquely radical provision: civil and criminal juries would consist of eight members in courts of record and just four members in inferior courts.⁵⁹

⁵⁸*Ibid.*, 277–78, 293–94.

⁵⁹*Ibid.*, 280; Utah Constitution (1895), art. 1, sec. 10.

TWENTIETH-CENTURY EPILOGUE

Utah closed out the string of victories in the new states of the West before 1900. By constitutional amendment, Minnesota in 1890 and Missouri in 1900 allowed majority verdicts in civil cases, and Missouri authorized small juries in inferior courts. The three western states admitted to the Union in the early twentieth century—Oklahoma, New Mexico, and Arizona—all adopted provisions to similar effect. States east of the Mississippi River proved more resistant to change. Kentucky authorized the legislature to provide for majority verdicts in civil cases in 1890, but a constitutional commission in New York and conventions in New York, Ohio, and Pennsylvania rejected proposals for small juries and majority verdicts.⁶⁰

The weak trend toward small juries in courts of record almost ground to a halt after 1896. Excluding those states that allowed small juries only in inferior courts or by consent of the parties, only five nineteenth-century constitutions—those of Nebraska, Texas, Colorado, Wyoming, and Utah—required or allowed the legislature to require small juries in civil cases. In 1907, Oklahoma followed Nebraska and Texas by providing for civil juries of six in county courts, which were courts of

⁶⁰Minnesota Constitution (1857), art. 1, sec. 4 (amended 1890); Missouri Constitution (1875), art. 2, sec. 28 (amended 1900); Oklahoma Constitution (1907), art. 2, sec. 9; New Mexico Constitution (1911), art. 2, sec. 12; Arizona Constitution (1911), art. 2, sec. 23; Kentucky Constitution (1891), sec. 248; Lincoln, *Constitutional History of New York*, 2:474; *ibid.*, 3:67–68; *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio, Assembled in the City of Columbus, on Tuesday May 13, 1873* (1873–74), 2:1759–61; *Debates of the Convention to Amend the Constitution of Pennsylvania: Convened at Harrisburg, November 12, 1872, Adjourned, November 27, to Meet at Philadelphia, January 7, 1873* (Harrisburg, 1873), 4:451–63, 678–83; Pennsylvania Constitution (1873), art. 1, sec. 6.

The New York constitutional commission of 1872 turned down a proposal that courts of record in both civil and criminal cases use ten-person juries. Lincoln, *Constitutional History of New York*, 2:474. The New York constitutional convention of 1894 rejected suggestions that every jury have six members and that verdicts be decided upon agreement of three-fourths of the jurors. *Ibid.*, 3:67–68. The 1873–74 Ohio convention ultimately adopted an amendment that would have allowed smaller juries only in inferior courts (*Official Report*, 2:3324), but even this limited reform failed when the people of Ohio rejected the new constitution altogether. Of course, the state supreme court had already held twenty years earlier that the constitutional guarantee of trial by jury did not apply to justice courts. *Work v. State*, 2 Ohio St. 296 (1853). In 1876, the Ohio General Assembly passed a law providing for juries of six in civil cases tried before justices of the peace, and even smaller juries if the parties agreed. Act of March 4, 1876, Ohio, *Laws*, 73:14.

record. The first eastern state to permit small civil juries in courts of record was Virginia in 1902. By the time a committee studied the question for the New York constitutional convention of 1938, no other eastern states had followed suit.⁶¹

The stronger movement for majority verdicts, which by 1900 had succeeded in Nevada, Texas, California, Louisiana, Montana, South Dakota, Washington, Utah, Idaho, Minnesota, and Missouri, continued with the new states of Oklahoma, Arizona, and New Mexico. The list slowly expanded over the next quarter-century. In 1920, Nebraska amended its constitution to permit five-sixths verdicts in civil cases. That left Oregon, Kansas, and Iowa as the only states west of the Mississippi to be unaffected by either the small-jury or majority-verdict reform.⁶² Slowly, states east of the Mississippi began to change their constitutions to allow majority verdicts: Ohio in 1912, Mississippi in 1914, Wisconsin in 1922, Arkansas in 1928, and New York in 1937.⁶³

Within the span of fifty years or so, from the 1870s to the 1920s, a significant minority of American states abandoned unanimous verdicts in civil cases, a centuries-old feature of the common-law jury. A smaller minority of states altered the revered "palladium of liberty" by allowing for civil juries of fewer than twelve in courts of record. Even where constitutional conventions rejected reform proposals, the delegates often debated them vigorously. Traditional constitutional historiography, focusing on the decisions of the U.S. Supreme Court, takes little or no account of the nineteenth-century controversies over the unanimity of civil verdicts and the size of civil juries. The Supreme Court eventually held that the Seventh Amendment allows civil juries to have fewer than twelve members, and it has suggested that less-than-unani-

⁶¹Oklahoma Constitution (1907), art. 2, sec. 19; Virginia Constitution (1902), art. 1, sec. 11. For the texts of all state constitutions as they existed in 1938, see Rodney L. Mott and Wilbert L. Hindman, eds., *Constitutions of the States and the United States* (Albany, N.Y., 1938). This is volume 3 of twelve volumes of research reports prepared for use by the New York constitutional convention of 1938.

⁶²Oregon, Kansas, and Iowa had constitutions older than Nevada's. Alaska and Hawaii both entered the Union in 1959 with constitutional clauses allowing the legislature to provide for majority verdicts. Alaska Constitution (1956), art. 1, sec. 16; Hawaii Constitution (1950), art. 1, sec. 13 (originally art. 1, sec. 10).

⁶³Ohio Constitution (1851), art. 1, sec. 5 (amended 1912); Mississippi Constitution (1890), art. 3, sec. 31 (amended 1914); Wisconsin Constitution (1848), art. 1, sec. 5 (amended 1922); Arkansas Constitution (1874), art. 2, sec. 7 (amended 1928); New York Constitution (1894), art. 1, sec. 2 (amended 1937).

mous verdicts are constitutional.⁶⁴ But these decisions did not come until the 1970s, more than a century after Nevada set the states on their course of jury reform.

⁶⁴In late-nineteenth-century decisions, the Supreme Court held that the Seventh Amendment did not bind the states; but, said the justices, where the federal Bill of Rights controlled, as in western territories not yet admitted to statehood, the Seventh Amendment required trials according to the common law, with twelve jurors and unanimous verdicts. *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897) (unanimity); *Springville v. Thomas*, 166 U.S. 707 (1897) (unanimity); *Maxwell v. Dow*, 176 U.S. 581 (1900) (unanimity and size). In *Colgrove v. Battin*, 413 U.S. 149 (1973), the Court upheld the use of small civil juries in federal courts. Holdings from the same period in Sixth Amendment cases that criminal verdicts need not be unanimous suggest that the Court would uphold nonunanimous civil verdicts as well. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).



William E. Davis

WILLIAM E. DAVIS: AN ORAL HISTORY

William E. "Bill" Davis served as circuit executive for the Ninth Circuit from 1981 to 1986. He brought a wealth of experience to the position, including work as staff attorney for the Administrative Office of the Courts in California, director of the Administrative Office of the Courts for Kentucky, and personnel officer of the Bahai'i World Center in Haifa, Israel. After leaving the Ninth Circuit, Davis served as chief executive officer of the San Francisco law firm of Bronson, Bronson, and McKinnon, and then as director of the Administrative Office of the Courts, and secretary to the Judicial Council and the Commission on Judicial Appointments for the state of California. Davis is a cofounder of DPK Consulting, a firm that specializes in the promotion of the rule of law, dispute resolution, and anticorruption throughout the world; he also conducts projects in the West Bank and Gaza, Pakistan, Kosovo, Argentina, Venezuela, and the Philippines.

This excerpt of his oral history, recorded in 1994 by Terry Nafisi, deputy circuit executive of the Ninth Circuit, sheds light on Davis' experience in judicial administration and gives a glimpse into the management of courts. The transcript has been edited for publication. The original is part of the Ninth Judicial Circuit Historical Society's oral history collection.

INTRODUCTION BY THE HONORABLE JAMES R. BROWNING,
FORMER CHIEF JUDGE, NINTH JUDICIAL CIRCUIT

Back in 1981, when the court was searching for a new circuit executive, Judge Dorothy Nelson said she knew just the man for the job—Bill Davis, former administrator of the state courts in Kentucky—and she was right. This reference from Judge Nelson ultimately brought Bill to the Ninth Circuit as our circuit executive. Together, Bill and I embarked on a program to bring organizational and communication changes to a newly formed Judicial Council of the circuit.

Among the key changes was the democratization of the circuit council. District judges were added as voting members in number equal to judges of the court of appeals. The addition of a senior judge, a bankruptcy judge, and a magistrate judge as nonvoting, observer members further enhanced judicial representation and ensured that the council would be kept

informed of problems affecting all aspects of the circuit. To ensure that the Judicial Council had the means to address problems as they arose, a system of advisory committees was established and a professional administrative staff was added to develop solutions and carry out projects and programs.

Thanks to Bill Davis' skills, deep-seated values, and inexhaustible enthusiasm, we were able to make an impact, not just in the Ninth Circuit, but on the judiciary's national policy and administration. Convincing the Judicial Conference of the United States and the Administrative Office of the United States Courts to adopt a financial management policy of budget decentralization was one of our most important contributions.

Bill and I were partners, with different but complementary skills, who shared a commitment to improve the administration of the Ninth Circuit in every possible way. As Bill observes in his oral history, our working relationship was mutually satisfactory and very productive. I concur fully and look back on that relationship with fondness and gratitude.

Bill's oral history vividly recalls an important and exciting period in the history of the Ninth Circuit, a time when the circuit not only survived efforts to divide it, but, I believe, triumphed as a model of court governance and administration.

THE INTERVIEW

Nafisi: It would help, Bill, to give the context of how you came to the Ninth Circuit, to say where you'd been before you came to the Ninth Circuit. I don't know that you necessarily want to start with childbirth back in Kentucky, but maybe you can bring us up to when you started contemplating a move to the Ninth Circuit.

Davis: Let's see. From 1979 to 1981, I, along with my family, lived in Haifa, Israel, and I was working at the Bahai'i World Center. About March of 1981, it became apparent that, for the health of one of my children, we would have to leave Israel, and I contacted Dorothy Nelson, who is a member of the Ninth Circuit, about some suggestions. I had no plans.

She advised me that the Ninth Circuit—I'm not sure if this was the exact timing, but somewhere in that timeframe—was in the process of recruiting a circuit executive. I arranged to make a trip to San Francisco, and I probably have the dates a little off, but I think it was in May, about six to eight weeks later. So I came to San Francisco and interviewed for a full week.

N: Was the interview with Judge Browning?

D: I interviewed with Judge Browning; I interviewed with Judge Goodwin. I saw Judge Alarcon, whom I had known when I was the staff attorney for the California Judicial Council from '73 to '75. He served on what was then called the Judicial Planning Committee for California, and I was staff to that committee and so I knew him from that experience.

I also interviewed with one or two other judges, but I cannot recall who they were. I saw Judge Browning numerous times during the course of that week, and I actually saw Richard Dean, who was the clerk of court at the time. I did not know, but I was the primary applicant for the position, and I was unaware of background.

I went back to Kentucky where I'd been the state court administrator before going to Israel. I was offered the job as executive director of the Public Utilities Commission in Kentucky. Then the chief justice [of Kentucky] said he would like me to come back.

This was an interesting experience. I left San Francisco not knowing what the wishes or thoughts of the court were. We had a home in Kentucky. Our belongings were stored in a warehouse in Kentucky. So when I left Kentucky and got on the plane to fly back to Israel to see my family, it was pretty clear in my mind that the simplest thing to do was just to go back to Kentucky. I mean, you get off the plane, put stuff back in the house, and you're back in business.

I arrived at the airport in Tel Aviv, and I remember with great clarity telling my wife, who is from California, that I thought we ought to go to Kentucky, and I remember the stone silence I met.

N: [Laughter] The four years that you were court administrator in Kentucky were your wife's first experiences with living in Kentucky?

D: No. I finished law school there when we came back from Chile in the early seventies. To say she wasn't anxious to return to Kentucky would be an understatement. In any event, I got back to Israel and, in fact, I'd made a preliminary commitment to the chief justice [of Kentucky] that we would come back. [My wife] was quite distressed.

About four days later, or maybe a week later, Judge Browning called me and said that the court had voted to offer me the job as the circuit executive. And I said, well, as I had not heard back from them and I did not know that I was the primary applicant, I had in the interim given the chief justice of Kentucky my acceptance to come back, and it had already been announced publicly.

Then there proceeded about a week of Judge Browning at his finest. We had a phone conversation, I can't tell you how long it was, but it was of some considerable duration.

N: You, of course, being in Israel.

D: Yes, of course. And I had no idea what time it was here because it was, I think it was late afternoon in Israel. In any event, we talked at length about why it would be a wise thing to come here and not return to where I'd been before. That was his position, and in the course of that, he made a number of observations about why working with the federal courts was a unique opportunity and why the Ninth Circuit was the place to do that.

Obviously, he was persuasive because I accepted. I had to find a way to graciously get out of all the other commitments. We arrived in San Francisco in July 1981; I think it was toward the middle of July. And I remember walking in the door, going up to his office in that spectacular conference room in front of the fireplace, seated in one of those enormously thick, heavy, leatherbound chairs and having him look at me and say, "I want it to be clear, if this circuit splits, it's your fault."

N: (Laughter) Oh.

D: And I thought—I didn't even know—

N: And, otherwise, welcome to the Ninth Circuit.

D: Well, he has this inimitable way . . .

N: Yes.

D: . . . of communicating real clearly what he wants.

N: Yes.

D: It didn't mean anything to me.

N: Yes.

D: And I thought, well, what is it? What does this mean? What am I supposed to do? I always appreciate the clarity and candor that I think our relationship enjoyed, and that was the beginning of what I would consider a very fruitful five-plus years of working with the Ninth Circuit.

N: How did you actually get started with a career in court administration? When you started, it wasn't even really called a career, was it?

D: It was an accident. I finished law school. After, I worked with the Peace Corps about five years. Then we moved west. I tried

being a lawyer in a tiny town. I wanted to be a benevolent dictator in a small town; and I went crazy after six months of doing divorces and probates and minor crimes, and I said I couldn't—if this is the rest of my life, I will die. I can't stand this.

