

# WESTERN LEGAL HISTORY

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*Cover Photograph:* Anaconda Old Works in 1885, with  
two children seated in the foreground. The smelter  
effluents devastated water quality from its inception.  
(Courtesy of the Montana Historical Society, Helena)



# "80 PERCENT BILL," COURT INJUNCTIONS, AND ARIZONA LABOR: BILLY TRUAX'S TWO SUPREME COURT CASES

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ASTRID J. NORVELLE

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D uring an ugly 1916 labor dispute in the flourishing southern Arizona copper town of Bisbee, union handbills accused restaurateur Billy Truax of instigating both "injunction petitions and 80 percent law fights." The union men were old foes of Truax. Many nursed leftover grudges growing out of Truax's perceived role in organized labor's legal defeat in *Truax v. Raich* (1915).<sup>1</sup> In the *Raich* decision, the U.S. Supreme Court overturned a union-sponsored Arizona initiative known commonly as the 80 percent law. Its numerical quotas favored the hiring of American citizens over alien competitors who might, union men feared, work for lower wages and take jobs from citizens.

Less than a year after this defeat for labor, Truax antagonized the union men again. On April 9, 1916, he attempted to increase his unionized staff's hours of work, while cutting wages. The enraged Bisbee Cooks' and Waiters' Union struck his English Kitchen restaurant. Truax turned to the courts for an injunction to halt a boycott and disruptive union picketing. With the landmark *Truax v. Corrigan* (1921), the Supreme Court killed Arizona's anti-injunction statute, a second legal loss for organized labor in the first years of Arizona statehood.<sup>2</sup>

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<sup>1</sup>*Truax v. Raich*, 239 U.S. 33.

<sup>2</sup>*Truax v. Corrigan*, 257 U.S. 312.

Union men clearly understood that the two contested Arizona statutes, not the petty restaurant squabbles, ultimately formed the true crux of their feud with the man they labeled the "arch enemy of organized labor" and "80 percent Bill." Bisbee's local newspaper characterized the quarrel surrounding *Truax v. Corrigan*, the injunction fight, as "one of the bitterest labor disputes in the history of the state."<sup>3</sup>

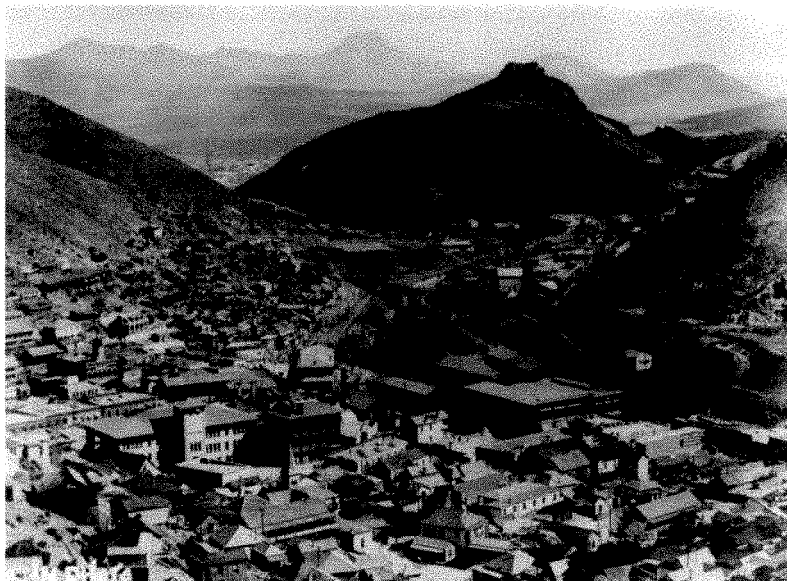
Nearly a century later, the Truax name endures in the two still-cited legal decisions, while Billy Truax himself has slipped into the same historical obscurity as other once-prominent Bisbee restaurateurs. He emerges as little more than a cardboard figure in the terse case particulars. Yet few people reach the legally exalted heights of the U.S. Supreme Court once—twice is rare indeed. Who was Billy Truax? Why did he face off with organized labor, not once but twice, at a troubled juncture in Arizona labor-management relations? If the two statutes favored labor over management, why were the cases fought by small businessman Truax and not by Arizona's great copper corporations in what was surely a copper fiefdom? These giants had hundreds of men on their payrolls, an uneasy relationship with organized labor, greater monetary resources, and, surely, a greater stake in overturning the two unwelcome laws. Truax's enemies vehemently claimed that he was a willing stand-in for big copper. Was there evidence for their accusations?

An attempt to answer these questions reveals a simple profile of Truax's colorful life—sketched from known actions, pried from newspaper accounts, public documents, legal transcripts, and the brief comments of his contemporaries. The largest amount of information is available from his Bisbee days because of the court fights and because he returned to Bisbee consistently over a twenty-year period.<sup>4</sup>

Billy Truax lived the meaningful parts of his life in mining towns whose names reverberate in mining lore to this day: Leadville, Aspen, Cripple Creek, Jerome, and, finally, Bisbee. In youth, he worked for other men as a waiter and cook; in maturity, he became proprietor of his own eating houses. Discarding his blue collar origins, he trailed his miner customers to new boomtowns as old strikes went bust. The mining

<sup>3</sup>"Supreme Court Rules Statute Can Not Stand," *Bisbee Daily Review*, December 20, 1921.

<sup>4</sup>No Truax diaries, personal or family papers, or even extensive reminiscences from acquaintances have yet turned up to flesh out a biography in depth. While photographs of Billy and his restaurants may exist, they have not, as of this writing, been found.



Bisbee, Arizona, 1905 (Courtesy of the Arizona Historical Society/  
Tucson, AHS no. 56120)

West's labor troubles form a backdrop to Truax's nearly forty years feeding the shifting populace of a succession of mining camps. Mining created a world of inherent economic insecurity, with an increasingly uneasy stew of nationalities. Struggling unions held goals that too seldom jibed with the profitability of mining corporations and their sometimes absentee owners. In these years, in these places, Truax chose sides. In copper Bisbee in the brand-new state of Arizona, he took on organized labor and its tenuous achievements in the legislature and with the ballot.

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### TRUAX AND THE MINING WEST

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Billy Truax was, in many respects, an opportunist. He churned around in the West with a variety of other folk seeking livings or even fortunes as each newly heralded bonanza haphazardly became another in what historian Rodman Paul has described as "a series of frontiers."<sup>5</sup> The "concentrated popula-

<sup>5</sup>Rodman W. Paul, *Mining Frontiers of the Far West, 1848-1880*, rev., exp. ed. by Elliott West (New York, 1963), 11.

tions" of wage-earning miners servicing increasingly industrialized mines drew ambitious merchants like Truax to satisfy miners' needs for food, shelter, and entertainment in unstable, jerry-built mining communities whose urban character differed from "the more-dispersed, rural pattern of settlement in farming and ranching."<sup>6</sup> If the mineral bonanza was short-lived—and so many were—the camp faded swiftly because few of its boomers or boosters sought a rancher's or farmer's roots in the land. Transient prospectors and merchants came "quickly and recently, and they could leave in just as short order."<sup>7</sup> Truax was one of these. He fed miners in Colorado's Leadville, Aspen, and Cripple Creek, in Arizona's Jerome and Bisbee, and even, very briefly, in the ephemeral Sylvanite in southern New Mexico. Truax's longest ties were with Bisbee, blessed with stable copper ores.

Billy Truax was native-born and could trace his ancestry to early colonial North America.<sup>8</sup> He went by the given name William, or more generally Billy, during his active years, but, curiously, his proper name, the one recalled for his death certificate, was "Warren." He was born in Kalamazoo, Michigan, in May 1857.<sup>9</sup> It was the year of the devastating national Panic of 1857, not a particularly auspicious year for those on the economic margins. The failure of the monetary system in the economic collapse hit the Great Lakes states particularly hard and was followed by disruptions from the Civil War.<sup>10</sup> Whether the Truax family was pushed from a sluggish Michigan or pulled away by opportunities in developing Colorado, the family, or at least part of it, was drawn westward to Denver, then flourishing at the heart of the great central expanse of American "desert" stretching from the Missouri River to the Rockies. This once-overlooked region was being

<sup>6</sup>Patricia Nelson Limerick, *Something in the Soil* (New York, 2001), 215–16.

<sup>7</sup>Daniel J. Boorstin, *The Americans: The National Experience* (New York, 1965), 97.

<sup>8</sup>Anthony L. Blair, "The Truax Family: A Microcosm of American Colonial Life" (master's thesis, Shippensburg University, 1993), 1. The Truax surname is one of the first European family names on American soil. Philippe de Trieux, a Flemish Huguenot and dyer by trade, immigrated to Manhattan in 1624 under the protection of the Dutch West India Company. The spelling and pronunciation of Trieux was subsequently anglicized to Truax, or, as a variant, Truex.

<sup>9</sup>State of California, Department of Health Services, "Standard Certificate of Death 39-015606, Warren E. Truax, filed Mar. 9, 1939" (copy, October 21, 2005, in author's possession)[hereinafter cited as "Certificate of Death 39-015606"].

<sup>10</sup>James L. Huston, *The Panic of 1857 and the Coming of the Civil War* (Baton Rouge, 1987), 262.

"rethought as the vital core of a rising empire."<sup>11</sup> Founded in 1858, Denver created itself as the regional center of this inland empire in ten short years, dominating the region's transportation, communication, and financial systems while nearby mining camps "boomed and busted."<sup>12</sup>

These Truaxes probably reached Denver by at least 1870. Newspaper records itemize some school accomplishments of a young W. Truax.<sup>13</sup> The *Denver City Directory* for 1876 lists the family on 15<sup>th</sup> Street, an area that would be, during all of the twentieth century, the heart of what is called "the hub" or "downtown Denver." William (Billy)/Warren Truax's death certificate gives his father's name as George Truax, born in Canada, and his mother as Pauline Sargent, born in Vermont.<sup>14</sup> Family members took up blue-collar occupations. George E. Truax worked in 1876 as a hostler; David as a yardman; James W. as a plasterer. Young Warren E. Truax took up relatively unskilled work as a waiter, joining the unsung "army of waiters and waitresses who 'slung hash' all over the West in nameless thousands."<sup>15</sup> He remained in the culinary trades through his last restaurant in 1929.<sup>16</sup> Sometime in the next few years the name Warren somehow became William, and, more familiarly, Billy. Frank Wentworth, a future acquaintance from Aspen, recalled Truax some fifty years later as a tall man, wiry and red-haired.<sup>17</sup>

With restaurant experience to peddle, young Billy Truax set out from already-civilized Denver, heading for the developing mining frontier. He joined other American-born hopefuls and a growing number of recent immigrants in Colorado's flourishing new boomtown, the 10,200-foot-high Leadville. Its tiny population of 200 or so in 1877 had exploded to at least 14,820 by 1880 when Truax was enumerated by census takers as William E. Truax for the national census. He volunteered his

<sup>11</sup>Elliott West, *The Contested Plains: Indians, Goldseekers and the Rush to Colorado* (Lawrence, KS, 1998), 318.

<sup>12</sup>Kathleen A. Brosnan, *Uniting Mountain and Plain: Cities, Law, and Environmental Change along the Front Range* (Albuquerque, 2002), 10.

<sup>13</sup>For example, see "Names of those who have been correct in recitations and deportment . . .," *Rocky Mountain News*, February 7, 1870. <http://gunnison.aclin.org/APA26136/>

<sup>14</sup>"Certificate of Death 39-0150606."

<sup>15</sup>Mary Lee Spence, "They Also Serve Who Wait," *Western Historical Quarterly* 14:1(January 1983): 5.

<sup>16</sup>*Denver 1876 City Directory*, transcribed by Rita Timm, April 8, 1999. <http://ftp.rootsweb.com/pub/usgenweb/co/denver/directories/den76tz.txt>

<sup>17</sup>Frank L. Wentworth, *Bisbee with the Big B* (Iowa City, 1938), 35.

age as 23, birthplace as Michigan, marital status as "single," and occupation as "cook."<sup>18</sup> Circumstantial evidence suggests that he may already have taken up prospecting, a steadfast sideline for much of his later life.<sup>19</sup> No longer waiting tables, he earned a more certain income cooking at the Tontine and Delmonico. Cooks earned between \$65 and \$200 a month producing "square meals" which sold for 25, 35, or 50 cents.<sup>20</sup> During the months preceding Leadville's first labor strike in 1880, underground miners earned \$3, or \$3.50 when working in wet places, per ten-hour day.<sup>21</sup> For a six-day work week, then, a miner might earn \$72 to \$84 per month. At the lowest wage of \$65, even a novice cook could earn wages safely aboveground which approached those paid the men laboring in the dangerous, dirty world under the earth.

Truax and many contemporaries among merchants on the mining frontier took their chances with an independent life aboveground, opting to "mine the miner," as the saying went, rather than dig underground. Ambitious early comers preempted prime commercial opportunities offered by booming Leadville. And in 1880 it was already "as big as the Comstock Lode's Virginia City and Gold Hill combined . . . with twenty-eight miles of streets, gas lights, a water works, thirteen schools, five churches, three hospitals, fourteen smelters, and about thirty producing mines."<sup>22</sup> Culinaries like Truax could seek work in thirty-one restaurants and 120 saloons "where one might also catch a bite."<sup>23</sup> Tidings of newly found silver soon lured him away, over the mountains to the (temporarily) less developed Aspen.

Tucked into the magnificent Roaring Fork Valley some forty miles distant from well-established Leadville, infant Aspen boomed on the heels of a silver discovery with the "potential of wealth beyond dreams."<sup>24</sup> Typical of the speed with which

<sup>18</sup>U.S. Bureau of the Census, *Tenth Census* (1880), "Colorado, vol. 3: Jefferson Co., Lake Co., La Plata Co.," 314.

<sup>19</sup>"*State Mining: Extracted from Exchanges*," *Colorado Miner* (Georgetown, Clear Creek County), May 1, 1880.  
<http://www.coloradohistoricnewspapers.org/APA26300/>

<sup>20</sup>Don L. Griswold and Jean Harvey Griswold, *The Carbonate Camp Called Leadville* (Denver, 1951), 210–11.

<sup>21</sup>Vernon H. Jensen, *Heritage of Conflict* (Ithaca, 1950), 21.

<sup>22</sup>Paul, *Mining Frontiers of the Far West*, 128.

<sup>23</sup>Joseph R. Conlin, *Bacon, Beans, and Galantines* (Reno and Las Vegas, 1986), 144.

<sup>24</sup>Malcolm J. Rohrbough, *Aspen: The History of a Silver-Mining Town, 1879–1893* (Boulder, CO, 2000), 41.



rough camps were transformed, the once primitive, tiny Aspen of 1881 was a prosperous, well-developed city where people worked for wages when the first train chugged into sight in November 1887. As a measure of that change, by 1888 "the single most powerful economic force in Aspen . . . was a corporation with its headquarters on Wall Street in New York City."<sup>25</sup>

Sometime between 1881 and 1886, Truax crossed the high mountains between Leadville and Aspen. No longer laboring for other men's wages, he was co-proprietor of Aspen's La Veta Restaurant by February 1886.<sup>26</sup> That year a mentally disturbed Colonel Thomas Duffy, a Leadville "old-timer" and Aspen publisher, viciously attacked Truax with a knife, ostensibly because of Truax's pursuit of Duffy's unpaid food bills. According to a newspaper account, Duffy engaged in "cutting and slashing in a terrible and ferocious manner," causing several long gashes on Truax's face, one cut almost severing the tip of his nose.<sup>27</sup>

Truax recovered, although he must have carried the scars to his death almost forty-five years later. An independent businessman since at least 1886, he appears in the Aspen city directories for 1892 and 1893 as proprietor of the English Kitchen Restaurant on Galena Street.<sup>28</sup> Up-and-coming citizen Truax represented Precinct B at Aspen's 1889 Republican convention.<sup>29</sup> He now possessed, or was acquiring, the successful restaurant man's memorable "presence," with the facility to portray the "genial host" so frequently described by the newspapers of the period. More than forty years afterward, Frank Wentworth, his friend from these Aspen days, mused, "And who of the old timers from Aspen does not recall Billy Truax, proprietor of the English Kitchen, a famous old time Aspen restaurant? Lest the waiters neglect some diner, about once in so often Billy would come down the long line of tables with cheery inquiry, 'Piece of pie, or sumpin' else?'"<sup>30</sup>

<sup>25</sup>*Ibid.*, 160-61.

<sup>26</sup>Advertisement for "La Veta Restaurant," *Aspen Daily Times*, February 7, 1886. <http://www.coloradohistoricnewspapers.org/APA26300/>

<sup>27</sup>"Tom Duffy's Bad Break," *Leadville Daily Chronicle*, December 16, 1886, May 9, 1887. <http://www.coloradohistoricnewspapers.org/APA26300/>

<sup>28</sup>Listings communicated by Erin McMillan, registrar, Aspen Historical Society, e-mail message to author, July 16, 1999.

<sup>29</sup>"The Republican Convention," *Aspen Weekly Times* (Aspen, Pitkin County), October 26, 1889. <http://www.coloradohistoricnewspapers.org/APA26300/>

<sup>30</sup>Wentworth, *Bisbee with the Big B*, 35.

Truax's livelihood depended on the shaky, silver-driven prosperity of Aspen and the West. Amid a continuing agricultural depression on the Great Plains, the price of silver fell in 1887, 1888, and 1889. Even the Sherman Silver Purchase Act of 1890 failed to halt permanently the fall of silver prices, and new wage cuts in western mines generally caused "widespread lockouts and strikes in the bitterest and most violent mining war the West was yet to see," one that would last more than a decade.<sup>31</sup> The Sherman Act's silver-purchase subsidies became a scapegoat of conservatives and supporters of the gold standard as economic conditions worsened. National and international financial events triggered a nationwide economic depression that reached Truax's Aspen home in late June 1893. The town was devastated as its silver became virtually unsellable. Miners were laid off. Aspen's mining workforce "dropped from 2,250 men to 150."<sup>32</sup>

Aspen and Leadville miners and merchants made haste to the Cripple Creek district southwest of Pike's Peak after the silver market collapsed. Gold, not silver, fueled a boom under way since 1891 around Cripple Creek. In fact, a former Aspenite observed, "Every other person you meet is either from Leadville or Aspen. Nine of our best business houses are conducted by Aspen merchants."<sup>33</sup> Billy Truax was among them by at least 1896, with a restaurant in Victor, on Battle Mountain.<sup>34</sup> During this period he began to settle his family in California.

Truax had married sometime after claiming single status in the 1880 census, but before the birth of his son, William, Jr., around 1883. Margaret Truax, his wife, suffered from ill health of a serious enough nature that in 1906 she was feared to be sinking into permanent invalidism.<sup>35</sup> Margaret and their daughter Mamie eventually made a home in Los Angeles. It was a second home (and prudent haven in difficult times) for William, Sr. and William, Jr.<sup>36</sup> William, Jr. attended school in

<sup>31</sup>Richard E. Lingenfelter, *The Hardrock Miners: A History of the Mining Labor Movement in the American West, 1863-1893* (Berkeley, 1974), 196.

<sup>32</sup>Rohrbaugh, *Aspen*, 212, 219.

<sup>33</sup>From *Rocky Mountain Sun*, January 13, 1894, quoted in Rohrbaugh, *Aspen*, 226.

<sup>34</sup>*City Directory, Cripple Creek/Victor* (1896), 497.

<sup>35</sup>"Trip for Health," *Bisbee Daily Review*, March 16, 1906; "Truax Goes to Bedside of Wife," *Bisbee Daily Review*, April 26, 1906.

<sup>36</sup>For example, see "The Wedding of Miss Brady and Mr. Truax," *Bisbee Daily Review*, June 10, 1908.

California. Throughout his nearly twenty-year association with Bisbee, Billy Truax shuttled back and forth between that copper outpost and comfortable Los Angeles. He even settled restlessly in California for extended periods, a pattern evidently set during the Colorado years.

Truax's links with Colorado weakened, even as he and his family put down roots in Los Angeles. By January 1899, he had permanently quit Cripple Creek and Colorado for Arizona. Shifting his attention south and west to the small copper camp at Jerome, Arizona, "Chef Truax" catered the Elite Saloon's 1899 grand opening banquet, serving three hundred guests.<sup>37</sup> Later that year he opened an English Kitchen, proclaiming it the "Best short order . . . House in Jerome."<sup>38</sup> In November Truax upgraded the Kitchen to better quarters, promising Jerome a "first class restaurant."<sup>39</sup> A scant two months later, he had sold this new place. The *Jerome Mining News* announced that Truax had "left his friends and gone to join the innumerable throng now on their way to Cape Nome to ascertain Dame Fortune's intention concerning him."<sup>40</sup> If Truax joined the stampede to Alaska, he was a latecomer even in February 1900.

Now a restaurant veteran, savvy Truax undoubtedly assessed Jerome's limitations quickly.<sup>41</sup> Talking expansively of Nome, he may have sought simply to put the best face on his rapid exit from Jerome, a tough restaurant town. The Jerome newspaper records frequent management turnovers, while advertisements allude to ethnic friction. Entrenched Chinese restaurant keepers probably furnished stiff competition for newcomers. Truax's successor at the English Kitchen, in fact, advertised it as the "Only First-Class White Restaurant in the Camp."<sup>42</sup> Truax was soon spotted in April 1901, down in

<sup>37</sup>"City and County News: The Elite," *Jerome Mining News*, January 9, 1899.

<sup>38</sup>Advertisement, *Jerome Mining News*, October 23, 1899.

<sup>39</sup>"News Items of Local Interest," *Jerome Mining News*, November 20, 1899.

<sup>40</sup>*Ibid.*, February 19, 1900. See also *Experience Jerome and the Verde Valley: Legends and Legacies* (Sedona, AZ, 1990), 188–89, for the subsequent history of the English Kitchen name—surviving long into the next century attached, ironically, to a Chinese-operated restaurant.

<sup>41</sup>J. Carl Brogden, "The History of Jerome, Arizona" (master's thesis, University of Arizona, 1952), 43, 57. Truax knew Jerome as a one-company town, totally dependent on the United Verde, cruder than Bisbee, and "temporary in appearance and point of view."

<sup>42</sup>Advertisement, *Jerome Mining News*, May 7, 1900.

Bisbee, on Arizona's border with Mexico, reportedly with another English Kitchen.<sup>43</sup>

From about 1901 to 1919 Truax operated restaurants off and on in Bisbee. Leadville's story is a classic mining tale of discovery and frenzied growth in the greedy extraction of a valuable metal—in Leadville's case, silver. When Truax served meals at the Fish Pond in 1902, the evolving, still unhealthy and unlovely Bisbee was already a twenty-two-year-old camp, visibly working to achieve the substantiality that adorned Leadville so quickly. Vast copper deposits fueled Bisbee's less spectacular growth. The red metal might be harder to extract and process than silver or gold, but the industrial twentieth century would need plenty of it. Drawn to Bisbee's heady atmosphere of an expanding camp with good prospects for the future, Truax may also have hoped that his wife's health would benefit from Bisbee's relatively low elevation and dry air. Even so, he came to a town that, as it entered the new century, was "by any measure still a dirty, somewhat ramshackle place that more nearly resembled its mining camp past than its urban-industrial future."<sup>44</sup>

Bisbee's small businesses, including most restaurants, were funneled into the flatter bottoms of two intersecting canyons—Tombstone Canyon and Brewery Gulch—out of the way of mine development. Bisbee never matched the simplest definition of a company town: any community that is owned and controlled by a particular company. But there could be no doubt that Phelps Dodge and its Copper Queen clearly dominated the life of the town on many levels.<sup>45</sup> Small merchants operated independent businesses along the two canyons, offering Bisbee residents both daily necessities and amusements: restaurants, groceries, saloons, boardinghouses, banks, department stores, and a red-light district at the top of Brewery Gulch. Most homes were privately owned. In company with schools, churches, and boardinghouses, they crowded one another haphazardly up the steep sides of surrounding hillsides not occupied by mines. It is a charming sight today, but a geographic necessity then, as the town outgrew its supply of flat building sites.

Bisbee's big population leap, from around four thousand in 1899 to about twenty-five thousand in 1918 occurred during

<sup>43</sup>"Items of Local Interest," *Jerome Mining News*, April 20, 1901.

<sup>44</sup>Carlos A. Schwantes, "Introduction," in *Bisbee: Urban Outpost on the Frontier*, ed. C.A. Schwantes (Tucson, 1992), 11.

<sup>45</sup>James B. Allen, *The Company Town in the American West* (Norman, OK, 1966), 6, 47.

Truax's time. The growing population survived extreme heat, devastating fires and floods, and even serious health problems stemming from poor public sanitation. "Garbage was thrown out the back doors of restaurants, the carcasses of dogs and burros occasionally littered even the main streets, and open cesspools contributed to the problem of pervasive stench, flies, and mosquitoes."<sup>46</sup> Two important milestones were the formation of an improvement company in 1900 and city incorporation in 1902. Bisbee undertook to recreate itself with substantial buildings, municipal services (including sanitation), communication, public ordinances regulating commerce and health—all congenial to family life and town permanence. Healthy mines operated at all hours, resembling "a beehive alive with ceaseless movement," creating dirt, noise, offensive smells, ugly landscapes dominated by mining equipment or buildings constructed for use rather than beauty, and a variety of refuse such as slag dumps.<sup>47</sup> Long after the big veins of gold and silver had played out in the West, the industrial apparatus used to extract and process low-grade copper dominated towns like Bisbee both physically and economically.<sup>48</sup>

In Bisbee, Truax slipped naturally into the middle ranges of a developing "economic pecking order organized largely along ethnic lines." It formed a rough pyramid, with a broad base occupied by folk "who had only their own labor to sell," with native-born Americans or western and northern European elements in skilled positions in mines or on the railroads, guarding their tenuous footholds against Mexican or southern and eastern European competition. These workers were particularly targeted in unionization campaigns. At the apex of the pyramid were "the owners and managers of the railroads, copper mines, and land-and-cattle companies," all Anglo-Americans or northern Europeans. In the middle were individuals, merchants like Truax, ranchers and farmers, some of whom constituted non-Anglo-European success stories.<sup>49</sup> Labor historian James Byrkit adds an element of imperialism to the mix, likening copper camps like Bisbee to the "isolated, mercantilistic colonies" of imperial outposts of the British Empire.<sup>50</sup>

<sup>46</sup>Schwantes, "Introduction," 10–11.

<sup>47</sup>Tom Vaughn, "Everyday Life in a Copper Camp," in *Bisbee* (Tucson, 1992), 57–58.

<sup>48</sup>Philip J. Mellinger, *Race and Labor in Western Copper: The Fight for Equality, 1896–1918* (Tucson, 1995), 2.

<sup>49</sup>This discussion is summarized from Thomas E. Sheridan, *Arizona: A History* (Tucson, 1995), 170.

<sup>50</sup>James W. Byrkit, *Forging the Copper Collar: Arizona's Labor-Management War of 1901–1921* (Tucson, 1982), ix.

Truax's arrival in Arizona coincided with a long conflict Byrkit describes as a labor-management war in which eastern corporate interests manipulated "economic, political, social and cultural life" throughout the American West. In Arizona, he writes, these corporations had wielded great power, had used it, abused it, and would temporarily lose it.<sup>51</sup> In this scenario, *Truax v. Raich* and *Truax v. Corrigan* were features of the corporate regrouping. Although other copper companies shared the wealth of the surrounding Mule Mountains, the great Phelps Dodge (PD) reigned in Bisbee as prime employer and benefactor. In fact, "when townspeople spoke of 'the company' they meant Phelps Dodge."<sup>52</sup> Organized labor readily cast a villainous and manipulative PD as a shadowy actor in the background of the two Truax cases.

Throughout these same years, Billy Truax opportunistically came and went from Bisbee without significant loss of status as a local personage, at least as reported in brief newspaper notes of his activities. After selling his interest in the Fish Pond in 1902, he opened an English Kitchen the same year. The *Bisbee Daily Review* was certain that with such an "experienced and popular caterer in command," the English Kitchen would be as "shining" a success as his other enterprises in Bisbee.<sup>53</sup> By February 1903, he had retired to Los Angeles, having sold a "New England Kitchen" in Bisbee.<sup>54</sup> In January 1905 he was back at the Kitchen, pursuing stolen meal tickets.<sup>55</sup> Briefly operating the Saddle Rock Cafe in about 1906, he was permanently disassociated from his first Bisbee English Kitchen. In Los Angeles, his wife was ill for much of the year, and he commuted to her bedside.<sup>56</sup> Bisbee "restaurant tables were vacant" in the economic downturn of 1907.<sup>57</sup> Truax retreated from Bisbee back to the West Coast, where he bided his time safely in the restaurant business in Los Angeles,

<sup>51</sup>Ibid., xiv.

<sup>52</sup>Schwantes, "Introduction," 7.

<sup>53</sup>"English Kitchen Opened," *Bisbee Daily Review*, October 3, 1902.

<sup>54</sup>"Brief City News: New Management," *Bisbee Daily Review*, February 14, 1903, and "Truax Returns," *Review*, October 4, 1903.

<sup>55</sup>"Harry Baker Arrested," *Bisbee Daily Review*, January 11, 1905.

<sup>56</sup>"Town in Brief: Green Sea Turtle," *Bisbee Daily Review*, March 11, 1906; "Trip for Health," *Review*, March 16, 1906; "Local News of the City: Truax Goes to Bedside of Wife," *Review*, April 26, 1906; "Brief City News," *Review*, September 27, 1906.

<sup>57</sup>Isabel Shattuck Fathauer, *Lemuel C. Shattuck: A Little Mining, a Little Banking, and a Little Beer* (Tucson, 1991), 125.

watching for renewed economic health in Bisbee and the copper business. New Mexican gold lured him briefly from this staid existence in late 1908.

Truax in fact prospected stubbornly through the years. Perhaps he aimed to join the ranks of the lucky few that Richard Peterson calls the "bonanza kings." A risk-taker, he likely had much more in common with gold-seeking forty-niners than steady, respectable town fathers. Although Truax moved on from his blue collar origins and easily joined the middle economic classes in Arizona, he apparently lacked the settled nature of a rooted town builder. Sketchy evidence links the Truax name, at least, to mine claims in Colorado. In 1897 the *Los Angeles Times* reported that a William Truax, identified as a "miner from Cripple Creek," had located a rich gold shelf, two feet wide and "of wonderful richness," near Carrville, California.<sup>58</sup> However rich, it was not Truax's personal bonanza. When gold was found in February 1908 at Sylvanite just over the New Mexico border from Bisbee, Truax and his newly married son joined other exuberant boomers, some of them prominent Bisbeeites, at the rough and ready camp.<sup>59</sup> Father and son had a mine and a restaurant where Truax fed some of the town's one thousand or so inhabitants during Sylvanite's year-long life.<sup>60</sup>

Around the time in early 1914 when Truax and organized labor first squared off in the courts with *Truax v. Raich*, he was again pursuing dreams of gold on claims held with a partner at Juniper Flats in the heights just north of Bisbee. The promise of Juniper Flats faded quickly. It is difficult to know how much money he ultimately lost, but certain of his claims were sold at auction to satisfy his debts.<sup>61</sup> These losses may have contributed to his monetary difficulties during the later

<sup>58</sup>"A Lucky Find," *Los Angeles Times*, August 19, 1897.

<sup>59</sup>"Sylvanite News Notes," *Bisbee Daily Review*, December 3, 1908.

<sup>60</sup>"Sinkers and Pie Ready for Camp Assays," *Bisbee Daily Review*, November 14, 1908; "Booze Fighter' Looks Good," *Review*, December 19, 1908.

<sup>61</sup>State of Arizona, Office of the Arizona Corporation Commission, "Articles of Incorporation of the Juniper Flats Gold Mining Company," filed July 23, 1914. Copy from the Office of the Cochise County Recorder, *Incorporations*, Book 6, 571-73, and untitled advertisement in *Bisbee Daily Review*, September 6, 1914. Truax incorporated the Juniper Flats Gold Mining Company on July 23 and offered ten thousand shares of stock to the public at twenty-five cents per share, with the object of financing a road up to the mine site. See also *Boston v. Juniper Flats Mining Co. and William Truax, Sr.*, no. 2223, Cochise Bounty Book 15, 386 (Arizona Superior Court, Cochise Co., 1918) and "Sheriff's Deed," Cochise County Recorder, *Deeds of Mines*, book 29, 285-86. In January 1916, Truax was forced to issue a promissory note to Mary Boston for \$2,091, giving as security a mortgage on certain of his claims. By 1918, Truax and the Juniper Flats Gold Mining Co. defaulted on Mary Boston's bond. The mining claims offered as security were sold at auction.

*Truax v. Corrigan* fight. In the midst of the mining excitement an amused *Bisbee Daily Review* reported that a preoccupied Truax (possibly contemplating problems with both diminishing gold and unruly labor) stepped out of his restaurant one day, mounted up, and rode off on someone else's horse.<sup>62</sup> Gold-hunting probably defined Billy Truax as much as his restaurant-keeping did.

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### KEEPING A PUBLIC TABLE IN BISBEE

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Entering the competitive food service fray in Bisbee, Truax was already a seasoned mining camp "restaurant man," as the newspapers of the day frequently styled restaurant keepers before the term *restaurateur* entered everyday usage. Hardworking miners had to eat. In a multitude of primitive camps or in solid towns (like Leadville or Bisbee, still called *camps*), this generally meant eating out rather than troubling to put together meals on their own.

Studying miner food habits from 1849 to 1920, Joseph Conlin concluded that restaurants arrived at a new strike hard on the heels of prospectors themselves. "Keeping a public table," he wrote, "was one of the first non-mining occupations to be found in a hundred 'No Name Cities.'"<sup>63</sup> Dusty Bisbee offered the uncritical a primitive restaurant by 1880. Leadville had thirty-one in 1880. Conlin found that early miners eagerly indulged somewhat expensive and sophisticated tastes, happily ditching beans and biscuits whenever they could for such delicacies as, for example, fresh oysters imported from far distant seacoasts.<sup>64</sup> Restaurants routinely catered to their special needs and tastes in a "highly speculative restaurant economy" linked to the success of the camp itself.<sup>65</sup> Wage-earning hardrock miners formed the most sizeable customer block in industrialized mining camps like Leadville and later Bisbee. The hungry miner coming off shift could fill his stomach twenty-four hours a day in eateries ranging from the roughly utilitarian food cart to the most opulent of mining camp palaces. Western miners were, indeed, behind some of

<sup>62</sup>"Strange Horse Cause of Near Mix-up for Absent Minded Rider," *Bisbee Daily Review*, September 29, 1915.

<sup>63</sup>Conlin, *Bacon, Beans, and Galantines*, 153.

<sup>64</sup>*Ibid.*, 109, 119.

<sup>65</sup>*Ibid.*, 138, 145.



the first all-night businesses.<sup>66</sup>

In his Bisbee houses, Truax never lacked access to rail service for food supplies, restaurant furnishings, and cooking equipment. His English Kitchen frankly offered plain, traditional American food, offspring of the British culinary heritage, although he never had a monopoly on the name *English Kitchen*.<sup>67</sup> Published menus indicate that he catered to substantial, mainstream tastes, certainly for Sunday and holiday fare, offering relatively simple, hearty meals. He filled miners' lunch boxes and offered sit-down, extensive menus of robust breakfasts, straightforward meats, breads, vegetables, and desserts to hungry workmen and families in "first-class" surroundings, proud of the Kitchen's claimed status as the "only place in town where meats are broiled."<sup>68</sup> He also competed for the miners' custom by offering boarding meal tickets.

And he honored them. When Truax purchased the Edelweiss in 1912, it had been closed for two weeks with "meal tickets outstanding." He hastened to assure ticket holders that he would honor outstanding tickets when he reopened the Edelweiss.<sup>69</sup> In this and other ways, he lived by his own standards. A December 1914 *Review* column, written at the height of his unpopular involvement with *Truax v. Raich* (and probably intended to be something in the way of public redemption), flattered Truax. No organ of the Democratic Party, the Phelps Dodge-owned *Bisbee Daily Review* favorably compared Truax's nightly feeding of twenty of the city's hungry youngsters with Democratic Governor George W.P. Hunt's more famous breakfasts for Phoenix "newsies," or young newspaper boys.<sup>70</sup> Restaurants like Truax's English Kitchens and Edelweiss or the Copper Queen Café in Bisbee's premier hotel, along with their proprietors, were entrenched at the upper end of the scale and served families as well as mining men. These restaurants, and even some boarding

<sup>66</sup>*Ibid.*, 169.

<sup>67</sup>It was a frequent name choice in the era. See *Dolores News* [Colorado], October 30, 1880, in <http://www.coloradohistoricnewspapers.org/APA26300/>. He may have encountered the name first in an ill-starred Denver English Kitchen, which burned in 1880. See also Gary P. Tipton, "Men Out of China," *Journal of Arizona History* 18:3 (Autumn 1977): 348. Members of the Phoenix, Arizona, Chinese colony ran an English Kitchen, American Kitchen, and French Kitchen.

<sup>68</sup>Advertisement, *Bisbee Daily Review*, April 6, 1916.

<sup>69</sup>"Edelweiss Café Is To Be Overhauled," *Bisbee Daily Review*, October 20, 1912.

<sup>70</sup>"Gov. Hunt Hasn't Anything on Bill Truax with Kids," *Bisbee Daily Review*, December 17, 1914.

houses, were being unionized between 1912 and 1917. Truax and the culinary union clashed in 1914 and 1916.

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### LABOR PROBLEMS

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Throughout Truax's active years, between 1880 and 1920, large numbers of miners and mill workers were still essential for the industrial mining done to wrest gold, silver, and copper from deep under the earth's surface. Restaurant men also needed workers to prepare and serve food to miners and others throughout the long mining camp days. In failures like Aspen's, restaurants might simply fold, sending cooks and waiters to join out-of-work miners. To be sure, technological innovations were progressively de-skilling many tasks above and below the ground, reducing the numbers of human workers needed to extract and process ore.

Although uneasy and sometimes hostile relations mark the period's interactions between labor and management, the conflict that marred Truax's relations with his cooks and waiters in Bisbee in the second decade of the twentieth century were probably not inevitable. Vernon Jensen, a scholar of the western labor movement, titled his major study *Heritage of Conflict* to reflect the era's violence and the belligerent legacy of its labor confrontations. On the other hand, Richard Peterson studied mining entrepreneurs, pointing in his *The Bonanza Kings* to frequent instances of worker/boss consensus and the use of the carrot rather than the stick. He concluded that many mine operators did not find it necessary to employ "military and judicial power to enforce and defend their policies."<sup>71</sup> The upwardly mobile and individualistic Truax sought judicial remedies rather than a negotiated settlement in both the 80 percent and anti-injunction fights, recoiling unsympathetically from the economic class that needed unions and from disruptive union tactics. As Vernon Jensen points out, "Individualists do not take to unions."<sup>72</sup> Individualist Truax doggedly refused compromise.

The economic and class partitions of older, larger camps were not characteristic of new camps, where every prospector (and even a restaurateur like Truax) might still dream of a

<sup>71</sup>Richard H. Peterson, *The Bonanza Kings: The Social Origins and Business Behavior of Western Mining Entrepreneurs, 1870-1900* (Lincoln, NE, 1977), 85.

<sup>72</sup>Jensen, *Heritage of Conflict*, 10.



A PAGE OF CARTOONIST'S IMPRESSIONS OF BISBEE

William Truax, Jr. was portrayed as a "booster" of Bisbee in this page of caricatures of local businessmen in a publication of his time. (Courtesy of the Arizona Historical Society/Tucson, *Out West*-1974-pg 285)

bonanza. For example, the young mining camp was "democratic at table" and even its "premier *public* restaurants [never private clubs, of course] . . . counted as a major part of their patronage the ordinary miners of the camp and their companions. . . ." <sup>73</sup>

The hazardous deep rock mining that followed early discoveries was big business, heavily dependent on capital. The independent, individualistic prospector of western fable could work a lucky metal strike only at or near the land's surface. Once these easy workings played out, the "man with capital" ushered in large-scale development of any prospective underground bonanza. <sup>74</sup> These few fortunate men, many headquartered in distant places, made fortunes financing and building the industrialized infrastructure to dig deep into the earth and then process its hidden wealth. "It takes a mine to run a mine," a saying went, and "underground mining meant shafts, tunnels, tracks, carts, hoists, blasting equipment, and paid labor. Minerals encased in or bonded to rock then had to be removed by expensive crushing and refining techniques." <sup>75</sup>

Any "Jacksonian idyll" vanished quickly: "The expense of ever more sophisticated and expensive technology to win precious metal from the earth, and the resulting flow of capital into the West, created clear class lines in the mining towns between capitalist and worker, between employer—and his superintendents and professional associates—and employee." The surprise is not really the return of conventional divisions of power and privilege, but the rapidity of that return. <sup>76</sup> Demands for a living wage, mine safety, the eight-hour day, job security in an unstable industry ruled by distant financial markets all divorced workers from managers who had at least one eye on the bottom line. When out of work, miners and a variety of camp followers such as cooks and waiters (who might at times be miners, too) drifted from camp to camp in search of jobs.

Truax, though, joined the respectable middle ranges of Bisbee's citizens. Their fear of drifters and other unemployed partially drove the town's 1917 deportation of unwanted workers. <sup>77</sup> The "polar opposite" of Jefferson's self-sufficient yeomanry, with an increasing number of the foreign-born, was

<sup>73</sup>Conlin, *Bacon, Beans, and Galantines*, 148–49.

<sup>74</sup>Paul, *Mining Frontiers of the Far West*, 10.

<sup>75</sup>Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987), 105.

<sup>76</sup>Limerick, *Something in the Soil*, 220.

<sup>77</sup>See Marshal A. Oldman, "Phelps-Dodge and Organized Labor in Bisbee and Douglas," *Western Legal History* 5:1 (Winter/Spring 1992): 83–96.

forming in the West: "a wage-earning proletariat at the mercy of absentee mine owners and their managers, helpless in gut-wrenching cycles of boom and bust, never sinking roots in permanent community, destined to drift from one ramshackle mining camp to another in a futile quest for their lost dream of western autonomy."<sup>78</sup> Anglo and Irish "tramp miners" may have been as likely to leave their jobs as were Mexicans, U.S.-born Hispanics, and Italians as itinerancy became the rule in early twentieth-century mining centers.<sup>79</sup>

Such movement of men, labor unrest, or rumors of unrest, greeted Truax in the camps for forty years. While he was learning his own trade between 1877 and 1883, "more than three dozen miners' unions were organized throughout the West, representing nearly ten thousand miners."<sup>80</sup> The Miners', Mechanics' and Laborers' Protective Association of Leadville had been formed in January 1879 and was out on strike in May 1880 over wages and the lack of a standard eight-hour day in all of Leadville's mines. Vernon Jensen considered this early strike something of a prototype for some of the major battles to come in both Colorado and the Rocky Mountain area.<sup>81</sup> Leadville's business community was deeply involved in planning to defeat the strike, the "bonds of sympathy" between merchants and the mine owners or operators being strong.<sup>82</sup>

In the year of that strike, Truax, cooking in Leadville's Tontine Hotel, had an easy window to hostilities. In 1893, labor war "gripped the western states" as hardrock miners met in Butte to form the Western Federation of Miners (WFM), a "grand federation of underground workers throughout the western states."<sup>83</sup> While Truax operated restaurants in Aspen and in Victor in the Cripple Creek district, falling silver prices and new wage cuts in western mines generally caused "widespread lockouts and strikes in the bitterest and most violent mining war the West was yet to see," one that would last a decade.<sup>84</sup> Striking Cripple Creek miners in 1894 had "virtual possession of the camp" in a dispute that ran for 130 days, cost

<sup>78</sup>J. Anthony Lukas, *Big Trouble: A Murder in a Small Western Town Sets Off a Struggle for the Soul of America* (New York, 1998), 100–101.

<sup>79</sup>Mellinger, *Race and Labor in Western Copper*, 36.

<sup>80</sup>Lingenfelter, *The Hardrock Miners*, 133.

<sup>81</sup>Jensen, *Heritage of Conflict*, 22, 24.

<sup>82</sup>Eugene Floyd Irey, "A Social History of Leadville, Colorado, During the Boom Days, 1877–1881" (Ph.D. diss., University of Minnesota, 1951), 103, 109–10.

<sup>83</sup>Lingenfelter, *The Hardrock Miners*, 219.

<sup>84</sup>*Ibid.*, 196.

"three million dollars in lost production, lost wages, and upkeep of the armies involved."<sup>85</sup> Miners' strikes disrupted Bisbee in 1903 and again in 1907. Truax took over Bisbee's Edelweiss Café in 1912, after two separate strikes by local waiters against it, the second including its competitor, the Maze Café.<sup>86</sup> Bisbee had nine unions in 1916 when the English Kitchen dispute broke out. These included, along with the struggling local of the Western Federation of Miners, unions of bootblacks, bakers, meat cutters, barbers, and carpenters, along with Truax's adversaries, the cooks and waiters.<sup>87</sup>

Although scholarly attention has focused chiefly on western miners' unions, Truax dealt with unhappy cooks, waiters, and kitchen helpers in his restaurants. The feisty "culinaries," as they were known, organized separately from miners and craftsmen during these years, joining their near allies, the bartenders. Howard Kimeldorf points out that the culinaries were service workers who waited on the public. Unionization strategies developed by craft workers or manual laborers such as miners would not transfer well to service work, so the culinaries had to find new patterns.<sup>88</sup> They might, for example, time a walkout for the height of the dinner hour, emphatically declaring their value by causing maximum distress to their employers and patrons' empty stomachs.

Respect, particularly for the waiter or, increasingly as time passed, the waitress, was a variable thing. While union members extolled their "craft," the largely unskilled nature of restaurant work attracted both the rootless and young people with no experience.<sup>89</sup> The foreign-born were always much in evidence among restaurant workers such as table help, although proportions varied with time and place.<sup>90</sup> This was a source of ethnic conflict among workers, and between workers and their nativist bosses. Slavic cooks and waiters walked out on Tom Whitehead at Bisbee's Edelweiss in 1910 because of ethnic slurs. He simply replaced them with Americans, whose ineptitude caused the local newspaper much amusement.<sup>91</sup>

The first known, true culinary local was organized in

<sup>85</sup>Peterson, *The Bonanza Kings*, 73–74.

<sup>86</sup>"Hurt Feelings Lead to Strike at Edelweiss," *Bisbee Daily Review*, February 19, 1910; "Maze Waiters Back at Work," *Review*, July 2, 1912.

<sup>87</sup>Carlos A. Schwantes, "Toil and Trouble," in *Bisbee*, 119.

<sup>88</sup>Howard Kimeldorf, *Battling for American Labor: Wobblies, Craft Workers, and the Making of the Union Movement* (Berkeley, 1999), 87.

<sup>89</sup>Spence, "They Also Serve Who Wait," 16.

<sup>90</sup>*Ibid.*, 14. See also Kimeldorf, *Battling for American Labor*, 88–89, for a discussion of the polyglot nature of New York culinaries.

<sup>91</sup>"Hurt Feelings Lead to Strike at Edelweiss," *Bisbee Daily Review*, February 19, 1910.

Chicago in 1866.<sup>92</sup> Far to the west, San Francisco "culinaries," alarmed by a Chinese presence, formed the Cooks' and Waiters' Anti-Chinese Club in the late 1870s. In the early 1880s, they grandly transformed themselves into the Cooks' and Waiters' Benevolent and Protective Union of the Pacific Coast. This group briefly boasted two thousand members in San Francisco alone.<sup>93</sup>

A continent away in New York City, a small group of German waiters founded a union they could not sustain as independents, so they joined the American Federation of Labor. Members of the national considered themselves a skilled "craft" union composed chiefly of cooks, bartenders, and waiters rather than the "unskilled" laborers who did other work within the culinary industry. In 1911 the national had forty-three thousand members and was the eleventh-largest union in the AFL.<sup>94</sup>

The Arizona union had associated locals in Miami, Douglas, Oatman, Tucson, and Phoenix in 1916.<sup>95</sup> Cooks' and Waiters' Local 380 of Bisbee was affiliated with both the Warren District Trades Assembly and the American Federation of Labor. Some of the itinerant culinaries in the Bisbee local may have known Truax in Colorado, well before their legal wrangles after he returned to Bisbee in 1912. Cooks and waiters had been active in Truax's former home in the Cripple Creek District. By 1903, the Victor Cooks and Waiters Local No. 9 had achieved its own hall.<sup>96</sup>

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### "80 PERCENT BILL" AND THE ALIEN LABOR FIGHT

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Truax returned to Bisbee in late 1912 after five years in California. With a long-time associate, he purchased the lease and furnishings of the once-successful Edelweiss Café, tucked into the basement of Brewery Gulch's Muheim Building. Describing Truax as a "pioneer in the restaurant business in Bisbee," the *Bisbee Daily Review* celebrated his reentry after

<sup>92</sup>Jay Rubin and M.J. Obermeier, *Growth of a Union: the Life and Times of Edward Flore* (New York, 1943), 42.

<sup>93</sup>Edward Paul Eaves, "A History of the Cooks' and Waiters' Unions of San Francisco" (master's thesis, University of California, 1930), 2, 4.

<sup>94</sup>Rubin and Obermeier, *Growth of a Union*, 117, 120.

<sup>95</sup>"Results of Election of Officers," *Arizona Labor Journal*, September 29, 1916.

<sup>96</sup>Elizabeth Jameson, *All That Glitters: Class, Conflict, and Community in Cripple Creek* (Urbana, IL, 1998), 64, 76.

years in the Los Angeles restaurant business.<sup>97</sup> For his part, Truax was pleased to find Bisbee so prosperous. "Ten years ago it was the best town in the west of its size," he said, "and I am perfectly willing again to cast my lot here."<sup>98</sup> Big things had happened politically in his absence. Arizona became the forty-eighth state in February 1912. Its new constitution embodied certain modern, progressive ideas like the secret ballot, direct primary, initiative, referendum, and recall of judges. Their tenacious advocates overcame considerable "resistance to their novelty" to see these innovations become part of Arizona's political process.<sup>99</sup>

Organized labor figured prominently in these changes. The Arizona labor movement took full advantage of a brief interval of political power just around the time of statehood, assuming a "pivotal role" at the constitutional convention in a coalition of anticorporation forces.<sup>100</sup> Such gratifying political clout was an anomaly for labor—it would not survive long or be held again.<sup>101</sup> The finished constitution did not give laborites all that they had wanted or, indeed, all that any reform group had wanted. It did express "many of the aims and aspirations of the Labor party and of organized labor" and had the approval of the Western Federation of Miners.<sup>102</sup> With this constitution, "arguably the most Progressive of the day," labor won the eight-hour day, child labor prohibition, the office of a state mine inspector, employer liability for protection of workers in hazardous occupations, and workers' compensation for occupational injuries.<sup>103</sup>

Nonetheless, two long-desired measures did not make it into the new document. First, labor saw as its "greatest failure the collapse of its crusade to restrict 'alien' labor in Arizona."<sup>104</sup> The Anglo-dominated organized labor movement feared Hispanics and certain other ethnic groups as strikebreakers, believing they also drove down wages for whites through their

<sup>97</sup>"Pioneer Comes Back to Bisbee," *Bisbee Daily Review*, October 11, 1912.

<sup>98</sup>*Ibid.*

<sup>99</sup>John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20:1 (Spring 1988): 111–12.

<sup>100</sup>Sheridan, *Arizona*, 175.

<sup>101</sup>Toni McClory, *Understanding the Arizona Constitution* (Tucson, 2001), 25.

<sup>102</sup>David R. Berman, *Reformers, Corporations, and the Electorate: an Analysis of Arizona's Age of Reform* (Niwot, CO, 1992), 83.

<sup>103</sup>McClory, *Understanding the Arizona Constitution*, 26–27.

<sup>104</sup>Sheridan, *Arizona*, 176.



willingness to accept lower wages. Second, labor failed to see passed "A Proposition Relative to Violations of Injunctive Powers of Courts," or, in other words, an anti-injunction provision aimed at restricting management's access to the court-issued injunction in labor disputes.<sup>105</sup> Similar proposals for both foreign labor restrictions and anti-injunction measures had knocked around the mining West and the nation as a whole for some years and figured permanently on union wish lists. Biding its time, organized labor in Arizona remedied the alien labor law failure after statehood using the brand-new initiative mechanism and the direct approval of Arizona's voters. In so doing, laborites circumvented corporate opposition.

Class differences often fueled major conflicts between working class miners and absentee mine owners and their on-site managers.<sup>106</sup> *Truax v. Raich*, however, was born out of the ethnic conflicts that separated hard-rock miners and their descendants—whether native-born or of northern European origins—from the increasing numbers of foreign-born from outside northern and western Europe. Cripple Creek reflected the ethnicities of earlier hard-rock camps. Its mineworkers were "like the people of previous gold rushes, predominantly born in the East or Midwest if they were native-born and in Canada or northern or western Europe if they were immigrants."<sup>107</sup>

But ethnic composition was in flux. In Leadville and surrounding Lake County, 30 percent of the 1880 population was born outside the United States; in Tombstone that same year, this figure rose to half.<sup>108</sup> Immigrants from northern and western Europe could assimilate; arrivals from other places found uncertain welcomes. Mabel Barbee Lee, a young contemporary of Truax in the early Cripple Creek district, held clear memories of intolerant Cripple Creekers of northern European ancestry. She recalled that they organized the Free Coinage Union in the face of monetary troubles. Affiliating with the Western Federation of Miners, the new union immediately ran anyone "with lower standards of living" who were "willing to work for a pittance" out of town or, as Lee

<sup>105</sup>Arizona Constitutional Convention, 1910, *Arizona Constitutional Convention 1910: Propositions, Journals, Minutes*. Microfilm ed., reel 1. Phoenix, AZ: Arizona State Library and Archives, 19-- (Microfilm in the collection of the Law Library, James E. Rogers College of Law, Tucson, Arizona.)

<sup>106</sup>See Jameson, *All That Glitters*, 40–41, for a succinct discussion of a common situation as found in Cripple Creek.

<sup>107</sup>*Ibid.*, 29.

<sup>108</sup>Elliot West, "Chapter 11: The World's Convention," in *Mining Frontiers of the Far West, 1848–1880* by Rodman Wilson Paul, rev. exp. ed. by Elliot West (Albuquerque, 2001), 234.

so baldly put it, all the "dagoes, bohunks and hunkies as well as chinks."<sup>109</sup>

An 1897 Idaho law endeavored to set limits to employment of noncitizens, and "a similar rule in Cripple Creek raised the number of native-born in one major mine to 346 out of 469—almost 75 percent."<sup>110</sup> In Arizona, cosmopolitan Bisbee excluded Chinese altogether and could be unfriendly to resident Mexicans, Italians, or Slavs.<sup>111</sup> Twenty nationalities were expelled from Bisbee in its mass deportation of labor "trouble-makers" in 1917. Of 1,003 men counted at the deportee refugee camp in New Mexico, approximately half, or 530, were aliens.<sup>112</sup>

Few culinaries could boast of skills irreplaceable to the restaurant trade. But around the turn of the last century, mining "men of northern and western European antecedents, including Irish as well as English, Welsh, Swedes, and Germans, formed a worker elite. In the less-mechanized era this elite did possess irreplaceable skills. Their jobs, their wages, their status on the job and in the community were all better than the jobs, wages, and community status of the more numerous group of men from Mexico, central, eastern, and southern Europe, Asia, and the men from Hispanic towns in the western United States."<sup>113</sup>

Technological improvements altered skill requirements in the mineral industry. Once-entrenched northern and western Europeans or native-born Americans came to fear replacement by less skilled or unskilled immigrant labor willing to work for lower wages.<sup>114</sup> Taking advantage of the ensuing worker bitterness and ethnic conflict, mine managers astutely applied the principle of "divide and conquer" to weaken workingmen's power in unity. And at no time would these corporation men welcome externally imposed quotas that both restricted internal company hiring policies and troubled the bottom line. Yet this is precisely what organized labor in Arizona attempted through the "80 percent law." It was to be their tool to protect jobs and wages. Like their

<sup>109</sup>Mabel Barbee Lee, *Cripple Creek Days* (1958; reprinted Lincoln, NE, 1984), 31.

<sup>110</sup>Mark Wyman, *Hard Rock Epic: Western Miners and the Industrial Revolution, 1860-1910* (Berkeley, 1979), 56.

<sup>111</sup>Schwantes, "Introduction," 16; Mary Nicklanovich Hart, "Merchant and Miner: Two Serbs in Early Bisbee," *Journal of Arizona History* 21 (Autumn 1980): 324.

<sup>112</sup>Schwantes, "Toil and Trouble," 124.

<sup>113</sup>Mellinger, *Race and Labor in Western Copper*, 10.

<sup>114</sup>Schwantes, "Toil and Trouble," 116.

corporate adversaries, organized labor was not above manipulating the law.

Bouncing back from labor's earlier defeat in the political maneuvering during Arizona's statehood process, the American Federation of Labor, at its Bisbee convention in 1913, voted to submit an initiative proposal for another alien labor competition law directly to voters in the 1914 general election. Arizona historian Thomas Sheridan has seen this new measure as chiefly anti-Mexican.<sup>115</sup> Organized labor argued that the restriction would hold wages to a level that would draw citizen workers. The opposition, not all of which originated with large corporations, asked who else would fill those less-attractive jobs in mining, agriculture, and railroads already held by aliens?<sup>116</sup> N.L. Amster, of eastern Arizona's Shannon Copper Co., wrote Governor Hunt from Shannon's Boston headquarters. He observed that if his mine had not already shut down the previous September in the face of a drop in the price of copper, then it "certainly would have had to do so as soon as the 80% law became effective, because we could not work the Shannon property if we depended upon 80% or even 50% of American labor . . . [and] the State has some moral obligations to the Mexicans. . . ." <sup>117</sup> The *Jerome News* worried that "a crushing blow has been struck at Arizona's mining industry."<sup>118</sup>

Commercial entities opposing the measure were not always, like Amster, honoring moral obligations to existing alien workers. Businessmen realistically sought to hire whomever they wished at wage levels that would maximize business profits. Profits aside, doomsayers even argued that Arizona's economic future itself could be threatened if jobs of lower status and pay could not be filled.<sup>119</sup> Voters passed the initiative by a substantial popular majority, with particular strength in counties with large miner populations. It required "employers of five or more people to hire at least 80 percent of their

<sup>115</sup>Sheridan, *Arizona*, 179.