So we literally got in our car and drove to California, and I came to San Francisco. My immediate boss in Chile had been a lawyer here. He introduced me to the director of the Administrative Office of the Courts of the State of California, Ralph Kleps, and I had an interview. Dates are a little foggy now, but it was in the spring of '72 or '73, and he offered me a job to do two projects funded by what was called the LEAA¹. As I hadn't taken the California bar—a job was a job.

N: Right.

D: I had a family and children, so this was something that I took up. I found in working there that it provided a nice marriage of two areas of interest, the law and administration, that I didn't really find in practicing law, and it gave me a chance to bring some of the things that I consider most enjoyable to me, to look at systems rather than just one case at a time.

So for two years I worked in California. We did a study on the use of tape recorders, which was one of the first in the United States at the time; we started the Judicial Planning Committee. I think the study that I enjoyed the most was the study on language needs that non-English-speaking people have in the justice system.

N: They're still undergoing those same studies.

D: Well, those issues are enormously complex; they're difficult—but it was a rich experience. I enjoyed it.

And then I got a call from a judge in Kentucky asking if I would come back and be considered for what was then called the Office of Judicial Planning, but Kentucky was in the process of adopting or proposing a constitutional change that would radically restructure the whole judicial system, and the opportunity was to come and direct that change.

Well, this is a once-in-a-lifetime opportunity; these things don't come but once, so with some significant persuasion, I convinced my wife and children to go back to Kentucky, which we did in 1975.

¹The Law Enforcement Assistance Administration was established by Congress in 1968 to funnel federal monies to state and local law enforcement agencies. The LEAA created state planning agencies, funded educational programs, research, and a variety of local crime control initiatives. It was abolished in 1982.

Then from '75 to '79, we had—well, it was the most demanding period of work in my entire life. It was unbelievable. It was politically tense, highly demanding. We eliminated nine hundred judges' jobs and about three thousand clerks, and literally cleaned the slate and started all over and built a brand-new system.

It was the first state in the United States to eliminate commercial bail bonds and make it a crime; first state in the United States to start a statewide pretrial release program, and created a court of appeals. Some of my contacts in California served, and we brought them there as consultants. I got to know Dan Meador in that time, Winslow Christian. Ever since then, it's just been a permutation of the same, some deviation of the same thing.

N: But it seems as if most people of roughly our generation just sort of, by mistake, wandered into the judicial administration field.

D: Well, I think two things coincided.

N: Coincidence.

D: You have to recognize Chief Justice Burger's vision and leadership. He really altered the discussion in the United States with respect to the organization and structure of courts. It was his leadership and his insistence that there needed to be created corollary administrative functions that supported the judicial function; his whole effort at creating the Office of Circuit Executives, creating the Institute for Court Management, coincided with this recognition that justice is an incredibly complex enterprise. It requires all manner of disciplines, not just the law, and the organization and structure of courts perhaps is one of the most complex enterprises in any society; to do it well requires more diversity than necessarily is brought by the lawyer and the judge.

So it was a serendipity—I just happened to be here in the early seventies when these things began to effloresce.

N: And, of course, the LEAA funding created so many jobs that for many of us were the first entrée. . . .

D: I think what LEAA funding did was it corroborated Justice Burger's assertions and it forced judicial systems to discover more about themselves than they were previously aware of, and in so doing, they began to recognize that this function warranted greater attention. We began what I consider the last twenty years or so of the real debate about independence.

I mean, we've gotten one thing. The debate of independence of the judiciary started with the notion of noninterference in

decision-making about cases and it has now evolved to the point where independence is really a discussion about noninterference—is subsumed in it. As a branch of government, a co-equal branch, do you operate in a way sufficient to draw attention to your confidence in your ability to manage your affairs, and independence has become more broadly defined than it once was. I think the advent of professional people who work in that area has contributed to that.

N: Now, when you joined the Ninth Circuit, I think there was still probably a majority of the clerks and circuit executives, and especially perhaps in the court of appeals, who were more traditionalists. They weren't graduates, let's put it this way, of the state court systems that much.

You were in one of the first tidal waves of people coming in; we were starting to see some changes, more recognition on the part of the judges of professionalization of the field of court administration. Almost concurrent with that recognition was sort of an uneasiness, even on the part of the judges, with regard to the role that professional court administrators are to play. It probably harkens back to the old policy administration dichotomy that so dots political science literature, but in the judiciary, it takes on a special twist.

I know you have had some experience with that while you were working here. What do you think is the proper role for court administrators? Is there any way for court administrators not to be involved in the policy process, and, if so, do judges have some things to be anxious about in that regard?

D: I would say the mature leader has nothing to be anxious about, but welcomes the participation of those who are informed and knowledgeable about how things work. Those who are less certain about themselves and their understandings have a tendency to be more resistant and are more anxious to put people in—and define their positions in much more limited ways.

I would also characterize—this is perhaps self-serving, so I hesitate to say it, but I will anyway—I think those of us who began to work in this business back in the early seventies started at a time when it was a discovery process, and consequently many of us had the benefit of uncovering these activities simultaneously with the people with whom we served, who were either justices or judges who were supervising the courts.

The role that evolved in my profession, my early life, was as much policy as it was administrative, and I never got lost in the dichotomy of the discussion until I came to the Ninth Circuit, where there were a number of members of the court who were perhaps unfamiliar with people with my background

and/or who were jealously guarding what they perceived to be their prerogatives.

My own definition was, when I sat at the table—whether it was with the council or the court—if I felt, and Judge Browning encouraged me to do this, if I felt I had something to contribute to the conversation that was occurring, then I had the obligation to make my observations, notwithstanding whether they could be characterized as policy or as administration.

This is something for which I've always been grateful. He was always open to that kind of dialogue; that was never an issue of discussion with him, my interfering in the policy-making process. Because actually, policy-making occurs because people are challenging thoughts and understandings based on their experience, and it is weakened when those individuals who have something to contribute are excluded from the process. It may in fact lead to erroneous conclusions if the information isn't provided that's adequate or is necessary to provide a strong policy position.

I see in the whole business of court administration—I would characterize it perhaps too harshly—that there has been in the last six to nine years very much of a winnowing away from the court administrator as a participant in the policy-making process and much more of an emphasis on the administrative, technical role, leaving the other to the judges alone, so to speak.

I don't think that's healthy. I think it's a cycle. As I said before, I think mature leadership will recognize that that's not a healthy way to do business and that ultimately it will come back and they will welcome—'they' being the judges—will welcome the participation of people who have got some things to say.

It doesn't necessarily mean you have to accept everything that people offer, but the wise, mature leader accepts good advice from whence it comes and then synthesizes that into a policy position.

So I think the court administration business is sort of redefining itself at this point.

N: Growing pains perhaps.

D: Perhaps, and then actually, I think you see it even more so, because in many cases, I find judges enjoy the court administration part more than they do the judging part. So you see this whole motion now of not what was originally postulated—that administrative people would assume these roles. Now you see proposals like the chancellor for the federal courts and other somewhat similar positions where judges would assume these roles. And think that's—well, I don't have an opinion. If

the people have the skill, it makes no difference to me what their background is.

Being a judge doesn't necessarily qualify, but federal courts are peculiar. In this sense, the state courts are much more egalitarian; the federal courts are more status conscious and hierarchy conscious: You're either an Article III,² or if you're not, you're something less, and therefore access to the upper stratosphere is limited.

N: You mentioned the difference between the state courts and the federal courts. I felt quite a culture shock moving from the state courts to the federal courts and perhaps maybe doubly so for you, coming from Kentucky, where you had been directing a major renovation, reinvention virtually, of the entire Kentucky court system.

There was certainly a mandate for change here in the Ninth Circuit, but what comparisons or contrasts struck you as you left Kentucky court administration reformation and began to participate in the changes that were under way in the Ninth Circuit?

D: I think the dominant one was the omnipresence of the Administrative Office of the Courts in every little detail of activity to the point that it created, perhaps not by design but certainly *de facto*, a complete state of dependency on the AOC for every aspect of day-to-day management, not recognizing that there were competent people who perhaps even had better and more appropriate experience than many of the people in Washington, or not recognizing that these judges who were constitutional officers with a vast array of experiences were perfectly capable of managing some of these things themselves.

The judicial conference and the AOC had wrapped themselves in the elaborate set of policy and procedures based on the presumption that you couldn't trust anybody outside the Potomac River; it was unbelievable, it was astonishing. It was incredible to someone who had actually come from a jurisdiction where we eliminated judges because of corruption because we couldn't figure out how to clean them up. The federal courts have never had that reputation, that you come to a system organized and constructed on the basis that not a soul outside Washington could be trusted with a single cent. This was phenomenal to me.

²Article III of the U.S. Constitution, of course, establishes the federal judiciary. Supreme Court justices, circuit judges, and district judges are Article III judges. Bankruptcy judges, magistrate judges, and judges of the court of claims, for example, are not.

Secondly, an elaborate statutory construct had been developed, i.e., under the label of judicial councils and [the] U.S. Judicial Conference, and this whole structure was premised on the notion that people could participate in development of policy and direction. But—well, I'll have to say this—the principle was adhered to in written form but not in substance. It was really a structure that was bent on control of the agenda by a very narrow group of people who intended to control the information available to the committees and who intended to control, therefore, the resulting policy development.

These things I saw as clear as day, and in my discussion with Judge Browning, I said these are things that we—notwithstanding the agendas that the Ninth Circuit would wish to pursue—have to confront the federal central system that had its own agenda, and it may or may not coincide with what the priorities were.

Now I've read, went back and looked at the original statutes regarding the councils and their roles, and this is completely opposite of the concept of the Judicial Council, which was a regional body that would be responsive to the local issues and, in this case, the Ninth Circuit, and would take initiative to address those issues and, where appropriate, would pass its recommendations on to the National Judicial Conference, and national policy would emerge.

What had occurred is, I guess, the councils (I know, because the councils had been weak, ineffective institutions)—I don't mean the Ninth Circuit only, I mean all of them—were replaced by an elaborate committee structure that supported the Judicial Conference, and the councils were set on the periphery and were not even conceptualized as being integral to the day-to-day administration.

And, in fact, when a council—in this case I'll speak of the Ninth Circuit—when we took initiatives, it usually was over the opposition of people in Washington. In fact, the frequent and sometimes affectionate refrain was we thought of ourselves as AOC West, but that wasn't altogether inaccurate.

We represented 25 percent of the country, and it was our view—I'm saying 'our' because I think this was the view shared by Judge Browning—that the strength of the system was dependent largely on the degree to which the smallest unit, i.e., a bankruptcy court or the next unit up, the district court and/or circuit or the Ninth Circuit, took initiatives to make things better. It wasn't dependent on some meeting that occurred twice a year called the Judicial Conference where they took votes on things. It was what you did every

day and how you initiated change and responded to the needs of justice at the local level.

So our whole concept of the council was that it was an engaging institution whose role was to provoke, promote change, and support initiatives.

N: You've referred to your working relationship with Judge Browning. How would you categorize that generally, and how did that work, practically speaking?

D: Well, it was a lot of work. Judge Browning is a fellow with a fertile mind and never-ending list of to-dos, and what I found in him and I think he found in me was a welcome participant in the notion that you can do anything you want to do, basically. And so we never started a conversation with 'you can't'; that was just never a discussion. Our conversation was, 'well, if it's this way, why can't we do that?'

Our working relationship was very stimulating; it was always a pleasant relationship. His good humor and sense of mission I found contagious, and I enjoyed that part of our relationship very much. I also enjoyed his willingness to listen, because he has a facility not many people seem to have, to hear other people. In that sense, I think our relationship was a wonderfully receptive, a mutually complementary relationship.

N: You met every day, did you not?

D: Every day. Absolutely every day between 9:00 and 9:30 as a norm, and because the list of things we had to do, or he wanted done, began to grow, we could never quite get a system that we would be completely satisfied with for following up. The only way we could do it was, he began to assign to his chief law clerk the task of sitting in on the meeting and keeping the ongoing list. The time it would take me to inform him of all the things I had done that we had talked about the day before would take a couple of hours to write, and who had the time to do that? So the law clerk filled that role.

I don't remember, in all honesty when I left here—the list probably had eighty items on it at a minimum, and they ranged from phenomenally significant to mundane. But I think the list was simply symptomatic of the range of concerns that he had, from a very great, detailed concern about the power of a light bulb to the concern about how you influence policy with respect to the Criminal Justice Act.

N: Surely you haven't forgotten the timing meters in the courtrooms.

D: (Laughter) I remember with great clarity the timing meters and the search for the perfect timing meter.

N: I think they finally found them.

D: Well, I'm elated that they found them, but that one never got on my front burner. I tried to get it on Franco Mancini's front burner.³ I remember, you know, we're trying to keep GSA on schedule with this infernal project in Pasadena, which is beset with 'the number of opinions is relevant to the number of participants,' and policy is decided by who spoke last, and the decisions of committees that are changed by the chair who didn't like them, and those issues of trying to find the money and keep that project going, and/or the project in Seattle, and/or . . . and then the timing meters, you can see. My heavens to Betsy (laughter)!⁴

N: All things great and small.

D: Everything had its place. It was a delight. It was always fun to go to the Judicial Conference with Judge Browning. He was always the best prepared judge at the meeting. There was just simply nobody in his league. And part of that was because of the process we devised here. We asked all of the Ninth Circuit committee members who served on Judicial Conference committees to give us information. We, of course, had formed a parallel structure, largely of Ninth Circuit committees so as to have the ability to articulate views from the Ninth Circuit perspective on similar questions, and he had a briefing book of equal size to what the Judicial Conference book was, which was usually about eight inches thick. So as he would sit in the meetings, he could call up and say, 'well, in Idaho, it means this or in Oregon it means that,' and no one at the table would have a command of information as he did. Consequently, his influence at the Judicial Conference was disproportionate to one person's vote of equals, because he was better informed and usually we had already talked through what the position should be. So—often when there were, let's say, more knotty or complicated issues—we would go a few days in advance and do some lobbying with the AOC staff and/or the committee chair so as to set the stage for whatever the position would be.