<sup>116</sup>For a brief summary of the recurring arguments, see Sheridan, *Arizona*, 177.

<sup>117</sup>N.L. Amster to Governor Hunt, January 7, 1915. Governor's Papers, Hunt, 1914-15, 80% file, Arizona Department of Library Archives and Public Records.

<sup>118</sup>"80 Per Cent Law Is Called Menace," *Jerome News*, December 11, 1914.

<sup>119</sup>Berman, *Reformers, Corporations, and the Electorate*, 122-23.

employees from out of the citizen population."<sup>120</sup> More simply, only one employee out of five could be a non-citizen.<sup>121</sup>

Alien labor rights groups promptly mustered some powerful defenders outside Arizona. These included the British and Italian governments, both of which immediately lodged diplomatic protests with the Department of State on behalf of their citizens working in Arizona. Five hundred British subjects, for example, were living and working in Bisbee.<sup>122</sup> U.S. Secretary of State William Jennings Bryan inquired of Arizona's Governor Hunt whether steps could be taken to prevent the law's taking effect. The governor replied that the law automatically took effect once proclaimed because it was an initiative, direct legislation on the part of the people of Arizona, overriding any executive or legislative opposition.<sup>123</sup>

In Bisbee's near neighbor Tombstone, the Cochise County Superior Court reported that panicked aliens made 198 citizenship applications during November 1914, just after passage of the law in the general election.<sup>124</sup> These frightened applicants could not know that the law's life was to be quite brief. A special federal tribunal effectively ended its practical power in *Raich v. Truax* as early as January 7, 1915, two months after passage. The U.S. Supreme Court delivered the death blow on November 1, 1915, in *Truax v. Raich*, slightly less than one full year after voters gave the law tenuous life. The test case took shape in copper-dominated Bisbee. William Truax, Sr.'s Edelweiss Café had nine employees, of whom seven were neither "native-born citizens" of the United States nor "qualified electors," in the language of the Court.<sup>125</sup> Mike Raich, an Austrian cook at the Edelweiss, was among those slated to

<sup>120</sup>*Ibid.*, 121. See p. 201 for a statistical analysis of votes cast. The *Tucson Citizen*, on December 30, 1914, concluded that the labor vote overwhelmed the less-than-favorable rural vote.

<sup>121</sup>"Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some sub-division thereof." As quoted in *Truax v. Raich*, 239 U.S. 33, 35 (1915).

<sup>122</sup>"Decision Given Stirs City Deeply," *Douglas Daily Dispatch*, January 8, 1915.

<sup>123</sup>"Hunt Will Not Delay New Law," *Tombstone Daily Prospector*, December 9, 1914.

<sup>124</sup>"Tombstone Town Topics Tersely Told: Naturalization Papers," *Tombstone Daily Prospector*, December 3, 1914.

<sup>125</sup>*Truax*, 239 U.S. at 36.

become jobless so that the Edelweiss could comply with the 80 percent quota. Maintaining that he was "skilled in his work and unfitted to take other occupation," Raich filed suit in the federal district court in early December to enjoin Truax from firing him to comply with the quota.<sup>126</sup>

As a test case, *Raich v. Truax* (to become *Truax v. Raich* on appeal to the U.S. Supreme Court) triumphed over other candidates. A second possibility emerged briefly in nearby Douglas, Arizona, and Chinese restaurant owners in Phoenix initiated separate litigation.<sup>127</sup> A known personality even within the transient world of the camps, Billy Truax brought with him from Colorado a reputation for being no friend of organized labor. Philip Ukman, of the Bisbee Cooks & Waiters Union, later portrayed Truax as "the man used by the interests to fight it [i.e., the 80 percent law]." <sup>128</sup> How close, in actual fact, were the relations between Truax and corporate copper? Was there an understanding, outright or more subtle, that Truax's restaurant would launch the test? Ukman and colleagues had no doubts. In their view, Billy Truax consistently marched with Bisbee's business interests, small and large.

Corporate copper had small use for hiring quotas, and Walter Douglas of the Copper Queen opposed organized labor. He was general manager of the Queen and a son of James Douglas, the most influential man in Bisbee mining's formative era. Walter Douglas later headed Phelps Dodge itself.<sup>129</sup> Questioned, Douglas simply indicated that his company had taken no steps to comply with the law, a statement the *Douglas Daily Dispatch* took to mean that the corporation was determined "to fight the issue to the finish."<sup>130</sup> By design or happenstance, the *Truax* case freed Phelps Dodge and its Copper Queen from participation in the courtroom maneuverings.

Few solid biographical details have come to light about Mike Raich, the other half of the case. He was a citizen of

<sup>126</sup>"Suit Filed to Test Eighty Percent Law," *Tombstone Daily Prospector*, December 17, 1914.

<sup>127</sup>"Arrest Made for Violation of the 80 Per Cent Bill," *Bisbee Daily Review*, January 2, 1915; "Phoenix Aliens Bring Test Fight against '80' Law," *Bisbee Daily Review*, January 3, 1915.

<sup>128</sup>Philip Ukman, "Culinary Workers' Campaign against English Kitchen," *Arizona Labor Journal*, June 22, 1916.

<sup>129</sup>Schwantes, "Introduction," 6-7. The Douglas family reigned powerfully in Arizona mining during the latter part of the nineteenth and early twentieth centuries. James S. Douglas, a second son, was also involved in mining.

<sup>130</sup>"Eighty Per Cent Law Will Not Hold Water," *Douglas Daily Dispatch*, December 18, 1914.

the empire of Austria (neither a U.S. citizen nor a qualified elector), and a cook. He did not claim union membership in his few recorded statements. In his suit he maintained that his employer, Billy Truax, now the defendant in Raich's suit, was "willing and anxious" to keep him cooking at the Edelweiss but for the quota and the threat of prosecution by the state of Arizona.<sup>131</sup> A "Max" or "Mato Raich," member of the Masons and Odd Fellows, resident of Bisbee for ten years prior to 1910, had worked for a previous owner of the Edelweiss as both chef and butcher.<sup>132</sup> "M. Raich" owned or managed the Maze Café on Main Street in 1912.<sup>133</sup> Newspaper accounts of case progress sometimes spelled the last name "Riach" or gave a first name of "Max."<sup>134</sup> These variants might all attach to the Mike Raich of the court case, much in the way that the printed records of the day identified Truax as Truex and Billy, Bill, William, or Warren. Complainant Raich may have been of some substantiality in Bisbee rather than an unknown, itinerant kitchen worker. It is also possible that more than one M. Raich made his home in Bisbee and cooked in restaurants.

Cook Raich found able—and possibly costly—counsel, retaining John S. Williams and Edward J. Flanigan of Bisbee along with former judge John H. Campbell of Tucson.<sup>135</sup> Labor easily noted overt connections between these attorneys and Phelps Dodge and the Copper Queen. Historian James Byrkit, certainly a critic of corporate copper, baldly labeled the three "high-powered Arizona Corporation attorneys."<sup>136</sup> Campbell held a law degree from Columbia, served in Washington with the Department of Justice, practiced law in Tucson, and was an associate justice of the territorial Supreme Court of Arizona between 1905 and 1912.<sup>137</sup> The

<sup>131</sup>*Raich v. Truax*, 219 Fed. 273, 275 (D. Ariz. 1915).

<sup>132</sup>"Max Raich, Former Bisbee Man May Have Been Murdered," *Bisbee Daily Review*, January 29, 1910.

<sup>133</sup>Advertisement, *Bisbee Daily Review*, February 17, 1912.

<sup>134</sup>For example, "Suit Filed to Test Eighty Percent Law," *Tombstone Daily Prospector*, December 17, 1914, and "First Arrest for Violation of 80 Per Ct. Labor Law," *Tucson Citizen*, December 30, 1914, respectively.

<sup>135</sup>"80 Per Cent Fight to Begin Monday in Los Angeles," *Bisbee Daily Review*, December 18, 1914.

<sup>136</sup>Byrkit, *Forging the Copper Collar*, 53.

<sup>137</sup>"Hon. John H. Campbell," *Arizona—the Youngest State. Vol. 3: Biography* (Chicago, 1916), 538–39.

Bisbee firm of Williams & Flanigan represented the Bank of Bisbee, founded and managed by men closely associated with the Copper Queen.<sup>138</sup>

These attorneys sought a "temporary injunction pendente lite to restrain the Attorney General of the state of Arizona and the county attorney of Cochise county, Ariz., from enforcing a law enacted by vote of the people of that state, under an initiative petition, on November 3, 1914, upon the ground that the law is in violation of the Constitution of the United States. . . ." <sup>139</sup> The Judicial Code of 1911 required that petitions for such injunctions be filed in the U.S. District Court and be heard by a three-judge panel acting as a court of equity.<sup>140</sup>

Each of the three judges on the panel had considerable standing in the western judiciary. Judge William Sawtelle, who wrote the opinion for the panel, served almost two decades with the District of Arizona and later with the Ninth Circuit Court of Appeals. Judge William C. Van Fleet, who was sitting by designation from the Northern District of California, had served for five years on the California Supreme Court before his appointment to the federal bench. Circuit Judge William W. Morrow, from the Ninth Circuit Court of Appeals, had been a district judge in the Northern District of California before his elevation.<sup>141</sup>

The "80 percent fight," as the case was popularly called, involved an Arizona statute; thus the defense of the law—as well as of the ostensibly law-abiding Truax—was assumed by the state of Arizona and Attorney General Wiley Jones, who

<sup>138</sup>The firm's listing appeared as such in *F.A. McKinney's Bisbee-Warren District Directory 1916-1917* (Bisbee, 1916), 201. A succinct account of the bank's history, including its founding by Copper Queen men such as James Douglas and Billy Brophy, appears in Bill Eppler, "B Mountain Memories," ephemera file, Arizona Historical Society, Tucson. The term *Copper Queen crowd* was used by Isabel Fathauer in her biography of Lemuel Shattuck, her father, as she recounted the Bank of Bisbee's denial of his request for a mining development loan. See Fathauer, *Lemuel C. Shattuck*, 65.

<sup>139</sup>*Raich*, 219 F. at 275.

<sup>140</sup>For a discussion of proceedings in equity, see Erwin C. Surrency, *History of the Federal Courts*, 2<sup>d</sup> ed. (Dobbs Ferry, NY, 2002), 232-46; see also James Love Hopkins, *The Judicial Code, Being the Judiciary Act of the Congress of the United States, Approved March 3, A.D. 1911* (Chicago, 1911), §266, 217-18.

<sup>141</sup>David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941* (Berkeley, 1994), 173, 26, 28; <http://www.fjc.gov/servlet/tGetInfo?jid=2442>

served from 1915 through 1921.<sup>142</sup> The flamboyant labor lawyer William B. "Bill" Cleary assisted the state, but the Arizona Federation of Labor, not the state, paid his salary.<sup>143</sup>

The "80 percent fight" was essentially finished on January 7, 1915 when the federal tribunal issued an interlocutory injunction halting state proceedings against employers. Judge Sawtelle wrote in part that "the act in question denies to the complainant the equal protection of the laws and is therefore in violation of the fourteenth amendment to the Constitution of the United States, and is void."<sup>144</sup> He also dismissed any criminal proceedings in state courts against Truax, maintaining his own court's priority in jurisdiction.<sup>145</sup>

The state of Arizona appealed to the U.S. Supreme Court. The case was argued in October 1915, and the decision was handed down the following month. Associate Justice Charles Evans Hughes wrote the majority opinion. First, the Court pointed out that Raich had been admitted lawfully to the United States under federal law. He was then entitled to the protection of the Fourteenth Amendment's due process and equal protection provisions. A state law like that of Arizona, said the Court, could not deny aliens the right to earn a living when they had already been admitted to the United States under its power to regulate immigration.<sup>146</sup> The 80 percent law's unconstitutionality was sealed. Justice James S. McReynolds made a lone dissent, arguing that while there was no doubt that the law was invalid, it nevertheless was also plain that the United States lacked jurisdiction in "a suit against a State to which the Eleventh Amendment declares 'the judicial power of the United States shall not be construed to extend.'"<sup>147</sup>

<sup>142</sup>James M. Murphy, *Laws, Courts, and Lawyers: Through the Years in Arizona* (Tucson, 1970), 180.

<sup>143</sup>"Cleary Must Receive Salary from Outside," *Bisbee Daily Review*, December 22, 1914; *Truax*, 239 U.S. at 34. For information on Cleary's life, see Tom Vaughn, "W.B. Cleary Became the Spokesman for Accused and Wronged," *Borderland Chronicles*, July 22, 1984, and Byrkit, *Forging the Copper Collar*, 285. Bill Cleary had been born into comfortable circumstances in the East and was radicalized in the West; he became a labor lawyer and street corner orator (until banned by the Bisbee City Council). In his colorful career, he defended Mexican revolutionary leaders in Tombstone in 1909, rode the deportee train to New Mexico during Bisbee's deportation of 1917, and traveled to Chicago to aid in the defense of I.W.W. leaders in 1918.

<sup>144</sup>*Raich*, 219 F. at 276.

<sup>145</sup>*Ibid.* at 284.

<sup>146</sup>*Truax*, 239 U.S. at 39, 44.

<sup>147</sup>*Ibid.* at 44.



As the case went forward in the federal system, a second attack was made on Truax, but ultimately it was little more than harassment.<sup>148</sup> On December 29, the Western Federation of Miners lodged a criminal complaint against Truax for continuing noncompliance with the quota. He was arrested and then released on his own recognizance, the whole action becoming a dead end for organized labor when *Raich v. Truax* denied the state's criminal jurisdiction eight days later.<sup>149</sup> It is impossible to know whether Mike Raich, Billy Truax, or any shadowy supporters privately celebrated labor's defeat in Bisbee. The copper corporations, those largest of Arizona employers, as well as the smallest of businesses were again free to hire as many legally admitted alien workers as seemed good to them. Sputtering threats by labor sympathizers promised a new version of an anti-alien law, but nothing came of them.<sup>150</sup> Embittered organized labor left the fray convinced that a consenting Truax had served as a front for the big corporations. He was marked as an enemy of unionized labor.

The courtroom victory was good news for Truax and his son and partner, but the gold vein mined by their Juniper Flats Gold Mining Company was even then pinching out. Truax also sold the Edelweiss to another "well known restaurant man" in March 1915, declaring publicly that his undivided energies could then go to his mine.<sup>151</sup> Within the month, he had opened his ill-starred second Bisbee English Kitchen on Main Street.<sup>152</sup> He was now in late middle age. *Out West* magazine included his son William, Jr. with other prominent Bisbee business boosters in an article promoting Bisbee's happy commercial future.<sup>153</sup> Mr. and Mrs. Truax, Jr. hosted a

<sup>148</sup>F.J. Perry, Western Union telegram to Governor Hunt, December 28, 1914; and George W.P. Hunt, Western Union telegram, to F.J. Perry, December 28, 1914. Both in Governor's Papers, Hunt, 1914-15, 80% file, Arizona Department of Library Archives and Public Records. Perry, the secretary of the local branch of the Western Federation of Miners, was evidently too cautious to rely on secondhand information and wired Governor Hunt on December 28 for a precise effective date for the law. Hunt replied by wire the same day, specifying "three thirty o'clock on the afternoon of December 14, 1914."

<sup>149</sup>"First Arrest for Violation of 80 Per Ct. Labor Law," and "Restaurant Man Hailed into Court on Charge He Has Been Violating the Eighty Per Cent Bill, First Case," *Bisbee Daily Review*, December 30, 1914.

<sup>150</sup>For example "Eighty Percent to Again Come to Life," *Douglas Daily Dispatch*, January 10, 1915.

<sup>151</sup>"Café Edelweiss Is Sold to J. Miller; Will Change Today," *Bisbee Daily Review*, March 26, 1915.

<sup>152</sup>"Handsomely Equipped Restaurant," *Bisbee Daily Review*, April 4, 1915.

<sup>153</sup>Joseph H. Gray, "Bisbee, Arizona: The Greatest Copper Mining Center of the Great Southwest," *Out West* (May-June 1914), 285.

"well-appointed luncheon" for Congressman and Mrs. Carl Hayden in October 1915.<sup>154</sup> The younger Truax had "arrived" in Bisbee, and the elder surely had some stake in helping him retain his position. The three scattered elements of his second big court battle, *Truax v. Corrigan*, were also coming together: a brand-new anti-injunction statute, a belligerent and determined local cooks and waiters union, and a probably equally belligerent and determined Billy Truax.

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### THE INJUNCTION FIGHT

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The essential piece of *Truax v. Corrigan* had been created when an anti-injunction statute finally became Arizona state law in 1913.<sup>155</sup> The American labor movement as a whole cursed "government by injunction." Indeed, every congressional session but one between 1894 and 1914 had before it proposals to curb the legal power to issue injunctions.<sup>156</sup> The first court orders against labor strikes had been issued in the widespread national railroad disputes of 1877.<sup>157</sup> These and other injunctions propagated in railroad strikes of the "late 1880s and early 1890s, particularly the Pullman strike of 1895, established precedent that would be applied for the next 40 odd years."<sup>158</sup> Federal judges responded to the Pullman strike by turning "their courtrooms into police courts" and issuing some one hundred injunctions.<sup>159</sup> In this period, the future president of the United States and chief justice of the Supreme Court William Howard Taft was already a well-known "injunction judge," long before his opinion in *Truax v. Corrigan*.<sup>160</sup>

Edwin Witte studied the role of government and judges like Taft in labor disputes up to 1932, finding definite records of 508 injunction cases in federal courts and 1,364 in state courts

<sup>154</sup>"Entertain for Haydens," *Bisbee Daily Review*, October 27, 1915.

<sup>155</sup>Arizona, *Revised Statutes of Arizona 1913: Civil Code* (Pattee, 1913), 551-52.

<sup>156</sup>Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York, 1930), 163.

<sup>157</sup>William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA, 1991), 66.

<sup>158</sup>Holly J. McCammon, "Government by Injunction: The U.S. Judiciary and Strike Action in the Late 19<sup>th</sup> and Early 20<sup>th</sup> Centuries," *Work and Occupations* 20:2 (May 1993): 178-79.

<sup>159</sup>Forbath, *Law and the Shaping of the American Labor Movement*, 75.

<sup>160</sup>*Ibid.*, note 47, p. 73, and text, pp. 73-75.

prior to mid-1931 where the injunction was sought by employers.<sup>161</sup> William Forbath believes it would be impossible to derive an "accurate tally" of injunctions issued after 1880.<sup>162</sup> No less than seventy injunctions were pending against San Francisco culinary workers alone in 1906.<sup>163</sup>

Felix Frankfurter called the labor injunction "America's distinctive contribution in the application of law to industrial strife."<sup>164</sup> Although temporary in theory, the injunction as applied tended to become law, permanently halting the enjoined strike, boycott, or picket line. Frustrated union men sought remedies for the injustice they perceived in the application of such writs in labor disputes.<sup>165</sup> Many fair-minded observers supported their efforts. In a relatively tiny number of cases, unions secured injunctions against employer action.<sup>166</sup>

Arizona labor unions were familiar with the power of injunctions on their home ground. For example, Mike Raich's lawyers successfully asked Judge Sawtelle for an injunction to prevent Truax from firing Raich. A 1903 injunction ordered striking miners back to work in Clifton-Morenci. In 1907 Bisbee, another injunction forbade the picketing of arriving trains or even the use of the U.S. mails to publicize a strike against the Copper Queen mine.<sup>167</sup> Although it lost its anti-injunction measure at the Arizona Constitutional Convention, organized labor looked to new opportunities in the lawmaking done after statehood.

Arizona's first legislature authorized a completely new code for the new state in 1912 to replace the out-of-date territorial

<sup>161</sup>Edwin E. Witte, *The Government in Labor Disputes* (New York, 1932).

<sup>162</sup>Forbath, *Law and the Shaping of the American Labor Movement*, 193. He writes, "Many researchers with many lifetimes would be required to sift through the relevant court records of the industrial states where injunctions bulked largest, and even then the search would not yield more than a fraction of the total number of unreported labor injunction cases. Many court records have disappeared. . . ."

<sup>163</sup>Eaves, *History of the Cooks' and Waiters' Union of San Francisco*, 54.

<sup>164</sup>Frankfurter and Greene, *The Labor Injunction*, 53.

<sup>165</sup>*Ibid.*, 183.

<sup>166</sup>McCammon, "Government by Injunction," 175. McCammon summarized Edwin Witte's 1932 statistics from *The Government in Labor Disputes*, 231-34. In McCammon's summary, "between 1880 and the early 1930s, the number of injunctions secured by employers against workers was at least 40 times greater than the number secured by workers against employers."

<sup>167</sup>Byrkit, *Forging the Copper Collar*, 28, 29-31.

law code of 1901. Code commissioner (and future judge) Samuel L. Pattee "promptly and efficiently prepared the *Revised Statutes of 1913* and the *Penal Code of 1913*."<sup>168</sup> Pattee was a Democrat with something of a liberal turn of mind. His paragraph 1464, the anti-injunction part of the code's chapter III on injunctions, was a distinctly liberal addition and was one of the few code measures to generate some debate in the legislature. It actually afforded the "bored-looking boys up in the press gallery a genuine story."<sup>169</sup> Unlike its failed predecessor during the constitutional convention, this anti-injunction measure succeeded, probably because progressive legislators of both houses were largely Democrats from mining districts and could be expected to be sympathetic to labor problems and the liberal reforms of the day.<sup>170</sup>

This Arizona law was essentially an internal state experiment in limiting these powerful court orders, which, in theory, were temporary but in fact "usually the final orders issued in labor injunction cases."<sup>171</sup> Fervent supporters in the labor movement celebrated its potential to attack the heart of their problem: "the power of a single judge to issue orders, to interpret them, to declare disobedience and to sentence."<sup>172</sup> Arizona's law mirrored the national version passed in 1914 as section 20 of the Clayton Act (sometimes called the "Gompers anti-injunction law" for its association with the national labor leader) and read:

No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and

<sup>168</sup>Murphy, *Laws, Courts, and Lawyers: Through the Years in Arizona*, 79.

<sup>169</sup>*Phoenix Gazette*, March 26, 1913.

<sup>170</sup>Sharon Faye Kearney, "Arizona Legislature 1912-1914: A Study of State Progressivism" (master's thesis, California State University, Fullerton, 1977), 256, 263.

<sup>171</sup>Witte, *The Government in Labor Disputes*, 93.

<sup>172</sup>Frankfurter and Greene, *The Labor Injunction*, 190.

such property or property right must be described with particularity in the application. . . .<sup>173</sup>

The following paragraph specified activities which, when peacefully undertaken, could not be halted by injunction. For example, employees might both cease working and endeavor to persuade other employees from working . . . if their activities were peaceful.

After passage of this law, the Truaxes sought just such an injunction in 1916 to halt picketing by striking employees outside their new English Kitchen. Battle lines formed in what eventually became *Truax v. Corrigan*, because these workers were members of the militant Cooks' and Waiters' Local 380. Culinary workers, like many miners, tended to be a mobile lot, but this Bisbee local with its somewhat unstable roll of members nevertheless became the second ingredient of *Truax v. Corrigan*.<sup>174</sup>

Their mother union was serious about organizing and improving working conditions and wages for culinary workers. Additional Arizona locals had been founded in at least Miami, Douglas, Oatman, Tucson, and Phoenix by 1916 and did support their Bisbee brethren.<sup>175</sup> They had aggressive models within their own industry, although any gains tended to be ephemeral. In San Francisco, stubborn culinary unionists had "secured a shorter work day, uniform wages, better working conditions, and most important of all one day's rest in seven" between 1901 and the earthquake and fire of 1906.<sup>176</sup> Bisbee

<sup>173</sup>Arizona, *Revised Statutes of Arizona 1913: Civil Code*, title 6, chapter 3: Injunctions, paragraph 1464 [Pattee, 1913]. The federal section 20 of the Clayton Act: *U.S. Statutes at Large* 38 (1914): 738, § 20.

<sup>174</sup>In the suit's first guise, *Truax v. Bisbee Local No. 380*, the named defendants included Jack Barnett, Boutcha Broutto, Butch Broutto, Philip Ukman, John Plank, John Plankage, E. Thompson, Charley Vidiana, Mike Brajevich, Roko Rokovich, John Doe, and Richard Roe. Five of these names appear to be southern or eastern European in origin; two may be variants of the same name; two are plainly aliases. (Arizona Supreme Court, *William Truax and William A. Truax vs. Bisbee Local No. 380. Cooks' and Waiters' Union . . . Abstract of Record* (n.p., 1916), cover). The final case, the one that reached the Supreme Court, lists a second set of names for defendants/appellees: Michael Corrigan, Albert Shipp, Charles Brooks, Edward Fauntleroy, Michael Gregovich, John Doe, Richard Roe. A larger proportion of the surnames here appear to indicate English/Irish ancestry (Arizona Supreme Court, *William Truax and William A. Truax vs. Michael Corrigan . . . Abstract of Record* (n.p., 1917), cover).

<sup>175</sup>"A Sorry Spectacle," *Arizona Labor Journal*, September 29, 1916.

<sup>176</sup>Eames, *History of the Cooks' and Waiters' Union of San Francisco*, 54–55.

strikers probably copied the San Franciscans' famous picket burros with their own placarded donkey, marched through Bisbee streets to proclaim the English Kitchen's unfairness to organized labor.<sup>177</sup> San Francisco culinaries were again embattled in August and September 1916, hard on the heels of the Bisbee fight. California lacked an anti-injunction statute, so the Californians were the unhappy recipients of eighteen petitions for the "injunction cure."<sup>178</sup> In faraway New York City, culinary workers staged a citywide walkout of six thousand hotel workers in 1913 (an account of the walkout appeared in the pages of the *Bisbee Daily Review*) and had begun to experiment with industrial syndicalism and the IWW.<sup>179</sup>

Ornery Billy Truax, joined by his son and partner William, Jr., formed the third and final element of *Truax v. Corrigan*. Truax initiated a quarrel by revoking terms of an agreement made with his workers only one month previously. Truax and (briefly) Joe Krilanovich of the Busy Bee did not deny that they had so recently accepted the union's terms of an eight-hour day at \$3.50 per day for a six-day week, without split shifts. But the two restaurant men now argued that this shorter day, at a daily wage of \$3.50, created a "hardship," making it impossible for them to operate efficiently and profitably.<sup>180</sup> Truax and Krilanovich wanted to pay time-and-a-half for overtime, fifty cents more for a ten-hour day (or \$4.00), tied to split shifts and a seven-day week.

On April 10, 1916, workers at the English Kitchen and the Busy Bee Cafe, members of the Cooks' and Waiters' Union, struck rather than accept these altered working conditions. In a formal advertisement, union spokesman Phillip Ukman publicly replied that only these two restaurants found the new conditions a hardship. "When a cook, waiter or dishwasher has worked 8 hours without stopping even to eat, sit down one minute, or taking [sic] one puff at his cigarette and under the nervous strain the nature of his work imposes, he has done a day's work," said Ukman.<sup>181</sup>

<sup>177</sup>*Ibid.*, 42.

<sup>178</sup>*Ibid.*, 50, 74–76.

<sup>179</sup>Kimeldorf, *Battling for American Labor*, 7, 117–18. The local headline read, "Strike of Waiters Causes Disorder; Riotous Scenes Occur in New York Restaurants and on the Streets." *Bisbee Daily Review*, January 25, 1913.

<sup>180</sup>Busy Bee Café and English Kitchen, "Restaurant Keepers Present Their Side of Controversy with Cooks and Waiters Union," *Bisbee Daily Review*, April 14, 1916.

<sup>181</sup>Phillip Ukman, "Cooks & Waiters Union Explain Their Case to the Public," *Bisbee Ore.*, April 14, 1916.

Main Street in front of the restaurant soon became "almost impassible."<sup>182</sup> Pickets marched. Observers came to gawk. "Friends of labor" were urged to boycott the English Kitchen. A burro paraded around Bisbee, draped with a banner reading "Don't Patronize Busy Bee English Kitchen Unfair to Organized Labor Cooks' and Waiters' Local 380."<sup>183</sup> Truax's history of inimical relations with organized labor was recalled, as, for example, in Ukman's printed accusation that "Mr. Truax has always been antagonistic to Unionism both here and in Colorado."<sup>184</sup> Ammonium valerianate was "maliciously spilled" in the restaurant. Truax offered a twenty-five-dollar reward for information leading to the arrest and punishment of the perpetrator.<sup>185</sup> Young Mrs. Sadie Truax, taking cash at the register, was treated rudely.<sup>186</sup>

Handbills were distributed. These were later submitted as evidence to the courts. Harking back to the 80 percent case, one of the handbills, bearing the names of both the Cooks and Waiters Union and its umbrella body, the Warren District Trades Assembly, coyly charged that "William Truax spent \_\_\_\_\_'s money and knocked out the law which placed a premium on American citizenship." Interested readers could fill in the blank with the name of Phelps Dodge, Bisbee's ruling copper company. Others carried vague threats and crude accusations and innuendoes in language reflecting the under-educated strikers: Truax imported scab labor (indeed favored the hiring of foreign labor), overcharged patrons, chased his employees with a butcher knife, did not honor his pledged contracts, and fought the eight-hour day. Much later, Chief Justice William Howard Taft, no friend of labor, focused on the handbills' threatening language. In Taft's words, these flyers held "abusive and libelous charges against plaintiffs, their employees and their patrons, and intimations of injury to future patrons."<sup>187</sup>

<sup>182</sup>"Last Chapter in Long Legal Fight Written," *Bisbee Daily Review*, December 20, 1921.

<sup>183</sup>William A. Truax (Jr.), testimony in Arizona. Supreme Court, *William Truax and William A. Truax vs. Bisbee Local No. 380, Cooks' and Waiters' Union . . . Abstract of Record* (n.p., 1916), 61.

<sup>184</sup>Ukman, "Cooks & Waiters Union Explain Their Case to the Public."

<sup>185</sup>Advertisement, *Bisbee Daily Review*, April 19, 1916.

<sup>186</sup>William A. Truax (Jr.), testimony in: Arizona Supreme Court, *William Truax and William A. Truax vs. Bisbee Local No. 380, Cooks' and Waiters' Union . . . Abstract of Record* (n.p., 1916), 72.

<sup>187</sup>For one version of the exhibits, see "Brief for Plaintiffs in Error," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, ed. Philip B. Kurland and Gerhard Kasper (Arlington, VA, 1975), 643-53; for Taft's words, see *Truax v. Corrigan* 257 U.S. 312, 321 (1921).

The picketers confronted campaigning gubernatorial candidates Tom Campbell (Republican, supported by business and corporate interests) and Governor George W.P. Hunt (Democrat, an old progressive and current friend of labor), with predictable results. Governor Hunt ostentatiously respected the picket line and dined at another restaurant.<sup>188</sup> Campbell, an old acquaintance of Truax's from Jerome, had his meal at the Kitchen. Many years after the English Kitchen strike, Campbell recalled a short conversation he had with Truax. "Billy," he remembered saying, "I see you are being picketed." Truax replied, "Yes, I have been for some time. And they have just about got me broke. But I am going to stick it out until Hell freezes over." Truax also told Campbell, as recollected, that it would do Campbell no good politically to stay, and urged that he leave by the back door. Campbell stayed for breakfast and was roughed up by pickets as he left by the front door.<sup>189</sup> When addressing workers later that day, Campbell chose political discretion and deprecated his own actions.<sup>190</sup>

Ordinary customers faced daily repetitions of the Campbell/Hunt incident. The Truaxes' business suffered more than it had in the 80 percent fight, and organized labor directly attacked Truax's supposed complicity with corporate management. So strong was this linkage in workers' minds that sixty years later, English-born Fred Watson (a still very indignant 1917 Bisbee deportee), characterized the English Kitchen as "run by the PD [Phelps Dodge]." <sup>191</sup> The Truaxes testified that the English Kitchen's income fell off dramatically—average daily receipts dropped from more than \$156 to less than \$75.<sup>192</sup> Upon hearing that the Truaxes hoped to sell the English Kitchen, labor printed a handbill threatening potential purchasers with union-levied fines.<sup>193</sup> Krilanovich and his Busy Bee settled quickly, and the Trades Assembly urged workingmen back to the Busy Bee tables.<sup>194</sup> Only the English Kitchen refused the cooks' and waiters' terms.

<sup>188</sup>Byrkit, *Forging the Copper Collar*, 91.

<sup>189</sup>Thomas Campbell, "Untitled Fragments," 17–18, Campbell Family Papers 1912–1977, Library, Arizona Historical Society, Tucson.

<sup>190</sup>Byrkit, *Forging the Copper Collar*, 89, 91.

<sup>191</sup>Fred Watson, "Still on Strike: Recollections of a Bisbee Deportee," *Journal of Arizona History* 18 (Summer 1977): 172.

<sup>192</sup>"Brief for Plaintiffs in Error," 641, 653.

<sup>193</sup>*Ibid.*, 652; see also "Attainder at Bisbee," *Bisbee Daily Review*, June 9, 1916, for an editorial featuring a reprint of one that had just run in the *Arizona Republican*, likening the union action to a bill of attainder.

<sup>194</sup>"Attention: All differences ...," *Bisbee Daily Review*, May 21, 1916.



Was it in truth impossible for the English Kitchen to function profitably under the conditions asked by the union, when other unionized restaurants, including the Busy Bee, continued under union terms? In his detailed study of the 1917 labor deportation, Bisbee's landmark event, James Byrkit pointed out that the English Kitchen confrontation occurred when both Bisbee and the nation were prosperous. Calling the Truaxes "ardent Phelps Dodge sympathizers," he concluded that "the Truaxes wished to provoke a strike."<sup>195</sup> Their business had the precedent of surviving labor's ire in the successful defeat of the 80 percent law.

Prominent (or soon to be prominent) attorneys from the firm of Ellinwood and Ross, formed at the behest of Phelps Dodge and retained on a permanent basis as corporate counsel, represented the Truaxes all the way to the U.S. Supreme Court.<sup>196</sup> These were Alexander Murry and Clifton Mathews (a future Ninth Circuit Court of Appeals judge) for *Truax v. Bisbee Local No. 380* and *Corrigan's* first stage. Mathews, Everett E. Ellinwood, and John Mason Ross appeared at the

<sup>195</sup>Byrkit, *Forging the Copper Collar*, 313.

<sup>196</sup>Dennison Kitchel to Joseph Gilliland, October 9, 1972, letter, box 3, folder 1, Evans, Kitchel & Jenckes Papers, Arizona Historical Society, Tucson. Walter Douglas, C.E.O. of the Copper Queen, recruited Everett E. Ellinwood, a Prescott attorney, delegate to the Arizona Constitutional Convention and former territorial United States district attorney, from Prescott in 1907 to become company attorney. His Prescott colleague, John Mason Ross, joined him in 1910 to form Ellinwood and Ross, one of the most venerable law firms in Arizona, for an association lasting thirty-eight years. They intended to be "general attorneys for the Phelps Dodge & Co. interests in the territory" and also to engage in a general civil practice. See "New Law Firm Formed in Bisbee," *Bisbee Daily Review*, June 29, 1910. Ross later served on the Colorado River Commission. His obituary appeared in 1944: "John Mason Ross," *Arizona Daily Star*, August 18, 1944. William Rehnquist practiced in the 1950s with a subsequent incarnation of the firm. See "Firm History," typescript, box 1, folder 60, Evans, Kitchel & Jenckes Papers. With regard to the question of fees for the Truax cases, it may be impossible to determine whether Phelps Dodge materially assisted Truax. When Denison Kitchel initiated a history of his firm, he wrote in 1972 to George B. Munroe, Phelps Dodge's current president, seeking information about the founding. Munroe's reply indicates that no correspondence on this topic remained and no other pertinent records regarding the firm were offered. Kitchel's inquiry notes that his firm also lacked records. See George B. Munroe to Denison Kitchel, letter, September 14, 1972, box 3, folder 1, Evans, Kitchel and Jenckes Papers. In fact, the Gilliland letter indicates that all files of Phelps Dodge and the firm pertaining to the firm's activities in Bisbee from 1910 to 1935 had been lost or destroyed.

Supreme Court.<sup>197</sup> It seems fair to ask how their fees were paid when restaurant receipts were sadly in decline and the Juniper Flats venture was troubled. Byrkit noted additional evidence of, at least, sympathetic relations between Truax and the PD: Phelps Dodge Mercantile Company administrator A.J. Cunningham and prominent meat merchant Phil Tovrea (probably an old acquaintance of Truax's from Jerome) gave a one-thousand-dollar bond for the initial appeal to the Arizona Supreme Court.<sup>198</sup> Bill Cleary appeared alone for the union in *Truax v. Bisbee Local No. 380*; three new attorneys joined Attorney General Wiley Jones for *Truax v. Corrigan*.<sup>199</sup>

In the first chapters of the "long legal fight," the Cochise County Superior Court in Tombstone and the Arizona Supreme Court denied the Truaxes' petition for a temporary injunction against both the picketing and boycotting by their former employees in *Truax v. Bisbee Local No. 380*. The Arizona Supreme Court affirmed the judgment of the lower court regarding the peaceful nature of the picketing, which did not damage property or property rights irreparably.<sup>200</sup> The Truaxes and their lawyers regrouped. This second approach became *Truax v. Michael Corrigan, Albert Shipp, and Charles Brooks, et al*. The Truaxes argued that the statute, paragraph 1464 of the Arizona Civil Code, was unconstitutional, contravening the Fourteenth Amendment by depriving them of property without due process of law and of the equal protection of the law.<sup>201</sup> They contended that they had a property right in their

<sup>197</sup>171 P. 121, 122 (Sup. Ct. Ariz. 1918); 257 U.S. 312, 314 (1921). For his life, see John J. Mathews, "Clifton Mathews: A Remembrance," *Western Legal History* 12:1 (Winter/Spring 1999), 6–7. A "self-taught country lawyer," Clifton Matthews came west to recover from tuberculosis and was recruited by Ellinwood and Ross in time to aid the firm in the Bisbee deportation cases. In 1921, the firm helped him become established in Globe, Arizona, as attorney for another copper company. In a long and distinguished career, he became U.S. attorney for Arizona and in 1935 assumed William Sawtelle's seat on the Ninth Circuit Court of Appeals. Mathews was not afraid to publicly "flay" the Ku Klux Klan. Reported in "Globe Attorney Flays Ku Klux," *Tombstone Prospector*, November 21, 1923. An obituary, unattributed but most likely copied from the *Arizona Daily Star*, September 16, 1943, reports that Alexander Murry arrived in Bisbee in 1903, was for a time a deputy Cochise County attorney, and, from 1935 to 1937, Pima County attorney.

<sup>198</sup>Byrkit, *Forging the Copper Collar*, 313–14.

<sup>199</sup>*Truax v. Bisbee Local*, 171 P. 121 at 122; *Truax v. Corrigan*, 257 U.S. at 317. James M. Murphy, in *Laws, Courts, and Lawyers through the Years in Arizona*, has nothing to say of the three.

<sup>200</sup>"Last Chapter in Long Legal Fight Written," *Bisbee Daily Review*, December 20, 1921; *Truax v. Bisbee Local No. 380*, 171 P. 121, 126 (Ariz. 1918).

<sup>201</sup>"Brief for Plaintiffs in Error," 655–56, 658, 685.

Bisbee Citizens Protective League, formed in part because of the Truax difficulties.<sup>210</sup>

Father and son had played minor parts in the deportation drama. In a brief memoir of that exciting time written some years after the events described, William Beeman, a deputy sheriff and a member of the Loyalty League, claimed some responsibility for the original idea of deporting strike ringleaders to Mexico. Among the Bisbee leaders he contacted with his idea was Bill Truax, Jr. at the English Kitchen. Beeman recalled that "most people were thoroughly disgusted with the manner in which their place had been boycotted and picketed."<sup>211</sup> When she was questioned by U.S. government investigators in the deportation hearings, Mrs. Gertrude Bailey, divorcee and sometime manager of Truax's old Saddle Rock Café, indicated that Truax, Sr. tied a white band around his arm and wielded a gun as one of the two thousand vigilantes.<sup>212</sup>

In the deportation's aftermath, the Truaxes struggled on with a much-reduced customer base in a Bisbee that would never be quite the same. They witnessed the coming of open pit mining to Bisbee mere days after the deportation. The growing pit substituted machines for a great deal of human labor.<sup>213</sup> A smaller Bisbee would become both more family-oriented and company-dominated, lacking the radical labor element of the footloose, single miner.<sup>214</sup> With independent labor unions in disarray, Walter Douglas' Phelps Dodge successfully substituted a company union.<sup>215</sup>

Scrambling to reach this altered market, the Truaxes' new ads ironically reflected leftover nativist war sentiment (despite their position in the 80 percent fight): "Patronize the old

<sup>210</sup>Ibid., 123 for a brief account of the deportation.

<sup>211</sup>William S. Beeman, "History of the Bisbee Deportations by an Officer in Charge of the Loyalty League" (unpublished manuscript, Arizona Law Library and Archives, 1940), 3-4.

<sup>212</sup>"Deportation Hearing Papers: VIII Labor, Bisbee Deportation-1917, T" at entry "Truax, Sr., Mrs. Bailey" (microfilm 51.71.1 from the records of Cochise County, Arizona in the Arizona Department of Library, Archives, and Public Records).

<sup>213</sup>Schwantes, "Introduction," 21.

<sup>214</sup>Vaughn, "Everyday Life in a Copper Camp," 85.

<sup>215</sup>Oldman, "Phelps-Dodge and Organized Labor in Bisbee and Douglas," 91. With Bisbee's independent labor vanquished in the aftermath of the deportation, the Phelps Dodge Corporation was to be "successful in controlling labor relations through various company-sponsored unions until the passage of the National Labor Relations Act in July 1935."

reliable English Kitchen, 20 years in Bisbee, run by an AMERICAN with AMERICAN help."<sup>216</sup> They experimented with embellishments that might attract customers."<sup>217</sup> Advertisements continued to feature steaks and chops from their trademark charcoal broiler, a merchants' lunch, their own pies and cakes, and an a la carte dinner every Sunday. These measures did not bring prosperity, although their case, *Truax v. Corrigan*, finally reached the U.S. Supreme Court during its October term in 1919. Then, in October 1920, the Copper Queen and Denn-Arizona began laying off men in the postwar downturn in the worldwide demand for copper.<sup>218</sup>

In 1920 a Bisbee census taker enumerated Truax, Sr. as a lodger in his son's home.<sup>219</sup> In May, Truax set out for Los Angeles with the declared aim of purchasing furnishings to completely refit the English Kitchen.<sup>220</sup> William Truax, Jr. and family followed him in September.<sup>221</sup> A few days later the Bisbee Democratic Party announced that it would open its headquarters in the "old English Kitchen on Main Street." Alterations were even then in progress.<sup>222</sup> Billy Truax last ran a restaurant in 1929, in Los Angeles, where he died in 1939 at age 81, of bronchial pneumonia among other causes.<sup>223</sup> Word was sent back to Bisbee, and the *Bisbee Daily Review* printed a brief obituary, which described "W.A. Truex [sic], Sr." simply as a "former restaurant proprietor of Bisbee."<sup>224</sup> No mention was made of his role in Bisbee's bitter and not-so-distant labor-management war. His last English Kitchen,

<sup>216</sup>Advertisement, *Bisbee Daily Review*, March 27, 1919.

<sup>217</sup>For example, they added a private dining room and then purchased the cigar stand inside the premises, promising to sell "cigars and tobacco, etc., at all hours day or night" to "Miners and Others." In July 1919, they completely redecorated the restaurant's interior. See the *Bisbee Daily Review*: "Fills Local Want," July 3, 1918; "Notice to Miners and Others," September 13, 1918; "Re-decorated," July 20, 1919.

<sup>218</sup>*Ibid.*, October 17 and 31, 1920.

<sup>219</sup>U.S. Census, *Fourteenth Census* (1920), "Arizona: Index" (Department of Commerce, Bureau of the Census), T620.

<sup>220</sup>"William Truax, proprietor of the English Kitchen . . .," *Bisbee Daily Review*, May 15, 1920.

<sup>221</sup>"Leave for Coast," *Bisbee Daily Review*, September 24, 1920.

<sup>222</sup>"Bisbee Democrats Open Local Headquarters in the Old English Kitchen," *Bisbee Daily Review*, September 28, 1920.

<sup>223</sup>"Certificate of Death 39-0150606."

<sup>224</sup>"W.A. Truex [sic], Sr., Former Resident of Bisbee, Dies," *Bisbee Daily Review*, March 15, 1939.

business. The picketing and boycotting irreparably injured that property right, and the denial of injunctive relief was illegal.

These courtroom maneuvers moved forward independently of the now troubled English Kitchen. On August 2, 1916, the Truaxes closed the restaurant, owing to an "inability to secured [sic] help."<sup>202</sup> They sought a second injunction aimed specifically at ending the boycotts. Judge Lockwood of the Cochise County Superior Court obligingly issued this one, ordering union men and sympathizers "to absolutely desist and refrain from, in any manner or by any means conspiring to boycott, or combining to boycott the business of plaintiff's. . . ." The writ's language denied specifically "threats, menace, coercion, fear or intimidation" as means to further the boycott.<sup>203</sup> The English Kitchen reopened amid ongoing picketing and harassment.

The embattled Truax, mining camp veteran that he was, would have felt vulnerable to the violence always simmering beneath labor-management disagreements that had turned ugly and personal. Back in Aspen he had sustained knife wounds in a non-labor quarrel. He must have known, too, of the death by gunshot of the Portuguese restaurateur John Silva in a once-famous picketing incident in Goldfield, Nevada, during labor troubles in 1907.<sup>204</sup> In any event, he carried a gun in Bisbee in 1916. On September 8, an armed Truax attempted to escort his cook from the restaurant. Grabbed by William Lewis, a picketing dishwasher, Truax brandished his gun, threatening to whack Lewis on the head with it. Both combatants were arrested and later released when the union declined to press the case.<sup>205</sup> Bisbee area merchants, angry and fearful in the face of such continuing working class intransigence, soon mustered current support for Truax in his plight as they organized to handle future threats to their town's social and economic stability.

In late August 1916, these Warren District businessmen formed the Citizens' Protective League, an "association to make permanent the peace and prosperity of the city . . . [and] to uphold the city authorities in every move made in the name of law and order, and insist that the authorities exercise constant

<sup>202</sup> *Bisbee Daily Review*, August 3, 1916.

<sup>203</sup> "Restaurant Is Free to Open Without Trouble," *Bisbee Daily Review*, August 19, 1916.

<sup>204</sup> Sally Zanjani and Guy Louis Rocha, *The Ignoble Conspiracy: Radicalism on Trial in Nevada* (Reno, Nevada, 1986), 1-2.

<sup>205</sup> "Wm. Truax Arrested," *Bisbee Daily Review*, September 9, 1916.

viligance [sic]."<sup>206</sup> After a mere ten days of organizing, the league claimed five hundred members and expected more. Local resident Lemuel Shattuck headed the Shattuck-Arizona and Denn-Arizona copper companies as well as the Miners' and Merchants' Bank. His daughter and biographer wrote that the league was formed as a response to unionizing directed to the town's clerks and drivers in the unsettled atmosphere just after the English Kitchen dispute.<sup>207</sup> The league was firmly in place to fill a critical role in the Bisbee deportation the next summer.

As *Truax v. Corrigan* ground its way through the legal system, Bisbee's labor/management differences were coalescing into the demarcation event of Bisbee history—the deportation of 1917. On April 6, 1917, the United States entered the war against Germany. Copper, however, was already in heavy wartime demand because of its many military uses such as shell casings and wiring. Copper companies reaped great profits, while the cost of living rose for ordinary citizens. Bisbee miners unhappily watched their wages remain the same while their purchasing power diminished through wartime inflation. The two miners' unions were disorganized and preyed upon one another. Watching this union dissension, western mining companies saw an opportunity to counterattack.<sup>208</sup> The Wobblies, the radical and syndicalist International Workers of the World (IWW) and the smaller of the two organizations, seized control of the more conservative International Union of Mine Mill and Smelter Workers Mine Mill Union (the former Western Federation of Miners) and called a strike. In the end, "approximately three thousand miners walked out on June 27."<sup>209</sup>

Bisbee and the Warren District were already uneasy, awash in fear and rumor of threatened violence and wartime sabotage. Idle mines meant economic loss for the community and the possibility of trouble from unemployed workers. On the morning of July 12, 1917, some two thousand armed vigilantes, identified by white armbands and led by the Cochise County sheriff, rounded up and deported approximately twelve hundred "undesirables," sending them on a Phelps Dodge-owned train to New Mexico. The sheriff had the support of the copper company management and two citizens' groups: the newly organized Workmen's Loyalty League and the year-old

<sup>206</sup> "Protective League Formed to Insure Law and Order in Warren District," *Bisbee Daily Review*, September 8, 1916.

<sup>207</sup> Fathauer, *Lemuel C. Shattuck*, 187.

<sup>208</sup> Mellinger, *Race and Labor in Western Copper*, 175.

<sup>209</sup> For this discussion see Schwantes, "Toil and Trouble," 121.

"long an eye sore to Main street," had been demolished back in 1924.<sup>225</sup>

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### THE END OF A STATE EXPERIMENT

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The *Truax v. Corrigan* legal saga finally ended on December 21, 1921, when the Supreme Court issued its decision. The Arizona Supreme Court had left the anti-injunction provision in force, finding that the English Kitchen's loss of patronage was not a loss of property to which Truax had a vested right. The state court also recognized the right of workers to pursue "peaceable means to accomplish the lawful ends for which the strike is called," including peaceful picketing.<sup>226</sup> William Howard Taft and four colleagues on the higher federal bench disagreed.

Newly seated Chief Justice Taft wrote the 5-4 majority decision reversing the Arizona Supreme Court's endorsement of the anti-injunction statute. "Plaintiff's business," Taft wrote, "is a property right."<sup>227</sup> Those printed attacks on the Truaxes in the handbills, along with defendants' other hostile actions, deprived the two restaurant keepers of a legitimate business interest without due process of law.<sup>228</sup> Such a law, the majority maintained, could not be valid under the Fourteenth Amendment. Also, in denying the protection of the law to the employer class as embodied in the Truaxes, the Arizona courts had favored the working class and denied equal protection of the law between classes.<sup>229</sup> Taft's opinion carefully singled out the Arizona state statute, while avoiding the invalidation of its federal model, section 20 of the Clayton Act.<sup>230</sup>

Three dissents accompanied Taft's majority opinion. Most famously, Associate Justice Oliver Wendell Holmes, Jr. supported the right of a state to experiment. He deprecated "the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social

<sup>225</sup>"Many Changes Made in Main Street Stores," *Bisbee Daily Review*, December 31, 1924.

<sup>226</sup>*Truax v. Corrigan*, 176 P. at 572.

<sup>227</sup>*Truax v. Corrigan*, 257 U.S. at 327.

<sup>228</sup>*Ibid.* at 328.

<sup>229</sup>*Ibid.* at 333.

<sup>230</sup>*Ibid.* at 340.

experiments that an important part of the community desires, in the insulated chambers afforded by the several States."<sup>231</sup> Business was not "property" in the same terms as land such that anyone could be deprived of it. He also observed that injunction abuses could occur more frequently in labor cases than in any other type.

At the bitter end, then, the Supreme Court found for the Truaxes against their picketing cooks and waiters. But by 1921, the Truaxes and their union adversaries no longer skirmished noisily on Bisbee's Main Street. The seven-year-long litigations changed laws yet won the Truaxes no prosperous Bisbee future, only a certain legal immortality for their surname. *Truax v. Raich* still resonates in certain areas such as alien rights and immigration restrictions. The better-known *Truax v. Corrigan* struck down a law that had much favorable justification in a time of "fierce controversy" over hostile judicial activism in the years 1890 to 1937.<sup>232</sup> Its limitations on injunctions and Taft's pronouncements on due process and equal protection would not long stand.<sup>233</sup>

In its time, though, *Truax v. Corrigan* was a landmark. A contemporary comment in the 1922 *California Law Review* grandly characterized it as marking "an epoch in constitutional law."<sup>234</sup> In Justice Holmes' terms, it essentially denoted the end of state experimentation with anti-injunction legislation, at least until the New Deal. The late Chief Justice William Rehnquist called *Truax v. Corrigan* one of a "series of body blows . . . to state and federal legislation that arose out of the Progressive movement."<sup>235</sup> Concerned more closely with its effects on Arizona's labor movement and politics, James Byrkit described *Truax v. Corrigan* as the "epitaph" of the Arizona liberal movement and its labor component after a battle for power with distant, manipulative corporations.<sup>236</sup>

<sup>231</sup>Ibid. at 344.

<sup>232</sup>William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton, 1994), 1.

<sup>233</sup>Kermit Hall, ed., *Oxford Companion to the Supreme Court of the United States*, 2<sup>d</sup> ed. (New York, 2005), "Truax v. Corrigan," 1029-30. Section author John E. Semonche concludes, "The decision in *Truax v. Corrigan* is representative of the Taft Court, but its reading of the due process and equal protection clauses would not long survive. Specifically, in *Senn v. Tile Layers Union* (1937), a similar Wisconsin law was upheld."

<sup>234</sup>H.R., "Comment on Cases" *California Law Review* 10 (1922): 237.

<sup>235</sup>William H. Rehnquist, *The Supreme Court*, new ed. (New York, 2001), 113, 114-15.

<sup>236</sup>Byrkit, *Forging the Copper Collar*, 315.



Serving his allies well, William Truax became the public face of the reaction to Arizona laws that mirrored the national labor movement's desire to pass legislation that could ultimately "alter the terms of industrial relations in organized labor's favor."<sup>237</sup>

Were Walter Douglas of Phelps Dodge and his fellow (generally absentee) copper magnates appropriately grateful to this man who fought their labor battles on the front line? Truax found it expedient to retreat from a changing Bisbee and his last, failing English Kitchen. New mining frontiers no longer beckoned, and he was not a young man. He lived out his remaining eighteen years in settled obscurity in Los Angeles. The evidence does not support a wealthy retirement for this self-made man and inveterate gold hunter. Old Aspen acquaintance Wentworth thought he "went broke in the mining game."<sup>238</sup> Did his frequent moves reflect wanderlust or failure? Were the unsuccessful, in fact, more likely to move on than the successful?<sup>239</sup> If organized labor cast him as a villain, the arch-enemy of labor, he was also, in a more textured approach, a man of his era, a good family man and small businessman reacting to unsettled times with his own moral standards and his own ordinary ambitions. He cast his lot with the Walter Douglasses and other Anglo-American businessmen, fighting his two cases because he believed he was right. New Western historian Patricia Limerick urges acknowledgement of the "moral complexity of Western history," in which "the good guys and bad guys combined the roles of victim and villain."<sup>240</sup> His willing aid in delivering those judicial "body blows" to labor's agenda in Arizona made him a union villain, but Billy Truax left Bisbee with unfulfilled dreams, an ordinary man of ordinary fortune who had the extraordinary experience of having two cases decided by the United States Supreme Court.

<sup>237</sup>Forbath, *Law and the Shaping of the American Labor Movement*, 16.

<sup>238</sup>Wentworth, *Bisbee with the Big B*, 35.

<sup>239</sup>Peterson, *The Bonanza Kings*, 2.

<sup>240</sup>Limerick, *Legacy of Conquest*, 54.



# WATER POLLUTION, THE LAW, AND THE COLLAPSE OF SOCIETIES

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GORDON MORRIS BAKKEN

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The water pollution in Butte and Anaconda, Montana, in the Silver Bow Creek and the Deer Lodge River [Clark Fork River] was caused by the disregard of miners for the common law interests of downstream riparians and prior appropriators, the greed of miners looking at profit rather than the rights of other property owners, and a calculus of cost that determined that litigation and potential plaintiff property acquisition was cheaper than abatement. In *Collapse: How Societies Choose to Fail or to Succeed*, author Jared Diamond noted, "Early miners behaved as they did because the government required almost nothing of them, and because they were businessmen."<sup>1</sup> When federal and state compliance agencies imposed clean water regulations upon the Anaconda Copper Mining Company, the calculus of disregarding law and the property rights of others failed and caused corporate collapse.

It was not long after the beginnings of the company that the problem of water pollution came to the notice of the agrarian population of the Deer Lodge Valley. *The New North-West* newspaper of Deer Lodge recognized the problem in an April 17, 1885, story:

The farmers along Warm Spring Creek experiencing evil results from the impregnation of the waters with poisonous matter from the Anaconda Smelter or

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<sup>1</sup>Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (New York, 2005), 38.

Concentrator, we are informed the Company proposes cutting a drain across the flats from the works to the Deer Lodge river, into which all such poisonous matter will be diverted.

On May 21, 1886, *The New North-West* observed, "We hear it stated the Anaconda Company estimates it will cost \$30,000 for the right of way and to construct a ditch from the works to the river so that the debris will not be emptied into Warm Springs Creek." More than a year later, the paper reported,

The Anaconda company a few days ago let the contract to Jesse Miller for the long projected tailing ditch which will extend from the concentrators at Anaconda to the Deer Lodge river. It will be 12 feet wide, 5 feet deep, and probably about ten miles long. Into this waters polluted by washing the ore will be diverted, and after its completion Warm Springs creek will be pure again. We are informed the Anaconda company can turn more water into the creek from Silver lake than they use, so the quality of Warm Springs creek will not be impaired nor its quantity lessened by this diversion.<sup>2</sup>

The farmers of the immediate vicinity knew of the impact on their water and awaited abatement through diversion and dilution. Meanwhile, the Old Works ran its tailings and sluiced its slag downhill into the creek.