And we always visited Ninth Circuit senators. This was a normal process of just stopping by and saying 'hello, how are

³Franco Mancini worked for the Office of the Clerk from 1973 until 1982, when he transferred to the Office of the Circuit Executive. He was assistant circuit executive for Space and Facilities, and he retired in 1996.

⁴The General Services Administration (GSA) is the landlord for the federal government. The Pasadena project, initially contested by GSA, was the renovation of a former hotel and hospital into the Richard H. Chambers U.S. Court of Appeals Building. The Seattle project was the renovation and possible expansion of the U.S. Courthouse on Fifth Avenue.

you? We're doing fine, how about you?' This was all a part of the grand political strategy of keeping friends and not creating enemies so as to not divide the circuit.

Well, you went to Washington, you know. The only time you rested was between 10 at night and 7 in the morning. It was a full agenda. It was always rich and interesting and, I think, we were always a little more effective than some of our other counterparts.

N: You mentioned the Ninth Circuit committee system. That was part of, really, the overall governance structure that Judge Browning and you set up as part of the modernization of the Ninth Circuit Judicial Council.

D: Yes.

N: What did you and Judge Browning really hope to accomplish by that, and do you feel it really met its purposes?

D: Well, there were some very clear goals. First, it's recognized in professional organizations, professional people respect and adhere to policy development when they participate in it.

Second, this is an enormous geographical area, and except for the occasional [Ninth Circuit] Judicial Conference, many of the people didn't know each other and didn't have reason to trust each other, so to speak.

And third, the idea behind the Judicial Council was that this was a body that took its role seriously to make federal courts work better in its geographical area.

I remember writing the memo in 1982 suggesting that we build a parallel committee structure, where appropriate, and that we engage as many people as possible in the process of governance so as to have in all the courts someone who could say, 'well, I was at the committee meeting or I was on the committee that did this work,' so they would be the spokespersons at the local level on what was being discussed and developed.

And fourth, I guess it was really to recognize that there was no monopoly on wisdom here, that a lot of folks had a lot of things to say and contribute, that we needed to get their views in this process, and that by so doing, it would be a richer process and we would be better off as an institution if we could ensure that there was adequate participation.

And the Judicial Council debated it. We were in Tempe, Arizona. It was at the midwinter conference. I remember we had a long discussion about it, and there were no dissenting views. I think there was a really unanimity of view that this was a strategy that should be pursued.

So we set about doing it, and then we complemented that with strengthening the role of the annual [conference], by creating and encouraging the annual meetings of the different associations,

whether it was the magistrate judges or the bankruptcy judges or the district clerks or the bankruptcy clerks, or the chief judges—all with idea that if their folks had a role, not a social role necessarily, but a role in governance, then we had to encourage them to take leadership and initiate change and identify issues of concern, and then on that basis, identify things that the council ought to do in the Ninth Circuit or propose for the national level.

N: During that time, the role of the court of appeals in the governance of the council and in its relationship to the circuit, and certainly to the circuit executive, underwent significant changes. What are your recollections about those changes and have they evolved in the way that you would have liked to see them evolve?

D: Well, I remember one of them was a judge, whom I shall not mention, who wanted to spend \$13,000 or \$14,000 on a desk, and this matter went to the council. I remember this judge in the court meeting going through a meltdown, raising his voice and asserting that this was an infringement and that the council shouldn't be involved in these things because, heretofore, those things had been dealt with by the—the circuit and the council were the same.

N: You mean the court of appeals and the Judicial Council.

D: The court of appeals [and the Judicial Council] were the same institution until they split by a statute.⁵ And the Ninth Circuit, again under its leadership with Judge Browning, decided to create a council with equal membership of district judges and circuit judges and remove this administrative role from the circuit.

For the older circuit judges, this was very hard to do. They had gotten accustomed to making every little decision about space and assignments and all sorts of things, and so I think for some of them, it was a bit traumatic. It was not infrequent that you heard references made that this was a mistake, or if these guys ever did thus and such, we'd take it back and that sort of stuff.

Also, for some of the judges, it was clear they were relieved of having to deal with that; they didn't want to deal with those things. They didn't relish dealing with disciplinary matters. So there was a split. I don't know that I could ascribe a number to it, but it was a split.

⁵The circuit conferences and the circuit councils were created in 1939 [*Statutes at Large* 53(1939): 1224]. In 1980, the composition of the circuit councils was changed [*Statutes at Large* 94(1980): 2035]. See also Erwin C. Surrency, *History of the Federal Courts*, 2nd ed. (Dobbs Ferry, N.Y., 2002), pp. 120–22.

At the time, there were a whole bunch of new appointees, and they seemed to be much more willing to let the council do its work, and I think but for that, it would have been much more difficult because they came along at the same time as the council came along.

I can't articulate whether it's gone as it should have gone. I don't feel informed sufficiently today to know what the councils are doing except to know that there's been a profound change in the delegation of responsibility and increasing authority and responsibility to the councils. That's all impressionistic, but I don't know substance.

N: You mentioned that when you first visited with Judge Browning on your arrival from Israel, his opening words were, "If the Ninth Circuit splits, it's your fault." Well, clearly the Ninth Circuit didn't split on your watch. Do you consider that then your greatest accomplishment? What things do you really feel good about with regard to your legacy with the Ninth Circuit?

D: I think the most important thing was that we succeeded in getting a lot of people involved in trying to make the federal courts the kind of institution that they wanted to work in, and I think in that sense, the participation of lots of people in this process was a significant contribution. I don't take credit for it. I just think we recognized that need and found a way to give expression to it. In that context, the other thing that we did was, we proposed the decentralization of the budget process, and I remember the meeting at the Hotel Del Coronado of the Judicial Council. Then-Budget Director Ed Garabedian was present, and this was debated. I thought he was going to have a heart attack, he was so distressed over it.

The council voted to proceed with making the recommendation that every effort be made to find a way to delegate greater responsibility to district courts and give greater discretion to the circuit and district courts to oversee their expenditure of funds, and that they would be rewarded appropriately by giving some discretion over expenses.

Well, that was really throwing the gauntlet down at the time, and, in fact, a few short months later, Chief Justice Burger, in two public speeches, referred to me in very unkind words and made reference to these ideas.

N: That was sort of a conflict, inasmuch as, really Justice Burger himself was almost the Roscoe Pound of his era in terms of bringing about a new era in court administration, and yet with some other things, he was very traditional in his view about court governance.

D: I can't say whether this was his view. He spoke it, so it was his view, but my impression was that he was influenced more heavily by the Administrative Office of Courts than he was by his own conviction, and they had led him to believe that this could not be done, that you couldn't trust these folks to adhere to the limits, so he naturally supported that.

I remember several conversations, once in Judge Browning's office when Justice Burger called. Actually, I remember one day he called irate over [the fact that] we had approached a member of the Ninth Circuit who was on a Judicial Conference Committee for a draft of a report, and this person, I guess for whatever reason, had called the chair of the committee to see whether he could release it.

Now this strikes me as a very strange process. We're all in the same U.S. government, we're not fighting each other. These are all constitutionally confirmed officers, all of whom have the interest of the system at heart, and yet the system is designed so that you can't tell each other what you're talking about, what you're thinking about that might affect your own lives. This was amazing.

Anyway, he, I remember, expressed his views very strongly about what was the Ninth Circuit doing, who did we think we were, trying to influence these things? I think it's a natural tendency when you're the head of the system to want to try to control the outcome of things and manage things, and then you see a maverick like us, or perceive us as a maverick where we think we have something valuable to contribute and we're trying to do our best to add our salt and pepper to the mix. But, as you know, the funding business has now radically changed after a pilot study and I think . . .

N: You're talking about budget decentralization.

D: Right. I think budget decentralization will ultimately, in the long term, end up being a valuable contributor to the creation of a more dynamic and responsive federal judiciary.

N: You'll be surprised to hear that the JSP⁶ is now about to be laid to rest. They're going to give classification and compensation authority to the courts following the lead of budget decentralization. The millennium is arriving slowly but surely with regard to that.

D: Well, you know the federal courts don't live in a vacuum. The rest of the world has learned that you have to learn to

⁶JSP refers to the Judiciary Salary Plan, a centrally administered personnel classification system that some considered too rigid.

draw—you need to learn to define policy at the national level and take great strategic decisions, but ultimately it's wiser to leave some of the tactical decision-making to the people closer to the ground, and this is really a reflection of that process.

N: Sure. Do you feel, then, that setting up this system by which people would participate was really your greatest accomplishment while you were with the Ninth Circuit? And, if that is not the case, what was really the greatest challenge that you faced?

D: I don't know that I'm the best person to evaluate what I did, so let me come back and answer that two ways.

In my professional development, I see three patterns. I see one pattern that was my years in Kentucky—I really thought you had to have a certain kind of organizational structure, and once that was in place, the systems tended to sort of right themselves and work reasonably well. Then I came to the Ninth Circuit, and I thought, well, no, phooey, it's not the system, it's really the process. You've got to have processes that are in place that are consultative in nature and facilitate exchange and then processes that motivate people and things of that nature. And, third, I have moved from that to now, where I see the real issue is the people.

I say this in my talks in Latin America, that the world divides into thirds: One-third of the world never met a new idea they liked. They are characterized by saying "no" in the morning and "no" when they go to bed, and that's just who they are, and you have to understand them, treat them nicely, be civil to them. Then there is one-third that is unsure. They are never really quite convinced of anything; they're kind of in the middle. And one-third is "yes." And the "yes" group is the group with whom you work, because they are the ones that promote change and foster what I would consider the self-critical attitude that you need in any institution.

So the strategy should be to find out who's who, because the "no" people will be the loudest; they always are. They've always got a reason why something can't be done. I mean, if you've heard it once, you've heard it 800,000 times, "if it ain't broke, don't fix it." My rejoinder to that is, you haven't looked close enough, because there isn't any human activity that works so well that it can't be improved upon. So the challenge is to create the capacity to say, well, let's reevaluate, let's look at it.

That's something that Judge Browning and I shared, and I think because of that, we had this mutually beneficial working relationship. So, I would say, if you can in some way have

helped or fostered the participation of people in the governance of the system so they took ownership, they didn't feel as if they were dependent on someone else for their decision-making, and they felt as if this system was really contingent on their effort to make it better, and if I had some small [influence] in that, then it was worthwhile.

N: You mentioned working for Mr. Kleps in the California state court system. I think for many people, many Californians for sure, he was sort of their hero with regard to how courts should be administered, at least a modern court. Who would you say are the heroes today in court administration? Was he a big role model for you, and, if not, who else was?

D: That's a tough question. He was a role model in the sense that he was the first. I admired his long and distinguished public career. He had numerous distinguished posts before he became the administrative director.

I'm not altogether sure why this happened, but he and I became fairly good friends while I was working there, and he told me of this early experience at—oh, my, I can't remember the school over on the eastern slope of the Sierras where he went to high school and prep school—Deep Springs. His father died early, and he had gotten a scholarship there. A lot of the people who went to this school, from Seth Hufstедler to all sorts of other prominent Californians, all emerged with a very strong, keen public service commitment and in different ways had given life to that. I think that, probably more than anything else, [is what] I admired in him.

He was an astute, a political (small "p"), person. He was effective in the legislature. He had his troubles, as I think every administrative director does with judges, and particularly trial judges, and most notably Los Angeles trial judges. Then when I became the director of courts in Kentucky, we talked on occasion and I sought his advice, and then he had the change of chief justices. Chief Justice [Rose] Bird came, and he was asked to leave; that was very traumatic for him.

Who are my heroes? I haven't thought of that. I never thought I had a hero. One of my heroes was the chief justice in Kentucky, John Palmor. I enjoyed working for him as much as anybody I've ever worked with. He was a unique person. He was sent to Harvard during World War II after being a young lawyer; he was in the Quartermaster Corps, so he went to business school. They sent him to business school to run supplies during the war. He had the most unique sense of balance between very strong leadership and partnership with a person like me. And he, again like Judge Browning,

would seek counsel and then once the decision was made, we would do it, and we'd get in the car and drive anyplace.

I remember when we had a court reporters' strike in Louisville, and he said, "Go down and meet with them and tell them, you know, if they don't go to work tomorrow, we'll replace them all with tape recorders." I did that, and everybody but one came back the next day, and sure enough, we put a tape recorder in her place. And now there are no court reporters in Kentucky; they're all video reported.

But he was a delightful chap, a real gentleman, a Southern gentleman, and so, in a sense, I always admired his, what I would call "Southern gentleman's dimension." I admired his forthrightness. We had some much more difficult issues in the Ninth Circuit because the political nature had changed in the state. When you change local judges, the politics of that is unimaginable. The federal courts don't even come close to those issues. And everybody and their brother is touched, because—I've said it over and over—I continue to believe that nothing brings fear to a small town like an impartial judge. It scares people to death. And we actually saw that principle manifested in the Ninth Circuit. When we would assign a judge in Los Angeles to the Eastern District of Washington, watch the cases settle. People would settle cases hand over fist.

N: That's right.

D: So, it's the same principle. When you do it with a small town. . . . Anyway, Judge Palmor and I were an interesting duo together. I think my heroes today are the Italian judges who are taking on the Mafia. I think the true heroes of the day are those who are out in front confronting the great issues in their society and trying to build justice systems. I have some other heroes that are more international in nature.

N: You've always been a man of principles; they've been very important to you in your personal life. How have they assisted you in your career in court administration?

D: Well, I'll go back to Kentucky. I remember in December 1975 arriving back in Frankfort, Kentucky, and we rented a house. I went down to register to vote, and because of my religion—I'm a Baha'i—I don't belong in partisan politics, so I register as an independent.

Two days later, the chairman of the Democratic Party called me and said I'd made a mistake. I didn't know who this person was. I had no clue who he was. He presumed I would know who he was. I didn't have an idea. He called and said, "You've made a mistake." I said, "I beg your pardon, what mistake have I made?" And he said, "You've registered as an indepen-

dent." "Oh," I said, "That's not a mistake, I'm an independent." He said, "No, you're not. No one can be the head of a state agency in Kentucky and not be a Democrat." I said, "Well, you just met the first one."