The people of the Deer Lodge Valley also knew that the atmosphere had changed. *The New North-West* reported on October 7, 1885 that "last Friday was the smokiest day ever seen in Deer Lodge. It was so thick one could cut at it with a knife." Earlier the paper reported a story at the heart of a plaintiff's dilemma:

During the past week dense smoke has enveloped this valley and shut out vision beyond a mile. It reminds one

<sup>2</sup>*The New North-West*, July 15, 1887. In the quotations from these newspapers, I have not attempted to correct the grammar, leaving the flavor of the journalism of the times in place. The impact of this tailing ditch project is still evident. The 1987 Camp Dresser and McKee, Inc. study reported that "from aerial photos it appears that tailings in this area cover a more extensive area than that which has been mapped by Anaconda in the Stage I work. In addition, the air photos suggest that tailings materials may have also been conveyed toward Lost Creek via an irrigation ditch in this area." Camp Dresser & McKee Inc., "Final Data Report for Solid Matrix Screening study, Anaconda Smelter Site, Anaconda, Montana, March, 1987: Performance of Remedial Response Activities at Uncontrolled Hazardous Waste Sites, U.S.," EPA contract no. 68-01-6939.



Anaconda Smelter, Anaconda, Montana. (Courtesy of the Montana Historical Society, Helena)

of the impenetrable haze that hung over the country during the weeks that included the "Spike" ceremonies, in 1883. Many attribute the smoke to "Anaconda," but there is too much of it. There are undoubtedly heavy forest fires prevailing in the surrounding country.<sup>3</sup>

This dilemma was to sue or not, and to be certain of causation before filing suit. For the residents of Deer Lodge, more than ten miles away from the Old Works, it was hard to believe that such a thick smoke could be produced by a reduction facility.

The mitigation efforts of the tailings ditch were accompanied by litigation and property acquisition from potential plaintiffs. John Dougherty explained, in a letter to Marcus Daly dated August 18, 1894, that the company had purchased "lands along the line of the tailings ditch, [that this] was made necessary by the overflow of tailings, on the farms and properties of individuals along [the] side ditch, resulting in frequent claims for damages." In terms of risk management,

<sup>3</sup>*The New North-West*, August 21, 1885.

"it was deemed good policy to buy a strip of land one mile wide along the entire line of the ditch."<sup>4</sup>

The mitigation program, including purchase of substantial properties, was a response to the need to manage litigation potential. Yet abatement in the nineteenth-century sense only attempted to avoid litigation from neighboring property owners. Jared Diamond argues, "Toxicity problems associated with mining were already recognized at Butte's giant copper mine and nearby smelter a century ago, when neighboring ranchers saw their cows dying and sued the mine's owner, Anaconda Copper Mining Company."<sup>5</sup> Ranchers thirteen to fifteen miles away would soon experience the results of the abatement failure and would face the collapse of their fragile ecology.

Within the corporate confines of the company, executives viewed the problem of water pollution from a different perspective. Company vice president Frederick Laist, in his "Metallurgical History of the Anaconda Copper Mining Company," stated the corporate perspective. Water had to service processing such as smelters, concentrating plants, and the like. Laist noted that "by 1901 they had an aggregate capacity of about 4,000 tons of ore per day or about 8 times the capacity of the first mill at the Upper Works." Flotation techniques arrived in 1913, and "consisted of crushing the ore in Blake crushers to about 1-1/2" at which size it was passed through large jigs known as "bull" jigs, the concentrates from which were coarse enough to be smelted in blast furnaces. The tailings from these jigs were then crushed in rolls to approximately 3/8" when a second separation of concentrates was made in smaller Hartz jigs. Tailings from these jigs were crushed in a second set of rolls to about two millimeters and again the liberated concentrates were recovered by jigs, the tailings from which went to waste still containing about 1% of copper." Laist identified this as the "water or gravity concentration process." Importantly, "neither the process nor the machines used in the mills originated at Anaconda although improvements in both flow sheet and equipment were made." Given the technology, "concentrating ores at first ran from 6 to 8% copper and on such ores a satisfactory percentage recovery was made. Later the grade of the ore dropped to 4-1/2% and the recovery was always a serious matter and was approximately equal to the loss of tailings. Numerous at-

<sup>4</sup>John Dougherty to Marcus Daly, general manager, Anaconda Works, August 18, 1894, mss., Anaconda Copper Mining Company Records, General Office, MC 169, box 54, Montana Historical Society, Helena.

<sup>5</sup>Jared Diamond, *Collapse*, 36.

of expense to the Company, as the easement is so written as to include all past and future damage to the lands in question, both from tailings overflow within the limits of the metes and bounds description (the highest water mark seen,) but also smoke emanations on all the lands owned by the grantor."

He concluded, "In every case, settlement and easement has been made for overflow up to the highest water mark and thereby all subsequent and future damages provided against. Therefore my conclusion is that the best thing to do is to do nothing but settle with E. Whitcraft as has been done in all other cases."<sup>12</sup>

The policy of letting the tailings flow without mitigation or any attempt at flood control was clear. It is less clear that Noble recognized the cause of overflow as not being so much related to the rain as it was to the changing creek and river bed.

The company pursued its policy with a great deal of consistency. On August 15, 1903, Abraham and Maggie Beckstead gave the company an easement to ninety acres for \$1,500 for the purpose of "a dumping ground" and "for the deposit of slums, tailings and debris from the smelting plants and reduction works. . . ." The Becksteads waived "all claim for damages for and on account of the same, which may have accrued heretobefore or which may hereafter accrue by reason of such deposit of slums, tailings and debris upon said above described premises."<sup>13</sup> Harry M. Griffith gave his release on September 3, 1904, for \$750. His "X" was witnessed by John W. James, a Deer Lodge notary, and Jesse Miller. His "X" also conveyed an easement for dumping the "slums, tailings, debris, and other refuse matter" from the Anaconda Copper Mining Company, the Washoe Copper Company, the Boston and Montana Consolidated Copper & Silver Mining Company, the Butte & Boston Consolidated Mining Company, the Parrot Silver & Copper Company and the Colorado Smelting & Mining Company.<sup>14</sup> The release and

<sup>12</sup>Noble to William Wraith, Sept. 15, 1911, mss., Anaconda Copper Mining Company Records, MC169, box 441, Montana Historical Society.

<sup>13</sup>Book of Deeds #38, p. 418, Recorder's Office, Deer Lodge County, Anaconda, Montana. R.H. and Dorcas L. Mitchell executed an easement to the Boston & Montana, Butte & Boston, Parrot, and Colorado on October 27, 1903, receiving \$500 for an easement on their 160 acres in Deer Lodge County.

<sup>14</sup>Book of Deeds #39, pp. 43-45, Recorder's Office, Deer Lodge County, Anaconda, Montana.

easement language, as well as simple pollution easement language, appeared in other 1904 instruments.<sup>15</sup>

Rasmus Jendresen's friend filed the same day and reported an additional overflow on the east side of 16-3/4 acres and 11 acres on the west side of the Deer Lodge River.<sup>16</sup> The Miller and Croswhite investigation of the same ranch indicated a loss of twenty tons of hay due to tailings damage.<sup>17</sup> Purchasing agent Dunlap made corporate president John D. Ryan aware of the claims on August 11, 1908, noting that "none of these gentlemen are particularly offensive or interested in the smoke suit. In fact they are rather friendly with the excetction [sic] of Mr. Eli Dezourdi. While he is a member of the Farmers' Smoke Association he is not disagreeable in his actions."<sup>18</sup> The first step in dealing with these tailings damage claims had been taken.

The year also produced the Valiton easement, one of the early wraparound easements. Both easements included water and air pollution language. The first covered Clark's Colusa Parrot Mining and Smelting, and the second included Anaconda, the Washoe Copper Company, the Butte and Boston, the Boston and Montana, the Red Metal Mining Company, the Parrot Silver and Copper Company, and the Trenton Mining and Development Company. As Evans explained to Templeman in the 1920 letter above, Anaconda's legal staff was active in developing a pro-active policy of acquisitions. The release and easement language was broad, covering all water and air pollution.<sup>19</sup> The use of the wraparound language in the Valiton release and easement became virtually form language for Anaconda's legal department and purchasing agents.

<sup>15</sup>The "old" Whitcraft easement of 1904 is from book 38, p. 554 and following. The abstract of the same, entitled Adaline Krouskop, et al., dated May 6, 1904. Abstract of Johnson to APMC, et al., Oct. 4, 1904. Laura and D.L. Griffith to APMC, et al., Sept. 4, 1904, Book of Deeds #J, pp. 184-85, Clerk and Recorder's Office, Silver Bow County, Butte. Griffiths had 80 acres in Silver Bow County and received \$750 for their release and easement. Harry M. Griffith to APMC, et al., Sept. 3, 1904.

<sup>16</sup>Noble to Dunlap, Sept. 14, 1908, mss., Anaconda Copper Mining Company Records, MC169, box 193, Montana Historical Society.

<sup>17</sup>Jesse Miller and B.F. Croswhite to J.A. Dunlap, August 20, 1908, mss., Anaconda Copper Mining Company Records, MC169, box 193, Montana Historical Society.

<sup>18</sup>Dunlap to John D. Ryan, August 11, 1908, mss., Anaconda Copper Mining Company Records, MC169, box 193, Montana Historical Society.

<sup>19</sup>Book of Deeds, #7, Recorder's Office, Powell County, Deer Lodge, Montana, pp. 525-31. It also is worth noting that when the company started settling claims in and around the city of Deer Lodge, these lands were twenty-two river miles away from Warm Springs.



Even before the merger of 1910, the documents of easement wrapped the parties together with downwind and downstream property owners. The 1909 release and easement of John T. and Mary Hempstead and Anna, Katie, and John Boyle was to the Anaconda Copper Mining Company, the Washoe Copper Company, the Butte & Boston Consolidated Mining Company, the Boston & Montana Consolidated Copper and Silver Mining Company, the Red Metal Mining Company, the Parrot Silver and Copper Company, the Colorado Smelting and Mining Company, and the Trenton Mining and Development Company. The point source of the water and air pollution was wrapped around the "vicinity of Butte, Montana, or at or in the vicinity of Anaconda, Montana." The easement was for air and water pollution, another wrap.<sup>20</sup> Alfred Perkins' November 5, 1909, release and easement contained the approved language and recited consideration of one dollar.<sup>21</sup> The release and easement of May Henderson, Charles S. Henderson, Mary Bernard, Albert Moog, and Mary Savery of September 25, 1909, also recited the form language and included an additional easement for the Willow Creek ditch and flume.<sup>22</sup>

Civil engineer Frank Noble was in the field again in 1909 looking at water rights on James Purdee's ranch on the west side of the Deer Lodge River. J.D. Dunlap, the company purchasing agent, also expressed interest in Purdee's ranch, but for different reasons.

Dunlap saw the property in terms of its present cost and future value. First, he thought an exchange of sixty acres of the Goodwin ranch would save \$2,400 cash. The \$40-per-acre demanded was less than the railroad had paid for a right of way, but there were other costs. Keeping those pesky lawyers out of the mix was one of the factors calling for action.

The company's purchasing agent, Dan Welch, found himself very busy in 1910. Peter S. Mussigbrod of Warm Springs signed a release and easement for his 242 acres on February 15.<sup>23</sup> John E. Hofman did likewise on March 7, on his 83.85 acres of Deer Lodge County.<sup>24</sup> Welch started the settlement wheels rolling on the Ed Whitcraft ranch 1911 tailings overflow. Welch told E.P.

<sup>20</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 252–58. This book is referred to as Book U of Miscellaneous Records and is maintained by the county clerk and recorder.

<sup>21</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 265–68.

<sup>22</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 261–64.

<sup>23</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 314–19.

<sup>24</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 323–26.

Mathewson that "the overflow in my opinion has caused little or no damage, but if permitted to continue for two or three more years will necessitate our paying Mr. Whitcraft \$20.00 an acre or more for land overflowed."<sup>25</sup>

By 1912 the consolidation of the Deer Lodge River ranches was well under way. Civil engineer Noble made that clear in a February 1, 1912, report to William Wraith regarding the slum fields:

The factors that will prolong the life of the fields over a series of years are uncertain in practice and will vary from year to year. Some of them are:

... The allowing the slimes and other material to go over the spillway of the tailings dam in No. 1 Pond, and thence down to Deer Lodge River for uncertain periods during the year (the present practice is that during five or six months of the year, most all the slums pass over this spillway).

... Out of a total of twenty ranches which border on Deer Lodge River, between the French Crossing ranch and Deer Lodge City which have on them tailings deposits from the river, fifteen of them have been settled for all future deposits; and the intention is probably to settle the other five ranchers on the same basis.

The question is—may not the life of the slum fields be prolonged indefinitely by letting these ranch lands become a tailings and slum field whenever the river is high and will not carry the tailings.<sup>26</sup>

Wraith passed the report along to E.P. Mathewson, the manager of the Anaconda Reduction Works, with the advice to purchase lands "between our north line of our slum field, and the Warm Springs Road." That was good policy because it "would be a protection from any complaints of an increase of underground water from the slum field on account of the greater drainage of the country in that direction." Wraith also noted that given the expense of dikes and fences, "it would be cheaper to own the lands adjacent."<sup>27</sup>

<sup>25</sup>Welch to Mathewson, Sept. 1, 1911. Welch wrote to William Wraith on September 4, 1911, regarding a mitigation suggestion and offered that "if it is necessary to straighten the river for any great distance we would probably find it cheaper to make settlement and obtain release from Mr. Whitcraft covering the land which was overflowed by Tailings this year."

<sup>26</sup>Noble to Wraith, Feb. 1, 1912, mss., Anaconda Copper Mining Company Records, MC169, box 441, Montana Historical Society.

<sup>27</sup>Wraith to Mathewson, Feb. 21, 1912, mss., Anaconda Copper Mining Company Records, MC169, box 441, Montana Historical Society.

mately \$150.00." Further, "the whole dyke is a scrimpy affair of earth and with a backing on the lower side of thin boards and stakes (for the most part all rotted) and is about 2 to 3 feet wide on top, with slopes of 1 to 1." In terms of broader company policy, Noble observed,

As in other cases in Deer Lodge Valley involving the question of damage by tailings deposits, these ranches in this vicinity have been surveyed and reported upon for settlement, and that question is before the company officials at the present time and as far as I know no settlement has been agreed to.

As the damage has been done and will have to be settled for and at a certain stated price per acre of overflow, any additional damage (which I consider is not likely on the additional portion overflowed in 1908 and 1910) on the lands in question is of no moment, as the settlement provides for future damage and it seems to me that the repairing or making a better dyke is an additional expense that is not warranted under the circumstance.<sup>10</sup>

The calculus was simple. Mitigation by improving a tailings dike for \$150 was not cost effective because settlements, including easements and purchases, covered present and future damage. Let the tailings flow.

Lewis O. Evans, attorney for the company, explained Anaconda's practice to J.L. Templeman, chief counsel for the Colusa Parrot Mining and Smelting Company, in 1920:

In 1906 there were a large number of claims for tailings damage, some of which were in suit, against our companies, and also against your Colusa Parrot Mining and Smelting company and its predecessors. One of these was a claim of Mr. Peter Valiton. We settled the Valiton claim and in the settlement covered your company also. This was done under agreement with Mr. Shelton for your company, the understanding being that your company would participate in the settlement upon an agreed basis. Complete releases of all claims, and grant of future easements, as to all of Valiton's lands in Powell County, were taken to our company and a separate one to your company and W.A. and J. Ross

<sup>10</sup>Noble to Wraith, Oct. 23, 1911, mss., Anaconda Copper Mining Company Records, MC169, box 193, Montana Historical Society.

Clark, and both of these instruments were recorded in Powell County.<sup>11</sup>

As Noble and Evans stated, the provision for future tailings damages by easement allowed the tailings to flow.

Noble made the policy points clear to Wraith in 1911 in his discussion of "the old Hugh Whitcraft ranch lands." He believed that "the simplest and much the least expensive thing to do would be to settle by a deed of easement for the tailings damage that has occurred since the old survey and settlement was made in 1901." The additional overflow amounted "to 96.20 acres, and at the rate of about \$20.00 per acre, . . . it has been customary for the Purchasing Department to pay for easement and settlement for tailings and smoke damage." Noble added that "this additional easement and settlement ought to be made at not to exceed the \$20.00 per acre rate, because in the past that rate has included damages to hay land extending over a long series of years preceding the time of settlement." This was good business because "the damage to this additional overflowed land is very slight and for a short period (no complaint being made for damage to this portion of the ranch except for this past winter's overflow) compared to the previous settlements on this and other valley ranches."

Noble also believed "that if the Company cut new river channels at the bends of the river on Mr. E. Whitcraft's ranch, the effect will be simply to lessen the amount and the extent of tailings deposit on the bottom lands." Even such a civil engineering marvel would not prevent "such high water floods as occurred in June, 1908 and February-March, 1910" or

prevent the flood waters overflowing the banks of the river and carrying tailings to the same portions of the Whitcraft ranch as have been overflowed in the past, and this means, that after the Company has been to the expense of several thousands of dollars in making new channels, there will still be damages to pay for deposits caused by these very high water seasons, which seem to be coming more frequent of late years.

Noble asserted, "[I]f the Company will settle for the additional 96.20 acres overflow, then, that will be the end

<sup>11</sup>Evans to Templeman, Jan. 15, 1920. A report entitled "Anaconda Copper Mining Company. Details of Settlements Account Deer Lodge River Tailings Damages. May 1st, 1904 to October 20th, 1910," has an entry for Peter Valiton for July 2, 1908, in the amount of \$25,000 with the notation "settlement of all damages, past and future."

tempts were made to recover the slimed copper by means of buddles, vanners, etc., but without much success." Laist reported that "the slimes ran 4% copper, as high as 7% in the early days, and ponds were excavated for impounding them but these filled up faster than they could be dug and most of the slimes from the old mills found their way into the streams and *were wasted* [emphasis added]."<sup>6</sup>

The problem of slimes in the water was not the destruction of the streams and the property values of neighboring farmers, but the lost values of the tailings and slimes. The company first constructed tailings ponds to hold mineral values for future processing to recover lost copper, silver, or gold rather than to mitigate or abate a nuisance. Laist was part of a corporate culture that focused on efficiency in processing ores for profit. It was profit rather than environmental mitigation that filled his mind.<sup>7</sup>

For the farmers and ranchers downstream, the company was not a good neighbor. On May 26, 1896, attorneys for some of those ranchers sent a cease and desist letter to the company. One of the signers, Mike Mullen, filed suit against the company eight years later, and the company bought him out.<sup>8</sup>

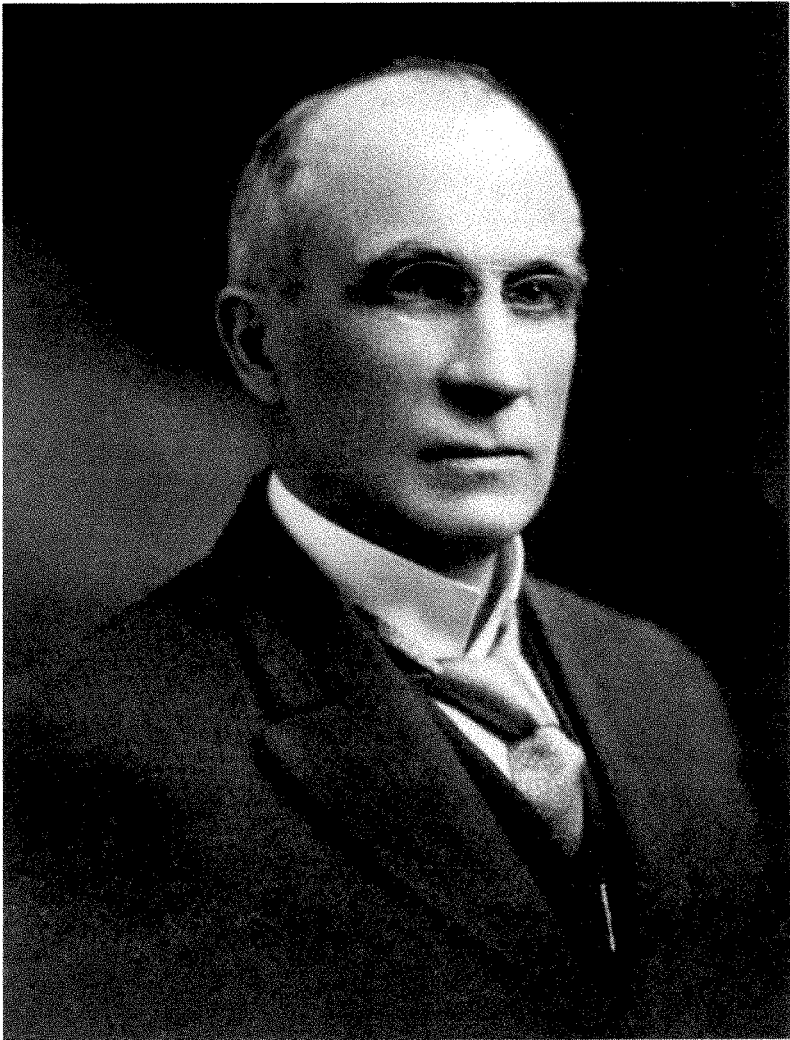
The company recognized the problem—at least Frank Klepetko did in 1902. As Laist's evaluation above makes clear, the company failed to or refused to adequately impound the tailings or the slimes. Klepetko wrote to William Scallon at corporate headquarters in New York, "[W]e have not in this [construction budget] allowed anything for the digging of the flood water channel which will cost in the neighborhood of \$30,000. . . ."<sup>9</sup>

<sup>6</sup>Frederick Laist, "Metallurgical History of the Anaconda Copper Mining Company," mss., Anaconda Copper Mining Company Records, Reduction Department (Anaconda), MC169, box 450, Montana Historical Society, pp. 5–6. The date 1944 is on the face of the title page of the document. Laist's history includes a third section covering the period 1922–42.

<sup>7</sup>Jared Diamond wrote that in 1907 the company created tailings ponds in some way responsive to the pollution problem, but the company documents clearly indicate that economics rather than abatement was the motive. Diamond, *Collapse*, 36.

<sup>8</sup>*Mike Mullen v. Anaconda Copper Mining Company*, case #2204, Deer Lodge County District Court (1903). George A. Maywood was Mullen's attorney of record. The company won a change of venue to Silver Bow County. The company was represented by A.J. Shores, Con Kelly, D. Gay Stivers, W.B. Rodgers, H.R. Whitehill and W.W. Dixon. The February 6, 1905, answer set up the prescriptive easement arguments regarding water pollution and industrial necessity for air pollution. The stipulation for dismissal can be found in the record dated June 26, 1920.

<sup>9</sup>Klepetko to Scallon, April 22, 1902, mss., Anaconda Copper Mining Company Records, Reduction Department, MC169, box 445, Montana Historical Society.



William Scallon (1855–1951), counsel for the Anaconda Copper Mining Company, president and western regional manager, 1900–1904, and president of the Montana Bar Association, 1905. (Courtesy of the Montana Historical Society Research Center, Helena)

As Frank C. Noble, the company's civil engineer, wrote to William Wraith, superintendent of the Reduction Works, in 1911, the issue was cost. Reporting on the tailings dike located on the Henry Williams Estate Ranch, Noble estimated that "to put the dyke, at this point, in as good condition as it was before the high water overflows of 1908 and 1910 cost approxi-

Eli Dezourdi was one of the ranchers who signed off on a release and easements for tailings and smoke in 1912. Ed Whitcraft was another. Frank Noble was in the field again making maps. His survey of May 18, 1911, revealed 96.20 acres of additional tailings overflow.<sup>28</sup> William Wraith forwarded Noble's report to Dan Welch and concurred "in Mr. Noble's conclusions, and I believe the cheapest way in the end would be to get an easement on that portion of the ranch that has been covered by tailings."<sup>29</sup> On March 15, 1912, Ed and Mary Whitcraft gave a release and air and water pollution easement on 96.2 acres to the company.<sup>30</sup> Welch wrote to J.T. Roberts on March 15, 1912, requesting a check for \$2,000, or \$20.79 per acre.<sup>31</sup> Contemporaneously, Henry C. Gardiner, the prime mover in the Deer Lodge farming and land company, purchased seventy-eight acres of the Whitcraft ranch west of the river for \$250, or \$3.21 per acre. It would not be the only time Gardiner purchased land in his name and transferred it to the company.

The policy continued with several accounting variations such as one evidenced by a 1914 report. The reconciliation report noted,

Credit A.C.M. Co. General Office with that portion of the amount paid for certain lands purchased for the Deer Lodge Valley Farms Co. by the A.C.M. Co. that was considered as settlement of tailings and smoke damage caused by the operation of the A.C.M. Co.'s reduction works at Anaconda and so taken into account by that Company. Mr. Thayer and Mr. Kelly however, decided on July 16, 1914, that the total amount paid to the various owners of the properties at the time of purchase should be assumed by the Deer Lodge Valley Farms Co. as cost of lands

Norton Ranch	1,280 acres	10,328.42
Harris Ranch	160 acres	3,052.00
Cox Ranch	80 acres	405.75
McGuire Ranch	200 acres	4.00
Evan J Evans Ranch	240 acres	2.00
Hensley Ranch	320 acres	5.50

<sup>28</sup>Noble's map may be found in the Montana Historical Society at B-1187 in MC169 within the ACMC Office of Civil Engineers collection.

<sup>29</sup>Wraith to Welch, Sept. 25, 1911, mss., Anaconda Copper Mining Company Records, MC169, box 441, Montana Historical Society.

<sup>30</sup>Book U, Recorder's Office, Deer Lodge County, Anaconda, pp. 617-20.

<sup>31</sup>Welch to Roberts, March 15, 1912, mss., Anaconda Copper Mining Company Records, MC169, box 441, Montana Historical Society.

Parrot Ranch	160 acres	1.50
Morgan Evans Ranch	480 acres	55.60

The balance to credit of A.C.M. Co. General Office on the Deer Lodge Valley Farms Co. books, after making the above entries, equaled \$243, 807.82.<sup>32</sup>

Regardless of the progress to 1914, the work of consolidating the lands and interests in lands to avoid litigation continued. One of the reasons was that some claimants, like Conrad Kohrs, refused to settle. Others such as George Wellcome settled on January 14, 1915, and the instrument was recorded March 1, 1916.<sup>33</sup> On March 30, 1916, Kohrs, president of the Kohrs and Bielenberg Land and Livestock Company, would, with his wife and John Bielenberg, sign a release and easement.<sup>34</sup> Kohrs and Bielenberg received \$25,000 [\$423,200 in 2003 dollars] for the release and easement.<sup>35</sup>

One of the internal problems the company faced in these acquisitions was accounting. As noted above, the corporate executive officers changed the system somewhat, and thereafter administrative officers would have to deal with the numbers. George Jackson, the company's chief clerk, wrote to Henry C. Gardiner regarding the Hellstrom and Perdee ranches:

Your letter states that the total purchase price should be considered as account Smoke and Tailings. Apparently, I did not make my question clear regarding the disposition of the cost of these ranches in my previous letter.

<sup>32</sup>Statement showing amounts to be taken into account by the Deer Lodge Valley Farms Co, to bring that company's books into reconciliation with the books of the Anaconda Copper Mining Co. at June 30, 1914," p. 2, mss., Anaconda Copper Mining Company Records, MC169, box 105, Montana Historical Society. The amount of money expended on tailing settlements to October 20, 1910, amounted to \$59,659, according to the "Details of Settlements Account Deer Lodge River Tails Damage" list, p. 3.

<sup>33</sup>Book V, Recorder's Office, Deer Lodge County, Anaconda, pp. 256-57.

<sup>34</sup>Deed Book #16, Recorder's Office, Powell County, Deer Lodge, Montana, pp. 47-51.

<sup>35</sup>Assistant Secretary J.T. Roberts to George C. Jackson, April 18, 1916, mss., Anaconda Copper Mining Company Records, MC169, box 125, Montana Historical Society. The letter continues regarding the accounting system: "Mr. Evans suggests that one-half of this amount might be considered as damage settlement and the other half as payment for the easement. This latter amount should be capitalized to follow a precedent established a number of years ago. Mr. Evans further states that we should deal with this as we dealt with the Valiton payment. I do not remember how this was handled as we appear to have no information regarding it in this office."



It would only be proper to charge Smoke and Tailings account with the amount paid for the land in excess of the actual property value. The real value of the land would be charged to a property account, and not to expense account. Judging from the price paid for the property, I think very little, if any, of the amount should be charged to Smoke or Tailings.<sup>36</sup>

Gardiner replied five days later, telling Jackson that the Hellstrom purchase was "a straight purchase in which the land and water secured represent fully the value of the money paid." The Perdee property was another matter.

Gardiner evaluated the economics of the situation. "The Perdee property will not rent for more than \$200.00 or \$250.00 a year," he offered. Moreover, "the Perdee water rights have been completely destroyed, as a result of construction with tailings dam and field operations years ago, and a considerable portion of the Perdee property has been tailings damaged both from Anaconda and Butte." The only potential value was in a prospective "tailings damage" settlement. "As the Perdee Ranch stands at the present time," he asserted, "the agricultural land has little more than a depreciated pasturage value." His judgment was "that a valuation of \$3000 to \$4000 on property account would be the extreme value which this property could be carried at under the circumstances mentioned, as it could not be sold in my judgment for this amount, and it is questionable if a purchaser could be secured for the place at \$4,000." Gardiner's idea was that, "in view of the Smoke Easements, a reasonable distribution would be—\$1000.00 to Smoke, \$6000.00 to Tailings, \$3000.00 to Property account."

This was based on the fact that "some years ago, Mr. Dunlap offered \$15,000. for some 232 acres of this property, the offer at that time being refused. This offer was on account of tailings damage."<sup>37</sup> Although Gardiner made a case for keeping the bulk of the expense off of his property account, it is also clear that the process of negotiation amid continuing air and water pollution had saved the company \$5,000.

The onset of a national agricultural depression in 1920 also aided company negotiations. Gardiner had already sent Evans similar good news on April 7, 1920, regarding the Samuel Ayotte

<sup>36</sup>Jackson to Gardiner, May 19, 1916, mss., Anaconda Copper Mining Company Records, MC169, box 125, Montana Historical Society.

<sup>37</sup>Gardiner to Jackson, May 24, 1916, mss., Anaconda Copper Mining Company Records, MC169, box 125, Montana Historical Society. Jackson would continue to consult Gardiner regarding this matter.



Butte Hill. Note the smelter smoke and the slag pile in the foreground. (Courtesy of the Montana Historical Society, Helena)

place. He reported that "this is the piece of ground that we have been negotiating for some three or four years, last past, and the owner has finally decided to accept an offer which was made about two years ago."<sup>38</sup> In 1921, Gardiner and his wife deeded the Ephraim Staffanson interests in air and water pollution claims and an easement to the company.<sup>39</sup> The consolidation program worked in various ways to achieve its ends.

Why did the company spend so much time and money settling tailings claims rather than mitigating or abating the nuisance? As indicated by various participants in the company

<sup>38</sup>The company also picked up the "Pedranti lands" in this period from E.O. and Lily M. Selway holding the deed "*unrecorded*." W.R. Baxter to R.D. Cole, Feb. 12, 1919, mss., Anaconda Copper Mining Company Records, MC169, box 126, Montana Historical Society. Gardiner explained the transaction to Cole in a February 1, 1919, letter: "Enclosed herewith please find deeds from Joseph Pedranti and his wife, Ellen Pedranti, to E.O. Selway. We are going to hold this property in Mr. Selway's name as we do not wish it to appear that we are buying land in Silver Bow County on the east side of this valley." Gardiner to Cole, Feb. 1, 1919, mss., Anaconda Copper Mining Company Records, MC169, box 126, Montana Historical Society. The deeds were transferred to the abstract department in December 1912 for recording. See Cole to W.K. Quarles, Dec. 12, 1921, Quarles to Cole, Dec. 13, 1921, and Quarles to County Clerk and Recorder, Dec. 13, 1921, in the same box.

<sup>39</sup>Book of Deeds #54, Recorder's Office, Deer Lodge County, Anaconda, pp. 189–91. The Staffanson easement was the end product of the settlement of an 1897 Deer Lodge County case alleging water pollution.

hierarchy, the issue was not how to fix the problem, but how to settle claims most cheaply. On the claims side of the company, the directive was clear. On the tailings engineering side, the messages were equally clear: managers were to sluice granulated slag and tailings the cheap and easy way regardless of the property interests of downstream riparians. As noted above, the company constructed ditches to carry Old Works tailings and granulated slag away from Warm Springs Creek ranches and farms, but the ditch proved too narrow and the company had to acquire property a mile wide for the task.

Anaconda was not the only corporation to behave in this manner. Idaho's Bunker Hill Company combated water pollution lawsuits through a pattern of delaying, litigating, buying land and/or easements, and repeating the process.<sup>40</sup> The company even negotiated pollution easements before building its smelter at Kellogg, Idaho.<sup>41</sup>

The issue was speed and volume from the outset. H.H. Nell, the assistant superintendent of the Old Works in Anaconda, reported to Marcus Daly on March 25, 1896, that "the lower tailings flume at the Lower Works Concentrator has been repaired. This flume will carry the tailings of but three stamps, and these were started up at 6 o'clock this evening. The upper flume will be completed sometime during the night, and immediately upon its completion the balance of the stamps will be put in operation."<sup>42</sup> The fast pace had consequences. Frank Klepetko, the manager of the reduction works, wrote to F.A. Jones, engineer of the Butte, Anaconda, and Pacific Railway, in 1902, requesting help:

In looking over the pond recently constructed to impound the tailings of the New Works, I noticed a good deal of wash taking place in the bank. To obviate this, it will be necessary to rip rap this with slag; by rip rapping I mean, simply dumping a lot of slag on the side against the water. This ought to be done before the track is moved, as I think the work can be done cheaper by means of railway cars. Will you kindly do this and have same charged to the New Works?<sup>43</sup>

<sup>40</sup>Katherine G. Aiken, *Idaho's Bunker Hill: The Rise and Fall of a Great Mining Company, 1885-1981* (Norman, OK, 2005), pp. 63-65.

<sup>41</sup>*Ibid.*, p. 69.

<sup>42</sup>Nell to Daly [at the Holland House in New York City], March 25, 1896, mss., Anaconda Copper Mining Company Records, MC169, box 442, Montana Historical Society.

<sup>43</sup>Klepetko to Jones, May 22, 1902, mss., Anaconda Copper Mining Company Records, MC169, box 443, Montana Historical Society.



Anaconda Smelter in the 1920s. Note the tailings pile extending out from the base of the smelter hill. (Courtesy of the Montana Historical Society, Helena)

Klepetko also tried to get F.I Cairns, the assistant manager, to regulate the flume so "there will be no flow over the tailings pile; this tends to take tailings down the valley."<sup>44</sup> Good intentions apparently did not stop the tailings from flowing onto downstream riparians.

One of the reasons for this can be found in the reports of the tailings disposal engineers. One put it succinctly: "late in the Year 1917 the disposal of tailings from the Washoe Reduction Works began to receive serious consideration, the methods employed up to that time having been totally inadequate to take care of their permanent impounding and prevent their getting into the Deer Lodge River."<sup>45</sup> The plans of 1918 did not go as expected because "the Opportunity Dams could not be built with gentle slopes on both sides as was the original intention." Further, "water was at the surface of the ground where the dams were to be built, there was practically no gravel near the surface, and the earth was very soft." As a result, the Opportunity Dams, as completed, were nothing more than dykes. . . ."<sup>46</sup> Years later, "wave action during high

<sup>44</sup>Klepetko to Cairns, May 24, 1902, mss., Anaconda Copper Mining Company Records, MC169, box 443, Montana Historical Society.

<sup>45</sup>"Report on Tailings Disposal Plant at Opportunity and Clarifying Plant at Warm Springs," circa 1922 based on internal evidence on page 7. Authorship seems to be Frederick Laist in terms of the filing stamp on the face of the document. Mss., Anaconda Copper Mining Company Records, MC169, box 90, Montana Historical Society.

<sup>46</sup>*Ibid*, p. 3.

winds is the most serious menace to the safety of the dams. This is particularly so at Opportunity due to the poor quality of material in the dam structure."<sup>47</sup> The report went on to observe that "it may be advisable to pass as much of the refuse and debris as possible which comes down Silver Bow Creek with the flood through the Ponds and into the river below to conserve the life of the ponds."<sup>48</sup>

William F. Flynn, the company's tailings engineer, filed another report on January 26, 1937.<sup>49</sup> Flynn first reviewed the history of tailings disposal at Anaconda. He found that "the tailings from the Concentrator were sluiced in flumes and carried by gravity to areas northeast and westerly from the main smelting plant." He also noted, "[T]he tailings from the tables in the old process were carried across the B.A. & P. [Railway] main line and deposited from a flume high above the natural ground. A dyke erected along the old Montana Union track on the north side of the field controlled the waters on that side of the tailings field." The company had built "a dyke on the east side of the field near the main highway to the Big Hole [that] controlled the water on the east side of the field. In this latter dyke there was a bridge with gates which controlled the deposit of the tailings." "[F]rom this bridge a ditch meandered easterly to the Deer Lodge River entering the river near the old 'French Crossing Ranch.'"

Flynn traced "the tailings from the Slimes Plant . . . down through Walker Gulch west of the plant and settled in six ponds, each pond about 300 by 600 feet. These slimes were later returned and retreated at the Smelter Briquette Plant." He found that "the overflow from these ponds was carried in ditches in a northerly and easterly direction entering the Deer Lodge River near the 'French Crossing Ranch.'"

The company built "five tailings ponds . . . in 1910, about 8 miles east of the Smelter and 1 mile west of the Deer Lodge River." Flynn recorded that "these served as final settling ponds for the tailings waters from the Smelter until 1918." But the ponds were inadequate "owing to the amount of the slimes, the six ponds near the Smelter . . . and much slimes were sluiced down the valley." These slimes were settled in the lower ponds, which were filled up by 1918.

<sup>47</sup>Ibid, p. 4.

<sup>48</sup>Ibid, p. 7.

<sup>49</sup>William F. Flynn, "Report on Tailings Disposal at Anaconda Reduction Works," mss., Anaconda Copper Mining Company Records, MC169, box 90, Montana Historical Society.

The demands of World War I production overwhelmed the system. Flynn observed, "[O]wing to the large amount of tailings during the year 1914 to 1917 inclusive, it was almost impossible to keep storage room ahead with the excavation equipment available."

A 1917 study resulted in a new tailings program "including the two large clarifying ponds situated on the Deer Lodge River east of Warm Springs, Montana. These ponds were constructed in the years 1918-1920." Flynn determined that "the object of these ponds was to make a final settlement of the Anaconda Smelter tailings that might overflow from the upper ponds and also to settle the tailings in the Deer Lodge River." The Butte and Superior, East Butte and Timber Butte concentrators "sluiced tailings in various amounts into the waters of the tributaries of Silver Bow Creek which flows into the Deer Lodge River." Flynn maintained that the system settled "practically 100% of the tailings produced." The system did not prevent the iron in solution from producing water of "a reddish brown color," but he argued that the condition could not "be corrected by our present method." Presently, "the problem of dusting from the tailings area is now the most serious problem."<sup>50</sup>

A decade later, E.P. Dimock's February 20, 1947, report on tailings found 72 million tons of material in the ponds and the end dams, thirty-eight to fifty feet high. He reported "no record of failure of dams built by this system" and a proposal to deal with "the dust problem."<sup>51</sup>

In the 1950s, the company started to take a look at the percolation of waters from the ponds into the ground water. Henry F. Adams, the mill superintendent at the Inspiration Consolidate Copper Company in Arizona, told F.F. Frick, the company's research engineer,

Anaconda is fortunate in having what appears to me, an ideal "site" for tailings disposal. The tailing dam is located on a large flat, the soil of which I assume to be more or less sandy, at least, pervious to water. This means that the water percolating down through the impounded tailings will continue to percolate into the original soil, drain off through underground channels to an underground reservoir, and finally to the river. Under these conditions, the likelihood that seepage will occur anywhere in the dyke, from top to toe, is minimized.<sup>52</sup>

<sup>50</sup>Ibid, pp. 2-3.

<sup>51</sup>Ibid, p. 6.

<sup>52</sup>Adams to Frick, March 20, 1950, mss., Anaconda Copper Mining Company Records, MC169, box 91, Montana Historical Society.

Remembering William Wraith's words regarding the Warm Springs property acquisitions decades earlier, we know why the company started to study percolation in the 1950s: ground-water contamination and water supply.<sup>53</sup>

A more potent reason was, of course, the discovery of the environment by the Montana legislature and the nation. But in the early twentieth century, these issues were already being brought to Washington's attention. W.L. Stanton, chairman of the Deer Lodge Valley Farmers Association, wrote to President Theodore Roosevelt on June 18, 1909:

This water so reservoied [sic] is for their own use in their Smelter, and is so polluted after going through that plant that it is a detriment to the streams of Montana, as it is poisonous to stock and vegetable like, and in no streams but two have they any reservoirs, and there are eight creeks coming into the Valley only one of which they have a reservoir on, and on this creek litigation has been begun to determine the prior rights, as there is now not enough water for the farms.<sup>54</sup>

Stanton was complaining about the quality as well as the quantity of water available to valley farmers. Downwind farmers and ranchers from Arizona, Utah, Washington, and California were complaining to the White House about smelter smoke.<sup>55</sup>

Scientists involved in the federal air pollution abatement lawsuit of the same period identified another problem associated with the reduction works. Louis D. Ricketts, a mining expert, wrote to Frederick G. Cottrell, a chemist, regarding

<sup>53</sup>See Oscar L. Olsgaard to Frick, June 7, 1950; T.G. Fulmer to Frick, June 15, 1950; William Flynn and John Grant, "Tailing Disposal with emphasis on enlarged tonnage and thickening of pulp," mss., Anaconda Copper Mining Company Records, MC169, box 91, Montana Historical Society.

<sup>54</sup>Stanton to Roosevelt, June 18, 1909, mss., RG 60, Department of Justice Central Files, Straight Numerical Files, box 274, National Archives.

<sup>55</sup>Richard V. Francaviglia, "Copper Mining and Landscape Evolution: A Century of Change in the Warren Mining District, Arizona," *Journal of Arizona History* 23 (Autumn 1982): 267-98. John E. Lamborn and Charles S. Peterson, "The Substance of the Land: Agriculture v. Industry in the Smelter Cases of 1904 and 1906," *Utah Historical Quarterly* 53 (Fall 1985): 308-25. Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton, 2003). John D. Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (Lawrence, KS, 2000). Duane A. Smith, *Mining America: The Industry and the Environment, 1800-1980* (Lawrence, KS, 1987).

their investigations in Montana and the technical problems of reducing air pollution from the smelter. One of the remedies was capturing the sulphur dioxide and converting it into acid used in a reduction process known as leaching. Ricketts observed in 1912 that, since the volume of sulphuric acid and sulphates was great as a by-product of processing ore, "we would cause far more damage by leaching than now results in the way of damage by fumes. We cannot convert the sulphate into insoluble salts commercially and we cannot let them run away into living streams."<sup>56</sup> Cottrell was not as convinced of the danger. In a letter to J.A. Holmes dated January 31, 1914, he remarked that "spent liquors from the Leaching Plant" might cause complaints, but "the volume of these liquors seems so small in comparison with the large underground flow of water known to exist throughout the very deep gravel underlying this region that no particular difficulty is anticipated from this source."<sup>57</sup>

The company was taking a look at these issues, to some extent, in this period. In 1913, C.D. Demond was digging around the Lower Works tailing dump and experimenting with in situ leaching. The critical thing to Demond was the loss of values with the leach water rather than the impact upon the groundwater.

The next year Demond was looking at the "consumption and distribution of water at Washoe Reduction Works" and finding that "about one-third (10,622,000 gallons) of this recovered dirty water is at present being wasted into the main tailing flumes." The reverberatories were using 9.625 million gallons per day to sluice slag and ash. The blast furnace used twelve million gallons of dirty water to sluice slag. This dirty water was "clean water, after it has been used for cooling purposes. . . ." The total fresh water delivered to the concentrator per day was 54.260 million gallons and to the smelter 7.613 million gallons. A good deal of water was flowing into those flumes and into the tailings ponds.

Laist penned what would become an important theme: we know how to fix the problem, but cost prevents it. Remember it was 1921, and the industry was, by John D. Ryan's and Cornelius F. Kelley's proclamation, in an "industrial depression." Under those conditions, it "was impossible to avoid

<sup>56</sup>Ricketts to Cottrell, August 7, 1912, mss., RG 70, U.S. Bureau of Mines, General Files, Data Files Prior to 1953, box 84A, p. 12, National Archives.

<sup>57</sup>Cottrell to Holmes, Jan. 31, 1914, mss., RG 70, U.S. Bureau of Mines, General Files, Data Files Prior to 1953, box 84A, National Archives.



sustaining a heavy loss during the year," read the annual report for 1921. The report also noted that the company bought American Brass for \$86,562,809 in stock at par and \$49,201,700 in outstanding bonds.<sup>58</sup> Priorities were clearly on the market and profit side of the ledger.

The cost issue expressed by Laist to Edwin Young at corporate headquarters in the context of the annual report is of interest in terms of priorities. Laist, in internal correspondence, clearly knew the company's priority and knew that, in public correspondence, the excuse would be understandable. His frustration regarding the twenty-eight tons of iron per day going into the Deer Lodge River, or at an annual rate of more than ten thousand tons, seems to be more with the color of the water than with the magnitude of the degradation of the waters.

Engineering Department reports chronicled the dam building and reconstruction process. The 1919 report told management that "the dams across Deer Lodge River are about 95% complete. There are two dams, the upper about 10,655 feet long and twenty feet high, the lower about 6,666 feet long and twenty feet high, each built on a contour." Further, "a series of dikes were built at Opportunity to impound tailings, averaging fourteen feet high and 28,000 feet long." The cost of the two projects was "about seven hundred dollars."<sup>59</sup> The 1920 report indicated that the "series of dikes" at Opportunity and the "two earth dams across the Deer Lodge River were completed." Each dam had "three spillways of timber framing."<sup>60</sup> Assistant mechanical superintendent H.N. Blake's 1923 "Report of Operations-1922" noted that "the East Spillway in No. 2 Clarifying Dam across Deer Lodge River failed and washed out on September 29th. Work was at once started to rebuild this spillway. At the end of the year the job was 80% completed."<sup>61</sup> The repair of the spillway did not end the problems flowing from the ponds.

The environmental movement kept growing in Montana and the nation, and environmentalists kept watch over the Silver Bow and the Clark Fork. The company was high on the

<sup>58</sup>Annual Corporate Report for 1921, mss., Montana Historical Society, pp. 3, 9-10.

<sup>59</sup>"Engineering and Construction Work at Washoe Reduction Works During 1919," mss., Anaconda Copper Mining Company Records, MC169, box 453, Montana Historical Society, p. 4.

<sup>60</sup>"Engineering and Construction Work at Anaconda Reduction Works During 1920," mss., Anaconda Copper Mining Company Records, MC169, box 453, Montana Historical Society, p. 3.

<sup>61</sup>Blake to Laist, Feb. 2, 1923, mss., Anaconda Copper Mining Company Records, MC169, box 453, Montana Historical Society, p. 3.

list of the Western Montana Fish and Game Association in its 1961 presentation to the Federal Water Pollution Advisory Board. In particular, the association condemned "the red flood of March 1960 in the Clark's Fork and in July 1960, caused by release of large amounts of inadequately treated mine waters from the Anaconda Company operations in Butte into the upper Clark Fork water—resulting in extreme siltation and killing of nearly all underwater life in the stream at least as far as 100 miles down stream."<sup>62</sup>

In the 1960s the company started looking at the costs of environmental pollution control, and as late as 1991 it was still working on the problem, at least in terms of what company officials told compliance agencies. The continuing problem of water pollution in Butte flowed from a decision in the 1950s. As Jared Diamond has noted, "Until 1955 most mining at Butte involved underground tunnels, but in 1955 Anaconda began excavating an open-pit mine called the Berkeley Pit, now an enormous hole over a mile in diameter and 1,800 feet deep."<sup>63</sup> That pit is part of America's largest Superfund site, with no solution in sight for the remediation of the pit water other than constant treatment. The legacy of collapse remains visible in Butte.

<sup>62</sup>"Water Pollution in Western Montana: A Report of the Western Montana Fish and Game Association," Sept. 20, 1961.

<sup>63</sup>Jared Diamond, *Collapse*, 38.

# EXILING ONE'S KIN: BANISHMENT AND DISENROLLMENT IN INDIAN COUNTRY

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DAVID E. WILKINS

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What are First Nations, American Indian tribes, or Native American nations? Are they distinctive racial and ethnological groups, corporate entities, sovereign polities, or extended families? In fact, they are a fluid, if variegated, amalgam of all of the above. Each tribal nation is, in reality, a self-defined social group, thus the defining criteria—blood quantum, shared history, clan membership, language differentiation, geographical locale, religious distinction—for what constitutes legitimate and accepted participation, citizenship, or membership in the tribal group will vary from nation to nation. Three general criteria that many would agree are central for the term *tribal nation*, however, are the ideas that these are unique aggregations of people who are in some way biologically or ancestrally related to one another; who share a common cultural affiliation; and who inhabit or spend considerable time on particular lands often deemed vital to their spiritual history. In other words, First Nations, broadly described, are communities of related kin who view the world through a shared cultural paradigm and relate closely to a particular sacred territory.

In these basic respects, tribal nations, like other indigenous peoples around the world, are fundamentally differentiated from states. Not only are states relatively recent in origin in human history, but they also tend to have much larger populations—so large, in fact, that they include multiple categories

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of people, including ethnic groups, social classes, and others. According to Richard Perry, it is the internal differentiation of societal groups that really distinguishes states from First Nations: "States not only incorporate populations that are different from one another to begin with, but often, despite a tendency to eradicate cultural differences within the populace, they foster internal differentiation in power and wealth."<sup>1</sup>

If Native nations are indeed communities of kinfolk that are ancestrally, culturally, psychologically, and territorially related, then it would appear that the grounds on which to sever or terminate such a fundamentally organic and deeply connected set of human relationships would have to be profoundly clear and would, in fact, rarely be carried out given the grave threat such banishments or disenrollments—the literal depopulation of a community's inhabitants—would pose to the continued existence of the nation.

In this essay, we will critically examine the recent surge of banishments, disenrollments, disenfranchisements, expulsions, exclusions, and denials of membership that tribal government officials have engaged in or are engaging in in the United States. The purpose of the essay is to answer or at least shed considerable light on the following queries: (1) why are these occurring at the apparently heightened rate they are? (2) what are the rationales being used to justify such expulsions of tribal citizens? (3) how do these banishment or disenrollment proceedings comport with the tribes' own political and constitutional history? and (4) how do the current proceedings compare or contrast with traditional ways Native nations exiled individuals?

Before proceeding, we must acknowledge three incongruous operational premises: first, as sovereign nations, tribal governments retain as one of their core powers of self-governance the right to decide who may or may not be legally and culturally considered citizens/members of their nations;<sup>2</sup> second, many tribal nations, under their powers as sovereign governments and as property owners, also reserved in their treaties and constitutions the right to exclude nonmembers from reserved or trust lands, with stipulated exceptions for certain federal officials carrying out duties outlined in treaties or statutes;<sup>3</sup> third, the federal government, under the constitutionally

<sup>1</sup>Richard J. Perry, *From Time Immemorial: Indigenous Peoples and State Systems* (Austin, 1996), 5.

<sup>2</sup>*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>3</sup>*Solicitor's Opinions, "Powers of Indian Tribes"* (Washington, DC, 1934).

problematic doctrine of congressional plenary power,<sup>4</sup> has reserved to itself the power to trump both of the first two premises and overturn or interfere with a tribe's membership decisions when the administration or distribution of tribal property or federal entitlements is involved, or for the purposes of adjusting rights in tribal property.<sup>5</sup>

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### EXILE, BANISHMENT, EXPATRIATION: A HISTORICAL PERSPECTIVE

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Worldwide, the political, religious, or military leadership in societies has reserved to itself or shared the power to authoritatively expel individuals, families, or even entire groups from their respective nations or states as a punitive measure for what were considered grave offenses by officialdom. As such, enforced removal or dismissal from one's native land entailed a devastating loss of political, territorial, and cultural identity, since those so ostracized were utterly deprived of the security and comfort of their own families, clans, and communities, as well as their religious or ethnic groups.

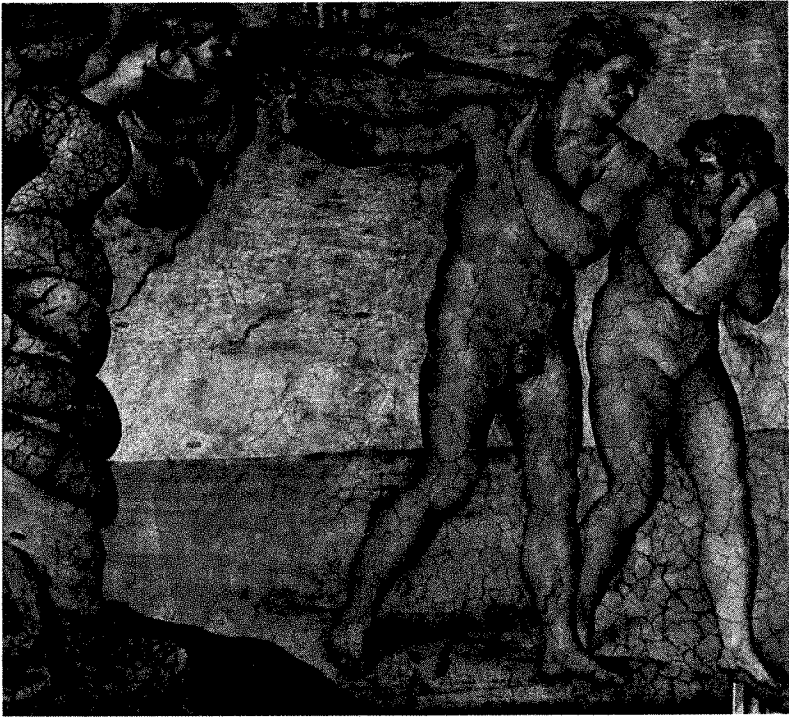
One of the most widely known cases of formal exile, as described in the Bible, was, of course, God's banishment of Adam and Eve from the Garden of Eden for their act of disobedience. Another famous banishment described in the Bible resulted from Cain's killing of his brother Abel, which compelled God to banish Cain and to place a shaming "mark" on him.<sup>6</sup>

Early Greeks and Romans used exile as a form of punishment for major crimes such as homicide, although ostracism—a

<sup>4</sup>I say constitutionally problematic because when a branch or agency of the federal government is exercising what amounts to virtually absolute—plenary—power over tribal governments, their resources, or their peoples, this, by definition, violates the essence of democratic government, which is based on the concept of limited government. Absolute power is fundamentally irreconcilable with both democracy and tribal sovereignty. Associate Justice Clarence Thomas, in his concurring opinion in the recent *U.S. v. Lara* decision [541 U.S. 193 (2004)], acknowledged as much when he correctly noted that nothing in the Treaty or Commerce clauses supports the Court's majority view that the U.S. claim to plenary power over tribes is moored in these doctrines.

<sup>5</sup>Felix S. Cohen, *Handbook of Federal Indian Law*, reprint ed. (Albuquerque, 1972), 98.

<sup>6</sup>Edward M. Peters, "Prison Before the Prison: The Ancient and Medieval Worlds," in *The Oxford History of the Prison: The Practice of Punishment in Western Society*, ed. Norval Morris and David J. Rothman (New York, 1995), 11.



Michelangelo portrayed the expulsion of Adam and Eve from the Garden of Eden on the ceiling of the Sistine Chapel in Rome.

variant of exile—was sometimes imposed for political reasons as well. Among Romans, prolonged, if not permanent, voluntary physical exile was one way to avoid the death penalty.<sup>7</sup>

Voluntary expatriation is, therefore, a unique case of emigration, “where what is sought is not primarily the advantages of the place to which one goes, but essentially freedom from whatever disadvantages prevailed at home.”<sup>8</sup> This “voluntary” aspect of Indian exile will not be explored in this essay, although it is certainly a subject worthy of further attention, as evidenced by the current crop of studies that examine the continuing exodus of Indians from their reservation homelands to metropolitan areas.<sup>9</sup>

<sup>7</sup>Roger Scruton, *A Dictionary of Political Thought* (New York, 1982), 161.

<sup>8</sup>*Ibid.*

<sup>9</sup>See, e.g., Terry Straus, ed., *Native Chicago*, 2<sup>d</sup> ed. (Chicago, 2002) and Susan Lobo and Kurt Peters, eds., *American Indians and the Urban Experience* (Walnut Creek, CA, 2001).

Holland also employed banishment with verve from the Middle Ages to the early 1800s, although the practice gradually diminished in use because of "an awareness that one did not solve the problem by just banishing someone from a small jurisdiction. . . ." <sup>10</sup> But during its heyday, 97 percent of the Amsterdam court's public, noncapital cases between 1650 and 1750 included banishment. For example, a person convicted of adultery or concubinage in local courts could receive a punishment of a fifty-year banishment. <sup>11</sup>

American Indian nations also practiced banishment or exile (*disenrollment* is a legal term that did not appear until the 1930s), although the scant available documentary evidence suggests that, given the familial, egalitarian, and adjudicatory nature of tribal societies—which were more focused on mediation, restitution, and compensation aimed at solving "the problem in such a manner that all could forgive and forget and continue to live within the tribal society in harmony with one another"—permanent expulsion of tribal members was rarely practiced. <sup>12</sup>

Given the kin-based nature of First Nations and the fact that many Native societies refused to employ centralized and coercive methods of dispute resolution or formal institutions of social control, tribal citizens generally acted with great care in how they behaved towards one another. The fear of being socially ostracized or treated as an outcast was generally sufficient to maintain relatively peaceful interpersonal behavior.

However, since perfect interpersonal relationships have never existed in any human society, conflicts and disruptions occasionally arose in tribal communities sufficient to justify banishment. The Iroquois Great Law of Peace, the oldest living constitution in the world, contains several provisions addressing the subject. <sup>13</sup> Section 20 describes what the penalty would be if a chief of one of the Five Nations committed murder. The other chiefs, if possible, were to assemble at the place where the homicide occurred to depose the offending chief. If this could not be accomplished, the chiefs were to

<sup>10</sup>Herman Diederik, "Urban and Rural Criminal Justice and Criminality in the Netherlands Since the Middle Ages: Some Observations," in *The Civilization of Crime: Violence in Town and Courts Since the Middle Ages*, ed. Eric A. Johnson and Eric H. Monkkonen (Urbana, IL, 1996), 158.