So having principles helped me deal with what soon became a series of very difficult confrontations over the role politics has in the judicial system and/or with individuals who work in public service. But for that, I'm not sure I would have had the wherewithal, but I'm not sure what I would have stood for, so the principles have helped me define myself and what I believe in.

I've always believed very strongly that you're in a place for a reason. You give what you have, whatever it is—if it's adequate, if it's inadequate—and do the best you can. I don't think I've ever really been consumed with personal ambition, but maybe I have and I should reflect on that. But my sense has always been the principle—and this is Ralph Kleps' license, you know: make a difference, make a contribution. That's been consistent with me from my time of joining the Peace Corps when I graduated from college 'til today. And try not to be possessive about things. Let others have their say. That's not easy to do; my wife will tell me that.

N: You know, we're having this conversation because of the Ninth Circuit Historical Society's interest in preserving the oral record of people who participated in the federal courts. Is there anything that we haven't talked about that you'd like to add for the record, or make a closing statement, Counselor?

D: Well, as Judge Browning often said, "This great experiment, the Ninth Circuit." I always felt it was a privilege to be here at this time, or at the time that I was in the early eighties to the mid-eighties. It was a dynamic time, and I got to associate with some really remarkable people. Our work relationships were demanding, but the experience has been enormously valuable to me, and the friendships I still count are things I cherish. I think it's best to let others judge what contribution one made.

N: When talking with Judge Browning before talking with you, I asked him to single out anything that he felt you particularly contributed to the Ninth Circuit, and that question really puzzled him. He said, "Gosh, you know, Bill and I talked every day, and just as you described it, he said we had this very open and very engaging dialogue about how to solve problems, and I don't remember even keeping track whether I suggested it or he suggested it. If one of us suggested it and we decided it was a good idea, we went forward. He was, in many respects, an

architect of a lot of the things that we agreed to do, and it's really hard for me to pin [down]." He said, "We were like Siamese twins in working with the Ninth Circuit."

D: Well, as I think I've tried to articulate, it was a real partnership. It was a wonderful symbiosis of collaboration. He never took the posture that I'm the boss and you're the servant. His position was, let's figure this out. And as I said earlier, that is the characteristic of a wise and mature leader, and it's a characteristic that anybody in that environment would welcome.

It was a wonderful model for me. I've tried to use it subsequently in every other kind of environment I've been in, and so I retain this enormous affection for him and those years. I look back with a lot of affection.

N: Okay. Well, I thank you very much.

D: My pleasure. Thank you.

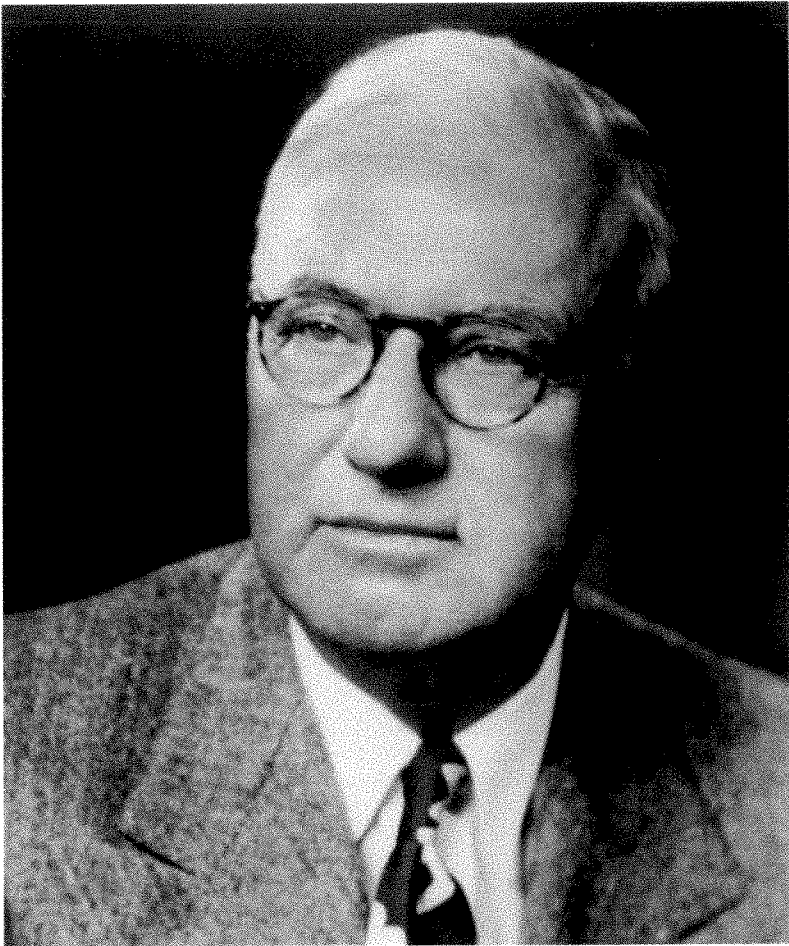
WILLIAM HEALY AND EARLY IDAHO LAW PRACTICE

JOHN J. HASKO

When Circuit Judge William Healy received an honorary doctor of laws degree from the University of Idaho in 1957, it was a fitting capstone to his twenty years on the Ninth Circuit Court of Appeals and an appropriate tribute to a man whose career included service with the Idaho State Legislature, the Idaho State Board of Education, the University of Idaho Board of Regents, and a term as president of the Idaho State Bar Association. Healy had also been a delegate to the Idaho state convention in 1933 that ratified Amendment XXI of the United States Constitution, thereby repealing Amendment XVIII, the Prohibition amendment. For three years until his 1937 appointment to the Ninth Circuit, he had been general counsel for the U.S. Farm Credit Administration. But before any of these distinguished posts, William Healy had first hung up his shingle as an attorney in the rough and tumble Idaho mining town of Silver City. This article examines his fledgling law practice there from 1908 to 1913 and provides a glimpse of the profession in a frontier town nearly one hundred years ago.¹ At

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¹William Healy's files from that practice, which are archived in the Special Collections Department of the University of Idaho Library, provide an enlightening picture of legal practice in early Idaho. Healy's practice was distinguished by remarkable variety. Ninety-six files in the collection deal with specific causes of action. Each file is numbered and labeled with the names of the parties involved, and includes such materials as communications between Healy and his clients, copies of motions and other documents, and final court opinions. In addition to these files, which are numbered sequentially, there are another five, numbered 97-102, containing, in most cases, only one document per several causes of action. In identifying the files, I have chosen to use the numbers of the appropriate files in the Healy collection at the University of Idaho Library, and not to identify clients or defendants by name.



Judge William Healy served for twenty years on the Ninth Circuit Court of Appeals. (Courtesy of the Ninth Judicial Circuit Historical Society collection)

the start of the twentieth century, Silver City was the seat of Owyhee County in southwest Idaho. The town was created by a special law of the Idaho Territorial Legislative Assembly in 1863. The word *Owyhee* is most commonly held to be a phonetic spelling of *Hawai'i*, the name given to the river that runs through that part of the country by two Hawaiian trappers employed by the Hudson's Bay Company in the early part of the nineteenth century. Originally taking up much of southwestern Idaho, Owyhee County was reduced to its current size in 1879,

but it is still the second largest county in Idaho, after Idaho County, covering an area roughly the size of Massachusetts. In 1910 the county had a population of 4,044. Today it has the distinction of being Idaho's most sparsely populated county in relationship to its area.²

Situated about seventy miles southwest of Boise, Silver City superceded the neighboring Ruby City as the county seat in 1866, when it became evident that the quartz lodes that brought everyone to the area were centered in Silver City's surrounding mountains. So the miners packed up and moved many of Ruby City's buildings one mile upstream on Jordan Creek to the Silver City townsite.³

From its inception, the life of Silver City hinged on the mining industry. In 1863 gold was found along Jordan Creek. Like many gold strikes in the West, for at least the first couple of years, placer mining predominated.⁴ Once this surface gold was depleted, however, the search was on for the source of that gold—veins imbedded in quartz outcroppings that indicated larger quantities below the ground. Quartz mining, with its tunneling, hauling, and crushing operations, replaced the simple panning process of placer mining. Silver was discovered in combination with metals like zinc and lead.⁵ Retrieving the ore from the underground mines and separating out the minerals was a

²An Act to Organize the County of Owyhee: "Section 1. That all that part of said territory lying south of Snake river, and west of the summit of the Rocky Mountain chain be, and the same is hereby organized into a county to be called Owyhee." *Laws of the Territory of Idaho* (Lewiston, ID, 1864), 624; Midretta Hamilton Adams, *Historic Silver City: The Story of the Owyhees* (Homedale, ID, 1981), 9; *Thirteenth Census of the United States Taken in the Year 1910: Population*, vol. 2 (Washington, DC, 1913), 418. The population of Owyhee County in 1999 was 10,277. *Idaho Blue Book: 1999–2000* (Caldwell, ID, 1999), 229.

³Julia Conway Welch, *Gold Town to Ghost Town: The Story of Silver City, Idaho* (Moscow, ID, 1982), 7.

⁴Placer mining is accomplished by the "romantic" process of gathering, which can best be described as prospecting. It involves digging into bedrock, placing the sand and gravel in a pan twelve to eighteen inches in diameter and three to four inches deep, and submerging it in water. The pan is swirled in a circular motion and the heavier material—gold—settles on the bottom. The process is repeated until only the gold is left. Leonard J. Arrington, *History of Idaho* (Moscow, ID, 1994), 1.

⁵Carlos A. Schwantes, *In Mountain Shadows: A History of Idaho* (Lincoln, NB, 1991), 94.

drawn-out process.⁶ A larger operation was required, one that called for more capital, labor, and equipment. Mining companies and partnerships were formed, and investment was solicited from large, out-of-state banks.⁷

Silver City prospered from the mid-1860s through the mid-1870s, with exceptionally high-quality gold and silver ore removed from the mountains surrounding the 6,300-foot-high city. Rising another 1,700 feet above the burgeoning town was the mountain dubbed War Eagle, "king of all the peaks . . . It is the richest and most wonderful deposit of quartz yet found in the United States, even eclipsing the famed Comstock Lode," wrote one contemporary booster.⁸ Between 1863 and 1875, Silver City mines produced \$30 million in gold and silver.⁹ In the mid-1870s, however, the United States was in the midst of a financial panic, and several banks that had invested heavily in the Silver City mining operations, including the Bank of California, suspended operations.¹⁰ Production of gold and silver from Silver City mines slowed down for about a decade following the panic.

By the time William Healy arrived, Silver City was experiencing a revival. In the 1890s, an improvement in the economy allowed the banks to take more risks, freeing up money to invest in the expensive operations connected with mining. A native of Iowa, Healy received his undergraduate degree from the University of Iowa in 1906 and two years later earned his law degree from that university's law school. After graduation, Healy and two law school classmates, John R.

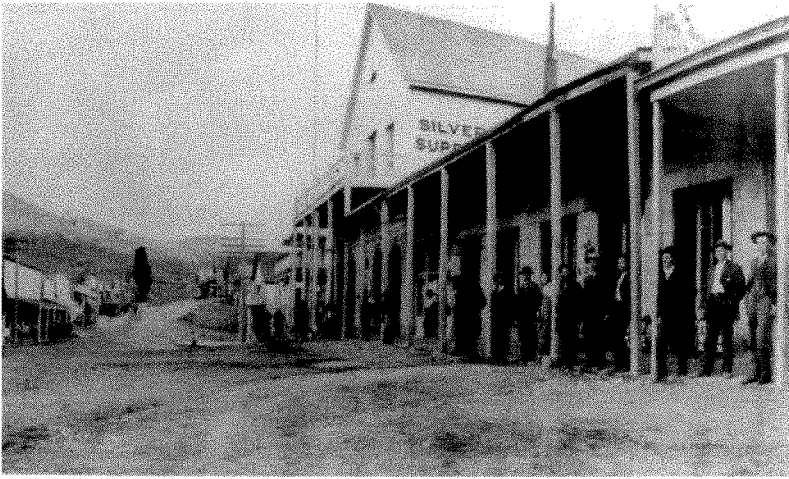
⁶"First, the quartz is broken down by sledge-hammers into fragments like apples. Next, it is shoveled into the feeders, where huge iron stamps, of from three hundred to eight hundred pounds weight, rising and falling sixty times a minute, thunder and clatter, making the building tremble, as they crush the rock to wet powder. Quiet, silent workers, with movements almost as mechanical as the stamps and wheels, run this pulp successively through settling-tanks, amalgamating-pans, agitators, and separators—the refuse material passing away, and quicksilver collecting the precious metal into a mass of shining amalgam, soft as putty. This goes into the fire-retort, where it leaves the quicksilver behind; and finally into molds, whence it comes forth clear and pure, in bricks and bars of the precious metals." Albert D. Richardson, *Beyond the Mississippi: From the Great River to the Great Ocean: Life and Adventure on the Prairies, Mountains, and Pacific Coast* (Hartford, CT, 1869), 503.

⁷Arrington, *History of Idaho*, 231–32.

⁸Richardson, *Beyond the Mississippi*, 505.

⁹Adams, *Historic Silver City*, 31.

¹⁰*A Historical, Descriptive and Commercial Directory of Owyhee County, Idaho. January 1898* (Silver City, 1898), 12 [hereinafter cited as *Directory of Owyhee County*].



Men line the sidewalk along Washington Street in Silver City, sometime after 1901. (Courtesy of Idaho State Historical Society. Photograph no. 79-121.2C)

Smead and Edward G. Elliott, headed west to Boise, Idaho, where they set up the firm of Smead, Elliott and Healy. Smead and Elliott stayed in the capital while Healy went to Silver City to establish a branch office.¹¹

Healy and his partners no doubt considered that Silver City was a good place to set up a law practice. It had embraced the trappings of a developing town, if not a city. One historian points out that the town boasted the following businesses at the time:

six general stores, two hardware stores, a tin shop, two meat markets, two hotels, four restaurants, eight saloons, a bakery, one shoe shop, a photography gallery, a brewery, a soda bottling works, two livery stables, a feed store, a jeweler, three blacksmith shops, a furniture store, two lumber yards, a tailor shop, three barber shops (one of them advertised 'baths a specialty'), a newspaper, four lawyers, and two doctors.¹²

¹¹Smead and Elliott continued to practice with Healy after he left Silver City in 1914 to move to Boise. Both of them later served as assistant attorneys general for the state of Idaho. Smead died in Albuquerque, New Mexico, on August 16, 1958, at the age of 76. Elliott died in Boise on April 25, 1966, at the age of 84.