<sup>11</sup>Peter Spierenburg, "The Body and the State: Early Modern Europe," in *The Oxford History of the Prison*, 62.

<sup>12</sup>Vine Deloria, Jr. and Clifford Lytle, *American Indians, American Justice* (Austin, TX, 1983), 112.

<sup>13</sup>See [www.law.ou.edu/hist/iroquois.html](http://www.law.ou.edu/hist/iroquois.html) for one version of the Iroquois Constitution.

discuss the crime at the next council session. The war chief was then selected to remove the chief from office and to remind the deposed chief that his female relatives were also negatively affected by his actions, since his crime was a stain upon his entire family. His title of chieftainship was then extended to a sister family.

The war chief was also charged with making the following statement to the now despised individual:

So you, ....., did kill ....., with your own hands! You have committed a grave crime in the eyes of the Creator. Behold the bright light of the Sun, and in the brightness of the Sunlight, I depose you of your title and remove the horns, the sacred emblem of your chieftainship title. I remove from your brow the deer's antlers which was the emblem of your position and token of your nobility. I now depose you and *expel* you and you shall depart at once from the territory of the League of Five Nations and nevermore return again (emphasis added). We, the League of Five Nations, moreover, bury your women relatives because the ancient chieftainship title was never intended to have any union with bloodshed. Henceforth, it shall not be their heritage. By the evil deed that you have done they have forfeited it forever.<sup>14</sup>

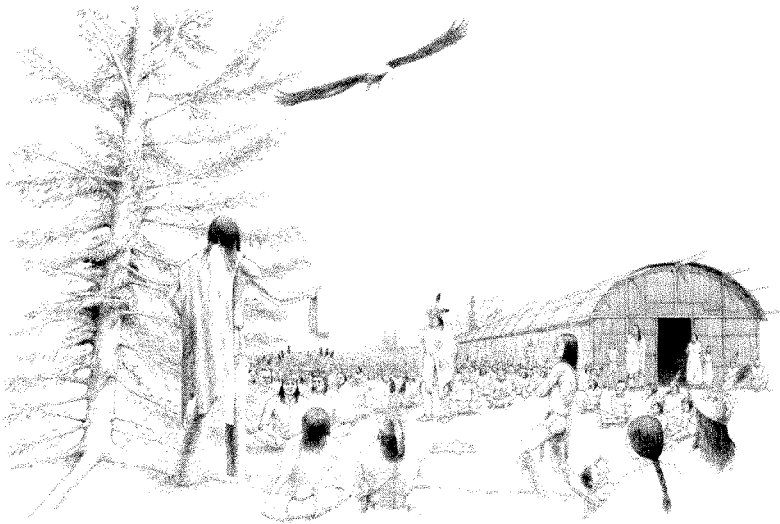
The Great Law also contains provisions regarding voluntary emigration and the punishment that might be meted out to adopted members of the Confederacy. With regard to voluntary emigration, section 21 declares, "When a person or family belonging to the Five Nations desires to abandon their Nation and the Territory of the Five Nations they shall inform the chiefs of their Nation and the Council of the League of Five Nations shall take notice of it." Interestingly, the chiefs reserved the right, in effect, to recall and reintegrate such individuals by sending forth a messenger bearing a belt of black shells to the émigrés. Upon hearing the messenger and seeing the belt, the émigrés understood that this was an order "for them to return to their original homes and to their Council Fires"<sup>15</sup>

Finally, section 75 speaks to the rights of adopted members of "alien nations" who, upon formal adoption, were to

<sup>14</sup>Ibid.

<sup>15</sup>Ibid.





The Iroquois Confederacy was established by Huron prophet Deganawidah (called "Peacemaker"). Peace was maintained through the Great Law of Peace, which was written on wampum (in Peacemaker's hand) and passed down through the generations. ("Peacemaker Presents His Vision," drawing by John Kahionhes Fadden)

be extended hospitality and considered "members of the Nation" and accorded "equal rights and privileges" in all ways except the right to vote in the Council of the Chiefs of the League. Adoptees were always to be on their best behavior and were not to cause "disturbance or injury." If they were found to have caused such a disturbance, their adoption, individually or collectively, could be annulled and they would be "expelled" by an appointed war chief who would make the following statement to the offending individual or group:

You, .....(naming the nation), listen to me while I speak. I am here to inform you again of the will of the Five Nations Council. It was clearly made known to you at a former time. Now the chiefs of the Five Nations have decided to expel you and cast you out. We disown you now and annul your adoption. Therefore you must look for a path in which to go and lead away all your people. It was you, not we, who committed wrong and caused this sentence of annulment. So then go your way

and depart from the territory of the Five Nations and away from the League.<sup>16</sup>

Similarly, the Cheyenne people had occasion to banish or exile tribal members who had murdered another Cheyenne. Again, it was a procedure rarely used, however, given the fact that, historically, murder was rarely committed in Cheyenne society. In fact, for one extended period—1835–79—there were only sixteen recorded killings—evidence, say Llewellyn and Hoebel “of the conflict between the aggressive personal ego of the individual male and the patterns of restraint which were ideationally promulgated by the culture.”<sup>17</sup>

Thus, when a killing did occur, it was a devastating cultural shock to the entire nation that affected the community spiritually. “The killing of one Cheyenne by another Cheyenne was a sin which bloodied the Sacred Arrows, endangering thereby the well-being of the people. As such it was treated as a crime against the nation.”<sup>18</sup> Llewellyn and Hoebel graphically described the impact: “When a murder had been done, a pall fell over the Cheyenne tribe. There could be no success in war; there would be no bountifulness in available food. ‘Game shunned the territory; it made the tribe lonesome.’ So pronounced Spotted Elk; so assent all Cheyennes. There is a brooding synonym for ‘murder’ in Cheyenne, (Cheyenne word) *putrid*. Such was the murderer’s stigma.”<sup>19</sup>

Although Llewellyn and Hoebel report that as soon as the murder had occurred, the tribal leaders would gather as a group to announce the banishment sentence, the authors admit that they were unable to learn precisely what transpired procedurally during these meetings. They pondered, for example, whether the perpetrator had an opportunity to present evidence in a trial-like setting. Although they could not find answers to these important questions since no living Cheyenne had participated in an actual banishment session, they were able to learn that Cheyenne banishment was not as absolute as many had believed.

Banishment among tribal peoples had often been perceived as the equivalent of a death sentence, but, as the Cheyenne discovered, that often depended on the social and physical

<sup>16</sup>*Ibid.*

<sup>17</sup>Karl N. Llewellyn and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, OK, 1941), 132.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*, 133.

environment into which the offender was exiled. For instance, banished Cheyenne could sometimes be warmly received by neighboring Arapaho or Dakota so that they were not literally isolated. Nevertheless, banished Cheyenne certainly felt undeniably "homesick" and would seek—and were often allowed—to return to Cheyenne society if they met certain conditions. In other words, exile, even of murderers, was typically not a permanent sentence. The expulsion was usually of an indeterminate length, although it generally lasted from five to ten years, depending on three factors: (1) the absence of intent or premeditation (the death may have been accidental, or caused by drunkenness); (2) the presence of provocation (the killer had been goaded into action); and (3) the character of the murderer (a decent man who had been provoked or who had killed accidentally vs. a so-called bully murderer—a man who had killed intentionally and with a degree of malice).<sup>20</sup> Llewellyn and Hoebel maintain that the "remission of banishment was preceded by eloquent presentation of the wretched condition of the banished man and his family, cut off as they were from association with the tribe."<sup>21</sup>

The chiefs retained the power to pardon exiled persons, but only after they had secured the consent of the Cheyenne military associations and the approval of representatives of the victim's family. The readmitted member could engage in many tribal functions but was permanently barred from certain activities: renewals of the Arrows, or eating or smoking from a Cheyenne utensil, lest it pollute or stigmatize the next user.<sup>22</sup>

Llewellyn and Hoebel concluded their discussion of banishment and commutation among the Cheyenne by referring to it as a "technique of multiple excellence." They noted that "by removing the murderer it lessened provocation to revenge; it disciplined the offender; allowance was made for the return of the culprit, but only when dangers of social disruption were over . . . the result was sociologically sensible, and the recorded handling of the cases compares in effective wisdom not unfavorably with that more familiar to the reader in his own society."<sup>23</sup>

The Cherokee nation is another tribal group that has been written about extensively. Rennard Strickland's study, *Fire & the Spirits*,<sup>24</sup> details the evolution of Cherokee law from pre-

<sup>20</sup>Ibid., 137–44.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid., 167.

<sup>23</sup>Ibid., 158.

<sup>24</sup>Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman, OK, 1975).

contact to contemporary times. In detailed tables dealing with four distinctive types of deviation in Cherokee law—spirit, community, clan, and individual—Strickland identifies the legal authority that addresses the deviation, the punishment to be meted out, and the enforcement agent who carries out the prescribed punishment.<sup>25</sup>

Behaviors that were considered deviations included theft of sacred objects, women's taboos, assaults, hunting violations, witchcraft, arson, marriage within one's clan, sex crimes, and murder. Sanctions ranged from name calling, public disgrace, whipping, and sickness for lesser offenses, to stoning, mutilation, and—the ultimate penalty—death for more serious offenses. Among the thirty listed offenses, "possible expulsion" was a sanction, along with whipping, insult, and outlawry,<sup>26</sup> for only one type of offense: "food and field regulations, refusal to work, contribute share of work and crops."<sup>27</sup> Interestingly, while death could be imposed for numerous deviations, including treason, arson, and witchcraft, expulsion was mentioned only once.

One final example appears in the classic novel *Waterlily* by ethnologist Ella Cara Deloria, which details life among the Dakota before white contact. Near the end of the book, the author describes a situation during the winter, when *Waterlily* accompanies a war party on a trek toward Blackfeet country. When a blizzard forces them to set up camp quickly, a small family group of "strange people" comes into their midst—strange because they are so isolated from their home community. The troupe consists of a mature married couple, in their fifties, their two daughters (one with child), and three small children.

They have been forced to come in because they are hungry, but, as Deloria describes it, it is clear after listening

<sup>25</sup>*Ibid.*, 35–39.

<sup>26</sup>Strickland describes "outlawry" as the placing of "individuals guilty of specified crimes beyond the protection of the tribe" (*ibid.*, 170–71). This was a longstanding procedure utilized by Cherokees before white contact. When an individual was declared an "outlaw," that person could be killed by any person within the Cherokee Nation. The killer of an outlaw would not be subject to any penalties under tribal law. In the 1830s, Chief John Ross relied on this sanction and applied it to those Cherokees accused of "political crimes" like selling tribal lands or negotiating treaties without the consent of the entire nation.

<sup>27</sup>*Ibid.*, 36.

to the husband and observing the ill-mannered children that something is amiss in the family's circumstances. Deloria writes, "After they had gone, the warriors agreed that the man was probably a degenerate character who lived away from civilization, that is to say, the camp circle, because of some crime against society! It was impossible that his wife at her age could be mother of those small children, and since the man was the only male, the conclusion was inescapable: 'something very bad' was the way the warriors voiced their suspicion, carefully avoiding the ugly equivalent of 'incest.'"<sup>28</sup>

The author does not state whether this family, or the husband and wife, had been banished or had gone into voluntary exile. But what is clear is that incest was an offense serious enough to lead to exile because it violated the kinship norms of a civilized people and that this forced or voluntary exile had terrible repercussions on the outcasts. As Waterlily muses, "Here were people unquestionably at their worst—and they did not know it! They did not know enough to care how they must appear to the party they had evaded; they were unconscious of being judged by them. It was a tragic thing, to stay alone like this, in a benighted state. It was better to stay with other people and try to do your best according to the rules there."<sup>29</sup>

It is clear, then, that although tribal nations historically had the power to exclude, banish, or exile individuals, it was a power they rarely used, due to the spiritually cohesive nature of tribal collectives and the assortment of informal sanctions that were in place that generally worked to ensure peace and social order in the society. Ostracism, public ridicule, or the destruction of a culprit's lodge, weapons, or other implements, was generally sufficient to resocialize the offending individual or family and restore harmony to the community. Even when banishment was employed in Iroquois and Cheyenne societies, it could, under certain circumstances, be of limited duration. If the offending party showed genuine interest in rectifying the situation, he or she would be eligible for reintegration into the community after a period of time had lapsed, certain conditions had been met, and the injured party's family consented.

<sup>28</sup>Ella Cara Deloria, *Waterlily* (Lincoln, NE, 1988), 214.

<sup>29</sup>*Ibid.*, 216.

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## TRANSITIONING FROM TRADITIONAL TO CONSTITUTIONAL GOVERNMENTS: BANISHMENT IN THE EARLY 1900s

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A number of studies<sup>30</sup> have been written that track the profound changes that Native nations underwent as, first, European states and, later, the United States sought to influence and coercively modify or eliminate tribal attitudes, languages, properties, and institutions of governance. In the early 1930s three dedicated employees in the Department of the Interior—John Collier, Nathan Margold, and Felix Cohen—successfully convinced Congress and a number of Native nations to accept major reforms in federal Indian policy via the tribes' adoptions of formal constitutions and charters of incorporation authorized under the Indian Reorganization Act (IRA) of 1934.<sup>31</sup>

Through these new documents, it was enshrined in tribal organic law that tribal policymakers, as federally recognized leaders, had the governmental capacity to establish their own member criteria and had the inherent power to decide who could remain on tribal land. Now there was, at least until the brief termination era of the 1950s, no question that Native peoples would decide the fundamental question of both citizenship and residency requirements for their nations. Although a number of Indian nations, including the Iroquois Confederacy and the Creek, Cherokee, Choctaw, and Chickasaw, had adopted written constitutions long before the 1934 IRA, and another fifty or so tribal communities had written constitutions or constitution-like documents before the IRA became law, within less than a decade of that act's passage approximately 133 Native nations adopted constitutions and charters of incorporation. According to one knowledgeable source, while the number of tribal nations with constitutions has increased, up to approximately 320, another 240 Native communities continue to govern themselves without a formal constitution.<sup>32</sup>

<sup>30</sup>See, e.g., Angie Debo, *A History of the Indians of the United States* (Norman, OK, 1970); Peter Iverson, ed., *The Plains Indian of the Twentieth Century* (Norman, OK, 1985); Sharon O'Brien, *American Indian Tribal Governments* (Norman, OK, 1989); and Peter Nabokov, ed., *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492–1992* (New York, 1991).

<sup>31</sup>Public Law 73-383, *U.S. Statutes at Large* 48 (1934): 984.

<sup>32</sup>Elmer Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (Reno, NV, 2000), 301.

Interestingly, a comprehensive computer search of 281 American Indian and Alaskan Native constitutions reveals that the words *banish*, *exile*, and *exclusion* are completely absent from these documents. Rather, we find *loss of membership* (150 references in constitutions—membership could be “lost” because of excessive absences, failure to visit or maintain actual contact with the tribe, non-participation in the tribe’s economic activities, dual enrollment in more than one tribe, etc.); *expel* or *expulsion* (16 references—for neglect of duty or misconduct); *disenrollment* (6 references—for dual membership or lack of blood quantum); *disenfranchisement*, and *removal*. These terms typically are found in those sections of constitutions dealing with the legislative powers of the councils and in the various tribes’ membership provisions. Interestingly, of the 150 loss-of-membership provisions, 42 percent (63 references) appear in the constitutions of Alaska Native nations; 17.3 percent (26 references) are lodged in California tribal constitutions, and 9.3 percent (14 references) are present in the organic documents of various Oklahoma tribal nations.

Not surprisingly, there is a significant amount of diversity in the rationales used by tribal officials to disenroll or expel tribal members; typically either a majority of the tribal council or “the community” as a whole could expel tribal citizens for “good reason,” which generally meant for such offenses as neglect of duty, or gross misconduct. In some cases, expelled persons were entitled to a hearing so they could learn the reasons they were being disenfranchised and could argue against the decision.

More often, provisions in the IRA constitutions regarding loss of membership tend to emphasize the “voluntary” aspect, in which tribal members might decide to emigrate in order to permanently separate themselves from their birth nations. In some cases, tribal governments allowed for readmission; in other situations, tribes informed voluntary emigres that they would not be allowed to rejoin the nation later.

Many of the IRA and other tribal constitutions contain clauses that refer to the power of the tribal council to remove or exclude “any non-members of the Tribe whose presence may be injurious to the people of the reservation.”<sup>33</sup> Importantly, until the present surge of banishments and disenrollments, provisions addressing a tribe’s power to exclude non-Indians from tribal lands were far more prevalent in tribal constitutions than language regarding the expulsion of bonafide tribal members.

<sup>33</sup>Hualapai Constitution & By-Laws, 1955.

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BANISHMENT IN THE 1990s AND BEYOND:  
THREE NATIVE CASE STUDIES

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In 1978, the U.S. Supreme Court handed down two major decisions that dramatically addressed the external and internal sovereignty of Native nations. In relation to external sovereignty, tribes learned to their great dismay, in *Oliphant v. Suquamish*,<sup>34</sup> that they were now without the inherent power to exercise jurisdiction over non-Indians who committed crimes on tribal lands. In *Santa Clara Pueblo v. Martinez*,<sup>35</sup> however, the Supreme Court reaffirmed tribal governments' internal sovereignty by asserting that they retained as one of their inherent powers the right to decide who could or could not be citizens of their nations.

In the 1970s, tribal governments already had other essential self-governing powers (taxation, regulation of hunting and fishing rights, formation of governments, administration of justice) supported by Congress and the courts. Now *Santa Clara* emboldened them to become more emphatically proactive or retaliatory in their efforts to clarify their membership rolls by modifying their constitutions' membership criteria or enacting tribal ordinances detailing the grounds on which tribal members could be disenrolled or banished.

Perusal of contemporary law and literature reveals four major reasons that tribal governments used to justify the exclusion or disenrollment of tribal members: (1) family feuds; (2) racial criteria and dilution of blood quantum; (3) criminal activity (e.g., treason, drug sales or abuse, gang involvement); and (4) financial issues (e.g., problems related to distribution of tribal gaming assets or judgment funds). Of course, in some disenrollment cases, tribal councils or judicial bodies may, and often do, invoke more than one reason to justify their expulsion of tribal members.

*Case 1: Tlingit Community: Crime*

In a widely publicized case in 1993, two seventeen-year-old Tlingit tribal youth who had been convicted in state superior court in Washington for assaulting and robbing a Domino's Pizza deliveryman and faced sentences of up to five-and-one-

<sup>34</sup>435 U.S. 191 (1978).

<sup>35</sup>436 U.S. 49 (1978).



half-years were instead turned over to Rudy James, a fifty-eight-year-old Klawock native, who purported to be a tribal judge of the Tlingit Nation.<sup>36</sup> Jones had convinced the state judge that if the young men were bound over to him, they would "undergo a traditional Tlingit punishment: banishment on remote, uninhabited islands, while contemplating their sins and hewing logs with which to build Whittlesey (the victim's surname) a house."<sup>37</sup>

Even as James convened a panel of eleven other Tlingit elders to determine the precise context for the banishment, which amounted to removal to remote islands for a period of twelve to eighteen months, "a firestorm of rumor, innuendo, and [dis]information erupted, revealing rifts both within the Tlingit tribe and between the Tlingits and mainstream society that threatened the success of the experiment before it had even begun."<sup>38</sup>

Questions arose around whether James had the authority to act on behalf of the Tlingit people, since he was not an officially recognized judge. Evidence also emerged that James and several other tribal judges had histories of bad debts and, in some cases, criminal records, and there was a question of whether banishment was even a part of Tlingit culture. Finally, Klawock's lone federally recognized Tlingit organization, the Klawock Cooperative Association, sent a letter distancing itself from the case.<sup>39</sup>

On May 1, 1995, the Court of Appeals of Washington ruled that the two boys would still have to serve a state-sanctioned prison term once their banishment had ended.<sup>40</sup> However, on October 3, 1995, the trial judge who had originally referred the boys to the tribal judges ordered their banishment to cease and sentenced them to state prison. The boys were given terms of fifty-five and thirty-one months, and received credit for having served nearly two years. Finally, they were held jointly liable for \$35,000 in restitution to Whittlesey.<sup>41</sup>

<sup>36</sup>Stephanie J. Kim, "Sentencing and Cultural Differences: Banishment of the American Indian Robbers," *John Marshall Law Review* 29 (1995): 239–67.

<sup>37</sup>*Time Magazine* (August 1, 1994), 74.

<sup>38</sup>William C. Bradford, "Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolutions," *North Dakota Law Review* 76 (2000): 593.

<sup>39</sup>*The Economist* (August 13, 1994), A29.

<sup>40</sup>*State v. Roberts*, 894 P.2d 1340 (Wash. App. Div. 1 1995).

<sup>41</sup>Bradford, "Reclaiming Indigenous Legal Autonomy," 596.

The judge preempted the banishment because he believed there were flaws in the way it was being carried out that "threatened its credibility and integrity." For example, one of the boys came to the mainland and applied for a driver's license. The judge had also been informed that the two had received visits from relatives throughout their banishment.<sup>42</sup>

*Case 2: Tonawanda Band of Seneca Community: Treason and Political Corruption*

The Tonawanda Band of Seneca Indians, part of the Iroquois Confederacy, were parties to a federal court of appeals case in 1996, *Poodry v. Tonawanda Band of Seneca Indians*<sup>43</sup> that, in the words of Judge Cabranes, placed before the Second Court of Appeals "a question of federal Indian law not yet addressed by any federal court: whether an Indian stripped of tribal membership and 'banished' from a reservation has recourse in a federal forum to test the legality of the tribe's actions. More specifically, the issue is whether the habeas corpus provision of the Indian Civil Rights Act of 1968 . . . allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve 'banishment' rather than imprisonment."<sup>44</sup>

In 1995, the district court had dismissed the applications of five Seneca, Peter L. Poodry, David C. Peters, Susan La Framboise, John A. Redeye, and Stonehouse Lone Goeman, who had been summarily convicted of "treason" and sentenced to permanent banishment from the reservation in 1992. The petitioners, upon their banishment, had filed applications in federal court asserting that the band's banishment order was a criminal conviction that violated their rights under the Indian Civil Rights Act (ICRA). They unsuccessfully sought habeas corpus relief provided under the ICRA with the district court, which concluded that permanent banishment was not a sufficient restraint on liability to trigger the ICRA's habeas corpus provisions.

The banished Seneca then appealed this ruling to the Second Circuit Court of Appeals, which vacated the district court's finding by holding that banishment was indeed a severe enough punishment involving sufficient restraint on the liberty of those banished to qualify as "detention," and thus permit federal review under the ICRA's habeas corpus

<sup>42</sup>Kim, "Sentencing and Cultural Differences," 262, n. 128.

<sup>43</sup>85 F.3d 874 (2<sup>d</sup> Cir. 1996).

<sup>44</sup>*Ibid.*, 879.

rule. The case was sent back down to the district court for a resolution based on the merits. The appellate court said, in effect, that the lower court had "erred" in dismissing the banished individuals' petitions for writ of habeas corpus on jurisdictional grounds.<sup>45</sup>

First, some historical background is warranted to establish the grounds on which the individuals were banished. In the latter part of 1991, a conflict erupted on Tonawanda lands when the petitioners made accusations against members of the Council of Chiefs and the chairman of the council, Bernard Parker. The council is the primary legislative body of the nation. The petitioners accused the council members of "misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal records."<sup>46</sup> Allegedly, the petitioners, in consultation with other tribal members, then formed a parallel legislative body, the "Interim General Council of the Tonawanda Band."

A few weeks later, on January 24, 1992, Poodry, Peters, and LaFramboise stated that they were accosted at their homes by groups of fifteen to twenty-five Seneca who gave them notice, in writing, that they were henceforth banished from the Seneca Nation (the other two petitioners received the same notice in the mail). The language in the banishment notice is reminiscent of the language spelled out in the Great Law of Peace described earlier in this paper. The 1992 statement read as follows:

It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return. According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason. Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of the Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required. According to the customs and usages of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is

<sup>45</sup>Ibid.

<sup>46</sup>Ibid., 877-78.

removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK YOU TO THE OUTER BORDERS OF OUR TERRITORY.<sup>47</sup>

The banishment notice was signed by six of the eight Council of Chiefs members. The two who did not sign, Corbett Sundown and Roy Poodry, were either too sick to sign—the council's explanation for their silence—or had been excluded from the council's meeting where the banishment was set—the petitioners' explanation.

The crowds were initially unsuccessful in forcibly evicting the three petitioners. However, the petitioners asserted that they and their family members were then harassed and assaulted by the chiefs and their supporters. One of the petitioners was literally "stoned," electrical services were terminated at their homes and businesses, and they were allegedly denied health services and benefits.<sup>48</sup> These events set the legal stage for the federal court's intervention.

The court of appeals rendered a detailed opinion that addressed the relationship between tribal sovereignty and congressional plenary power, the impact of the ICRA and the habeas corpus proviso, and the vitality of the *Santa Clara* precedent. Of importance for this essay, of course, is how the court addressed the issue of *treason* and the meaning of *banishment* for tribal citizens. The chiefs said the petitioners had been convicted of treason because they had engaged in "unlawful activities," including "actions to overthrow, or otherwise bring about the removal of the traditional government" of the Tonawanda Band.<sup>49</sup>

In describing "permanent banishment," the court compared that with denaturalization proceedings started when individuals have obtained U.S. citizenship illegally or through willful misrepresentation, or cases in which native-born American citizens must forfeit their citizenship for having committed major offenses. Both are exceedingly harsh measures reserved for the most egregious of offenses. The court described the petitioners' banishment as "the coerced and preemptory

<sup>47</sup>Ibid., 879.

<sup>48</sup>Ibid., 878.

<sup>49</sup>Ibid., 889.

deprivation of the petitioners' membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason."<sup>50</sup>

In ruling that permanent banishment as a punishment for treason amounted to a sufficient restraint on liberty to invoke federal jurisdiction in a petition for a writ of habeas corpus, the court reiterated that this was a novel question with potentially lasting significance for tribal citizens should the Supreme Court deny a writ of certiorari, which it did later that year.<sup>51</sup> Judge Cabranes noted that "this is especially true at a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason.'"<sup>52</sup> This is a slightly veiled reference to the gaming resources that some tribes are amassing. Interestingly, there is no discussion in the opinion about gaming per se.

Although the court concluded that the petitioners deserved the right to have the merits of their claims heard by the district court, it also held that the sovereign immunity of the Tonawanda Band must be respected and that the nation could not be sued without its express consent.

Finally, the court sent a stern warning to those tribal governments that attempt to use cultural difference to justify what the judges viewed as diminutions of essential civil rights of individuals. In the court's words, "Here, the respondents (Council of Chiefs) adopt a stance of cultural relativism, claiming that while 'treason' may be a crime under the laws of the United States, it is a civil matter under tribal law; and that while 'banishment' may be thought to be a harsh punishment under the law of the United States . . . it is necessary to and consistent with the culture and tradition of the Tonawanda Band."<sup>53</sup>

The court was not persuaded by these cultural arguments. While acknowledging that tribes are unique political and cultural entities, it more forcefully declared that "the respondents wish to use their connection with federal authorities as a sword, while employing notions of cultural

<sup>50</sup>*Ibid.*, 895.

<sup>51</sup>117 S. Ct. 610 (1996).

<sup>52</sup>*Ibid.*, 897.

<sup>53</sup>*Ibid.*, 900.

relativism as a shield from federal court jurisdiction."<sup>54</sup> Judge Cabranes recognized that tribal governments have the right to govern, to establish their own criteria for citizenship, and to regulate their lands and exclude outsiders. But he also acknowledged a "responsibility" for those "American citizens subject to tribal authority when that authority imposes criminal sanctions in denial of rights guaranteed by the laws of the United States."<sup>55</sup>

Robert Porter, a Seneca law professor, has said that the unprecedented *Poodry* decision "goes to the very heart of whether an Indian tribe has the inherent authority to determine its own membership."<sup>56</sup> The fact that the parties willingly entered the federal judicial system seeking resolution of this tribal dispute, in his words, "undoubtedly has jeopardized Tonawanda Seneca sovereignty."<sup>57</sup>

### *Case 3: The Tigua Community: Gaming Revenue and Alleged Lack of Blood Quantum*

The Tigua, relative newcomers to the world of federally recognized tribes—they were formally acknowledged in 1968 (82 Stat. 92)—inhabit territory southwest of El Paso, Texas. Their banishment conflagration formally began in 1993, when the tribe's leadership failed in their efforts to negotiate a compact with Texas Governor Ann Richards. Despite their diplomatic failure, the tribe proceeded to build a bingo hall and later expanded the operation to include pull-tab gaming, blackjack, and other gambling activities.<sup>58</sup> Within a short period of time, the Tigua's gaming operation was bringing in an estimated sixty million dollars annually. It would continue to be successful until it was shut down by federal officials in 2002 for failure to comply with the Indian Gaming Regulatory Act because of the tribe's inability to forge a gaming compact with the state.<sup>59</sup> That is another story.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

<sup>56</sup>Robert Porter, "Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee," *Buffalo Law Review* 46 (1998): 880.

<sup>57</sup>Ibid.