¹²Welch, *Gold Town to Ghost Town*, 77.

About two thousand people lived in Silver City at the turn of the century, and the mining and other businesses ensured a steady movement of people and supplies along the stage lines servicing the city. The town's designation as the county seat for Owyhee County also generated a predictable amount of activity.¹³

In the revival of Silver City, electricity was introduced, making life there a good deal more pleasant than it had been during the first era of mining success.¹⁴ By 1900, there were already twenty-eight telephones in town, and the following year the telephone company issued a phonebook.¹⁵

Healy's files indicate that he made use of the telephone service and other modern technology to conduct his practice.¹⁶ All of his court documents and correspondence to clients were typewritten. Whether Healy did the typing or employed a typist or stenographer is not clear. His may have been a one-man branch, but it was up to date.

On the other hand, there apparently were few law books available to Healy in Silver City. It appears that his Boise partners sent him relevant information about cases he was handling. Because Idaho case law was in its infancy, Healy and his partners looked for precedent in court opinions from a wide variety of sources to obtain guidance on some issues.¹⁷ Some tools of the legal trade seem to have been around forever: in employing the help of an attorney to collect on a bad check drawn on a bank in Lyons, Georgia, *Martindale* was the source of information for making the initial contact with the Georgia attorney.¹⁸

¹³*Directory of Owyhee County*, 28–29.

¹⁴The Trade Dollar Mining Company built a dam on the Snake River in 1901 to generate electricity for its mining operations. Silver City was able to tap into this power supply and get electrified several years before many of the surrounding towns. Welch, *Gold Town to Ghost Town*, 91.

¹⁵Julie J. Hyslop, *Foundations of Silver City, Volume 2: Stone Buildings in a Wooden Town* (Nampa, ID, 1985), 11.

¹⁶Files 6, 79, and 101, William Healy Papers, University of Idaho Library [hereinafter cited only by file number].

¹⁷For example, file 4 (trespass by sheep) contains citations to opinions from Michigan, Oregon, Texas, and Wyoming; file 7 (contesting a school bond vote) cites opinions from California, Illinois, Indiana, Kansas, Minnesota, New Jersey, Vermont, and Washington; file 8 (claims for labor) contains citations from cases from Alabama, Connecticut, Illinois, Indiana, Iowa, Minnesota, Montana, New York, and Pennsylvania; file 10 (contract for the care of sheep) cites opinions from *American Reports*, Illinois, and New York.

¹⁸File 93.

The overwhelming majority of Silver City's buildings were made of wood, with the exception of those situated on the "Granite Block." One of those buildings, the Crane Building, was sold to Owyhee County in 1885 for \$1,020. It operated as the Owyhee County Court House for fifty years—until the county seat was moved—and was the place where Healy perfected his courtroom skills.¹⁹

During his first two years in Silver City, the majority of Healy's clients brought him civil matters. A survey of his files for the years 1909–10 reveals three basic types of actions: suits under contracts, especially promissory notes; suits for unpaid wages, primarily on behalf of miners; and actions against sheepherders for violation of grazing statutes. As he gained more experience and began to expand his clientele, his cases became more varied. His last three years in Silver City saw him engaged in a more sophisticated range of actions, moving into probate, guardianship, and products liability. In addition to his private practice during the period 1911–12, Healy served as deputy prosecuting attorney for Owyhee County.

From the vantage point of the twenty-first century, it is surprising that someone so recently graduated from law school like Healy would be involved in such a wide range of legal activity. The files do not reveal what cases he turned down, but given the variety of matters that appear in the files, it seems likely that Healy took on virtually any client who walked through his door. Whether this was from necessity or ambition is impossible to say. Nevertheless, during his five years in Silver City, Healy handled matters involving alcohol and gambling, assault, bankruptcy, contracts (particularly promissory notes, loans, and unpaid debts), corporations, domestic relations, livestock (cattle, sheep, horses), mining (mostly suits for unpaid wages), probate, products liability, real property, schools, stolen property (in the form of livestock), and taxes. In order to get a clearer picture of frontier legal practice, we will examine representative cases from each of these areas.

ALCOHOL AND GAMBLING

Healy represented a saloonkeeper who was accused of selling alcohol on Sunday, and allowing a game of stud poker to take place on the premises at the same time.²⁰ *The Revised Codes of*

¹⁹Hyslop, *Foundations of Silver City*, 67.

²⁰File 36.

Idaho were specific: saloons were prohibited from selling alcohol on Sundays.²¹ Another statute prohibited "any game of faro, monte, roulette, lausquenet, rouge et noir, rondo, any game played with cards, dice, or any other device, for money, checks, credit or any other representative of values," and violators were guilty of a misdemeanor, punishable by a fine of not less than two hundred dollars or imprisonment in the county jail for not less than four months.²² Owners of houses in which such games were conducted were also liable.²³ Healy argued that his client was not present at the card game and didn't know it was going on; he was in the front room of the saloon cleaning up after midnight.²⁴

ASSAULT

Healy's files reveal one case involving two people charged with assault on two others.²⁵ One of the charges was assault with intent to commit murder, the punishment for which was one to fourteen years in the state prison. The other charge was assault with a deadly weapon that carried a penalty of up to two years in prison or a fine of up to \$5,000, or both.²⁶

BANKRUPTCY

Healy handled a bankruptcy of one client who had amassed personal debt totaling a little over \$11,000.²⁷ It is not clear

²¹"It shall be unlawful for any person or persons in the State to keep open on Sunday any saloon, or place of any kind or description in which spiritous, vinous, malt or any intoxicating liquors are at any time sold or exposed for sale, to be sold or exposed for sale; or to give, or sell, or otherwise dispose of any spiritous, vinous, malt or any intoxicating liquors except as provided for in other parts of this chapter." *Revised Codes of Idaho*, sec. 6825 (1908).

²²*Revised Codes of Idaho*, sec. 6850 (1908).

²³"Every person who knowingly permits any of the games prohibited by the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, is punishable as provided in the preceding section." *Revised Codes of Idaho*, sec. 6851 (1908).

²⁴24. File 36.

²⁵File 35.

²⁶26. *Revised Codes of Idaho*, sec. 6598 (1908); *Revised Codes of Idaho*, sec. 6732 (1908).

²⁷File 21, file 22, file 23.

what circumstances led to the insolvency, but the client had unpaid medical bills and outstanding bills for animal feed. Healy settled the debts by selling mining stock the client held and a parcel of land in Oregon. Another client facing bankruptcy had tried to avoid his creditors by transferring all his property to someone else. The property in question—twenty-three horses, a number of wagons, harnesses, chains, mining timbers, and one Studebaker top buggy—had to be used to settle the creditors' claims.²⁸

CONTRACTS

Nearly 30 percent of Healy's cases involved contracts. Of his ninety-six files from Silver City, twenty-six document cases concerning contracts, unpaid bills, and loans; in sheer numbers, these files represent the area of most activity. The range of this litigation was quite varied. One action was for feeding six head of cattle for thirty days during March and April 1911.²⁹ There were suits for unpaid salaries,³⁰ items purchased on credit (coffee, salmon, milk, tomatoes, candles, butter, crackers, salt, tobacco),³¹ one thousand dollars loaned to purchase wool,³² bad checks,³³ merchandise delivered but unpaid for,³⁴ breach of warranty (the sale of a stolen horse),³⁵ unpaid rent at a boarding house,³⁶ unpaid small loans,³⁷ service contracts (hauling hay),³⁸ a suit for payment for pack mules and wood,³⁹ and numerous matters involving promissory notes.⁴⁰

²⁸File 40.

²⁹File 5.

³⁰File 8.

³¹File 16.

³²File 32.

³³File 39, file 93.

³⁴Files 41, 54, 55, 69, 71, and 79.

³⁵File 42.

³⁶File 67.

³⁷File 68.

³⁸File 74.

³⁹File 80.

⁴⁰Files 18, 30, 38, 65, 73, and 76.

Historian Gordon Bakken has pointed out that at this time, promissory notes were used widely where currency was scarce. Healy's experience bears this out.⁴¹ He also had personal experience with unkept promises to pay. Some of his files contain notes to clients reminding them that they had been remiss in not paying the fees he had earned by acting on their behalf.⁴²

CORPORATIONS

In 1912, Healy represented the Owyhee Avalanche Publishing Company in its application for incorporation. Subscribers to the company's weekly newspaper, the *Owyhee Avalanche*, paid two dollars a year to read of the comings and goings in Silver City and its environs. The fees Healy paid on the company's behalf included ten dollars for filing the articles of incorporation, a dollar-and-a-half for recording them, and three dollars for the certificate of incorporation. The company also owed ten dollars for the annual license tax for the fiscal year ending June 30, 1913. Healy stood to collect a grand total of \$24.50.⁴³

DOMESTIC RELATIONS

On a few occasions Healy found himself dealing carefully with emotionally charged matters like guardianship, divorce, and child custody. In one situation, he handled a request to replace a guardian who was considered irresponsible.⁴⁴ In another matter, the mental competency of a guardian was challenged. The guardian was ultimately declared insane and replaced.⁴⁵ Healy also handled a divorce based on desertion⁴⁶ and two others based

⁴¹"The promissory note was the chief instrument of credit, although mortgages of real and personal property played an increasingly important role in transactions. In areas scarce of currency, the promissory note, strengthened by proper endorsements, circulated as a viable medium." Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912* (Westport, CT, 1983), 46.

⁴²Files 12, 31, 55, and 65.

⁴³File 59.

⁴⁴File 66.

⁴⁵File 48.

⁴⁶File 87. "Wilful desertion is the voluntary separation of one of the married parties from the other with intent to desert." *Revised Codes of Idaho*, sec. 2650 (1908).



In 1912, Healy collected \$24.50 for representing the Owyhee Avalanche Publishing Company in its application for incorporation. (Courtesy of Idaho State Historical Society. Photograph no. 77-19.15)

on "wilful neglect."⁴⁷ In another, somewhat poignant case, a husband living in Nebraska wrote the attorney asking him for help in a child custody case. The client contended that his wife had moved to Idaho, taking their children against court orders,⁴⁸ and he wanted to get his children back.

LIVESTOCK

Owyhee County is blessed with a good deal of land ideal for supporting livestock—both cattle and sheep. A contemporary

⁴⁷Files 52 and 86. "Wilful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy or dissipation." *Revised Codes of Idaho*, sec. 2651 (1908). Both wilful desertion and wilful neglect became causes of action for divorce if endured for one year. "Wilful desertion, wilful neglect or habitual intemperance must continue for one year before either is a ground for divorce." *Revised Codes of Idaho*, sec. 2653 (1908).

⁴⁸File 75.

of Healy's boasted that "stock raised on the high hills and prairies of this county, seldom fed in yards, ever housed and nourished on the rich native grasses, attain a perfection of form and growth that is rarely seen and never excelled in any part of the western country."⁴⁹

But there were limits. Cattle interests in the county had reached their maximum a quarter of a century earlier, in 1888–89, when the estimated head count was more than one hundred thousand. A couple of severe winters, the inability to find sufficient food for such large numbers of cattle, and other causes resulted in a major decrease in those numbers. A decade later, the estimate was that there were only about fifteen thousand head in the county. By that time, the sheep industry had taken off, and the estimate for sheep was 150,000 head. Although there was a mild recovery in the number of cattle by 1910, sheep continued to far outstrip that growth.⁵⁰

Like other western states, Idaho experienced conflicts between cattle ranchers and sheep herders. More often than not, the resolutions to those conflicts involved courtroom battles, not range wars as the motion pictures would have it. "It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons," the code read, "or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of such possessory claim."⁵¹

On several occasions, Healy found himself involved in these disputes. The claim was usually that the sheep had violated the two-mile limit and, in doing so, had destroyed the grazing land of the cattle and horses affected.⁵² Head counts for the sheep herds could be quite considerable, some in the range of 2,500 to 6,000,⁵³ grazing in the disputed areas for fairly long

⁴⁹"This county doubtless provides the most ideal conditions for stockmen that are to be found within the state. The thousands of hills and mountains furnish a broad and luxuriant pasture; the hundreds of springs and small streams afford a never-ending supply of water. In the sheltered valleys the herds find comfortable quarters and refuge during the winter." Hiram T. French, *History of Idaho: A Narrative Account of Its Historical Progress, Its People and Its Principal Interests* (Chicago, 1914), 141.

⁵⁰*Directory of Owyhee County*, 13; The 1910 census figures for Owyhee County listed 885 dairy cows, 29,096 other cattle, and 192,956 sheep. French, *History of Idaho*, 448.

⁵¹"Herding Within Two Mile Limit Prohibited," *Revised Codes of Idaho*, sec. 1217 (1908).

⁵²Files 3, 4, 6, 13, 43, 44, 45, 49, 53, 57, and 61.

⁵³Files 3, 4, 43, 44, 45, 49, 53, and 61.

periods of time (ten days⁵⁴ to four months⁵⁵), and sometimes covering incidents over the course of more than one season (1909 and 1910),⁵⁶ (December 1, 1910 to April 10, 1911; November 15, 1912 to April 8, 1913),⁵⁷ (1912 and 1913).⁵⁸ Damages claimed for the destruction of grass, verdure, and shrubbery ranged from seventy-five dollars⁵⁹ to five hundred dollars⁶⁰ for a single incident. The largest amount recovered was \$775⁶¹ for incidents covering more than one season.

These were all civil actions to recover for damages, but one section of the code was penal in nature.⁶² While acting as deputy prosecuting attorney for Owyhee County, Healy brought the first successful conviction under that statute, a version of which had been in effect in Idaho even before it obtained statehood.

Other causes of action involving livestock dealt with contracts for the care of sheep,⁶³ the sale of sheep,⁶⁴ the sale of a mare,⁶⁵ and goats grazing on land.⁶⁶ One action involved the intersection of livestock and mining, where sheep had grazed on mine land. The mine had "numerous prospect holes, cuts and tunnels opened by plaintiff for the purpose of disclosing the ore of said property."⁶⁷ The suit was for damages caused to those holes, cuts, and tunnels by rocks, earth, and debris knocked into them by grazing sheep; springs used on the mine lands were also claimed to have been polluted.⁶⁸

⁵⁴File 53.

⁵⁵File 44.

⁵⁶File 43.

⁵⁷File 44.

⁵⁸File 61.

⁵⁹File 3.

⁶⁰File 43, file 44.

⁶¹File 43.

⁶²"Grazing Sheep on Cattle Range. Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by an cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range." *Revised Codes of Idaho*, sec. 6872 (1908).

⁶³File 10.

⁶⁴File 46.

⁶⁵File 47.

⁶⁶File 50.

⁶⁷File 94.

⁶⁸*Ibid.*

MINING

Western movies and pulp fiction have bolstered the idea that most lawsuits in gold and silver mining camps and towns involved conflicts over claimjumping. While in Silver City, however, Healy was involved in only one such dispute.⁶⁹ Most of his mining cases involved the recovery of unpaid wages by mine workers.⁷⁰ Healy's files indicate that the prevailing wages for mine workers in Silver City ranged from \$3.00 to \$4.25 a day, depending on the nature of the work.⁷¹ To collect unpaid wages, a lien was filed on the mining claim⁷²—a procedure that had been available as a legal recourse while Idaho was still a territory. Historian Gordon Bakken has observed that territorial legislatures passed laws permitting the mechanic's lien in support of their constituents and partially to reign in the outside capitalists who owned and financed the mines. By providing a remedy for mine workers and thus ensuring a steady workforce, legislatures also promoted economic expansion to the benefit of all, including the mine owners.⁷³

Workers supplying the mines as well as miners themselves fell victim to unscrupulous employers. In one case, Healy represented workers who had built a mill at a mine but had not been paid for their work.⁷⁴ In another, he represented two

⁶⁹File 89.

⁷⁰Files 20, 28, 51, 64, 77, and 85.

⁷¹Files 20 and 28.

⁷²"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished." *Revised Codes of Idaho*, sec. 5110 (1908).

⁷³"Territorial lawmakers recognized the existence of a labor interest and the equity of affording them a statutory remedy for a contractual relationship. . . . The mechanic's lien and associated laws were directed against a predominantly foreign-capitalized economy in an effort to encourage rapid economic expansion without sacrificing natural justice. Although the laws had a large body of Eastern precedent and experience, Western application exceeded the bounds of that precedence. In doing so, they satisfied local political constituents, promoted social justice, and furthered economic development. Of equal importance, in passing this legislation and giving it a generous interpretation, the territorial legal system recognized the economic needs of labor. This recognition enabled legislators and judges conceptually to liberalize other labor-related common law." Bakken, *Development of Law*, 29–30.

⁷⁴File 88.

men who had been hired to cut firewood in the forest and to build a road for hauling the wood out. The workmen agreed to receive three dollars for each cord of wood they cut and an additional fifty cents for piling up the logs. They also agreed to be paid three dollars a day for building the road. After more than five-and-a-half months, they had cut and piled 226-3/4 cords and had hacked out the roadway. When the employer refused to pay, the workmen contacted Healy, who filed a suit for \$1,297.62 plus an additional \$48 in travel expenses. The jury found for the plaintiffs, awarding them \$770 in damages and \$39.60 in court costs. Healy received 25 percent of the recovery as his fee.⁷⁵

Underground mines were dangerous, and the work hazardous, and many miners were injured on the job. One suit Healy handled was brought by a miner who had broken his leg. The company doctor set the leg, but when it healed, it was misshapen, crooked, weaker, and two inches shorter than the other one. When he had worked, the miner had earned \$3.75 a day. He and other company employees contributed \$2.25 a month for "competent medical and surgical treatment and care, and proper and necessary medicines in case of sickness or injury."⁷⁶ Healy contended that the doctor was incompetent because of intoxication, and that because of "gross incompetence, negligence and unskillfulness," the miner was permanently crippled and disabled.⁷⁷

PROBATE

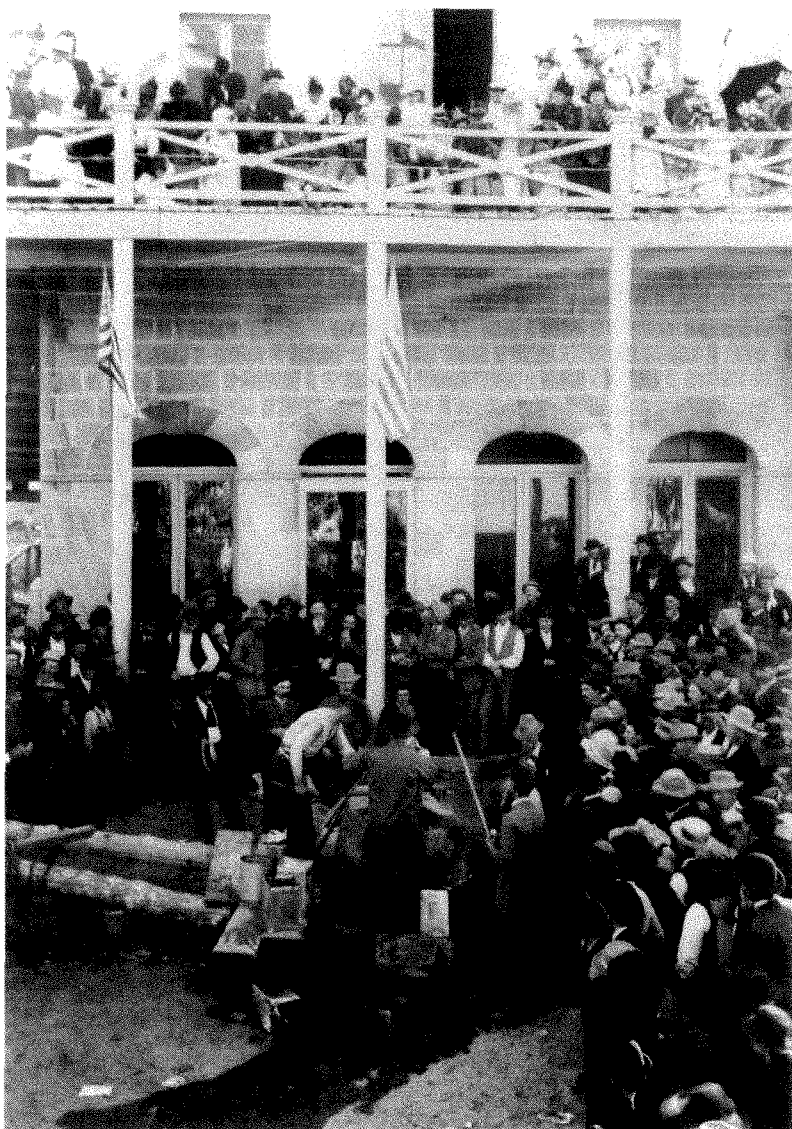
Much of Healy's practice involved probate matters. One estate was valued at thirty thousand dollars,⁷⁸ but more typical

⁷⁵File 84. The two men represented by Healy cut and piled the wood, and constructed a road for hauling it. One hundred sixty-eight days of work were involved. The rates for performing these tasks were \$3 per cord of wood cut, 50 cents for each cord piled, and \$3 a day for constructing the road. The men also received board while on the job. The suit was for \$1,297.62, plus travel expenses of \$48 (Boise to Flint, Idaho). The jury found for Healy's clients.

⁷⁶File 91.

⁷⁷Ibid.

⁷⁸File 9.



A crowd assembles in Silver City to watch a drilling contest, c. 1890s.
(Courtesy of Idaho State Historical Society. Photograph no. 77-154-25)

was the small estate.⁷⁹ Many of these cases involved real property. One probate action dealt with property located in Maine.⁸⁰ A handwritten will, purportedly signed by the deceased, left the land to someone other than his spouse. The court determined that the handwriting was not that of the decedent, and therefore the will was invalid. The wife, represented by Healy, ended up getting the real estate, Idaho being a community property state.⁸¹

Two other probate cases involved land obtained under the Homestead Act.⁸² In one, the brother of the deceased claimed he was entitled to land his brother filed on in Texas County, Oklahoma, but the U.S. Land Office never found the paperwork.⁸³ Another case involved land "proved up" in Idaho and encumbered by debt. The executor requested that the creditor wait for payment until the sheep held by the estate had been shorn and the wool sold.⁸⁴

One probate action hinged on the question of the deceased having obtained a divorce in Pennsylvania under an alias,⁸⁵ and another dealt with the inability to locate someone to administer the estate of the decedent.⁸⁶ A different suit dealt with adequate posting of notice for submitting claims on an estate. This suit had arisen from the claim of the administrator of an estate that Healy's client had double-billed the decedent. Healy counter-claimed, arguing that the plaintiff in this action had failed to adhere to the provisions of the code regarding the publication of notice to creditors. The contention was that the

⁷⁹File 14. Listed in the estate are: "4 sofa pillows, 1 silk umbrella, 1 seal skin coat, muff and bag, 1 cut glass nappy, 1 cut glass bowl, 1 fern dish, 1 oil bottle, 1 vase, 1 H.P. sugar and cream, 1 whip, 2 H.P. plates, 1 green suit, 12 toilet articles, 1 pongee dress, 1 picture, 1 towel (sic) rack, 1 dress pattern, handkerchief and tie, 12 small pieces hand work, 1 collar, 1 H. W. carnation table cover, 1 silk shawl, 1 black skirt, 1 house dress, 1 apron, 1 black dress, 1 skirt, 1 jewel casket, 1 pair corsets, 1 shirt waist, 2 aprons, 2 lace dresses, 1 felt hat, 1 rain coat, 1 trunk, 1 suit case, 2 sets beads and souvenir coins, 1 fob chain, 2 elk tooth pins, 1 plain band ring, 2 ring mounts, 2 pair cuff buttons, 1 gold thimble, 1 pair opera glasses, 1 diamond brooch, 1 pair earrings, 1 locket and chain, 1/2 interest in phonograph, 2 bags, 2 purses, 1 card case."

⁸⁰File 25.

⁸¹File 34.

⁸²*An Act to Secure Homesteads to Actual Settlers on the Public Domain. U.S. Statutes at Large* 12 (1862): 392.

⁸³File 58.

⁸⁴File 70.

⁸⁵File 92.

⁸⁶File 96.

plaintiff had neglected to state the place for presentation of claims, as specified by the statute. The court found for Healy's client, awarding six dollars for costs and disbursements incurred in the action.⁸⁷

Healy seemed to be efficient and effective most of the time, and his clients were pleased with his work. In one case, he successfully petitioned the court for a tax exemption on the sale of property benefiting a widow. In a touching note to the attorney, she wrote, "The little ones and I feel very much indebted to you for your trouble."⁸⁸

PRODUCTS LIABILITY

Healy brought one products liability action. It seems an Owyhee County brewery had purchased three wooden casks from a cooperage in Portland, Oregon. The casks were defective, the suit maintained, because they failed to maintain the proper pressure for brewing beer. The brewery estimated that it lost nine hundred dollars worth of materials.⁸⁹

REAL PROPERTY

Healy's records contain only one file dealing extensively with real property: an action for foreclosure on a mortgage (\$465.55) on property in Hailey, located far from Silver City in the central part of the state. Also included in this file is a claim by Healy for twenty dollars in unpaid attorney's fees.⁹⁰

⁸⁷File 82. "When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed by this title, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed." *Revised Codes of Idaho*, sec. 5613 (1908); see also *Revised Codes of Idaho*, sec. 5460 (1908).

⁸⁸File 17.

⁸⁹File 72.

⁹⁰File 12.

SCHOOLS

Healy represented one client who challenged a bond election for the building of a schoolhouse in the nearby town of Bruneau, "with all necessary furniture, desks, blackboards, globes, charts, outline maps, etc."⁹¹ The \$12,500 bond was approved by voters on April 12, 1913. Of the seventy-one votes cast, the final count was forty-seven in favor and twenty-two against. The electors threw out two other "no" votes, claiming they had been defaced. Healy's client also claimed that two of the "yes" voters were not eligible to vote.

STOLEN PROPERTY

There was only one action in Healy's files for the recovery of stolen property. The pilfered property in question was three horses. Although the fate of the pilferer is not recorded, the horses were recovered. Nevertheless, that was not the end of the owner's problems. One of the horses died, and another ran off.⁹²

TAXES

Healy represented one client in a tax grievance.⁹³ At issue was the application of an exemption on improvements to land acquired under the Carey Act. Under this legislation, the federal government granted Idaho desert lands that the state promised to distribute for reclamation and, ultimately, cultivation.⁹⁴

THE DEPUTY PROSECUTING ATTORNEY OF OWYHEE COUNTY

From the time he arrived in Silver City, William Healy was involved in Democratic Party politics. In 1910 he served as

⁹¹File 7.

⁹²File 15.

⁹³File 26.

⁹⁴*U.S. Statutes at Large* 28 (1894): 422 (codified as amended at *U.S. Code*, vol. 43, secs. 641-47 (1994)).

chairman of the Democratic Central Committee for Owyhee County. A year later, he was elected deputy prosecuting attorney of the county, a testament to the high regard in which he was held by the county's voters, or at least to his political skills. This was not a full-time position, so during the two years he held office, he continued to represent clients in a variety of civil actions. As deputy prosecuting attorney, Healy "gained distinction for his capacity to win the confidence of all the diverse elements of which juries are composed."⁹⁵

The duties of his office were varied, but responding to citizens' concerns was a main responsibility, especially if the incumbent was contemplating re-election. More or less typical was a situation described in correspondence found in the files. A citizen wrote that he knew of a man who had been quarantined by the health board, but who was nevertheless still walking around the town. The deputy prosecutor was well aware of the limits of his office. He replied that he was unable to act unless someone filed a formal complaint. It is unclear if the concerned citizen ever filed.⁹⁶

Another action gives an idea of how varied the cases were that came before the deputy prosecuting attorney. An irrigation company was charged with obstructing a public road in nearby Grosmere. The irrigation company defended its action by claiming it was engaged in "upbuilding the country" in arid southwestern Idaho.⁹⁷

Perhaps the most disturbing case that Healy handled as deputy prosecuting attorney involved a fourteen-year-old girl who had engaged in sexual intercourse once with a worker on the ranch where she lived, and several times with her older brother. Under the law of the day, the accusation against her was that she "knowingly associates with vicious and immoral persons, and is growing up in crime."⁹⁸ The law ran its course in this case; the victim was declared to be a juvenile delinquent and was sent to a children's home. A warrant was also issued for the arrest of the ranch worker for the crime of rape.⁹⁹

⁹⁵"Memorial Proceedings: Honorable William Healy," 308 F.2d 5 (Ninth Cir., 1962).