<sup>58</sup>Everett Saucedo, "Curse of the New Buffalo: A Critique of Tribal Sovereignty in the Post-IGRA World," *The Scholar: St. Mary's Law Review on Minority Issues* 3 (2000): 79–80.

<sup>59</sup>Ross E. Milloy, "Texas Casino Shut Down as Hope for Reprieve Dies," *New York Times*, February 13, 2002.

This article is more concerned with the combination of gaming revenue, sacred objects, and sibling camaraderie that would ensnare this small nation in a bitter banishment struggle. In 1990, a twenty-seven-year-old Tigua member, Marty Silvas, was named a war captain and was given the responsibility to be caretaker of one of the tribe's most sacred objects, a drum. Three years later, his brother, Manny Silvas, who was the tribe's lieutenant governor, was suspected by the Tribal Council of having misappropriated \$70,000 of the tribe's money. The council and the tribal chief, Enrique Paiz, were split on whether the accusations were true, but the council eventually voted, over Paiz's vigorous objection, to deny Silvas the opportunity to run for reelection.

Because Paiz had supported his embattled lieutenant governor, the council then took the unprecedented step of removing him from office as well. As a result of these actions, Marty Silvas then called for the entire council to step down, and he hid the sacred drum he had been entrusted with as war captain. He also refused to join in a tribal ceremony. While the tribe was exploring legal means to recover the sacred item, it wiped Marty Silvas' name from the tribe's rolls and sent tribal police to remove him from tribal lands in May 1996.<sup>60</sup> Silvas was ordered at gunpoint to reveal where he had hidden the drum. When he refused, "he was driven by car to the edge of the reservation and told that he was no longer a part of these people . . . [and that he] did not belong here anymore."<sup>61</sup>

The banishment conflict expanded dramatically in 1996 as the tribe's wealth increased and as the new Tigua governor, Vince Muñoz, consolidated his power. The banishment zeal soon included many additional families, and pitted two factions against one another: those who supported the Silvases and Chief Paiz, and those who supported the council and Governor Muñoz. As Everett Saucedo reports, "the tribal leaders confirmed the families' fears when they announced they would reexamine the tribal rolls in order to correct alleged disparities created by the inclusion, in tribal membership, of those who did not meet blood-line requirements. Those who lacked the minimum blood requirements were to be removed from the tribe's rolls."<sup>62</sup>

As the conflict continued to expand in 1998, several of Marty Silvas' supporters were first fired from their govern-

<sup>60</sup>Ibid., 81.

<sup>61</sup>Pamela Colloff, "The Blood of the Tigua," *Texas Monthly* (August 1999), 131.

<sup>62</sup>Ibid., 81.

ment jobs and then, four days later, officially banished for allegedly lacking the necessary requirement of Tigua blood. Some of those banished were given small financial settlements, and they departed voluntarily. But several other families fought the banishment proceedings in state district court. Their suit, however, was dismissed.

Armed with this judicial ruling, the tribe more aggressively sought to banish certain families and individuals that were still on tribal lands until all had been forcibly evicted. One of the last to be expelled was Grace Vela who, by January 1999, faced nearly unrelenting pressure from tribal police officers to leave. Finally, on February 18, police officers literally knocked down Vela's front door, placed her in handcuffs, and removed her from tribal lands.<sup>63</sup>

When Governor Muñoz was asked whether his government's decision to banish those members had anything to do with consolidating his power base or the tribe's fiscal affairs, he insisted that he was acting under "pressure from the Bureau of Indian Affairs," which, he alleged, "had threatened to reduce the tribe's federal funding unless the membership rolls were reexamined."<sup>64</sup> But according to Saucedo, who wrote a lengthy article on this case, neither the BIA or the tribe would comment on the issue, declaring that it was an "internal tribal matter."<sup>65</sup>

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### BANISHMENTS AND DISENROLLMENTS IN THE TWENTY-FIRST CENTURY

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In various regions of Indian Country—on numerous California rancherias, among the Paiutes of Nevada, the Sac and Fox of Iowa, the Oneida of New York State, the Minnesota Chippewa, and the Sauk-Suiattle and Lummi of Washington State—banishment and disenrollment proceedings have been occurring at a heightened pace.<sup>66</sup> In California alone, at least

<sup>63</sup>Saucedo, "Curse of the New Buffalo," 84.

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

<sup>65</sup>*Ibid.*, 84–85.

<sup>66</sup>See, e.g., Valerie Taliman, "Las Vegas Paiutes Oust Entire Council," *Indian Country Today*, July 20, 2002; James May, "Tribal Recall: Members Disenrolled after Financial Dispute," *Indian Country Today*, December 18, 2003; Richard Walker, "Lummi Chairman Reelected: Council May Revise Banishment Policy," *Indian Country Today*, February 19, 2004; James May, "Disenfranchised Tribal Members State Protest," *Indian Country Today*, February 20, 2004; Sarah Kershaw and Monica Davey, "Plagued by Drugs, Tribes Revive Ancient Penalty," *New York Times*, January 18, 2004.



four thousand American Indians have been disenrolled from their tribes in recent years.<sup>67</sup> The reasons for contemporary disenfranchisement of tribal members coincide with the ones discussed earlier, ranging from those steeped in traditional philosophical and sociological values to others that reflect new economic and societal forces that tribal governments must address.

TABLE I

Tribal Nation	Rationale for Banishment/ Disenrollment
Las Vegas Paiutes (Nevada); Sauk-Suiattle (Washington)	Alleged Failure to Meet Minimum Blood Quantum Requirement
Oneida Nation (New York); Redding Rancheria; Enterprise Rancheria; Maidu Barry Creek Rancheria; Mono-Chukchansi of Table Mountain Rancheria; Pechanga Band of Luiseno Indians; Santa Rosa Rancheria Tachi (California); Sac & Fox (Iowa)	Alleged Failure to Meet Minimum Blood Quantum Requirement; Financial Issues; Family Conflicts; Political Reprisals
Mille Lacs Band Ojibwe; Grand Portage Ojibwe; Boise Forte Band Ojibwe (Minnesota); Viejas Band (California)	Violent Criminal Activity
Lummi Tribe (Washington); Upper Sioux Community (Minnesota)	Drug-Related Criminal Activity

<sup>67</sup>Michael Martinez, "Claim Power Struggles Have Stripped Them of Gaming Profits," *Indian Country Today*, January 20, 2006.

Each of these tribes and the specific disenrollment rationales and procedures they are utilizing deserve specific and detailed treatment, but lack of time and comprehensive and comparative data does not permit such a systematic inquiry here. What is evident is that, historically, the power to banish one's kin was utilized only in the rarest of circumstances, and even then the expelled sometimes were given the opportunity for readmission to the nation. Since tribal nations were, in effect, extended families, the idea of permanently expelling one's own relatives was not a decision made lightly. Tribal values and norms stressed the use of much less traumatic forms of punishment to restore proper social behavior.

However, as tribal nations continue to expand, with their citizens becoming more differentiated through intermarriage, exposure to and appropriation of certain Western values via popular culture, media, and democratic institutions, and with the oftentimes disruptive role of capital via gaming revenues, smoke shop dollars, and claims settlements, some tribal governments have felt compelled to consider more dramatic sanctions such as banishment, disenrollment, or disenfranchisement as one means to cope with these modified and profound societal conditions.<sup>68</sup>

Certainly there are brazen examples where tribal councils and chief executives have acted maliciously and unjustifiably to banish some tribal citizens on the most spurious of grounds—personal feuds, greed, political power struggles.<sup>69</sup> In one of the harshest cases, the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation of California have disenrolled “over 130 adult members of the Tribe (almost 15% of the Band's population) and their families have lost their membership, and along with it their primary source of income, health care, education, and housing support.”<sup>70</sup>

Such actions violate not only indigenous values and traditions, but the basic civil and human rights of those banished. On the other hand, some tribal governments have very reluctantly arrived at the decision to institute or modernize and formalize their banishment proceedings as a way to address difficult social problems, and they have been careful in drafting ordinances and spelling out the conditions and due process

<sup>68</sup>Thanks to Tom Biolsi for his insights on the way modernization appears to be affecting some tribal nations.

<sup>69</sup>See, e.g., *Quair v. Sisco*, 359 F. Supp. 2d 946 (E.D. Cal. 2004) and *Shenandoah v. Halbritter*, 366 F.3d 89 (2<sup>d</sup> Cir. 2004).

<sup>70</sup>*Salinas et al. v. LaMere et al.*, Superior Court for the County of Riverside, case no. 427295 (March 17, 2005).



The Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation of California have disenrolled almost 15 percent of the band's population.

safeguards to which all tribal members, even those facing banishment, are entitled.

The Grand Portage Band of Chippewa, who live in northern Minnesota, typify a tribe that has wrestled mightily with this issue and has arrived at a decision—largely because of rising crime and social disruptions by a small segment of their population—to formally add a new title on “exclusion” to their laws. The tribe’s twelve-page law may well be the most detailed exclusion ordinance of any Native nation. It explains why the law became a necessity; describes who may be removed, the extent of the exclusion, and the reasons for expulsion; and outlines the procedural process for the banished individual and for enforcement.

The preamble to the law declares that “in order to properly secure the peace, health, safety and welfare of the residents of and visitors to the band’s territory, it is necessary to establish procedures and standards for the removal and exclusion from the lands subject to the territorial authority of the band those persons whose conduct or associations

become intolerable to the Community and threaten the peace, health, safety and welfare of the Band."<sup>71</sup> The preamble states that the purpose of the law is to provide "standard criteria to review and identify persons who may pose such threats and to establish standards of removal and exclusion which are appropriate and proportionate to the threat posed by such persons."<sup>72</sup> The new law provides due process protections to any person facing expulsion.

Section 5202, titled "Grounds for Exclusion," specifies eighteen offenses that can be causes for exclusion, including, but not limited to, the following: disruption of any religious ceremony or cultural event; "personal, impertinent, slanderous or profane remarks" to Tribal Council members; gang activity; sale or distribution of illegal drugs; "mining, prospecting, or cutting timber" without tribal authorization; threatening or intimidating conduct or words to band members or others; child molestation; sexual abuse; homicide; rape; designation as a level 3 sex offender, etc.<sup>73</sup>

Importantly, explicit due process stipulations are spelled out, including written notice and a hearing that allows the individual to address the council, call witnesses, present evidence, and question and challenge the witnesses who are testifying against the person. Expelled individuals have the right to request that the council rescind or modify the expulsion order "once every year after it has been entered." The order may then be changed or terminated only if the excluded person can demonstrate "that the act or omission which constituted the grounds for the exclusion has been resolved, corrected, or is no longer an issue" or that the person no longer poses a threat to the citizens or residents of the band's territory.

According to Norman W. Deschampe, the tribal chairman, peace and quiet have been restored since the tribe banished a mother, two mature sons, and a family friend who had been involved in a tribal fracas. This was the culminating event that compelled the tribe to craft its exclusion law.<sup>74</sup>

<sup>71</sup>"Exclusion" [copy of this ordinance in author's possession].

<sup>72</sup>*Ibid.*

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

<sup>74</sup>Kershaw and Davey, "Plagued by Drugs, Tribes Revive Ancient Penalty," 23.

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CONCLUSION

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Tribal nations have existed in the Americas for untold millennia. And as long as they have been here, each of these original nations has sought to maintain political stability, economic vitality, and cultural integrity. The expulsion of offenders was never in widespread use as a tool for dealing with disharmony, since longstanding traditions and customary practices helped resolve disputes before they became intolerable.

Yet today a wave of banishments has been unleashed, leading to the legal and cultural exile of thousands of tribal citizens. The recent spate of disenrollments has prompted an organized response by some of the disenfranchised and their allies. On May 21, 2005, hundreds of Indians from all over the nation—many of whom had been disenrolled—met in Temecula, California, site of the greatest number of what many consider egregious and unjust disenrollments, in a show of solidarity with one another and to protest the disenrollment process when it fundamentally violates basic human and cultural rights. Expressing the view that corruption in some tribal governments, often spawned by greed for additional gaming revenues, was the prime culprit in the current surge of disenrollments, the participants vowed to fight for the human and civil rights of all tribal people who have been wrongfully terminated from their tribal nations.

Some tribes have reluctantly determined that disenrollment is a mechanism they may sometimes have to employ to maintain community stability, and they have carefully constructed clear guidelines and procedures for carrying out this most difficult of tasks. In other cases, however, tribal officials are—without any concern for human rights, tribal traditions, or due process—arbitrarily and capriciously disenrolling and banishing tribal members as a means to solidify their own economic and political bases and to winnow out opposition families who disapprove of the tribal leadership's policies.

One commentator has proposed a set of strategies—in the form of institutional structures and policies—that might provide solutions for the membership conundrums currently enveloping many tribes. The first suggestion is that tribal governments that operate under constitutions should "incorporate enrollment policies into their constitutions."<sup>75</sup> This

<sup>75</sup>Brendan Ludwick, "The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment," *The Federal Lawyer* 51 (October 2004): 44.

would "include the right to be secure in membership but also may protect members' basic democratic rights, such as participation in tribal elections and the right to benefit from tribal services."<sup>76</sup> The Ysleta Del Sur enrollment provision established in 1997 is one example of how this might work.

Second, tribal governments should consider establishing or fortifying institutional barriers to separate elected officials from tribally operated business enterprises. An example would be to create a corporation to manage economic development and to select a board of directors who would be directly accountable to the tribe's leadership. The early corporate charters that a number of tribes established under the IRA are an example of a process that could be modified to provide a clearer separation of powers that might provide more protection for the individual civil liberties of tribal citizens.

Third, "and perhaps most important, an effective safeguard against tribal disenrollment is an independent tribal authority that has the power to review the tribal council's enrollment decisions."<sup>77</sup> An independent tribal court with co-equal power would be the most appropriate institution to wield such authority.

As Native nations continue to mature, let us hope that they will carefully weigh and factor in their own indigenous traditions and values, focusing on the core principles of fairness, justice, moral equality, and respect for dissenting opinions.

<sup>76</sup>Ibid.

<sup>77</sup>Ibid., 45.

## BOOK REVIEWS

*Negotiating Conquest: Gender and Power in California, 1770s to 1880s*, by Miroslava Chávez-García. Tucson: University of Arizona Press, 2004; 240 pp., illustrations, notes, glossary, bibliography, index; \$39.95, cloth.

Miroslava Chávez-García has written a well-researched history of gender and power in early California from the 1770s to 1880s. In *Negotiating Conquest: Gender and Power in California, 1770s to 1880s* she has analyzed a myriad of federal, county, and local court cases, creating a narrative with richly detailed historical accounts.

Part I, "Women in Spanish and Mexican California (1770s–1820s)," begins with the conquest of the region by the Spanish soldiers and their attacks against native women. The missionaries complained to authorities, but justice was delayed or nonexistent due to the distance between Mexico City and the frontier, the Spanish bureaucracy, and the Spanish insensitivity to the rights of the indígenas (native peoples). By the early 1880s, abortion, infanticide, and syphilis were common in the region.

Missionaries tried to recruit colonists from Mexico and other regions of New Spain. At the California pueblos, missions, and presidios, Spanish-speaking women taught the neófitas (Christianized native women) the domestic arts, European morality, and the cultural norms of Hispanic life.

In the 1830s, the Mexican government sent a colony of artists, teachers, merchants, farmers, and other skilled laborers to the Los Angeles pueblo. In Mexican Los Angeles and the greater region, men had complete authority over their dependents; however, they were also required to support, protect, and guide their spouses and legitimate offspring. If a husband failed in his duties, his wife could go to the Court of First Instance (judge and town council member presiding), or conciliation trial, or the Court of Second Instance (Justice of the Peace). The gente de razón (Spanish-speaking colonists, as distinguished from the native peoples) followed this course in challenging abusive and unfaithful husbands and coercive fathers.

The belief was that women needed protection and regulation of their sexuality and person. According to Spanish civil law, a father could disinherit a legitimate daughter if she married against his wishes. A "loose" woman, one who was

physically and sexually free of the patriarchal control of her husband or father, could bring shame on herself and dishonor the family. However, women at the lowest levels of the socioeconomic, gender, and racial hierarchy (*indígenas*) were perceived to possess no honor that could be insulted.

In the 1836 and 1844 censuses, women who transgressed moral and social norms of sexual behavior were identified as "*malas vidas (MV)*," which meant they led a sinful life. Although this insinuates prostitution, there is little evidence to support that premise. Many of these women had multiple partners and children by different fathers. Local authorities used public denigration to control perceived sexual misconduct and to warn others of the consequences of immoral excesses.

Although attitudes and laws restricted women in marriage and family, they had the legal right to own property in their own names. This was one way that women could assert their individuality and gain some independence. Women could acquire property through grants, endowments, purchases, gifts, and inheritance. Women could also administer, protect, and invest their property. They could initiate litigation, appear in courts, act as their own advocate, enter into contracts, form business partnerships, administer estates, and lend and borrow money and other goods. Property, however, had to be developed for productivity, which was difficult for widows and other women and required them to rely on men.

The *gente de razón* who owned ranching and agricultural land gained economic independence and entrance into the highest level of society. This distinguished them from the *indígenas*, who had little real property and were impoverished and socially marginalized.

Part II, "Women in American California (1860s–1880s)," describes the changes that occurred after the American takeover in 1848. Californios (early California settlers, their descendants, and Mexican-born residents) lost property rights and had to adapt to American common law, a foreign language, Euro-American and Protestant population and culture, Americanization of the Catholic Church, and the decline of the ranching economy due to a rapidly developing capitalist farming economy.

Now under common law women could divorce, which was not possible under Mexican law and church canon. This allowed women to recover personal and community property, obtain custody of their children, and seek support. However, women who were found to be at fault in a divorce action could lose everything. In addition, divorced women were regarded by the California-Mexican population as a disgrace and a threat to the traditional family and the Catholic Church. The right to



divorce increased women's power in the family, but it undermined their economic status and their ability to support themselves and their families.

The Treaty of Guadalupe Hidalgo (ending the Mexican-American War and providing for Mexican cession) guaranteed that property rights of Mexicans would be respected; however, by the 1880s most of the original resident landowners had lost their property. Federal legislation required a costly and time-consuming process for confirming land title. It took an average of 17 years for claimants to obtain legal ownership of their property. The new land laws, laborious court system, excessive litigation costs, high interest loans, taxes, plus floods, droughts, and a weaker cattle market led many landowners to bankruptcy.

For example, in the 1850s María Merced Tapia and her husband Victor Prudhomme owned more than thirteen thousand acres of land at Malibu, which had been lawfully granted to José Tapia in 1804 by the Spanish governor. However, in 1854 the land commission rejected their petition for title because they had no documentary evidence of the grant. They could demonstrate that the commandant at Santa Barbara had given Tapia legal possession of the rancho in 1804, but the issue became whether the commandant had the governor's authority to issue the grant. They appealed, but mounting legal expenses and debt finally forced them to sell their property for \$1,400 to Matthew Keller, a lawyer and real estate investor. Keller petitioned for another hearing, found (or manufactured) the missing documents, took the case to the district court and the U.S. Supreme Court, and, after a twelve-year battle, was awarded ownership of the land.

In summary, the transition from Spanish and Mexican civil law to U.S. common law gave women the right to divorce, gain support, custody, and community property. But ethnic biases in the laws and the courts severely affected the native California women, curtailing the land rights and most of the civil rights that they held prior to 1850. Property ownership, which had given women some independence prior to statehood, was adversely affected by the new laws.

Also, single, widowed, separated, or divorced women lost personal wealth and had to find other ways to take care of their families. Many impoverished Mexican women were abandoned by their husbands, who migrated elsewhere to find work. These women often found other men who would support them and their children. Illegitimacy increased dramatically, creating additional burdens for the unmarried or abandoned women who had to support their children.

Miroslava Chávez-García has made suggestions and hypoth-

esized about motivations and implications, giving richness and meaning to the text and a voice to the silent and invisible. This book dramatically and thoroughly documents the transition to the American era and the resulting legal, economic, political, cultural, and social transformation.

Elissa Kagan  
Laguna Hills

*Majesty of the Law: Reflections of a Supreme Court Justice*, by Sandra Day O'Connor. New York: Random House, 2003; 330 pp., illustrations, notes, bibliography, index; \$14.95, paper.

*Majesty of the Law* is a paperback reissue of a former national hardcover bestseller. The book has a conversational tone. When reading *Majesty of the Law*, I could easily imagine myself sitting with Justice O'Connor in her chambers as she told me about the Supreme Court over a cup of tea. However, readers should not let the informal tone of this book distract them from the depth and importance of Justice O'Connor's ideas.

Justice O'Connor begins with a brief history of the Supreme Court as an institution, of some of its most distinguished members, and of the reporters who recorded and published the Court's decisions during its early decades. Her admiration of Thurgood Marshall and Lewis F. Powell is genuine and deeply felt. I found her chapter on court reporters Alexander Dallas, William Cranch, Henry Wheaton, and Richard Peters fascinating. She writes with authority about women in society, in the law, and in positions of power.

Justice O'Connor speaks highly of the rule of law and traces its development from Magna Carta to today. She emphasizes the role of the judiciary in this development, without giving due credit to the legislative and executive branches of government for their contributions.

The most important part of *Majesty of the Law* is part 5, in which Justice O'Connor discusses professionalism among attorneys and addresses problems with the jury system and suggests some possible solutions. In the chapter entitled "Broadening Our Horizons," she discusses the influence foreign law should have on the American legal system. On the matter of jury service, she advises some "fairly simple changes" (p. 218). Most Americans' only first-hand experience with the justice system is a summons to jury service, and most Americans dread the experience. No litigator wants a fair and impartial jury to try his or her client's case. Every lawyer wants a jury as prejudiced as possible in favor of his or her

client. Highly paid jury consultants have made this a near reality by skewing juries away from being representative samples of the community to "the most ignorant, poorly informed citizens in the community" (ibid.). This is especially true when dealing with high-profile cases. To correct this problem, Justice O'Connor suggests restricting peremptory challenges and challenges for cause. Her points are well taken and should be carefully considered and implemented. Justice O'Connor also urges that jurors be treated with respect and dignity, be allowed to take notes, and be given plain English instructions at the beginning of the trial.

On the subject of professionalism, Justice O'Connor suggests that lawyers view oral argument "as discourse" (p. 227) and trial as "an investigation" (p. 228). She views the decline in civility as a result of lawyers' advertising. Unfortunately, she does not offer any concrete suggestions to deal with this serious problem, other than to remind the members of the bar that law is a profession first and a business second.

"Broadening Our Horizons" is a very important and timely chapter given the Senate hearing on Justice O'Connor's successor, Samuel Alito. During the hearing, Senator Tom Colburn (R-OK) asked Judge Alito about using foreign law in American courts. Judge Alito said, "I don't think it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. . . . The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time." Justice O'Connor, on the other hand, is very much in favor of borrowing ideas from "other constitutional courts, especially other common law courts that have struggled with the same basic constitutional questions that we have. All of these courts have something to teach us about the civilizing function of constitutional law" (p. 234).

Justice O'Connor has the stronger argument. Many other nations have bills of rights in their constitutions and many of them are similar to the American Bill of Rights, even if it wasn't completely original, drawing on the Magna Carta, as Justice O'Connor points out (pp. 33-35). As the world becomes increasingly interdependent, international courts and dispute-resolution systems will proliferate. American lawyers and jurists will be in a much better position to represent their clients if they are versed in foreign law and legal systems (p. 234-35).

Overall, *Majesty of the Law* is a solid book, beneficial to both a professional and a lay audience.

Richard A. McFarlane  
Buena Park, California

*With All Deliberate Speed: The Life of Philip Elman, An Oral History Memoir*, by Norman I. Silber. Ann Arbor: University of Michigan Press, 2004; 424 pp., illustrations, table of cases, index; \$29.95, cloth.

Oral historians, both interviewers and interviewees, should read this book to explore the full potential of their work product. Such histories can be published as very readable memoirs and, as shown here, can generate high-profile ethical controversies.

Norman Silber has followed up his series of extended interviews with editing and conversations, to create this oral history memoir of Philip Elman. He did this by deleting the basic Q and A format of the interviews. They become burdensome in lengthy works and place the reader outside of the dialogue. By rephrasing the questions in Elman's voice, Silber makes the book a conversation between the reader and the subject historian.

In order to counter the self-congratulatory nature of all oral histories, Silber adds an interpretive commentary at the end of each chapter. This salutary feature permits him to add documentation, interpretive comments, and annotations to guide readers to supporting as well as differing versions of the events Elman discusses.

Library shelves are full of books by and about United States Supreme Court justices, the Court itself, and the Court's decisions. But it is a thin shelf indeed where the book focuses on a one-year law clerkship that grew into a lifelong personal relationship. This is not to discredit Philip Elman. A bright student, he excelled at CCNY, was admitted to Harvard Law School and made law review. He was an accomplished student and writer, establishing relationships that helped his future career, including an association with Philip Graham, later publisher of the *Washington Post*. More importantly, he took a course taught by Felix Frankfurter, soon to become Justice Frankfurter. Subsequently, Elman became law clerk to the justice. Frankfurter, as is well known, was a great supporter of the New Deal while he served as an advisor to Franklin Roosevelt before being appointed to the high court in 1939. His reputation has risen and fallen over the years, but it is clear that he took good care of his law clerks as they moved on. With the justice's help, Elman became an assistant solicitor general and served in that capacity until his appointment by President Kennedy to the Federal Trade Commission in 1961. He served ten years in what may have been his greatest public contribution.

It is in relation to his work in the solicitor general's office where his memoirs reveal the controversy, his role in *Brown v.*

*Board of Education*, and the great pitfall that may engulf an oral history interviewee. In his life story, Elman takes credit for the idea of gradualism, which enabled the Supreme Court to unanimously decide what is generally regarded as the most significant court decision of the twentieth century. The case overturned *Plessy v. Ferguson* with its separate-but-equal doctrine.

"With all deliberate speed" is the prepositional phrase used by the Court in *Brown* to delay enforcement of its edict after it denounced segregation in public schools. Whereas the vindication of civil rights violations normally has an immediate remedy, some argue that requiring immediate enforcement would have prevented Court unanimity. Blacks, who otherwise were delighted with the ruling, condemned it. At the same time, it was palatable for separatists who had resisted integration for decades after the 1954 Warren Court decision.

Elman's revelations concerning ethical improprieties during the Court's consideration of *Brown* are startling. He told of ongoing, detailed ex parte conversations with Frankfurter, wherein the justice gave him information about the various positions of the members of the Court, including what was said in conferences, all while Elman was lead counsel in rewriting the government's brief. A furor arose after a portion of Elman's memoirs were published in the *Harvard Law Review* in 1987. While he later attempted to retract or explain the obvious conflicts, ultimately Elman rationalized that he was simply Frankfurter's "law clerk for life."

The reader gets caught up in Elman's reflections. Granted he had full opportunity to prepare himself for the interviews, but it is clear he had a detailed and articulate recall of events and places. He is a classic example of the many bright, hard-working, well-trained lawyers who make their careers in government service after law school. They are the people who provide the stabilizing keel to the ship of state, buffeted as it is by the varying political winds.

Silber's book is a good read—particularly for aging historians, lawyers, and judges who have personal recollections of the era and the people of the time, many of whom they would have known personally.

Paul G. Rosenblatt  
Senior United States District Judge for the District of Arizona  
Prescott, Arizona



## 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.

*American Indian Law Review* 28:2 (2004). Special Issue, "Symposium: *United States v. Billy Jo Lara*: A Constitutional Crisis in Indian Law?"

Anderson, Karen. "The Little Rock School Desegregation Crisis: Moderation and Social Conflict." *Journal of Southern History* 70 (August 2004).

Ball, Larry D. "Tom Horn and the 'Talking Boy' Controversy." *Journal of Arizona History* 45 (Winter 2004).

Beck, George. "The Fourteenth Amendment as Related to Tribal Indians: Section I, 'Subject to the Jurisdiction Therof' and Section II, 'Excluding Indians Not taxed.'" *American Indian Culture and Research Journal* 28:4 (2004).

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Brooks, Charlotte. "*Sing Sheng vs. Southwood*: Residential Integration in Cold War California." *Pacific Historical Review* 73 (August 2004).

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Graybill, Andrew. "'Texas Rangers, Canadian Mounties, and the Policing of the Transnational Industrial Frontier, 1885–1910.'" *Western Historical Quarterly* 35 (Summer 2004).

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Haan de, Amy. "Arizona Women Argue for the Vote: The 1912 Initiative Campaign for Women's Suffrage." *The Journal of Arizona History* 45:4 (Winter 2004).

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Hammond, John Craig. "'They Are Very Much Interested in Obtaining an Unlimited Slavery': Rethinking the Expansion of Slavery in the Purchase Territories, 1803–1805." *Journal of the Early Republic* 23 (Fall 2003).

Hedglen, Thomas L. "The Trials of Will Johnson: Race-blind Justice in the First Year of Oklahoma Statehood." *Chronicles of Oklahoma* 81 (Fall 2003).

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Lauck, Jon, John E. Miller, and Edward Hogan. "Historical Musings: The Contours of South Dakota Political Culture." *South Dakota History* 34 (Summer 2004).

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McKanna, Clare V., Jr. "An Old Town 'Gunfight': The Homicide Trial of Cave Johnston Coutts, 1866." *Journal of San Diego History* 44 (Fall 1998).

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