⁹⁶File 56. Applicable in this situation was a statute that governed quarantines of infected houses and individuals within them by local boards of health in cases of "small pox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever or any dangerous, contagious or infectious disease. . . ." *Revised Codes of Idaho*, sec. 1100 (1908).

⁹⁷File 60.

⁹⁸File 33.

⁹⁹Two years after the girl's assignment to the children's home, Healy was handling the estate of her father. By that time, she had been released from the home, was married, and was living in Nampa, Idaho. File 34.



A birdseye view of Silver City shows what the town looked like in 1907, the year before Healy arrived. (Courtesy of Idaho State Historical Society. Photograph no. 133-B)

In addition to the complete files for cases Healy handled, several random documents shed further light on the range of his practice. These files are fairly even balanced between those in which he operated as the deputy prosecuting attorney for Owyhee County and those in which he acted as a private attorney.

As the legal representative of the County Board of Commissioners,¹⁰⁰ Healy sent correspondence to collect monies owed the county. He wrote to one individual asking for recovery of the county's cost—twenty-five dollars—for disposing of carcasses of the man's sheep that had been found lying near a

¹⁰⁰The government of Owyhee County was made up of three commissioners, the sheriff, the clerk of the district court, the probate judge, the treasurer, the assessor, the coroner, and the surveyor. *Directory of Owyhee County*, 18.

public road.¹⁰¹ In another letter Healy demanded payment of a five-dollar-a-day fine for the flooding of a public road caused by the construction of an irrigation ditch,¹⁰² apparently another case in which "upbuilding the country" disrupted the public right of way.

These incomplete files contain charges leveled by deputy prosecuting attorney Healy against assorted lawbreakers. One such transgressor—a shepherd—led his flock into a stream and did "willfully and unlawfully suffer, permit and cause the waters of said Pole Creek there situate to become nauseous, foul, offensive and injurious to public health and public comfort."¹⁰³ Another person fraudulently impersonated a physician, promising to cure a patient of cancer of the womb by extraordinary and psychic powers, at a cost of \$375.¹⁰⁴ This file also contains a letter Healy wrote insisting that the letter's female recipient leave the county within a week, threatening her with the probably euphemistic charge of "disorderly conduct" if she did not.¹⁰⁵ In a similar vein, Healy threatened to file charges against a man if he did not stop selling liquor on Sundays and to minors.¹⁰⁶

These files also reveal a few of the civil matters that Healy handled as a private attorney. They contain his response to a request for advice from an individual asking if he might have a cause of action for being hung in effigy after the election of November 1911.¹⁰⁷ They include a request for advice about whether a husband whose wife refused to stay with him could bring suit against her employer for breaking up the family.¹⁰⁸ There is a suit for battery with fists, in which the plaintiff allegedly had broken teeth, a bruised and injured nose, facial disfigurement, and damaged clothing. The claimant missed four work shifts at the mine, which cost him \$3.25 a day, and spent \$8.00 to repair his teeth.

¹⁰¹File 97. Leaving Carcasses Near Highways, Dwellings and Streams. "Any person who shall knowingly leave the carcass of any animal within a quarter mile of any inhabited dwelling, or on, along or within a quarter mile of, any public highway, or stream of water, for a longer period than twenty-four hours, without burying the same, shall be guilty of a misdemeanor, and upon conviction shall be fined any sum not to exceed one hundred dollars." *Revised Codes of Idaho*, sec. 6934 (1908).

¹⁰²File 100.

¹⁰³File 99.

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.*

¹⁰⁶File 102.

¹⁰⁷File 97.

¹⁰⁸*Ibid.*

When pain and suffering were added in, he claimed damages in the amount of \$128.¹⁰⁹ Also in the file is a suit "for goods and merchandise sold and delivered at defendant's request," which were valued at fifty cents.¹¹⁰ Another client, the manager of an irrigation ditch association, wrote Healy complaining about the damming and cutting of the association's ditch by a trespasser. The manager pointed out that another party claimed to have received ownership from the manager, but he did not remember conveying it to them unless "I did it in a coma or stupor."¹¹¹

Also included in these files are letters from clients acknowledging Healy's efforts on their behalf. Typical is one from a sheepherder whom Healy represented in a suit for unpaid wages: "Mr. Healy you are a stranger to me," the sheepherder wrote, "but judging from the tone of your letter you mean to be square. So I will just leave you to act for me."¹¹² This seems a fair assessment of Healy's relationship with his clients.

CONCLUSION

By the mid-teens, the economic rebirth of Silver City had run its course. The increasing cost of extracting and refining gold and silver ore from the surrounding mines caused the industry to become less and less profitable. From 1910 to 1914, several of the Silver City mines closed, and the miners and other townsfolk began to move to more prosperous locations.¹¹³ With the economic downturn, Silver City lost its importance in the legal life of Owyhee County. So drastic was the loss that by 1934 the residents of Owyhee County, by a majority of four votes, chose to move the county seat to Murphy.¹¹⁴ By that time, Murphy had established itself as a railroad center, with much more economic importance than Silver City could muster.¹¹⁵

¹⁰⁹File 101.

¹¹⁰*Ibid.*

¹¹¹File 102.

¹¹²*Ibid.*

¹¹³Betty Darig, "A History of Silver City, Idaho" (master's thesis, Washington State College, 1949), 94.

¹¹⁴Adams, *Historic Silver City*, 20.

¹¹⁵Welch, *Gold Town to Ghost Town*, 96.

For a brief moment, however, Silver City, Idaho, exhibited an active legal life, and instrumental in that legal life was William Healy. In 1914, he and his new bride, the former Mary Hicks, moved to Boise. He practiced in Boise for twenty years before moving on to the U.S. Farm Credit Administration and the Ninth Circuit Court of Appeals.

William Healy's Silver City law practice was marked by a broad range of cases and clients, and the townspeople recognized his talent by electing him to the post of deputy county prosecutor. His success in Silver City served as a fitting predictor of his future legal career.

BOOK REVIEWS

The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America, by Sarah Barringer Gordon. Chapel Hill: University of North Carolina Press, 2002; 352 pp., illustrations, notes, bibliography, index; \$49.95, cloth; \$19.95, paper.

The 1856 Republican platform promised to battle the "twin relics of barbarism," slavery and polygamy. Sarah Barringer Gordon, professor of law and history at the University of Pennsylvania, has undertaken to tell the lesser-known story, the antipolygamy crusade against the Mormon church in Utah territory. It is part of the series, *Studies in Legal History*, from the University of North Carolina Press.

Gordon organizes her chapters into two parts. In Part 1, Gordon introduces the Church of Jesus Christ of Latter-day Saints (the Mormons or Latter-day Saints) and their founder, Joseph Smith. She sketches their unique doctrines, including celestial or plural marriage, known more commonly as polygamy. Following Smith's assassination in 1844, Brigham Young led the Mormon exodus to the Great Basin. Soon the Mormons acknowledged the practice of polygamy. American opinion-makers had already found Mormonism anathema, but soon a nucleus of ardent antipolygamists formed and waged political war against polygamy for two generations.

Gordon combines historical narrative with impressive religious, literary, political, and constitutional analysis. She traces how several influential antipolygamy novels of the 1850s fueled support for the first antipolygamy legislation, the Morrill Act of 1862. Lacking enforcement provisions, however, it was largely ineffectual. Following the Civil War, Northern reformers pursued Reconstruction in the South, but strong Southern resistance channeled the waning energies of abolitionism into antipolygamy and other reforms. Abandoning Reconstruction, reformers renewed efforts to subjugate polygamous Utah. In 1874, federal prosecutors convicted George Reynolds of polygamy under the Morrill Act. In 1876, Reynolds appealed to the Supreme Court.

For Gordon, these events are prelude. In Part 2, she describes how the battle shifted to the courts and constitutional considerations of faith, religion, marriage, the limits of tolerance, and the proper scope of the criminal law. In the *Reynolds* decision (1878), the Supreme Court upheld the Morrill Act

from legal challenges that it violated the religious liberty clause and that it invalidly extended federal power over domestic relations, an area of traditionally local control. Reignited, antipolygamists introduced new legislation. The Edmunds Act of 1882 excluded all Mormons in Utah from grand and petit juries and eased the burden of proof for prosecutors by criminalizing "unlawful cohabitation." Sensing that these measures were inadequate, reformers like Kate Field challenged Congress to dismantle the "Mormon Monster" by applying "the dynamite of law" to "blow up Mormon polygamy and the power of the [Mormon] church" (p. 160). The Edmunds-Tucker Act of 1887 did exactly that: It treated plural wives as fornicators, revoked women's suffrage in Utah, revoked the corporate charter of the Mormon church, and escheated extensive church property to the federal government. In *Late Church of Jesus Christ of Latter-day Saints v. United States* (1890) the result seemed largely preordained. In a 6-3 decision, the majority upheld all of the punitive measures of the act while the dissent merely objected that the legislature had usurped a power, escheat, traditionally reserved to the judiciary.

Meanwhile, other legislation effectively disenfranchised all Mormons in Idaho. To vote, each male of legal age had to deny affiliation with Mormonism, even if, like most Mormons, he was monogamous. In *Davis vs. Beason* (1890), a unanimous Supreme Court upheld the government position, noting that the free exercise clause was bounded by the concept of "general Christianity" and the recognition that legislatures could criminalize those acts "recognized by the general consent of the Christian [i.e., Protestant] world in modern times as proper matters for prohibitory legislation" (p. 227). The logic seemed airtight, even if it has taken decades to recognize that the jurisprudential premises were faulty.

Gordon has written an important study. She deserves praise for the broad swath of sources she has considered, the breadth of her inquiry in religious, social, political, economic, and constitutional arenas, and the balance she brings to her interpretation of a still controversial area. It will be required reading for students of American reform movements; constitutional law, particularly First Amendment issues; religion in America; and Mormon studies.

Some final comments are in order regarding areas tangential to Gordon's study. Examining the fate of Native Americans under the Dawes Act of 1887, it is noteworthy that disincorporation and escheat, the legal tools deployed against the Mormons, were likewise wielded against Indian tribal governments on reservation lands. A comparison to African-Americans is also instructive. Busy dismantling Mormon polygamy, reformers

ignored the plight of ex-slaves while Jim Crow laws heaped new legal, political, and social disabilities on them. These efforts were approved and even encouraged in *Plessy v. Ferguson* (1896), which enunciated the infamous "separate but equal" doctrine. How nineteenth-century lawmakers treated these minorities deserves further study. Still, in terms of protecting individual rights, it is hard not to conclude that the Dawes Act (1887), *Davis v. Beason* (1890), and *Plessy v. Ferguson* (1896) form the triple relics of legal barbarism from nineteenth-century America.

Robert H. Briggs
Fullerton

Broken Trusts: The Texas Attorney General Versus the Oil Industry, 1889–1909, by Johnathan W. Singer. College Station: Texas A&M University Press, 2002; 334 pp., illustrations, appendix, glossary, notes, bibliography, index; \$49.95, cloth.

Jonathan Singer's work is as complete a look at the workings of early antitrust enforcement as is possible for a text that remains fully accessible. If Singer's intended audience is the layperson or the lawyer or student who has not practiced or studied in the antitrust realm, the author's careful explanation of the litigation will be appreciated. All will enjoy the portraits that Singer draws of the personalities involved, as well as his insight into the politics of a legal regime that is so fundamentally intertwined with our free-market experiment.

This book comes out at a good time. Shifting tides of public opinion away from the importance of antitrust represents a return to the antipathy that some felt toward Texas' early efforts to implement laws controlling business practices of Standard Oil and associated entities. Singer notes the problem that, on the one hand, without monopolist (and Standard Oil affiliate) Waters-Pierce Oil Co., "most Texans would literally have been in the dark," while on the other hand, the cost to consumers of Waters-Pierce's monopoly was extraordinary. Might one have said the same twenty-five years ago about AT&T, or the same today about Microsoft? Singer shows that many hard questions being asked by antitrust policymakers today were present at the turn of the prior century.

Singer discusses the criminal charges of conspiracy to monopolize and restrain trade, price fixing (and its flip-side, limiting production), and predatory pricing that Texas brought against Waters-Pierce. Although the author does not purport to assess the factual accuracy of the claims, his editorializing

does make clear his view that the enforcement effort was warranted and deserved support. What I take away from the chapters on the early litigation is mostly an appreciation for the amount of change that has occurred in the one hundred-plus years of antitrust analysis. The charges had no apparent grounding in economic analysis, the primary driver of antitrust prosecutions today. Also, only price fixing would be prosecuted criminally today.

We can only hope that the treachery of Senator Bailey, who, according to Singer, was probably bribed or at least heavily persuaded to help Waters-Pierce reestablish its presence in Texas, has no current parallels, although attempts at influence by members of Congress on the federal enforcement agencies (recall Senator Hollings' hijacking in 2002 of the FTC budget) may not be a far cry. If Bailey was acting under a bribe, his conduct is abhorrent, but it appears just as likely that it was mere stupidity on the part of Texas Attorney General Smith and Secretary of State Hardy that permitted Waters-Pierce to reincorporate, swear its lack of affiliation with Standard Oil, be granted a new business license, and resume the identical business practices that had been found illegal.

Waters-Pierce's revival demonstrates the tragedy of executive enforcement of antitrust. When investigation and litigation almost necessarily outlast the administration that initiates the enforcement—in the case of Texas' first prosecution of Waters-Pierce, the replacement of enforcement-minded Attorney General Crane with Smith—shifting tides of political opinion prevent consumers from realizing the result of years of enforcement efforts. This reviewer believes the pattern has been repeated at the federal level: In my opinion, after the District of Columbia Circuit vindicated Joel Klein's pursuit of Microsoft, the watered-down consent agreed to by Charles James' Antitrust Division lacks significant consumer protection.

Later litigation against Waters-Pierce also resulted in guilty verdicts, which, Singer reports, had longer-lasting effect. Other aspects of this litigation deserve comment. The county attorney was remunerated on a contingency-fee basis—an incentive encouraging county attorneys to investigate and prosecute antitrust violations. In the litigation there had also been three special counsels, reminiscent of the Department of Justice's decision to bring in David Boies to try the case against Microsoft. The success of the prosecution spawned coordinated enforcement efforts between several states, a practice that is common and vital to state enforcement today. Finally, a result of the successful prosecutions was Standard Oil's decision to build a refinery in Louisiana rather than Texas. If anything, this demonstrates the need for federal enforcement,

since states do not enjoy the jurisdictional reach to effect real change in the operations of national and international actors.

Singer's book is too densely packed with interesting reading to do it justice in a brief review. As an antitrust practitioner, I greatly enjoyed the historical look at this body of law. Although a casual reader might complain about the occasional effort required to wade through the fact-intensive narrative, I reiterate that the book can and should be enjoyed by all.

Max Huffman
Washington, D.C.

The Modern Presidency and Civil Rights: Rhetoric on Race from Roosevelt to Nixon, by Garth E. Pauley. College Station: Texas A&M University Press, 2001; 264 pp., notes, index; \$39.95, cloth.

Brave words from the White House on race relations have always been the exception rather than the rule. "I was not inclined to express my sentiments on the merits of the question," George Washington said when Benjamin Franklin and a handful of Quakers presented an anti-slavery petition, and that silence was among the precedents established by the first president. With the obvious exception of Abraham Lincoln and a surprisingly few words from the Reconstruction Era presidencies, not until the second year of Harry S. Truman's presidency did brave words threaten to become something other than the exception. But the comfort of Washington's avoidance dominated the Eisenhower and Kennedy administrations until the force of the modern civil rights movement forced those two Oval Office occupants to do the right thing. If Lyndon B. Johnson needed no prodding to make his promise ("we shall overcome"), Richard M. Nixon adopted a race-baiting "Southern strategy" that became a model of sorts for other presidential candidates. Ronald Reagan opened his 1980 campaign at the Neshoba County Fair in Philadelphia, Mississippi, by declaring that he supported states' rights. The Neshoba Ku Klux Klansmen who lynched civil rights workers Michael Schwerner, James Chaney, and Andrew Goodman in 1964 and buried their bodies under twenty feet of Mississippi mud supported states' rights, too. In 1988, Reagan's vice president, George H.W. Bush, placed the great taboo of American race relations (the Black man who raped the white woman) at the center of his campaign in the person of Willie Horton.

Garth Pauley's study of White House rhetoric on race focuses on four examples of an obviously less opportunistic

and arguably braver sort: Truman's address to the National Association for the Advancement of Colored People (1947); Eisenhower's remarks following the school integration crisis at Little Rock, Arkansas (1957); Kennedy's words declaring civil rights a moral issue after demonstrations in Bull Connor's Birmingham and after Alabama Governor George Wallace made good his pledge to stand in the schoolhouse door (1963); and Johnson's call for voting rights legislation during the bloody Selma, Alabama, demonstrations (1965). The study includes analyses of each president's private and public views on racial justice, the context in which the words of the four addresses were written and spoken, and public reaction. Conclusions are solid if predictable. Truman made "civil rights a part of the presidential vocabulary"; Eisenhower demonstrated that the rule of law would prevail; Kennedy launched the Second Reconstruction; and Johnson "summoned the nation to leave behind its racist past."

The Modern Presidency and Civil Rights, which began as a doctoral dissertation, is especially solid for a first book and will no doubt remain for some time a definitive source for the four presidential addresses examined. What the book lacks is an aggressive and imaginative theme, and a structure that transcends a specific academic discipline (in this case, speech and communication). Such criticism might seem unfair, given that the volume is part of the publisher's series on presidential rhetoric. And the author certainly identifies timeless issues: "a disjunction between rhetoric and action, a dispute about the value of talk itself, a debate about the timing of presidential discourse, and a disagreement about the saliency of civil rights as a problem." Nonetheless, weakness on the thematic front will push this fine book to that place where so many academic press books reside. A place for other experts to mine for nuggets in the hope that they might push the story along by writing their own books.

Kenneth O'Reilly
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Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900, by Maria E. Montoya. Berkeley: University of California Press, 2002; 299 pp., illustrations, bibliography, index; \$50.00, cloth.

In the waning years of Mexican rule in New Mexico, Governor Manuel Armijo granted to Carlos Beaubien and Guadalupe Miranda a large tract of land in the northeast corner of the province. This grant, made in 1841 and later known as the

Maxwell Land Grant, encompassed 1.7 million acres. In no time at all, the grant was the subject of litigation and controversy: The litigation lasted fifty years; the controversy continues today. *Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840–1900* is the story of both the litigation and the controversy from 1840 to 1900.

The high plains and the eastern slopes of New Mexico's Sangre de Cristo Mountains were, by the early 1800s, the home of the Jicarilla Apache and the Ute tribes. By 1841, Hispanic settlers had begun to move into the area. After the United States' victory in the Mexican American War of 1848, Lucian and Luz Maxwell came—through purchase and marital connections—to own the entire Maxwell Land Grant. Thereafter, Anglo-Americans began to mine and settle on the grant. Thus, by the early 1850s, the Maxwell Grant was the scene—in microcosm if you will—of virtually all of the competing and conflicting interests common to the settlement of the American West: an influx of newcomers seeking to either sustain or enrich themselves on agriculture, mining, timber, and cattle ranching. All of this occurred in the context of contested land ownership and displacement of a previous population.

Maria Montoya's goal in *Translating Property* is to describe how the U.S. legal system "translated"—or failed to translate—the cultural, social, political, and legal complexity that existed on the Maxwell Grant—both Mexican and American—into a predominantly American context.

The book presents the history in roughly chronologically order. Chapter 1 discusses the early encounters on the grant between vying ethnic groups with differing property use systems. Chapter 2 examines how "Mexican married women and 'peones' defined their property and labor relationships on this Mexican frontier prior to U.S. occupation in 1848" (p. 15). Chapter 3 reviews how the land grant changed when it was sold by the Maxwells to the Maxwell Land Grant and Railway Company, an English corporation, in 1870. Chapter 4 examines the conflicts—often violent—between residents on the grant itself. Chapter 5 "returns to the familiar theme of law and property" (p. 17) and climaxes with a discussion of the U.S. Supreme Court's 1887 decision validating title of the entire 1.7-million-acre grant in the Maxwell Land Grant and Railway Company. Chapter 6 looks at the aftermath of that decision. "Translate" is defined by *Shorter Oxford English Dictionary* (5th edition, 2002) as "turn from one language into another; express the sense of in another language." It is also defined as "change in form, appearance, or substance." In law, "translation" is defined as "a transfer of property." Hence, Montoya

has chosen a title that not only describes her work, but reflects the nuances of her topic as well.

It is widely recognized, and has been since at least Blackstone, that the legal protection of property rights has the important economic function of creating incentives to use resources efficiently. As has been pointed out by authors far more learned than this reviewer, there are three criteria for an efficient system of property rights. The first is sometimes called "universality"—the need for property to be held in universal forms. The second criterion is "exclusivity," and the third is "transferability."

For all intents and purposes, the need for universality does not exist in a frontier environment. Resources are still so plentiful that everyone can consume as much as he or she wants without reducing consumption by another. Thus, issues of efficient use either do not arise or are relatively insignificant. In essence, the cost of creating or enforcing property rights exceeds the benefits to large numbers of individuals, so the rights are not created or not enforced. Eventually, the frontier environment (for lack of a better term) recedes, and universality becomes an economic necessity.

Once the need for universality begins—that is to say, once competition for resources becomes significant—the second criterion for an efficient system of property rights, exclusivity, comes into play and along with it the third criterion, transferability, commonly called alienability in the language of property law.

Translating Property is, in many ways, a discussion of the second of these three criteria for economic efficiency—exclusivity—and how foreign that concept was to the early inhabitants of the Maxwell Grant. While ultimately the Maxwell Grant was itself "translated" (in the legal sense) to new owners (and a new culture), the original "language" or culture of the property was itself lost in translation.

Montoya acknowledges a debt to "world system analysis" in two footnotes (p. 222, fn. 13; p.223, fn. 16). The weakness of world system analysis is that it does not explain regional or even national variances that account for the widely different political and economic successes that existed in pre-modern Europe (which forms much of the historical testing ground for world system analysis). Furthermore, world system analysis is based on a colonial model or understanding of capitalism that is fundamentally wrong. It is the creation and enforcement of a certain set of property rights—those rights necessary to create and enforce the concepts of universality, exclusivity, and transferability—that create economic growth. Montoya's debt to world system analysis seems misplaced. Although

some interesting similarities exist, for example, between the history of the Maxwell Land Grant and the enclosure movement in England beginning in the sixteenth century, the clash of cultures and races in the frontier context of the Maxwell Grant make this a very different topic—a fact Montoya herself points out. Certainly the frontier retreated as the economic possibilities of the Maxwell Grant were incorporated into the growing American economy. Incorporation theory seems a much more accurate description of the author's approach to her topic, an approach that Montoya also acknowledges has influenced her work (p. 10).

Portions of the book's introduction and conclusion have the ring of a court brief (which is not surprising since the author's interest in this topic is personal and was encouraged by being hired to do historical research in a pending court case involving another land grant). However, even though the introduction and conclusion seem slightly out of sync with the substance of the work, the bulk of the book is a well-rounded and thoroughly researched discussion of an important topic. Excellent illustrations and maps add to the readability of the book.

Translating Property is a pleasure to read not only because it is well written, but also because it is a welcome addition to the history of the American West and because it is a fine example of the intersection of law and history.

Hon. Karsten H. Rasmussen
Eugene, Oregon

The Renhquist Court and the Constitution, by Tinsley E. Yarbrough. New York: Oxford University Press, 2000; 306 pp., notes, index; \$35.00, cloth.

Whether out of personal conviction or political expediency, presidents generally view appointments to the U.S. Supreme Court as a means of assuring and perhaps enhancing their political, social, and economic legacy. Of particular note, Franklin Roosevelt made efforts to establish a Court sympathetic to his social and economic policies; of course, later presidents, namely Ronald Reagan, George H.W. Bush, and Bill Clinton, were no different in their approaches toward Supreme Court appointments.

Tinsley Yarbrough points out that President Reagan envisioned a Court that would be willing to repudiate earlier Courts, especially the Warren and Burger Courts' human rights legacy as well as decisions that expanded the reach of individual liberties. The result has been a Court with a gener-

ally conservative bent and an essentially mixed record on civil liberties. The author notes that the Rehnquist Court has continued the campaign of retrenchment in criminal justice cases begun in the Burger Court era, extending broad deference to governmental agencies in areas of search and seizure and Miranda advisements, and continuing to affirm and support the scope of the death penalty. Yarbrough also focuses on the two Clinton appointments and their impact on the process and rulings of the Court. He points out how these two justices differ in their approaches from the conservative Reagan and Bush appointees, describing Justice Ginsburg and Justice Breyer as moderate legal pragmatists.

An early entry in a spate of recent articles and books regarding the Rehnquist Court, this publication reviews the Court from its creation to its recent decisions. It also discusses differences within the Court itself. As the author explains in the preface, the book examines "decisional developments on the Rehnquist Court" but focuses "on the doctrinal trends and constitutional law on the Court, the forces of continuity and change, the positions of the justices on specific constitutional issues, and their competing conceptions of the proper role of judges in constitutional adjudication." The history of the various judicial selections and the thumbnail but insightful view of the Senate confirmation proceedings provide a signpost of the justices' later rationales and holdings on various issues.

Emphasizing the changing and "ascendant conservative majority," to use Yarbrough's phrase, may not correctly define the extent to which the Rehnquist Court has ardently and effectively neutralized or abridged decisions of earlier, more liberal Courts, thus fulfilling the goals of both Ronald Reagan and George H.W. Bush. Yarbrough presents this examination cogently through a series of sections that deal with the major aspects of the Court's rulings on constitutional law.

Brief biographies of the justices, including their confirmation hearings, give an overview of their judicial philosophies. Chief Justice Rehnquist himself comes under scrutiny for his political activities on behalf of the Arizona State Republican Party in the early 1950s, sometime after his clerkship with Justice Robert Jackson, where his legal memos clearly foretell his future willingness to challenge the status quo. It can hardly escape notice that this exceptional Stanford Law School graduate was expected to stem the liberal tendencies of the Warren and Burger Courts, first as a 1971 Nixon appointee and later as Reagan's 1986 nominee for chief justice. To be sure, the process on both occasions was controversial. The author quotes senators and witnesses who used Rehnquist's early memos, especially those dealing with *Brown v. Board of*

Education and the landmark school cases that followed it, to question his attitudes toward the Warren Court. Yarbrough points out that Rehnquist lamented that the Warren Court read its own sociological views into the Constitution on desegregation and adopted "the position palpably at variance with the precedent and probably with legislative history." Inferring that the past is prologue and that both sides in the confirmation process correctly gauged the outcome, the author proceeds to explore Rehnquist's rulings in various areas such as governmental powers, religious clause cases, privacy rights, criminal justice, and equal protection, to name a few.

The chief justice is not the only member to be scrutinized here. Yarbrough covers in some detail the confirmation hearings of Justices Scalia, Thomas, Ginsburg, Kennedy, and O'Connor, as well as the media coverage of several nominees who were advanced or whose nominations were withdrawn or, in a few cases, rejected. The author uses the historical pattern developed by each to demonstrate the changes that took place during the period covered. Incisive analysis of the cases decided by the Court could be foreseen on several occasions, but then again, as Yarbrough reveals, there are instances where the policies that Rehnquist advocated fifty years ago are now stated as decisional law. The author is particularly adroit at characterizing the polarity of views on the Court and focuses on the few justices who provide the swing votes.

Recent opinions of the Rehnquist Court, decided since this book was published, only lend further credence to the belief that "the past is prologue." Yarbrough's book is timely for its purposes, extensive in its coverage, and well worth reading.

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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.

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