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Cover photo:

The legal limbo of the Sinixt people, whose ancestral home was bisected by the U.S.-Canadian border, is the subject of Andrea Geiger's article "Crossed by the Border." (Image C-05564, courtesy of Royal BC Museum, BC Archives)

"CROSSED BY THE BORDER": THE U.S.-CANADA BORDER AND CANADA'S "EXTINCTION" OF THE ARROW LAKES BAND, 1890–1956¹

ANDREA GEIGER

I n 1956, Canada's Department of Indian Affairs declared the Arrow Lakes Band "extinct" and transferred the rich timberlands of the Arrow Lakes Reserve, located not far from Canada's boundary with the United States, to the province of British Columbia. The culmination of a decades-long process in which the government of Canada proactively wielded its self-assumed power to define Indian status and determine band membership, this outcome was also a product of extra-legal assumptions read into its Indian Act that reveal how willing the government was to manipulate its own rules regarding gender and band governance to achieve its goals. Also critical was the presence of the U.S.-Canada border, which transected the traditional territories of the Arrow Lakes (Sinixt) people and forced the reconfiguration of both their identities

¹Preliminary research for this essay was conducted in 1997 under the guidance of Professor Richard White at the University of Washington. I am grateful to him for his thoughtful comments on those early drafts. I am also thankful to Dale Kohler for suggesting this as a research topic; to Murray Adams of Rush, Crane, Guenther & Adams for his comments on an early draft; and to Professor William Bauer and Lawrence Fast for their comments on a recent draft. Although I served as a reservation attorney for the Confederated Tribes of the Colville Reservation in 1994, I did not work on this issue while there.

Andrea Geiger is assistant professor of history at Simon Fraser University in Burnaby, B.C., and the author of *Subverting Exclusion: Transpacific Encounters with Race, Caste, and Borders, 1885–1928*, which was published in 2011 and was awarded the Theodore Saloutos Book Award by the Immigration and Ethnic History Society.

and the environment through which they moved. The border rendered the Sinixt people subject to the jurisdictional authority of two separate nation-states, allowing each nation to impose its own criteria for preserving any rights in lands that the Indians had occupied from time immemorial and for formal recognition as a distinct people. Canada's eventual determination that the Sinixt were extinct, as a result, was a function not simply of the application of its own law but of its ability to utilize the international boundary as a tool to terminate its obligations to a people whose presence in this borderlands region predated Canada's establishment as a nation-state by many centuries.

Part of a larger story of conflict between Native forms of social organization capable of evolving over time and the efforts of the U.S. and Canadian governments to redefine those identified as Indians within largely territorial forms of organization in order to facilitate their assimilation, the Arrow Lakes experience reveals the extent to which the international border served not just to divide two different systems of aboriginal law and policy, but also to bind them to one another. Although the United States and Canada adopted somewhat different approaches to defining Indian status and establishing reserves and reservations, both systems of law and policy shared a common purpose: to facilitate the transfer of Indian lands to non-Indians and to place a finite limit on each government's obligations to those it had dispossessed. Although the Arrow Lakes people are unique in being the object of an official determination that they were extinct in Canada, their experience brings into focus the heightened pressure placed on all Native groups along the border to sustain their legal existence on either side given the combined weight of the border's presence and two separate bodies of assimilationist law and policy imposed concurrently on their traditional territories.

ESTABLISHMENT OF RESERVES FOR THE SINIXT PEOPLE

During the early nineteenth century, non-Native travelers to the Arrow Lakes region encountered groups of Native people they and, later, ethnographers identified as Lakes or Arrow Lakes Indians. Archaeological evidence reveals that the Arrow Lakes had been present in the area for many centuries. Given the scattered and seasonal nature of the resources on which they relied, the Lakes (Sinixt) people developed a semi-nomadic pattern of settlement, using the interconnected lakes and rivers of the Columbia River system to travel throughout a territory

that extended north to what is now Revelstoke, British Columbia, and south to Kettle Falls, Washington.²

Ethnographers agree that although the activities of the Sinixt were historically centered on the Arrow Lakes, a gradual southward migration into areas previously utilized but not permanently occupied occurred during the nineteenth century following the establishment of Fort Colville and Fort Shepherd by the Hudson's Bay Company. Additional factors leading to a reduction in the number of Sinixt living in the immediate vicinity of the Arrow Lakes were smallpox and other epidemics that swept through the region during this period. There is also evidence, however, that migratory patterns persisted among Sinixt who wintered near Fort Colville but continued to travel up the Columbia River into the Arrow Lakes region to utilize the plant and animal resources of that area on an annual basis.³

The United States' and Britain's agreement to fix the international border at the forty-ninth parallel in 1846 effectively divided Sinixt territories between the two. Both British and American officers in the area in the 1860s noted that the Sinixt continued to utilize their territories on both sides of the boundary line, a practice that complicated efforts to categorize them as exclusively British or American Indians. In 1861, for example, a lieutenant colonel in the Royal Engineers reported that "Lakes Indians . . . live as much South as north of the 49th parallel . . . so that they must be considered as much American as British subjects."⁴ Government officials on the U.S. side of the border likewise noted the Arrow Lakes' continued utilization of areas both north and south of the forty-ninth parallel, observing that the fact that "they are migratory in habit" made

²The name the Arrow Lakes Indians gave to themselves, *sngaytskstx*, refers to a particular species of trout found in the Arrow Lakes. The term has been rendered in the English alphabet in various ways over time. Randy Bouchard and Dorothy Kennedy, *Lakes Indian Ethnography and History* [report prepared for the B.C. Heritage Conservation Branch, Victoria, B.C., August 1985], 2, 6, *Forty-fifth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1927-1928* (Washington, DC, 1930). I use *indigenous*, *Native*, and *aboriginal* interchangeably to refer to North America's first peoples and use *Indian* as a term of art to refer to those identified as such under the terms of Canada's Indian Act or under U.S. law, or where it is the term used by the original source.

³Bouchard and Kennedy, *Lakes Indian Ethnography*, 13-14, 18, 20.

⁴Report of J.S. Hawkins, lieutenant colonel, Royal Engineers, 5 June 1861, B.C. Archives, Colonial Correspondence, file 736, quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*, 17. In 1862 Hawkins again reported the Arrow Lakes utilized resources on both sides of the forty-ninth parallel and noted the importance of access to the fisheries at Kettle Falls as an element. J.S. Hawkins to J. Cox, 26 March 1862, B.C. Archives, Colonial Correspondence, file 377/5, quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*.

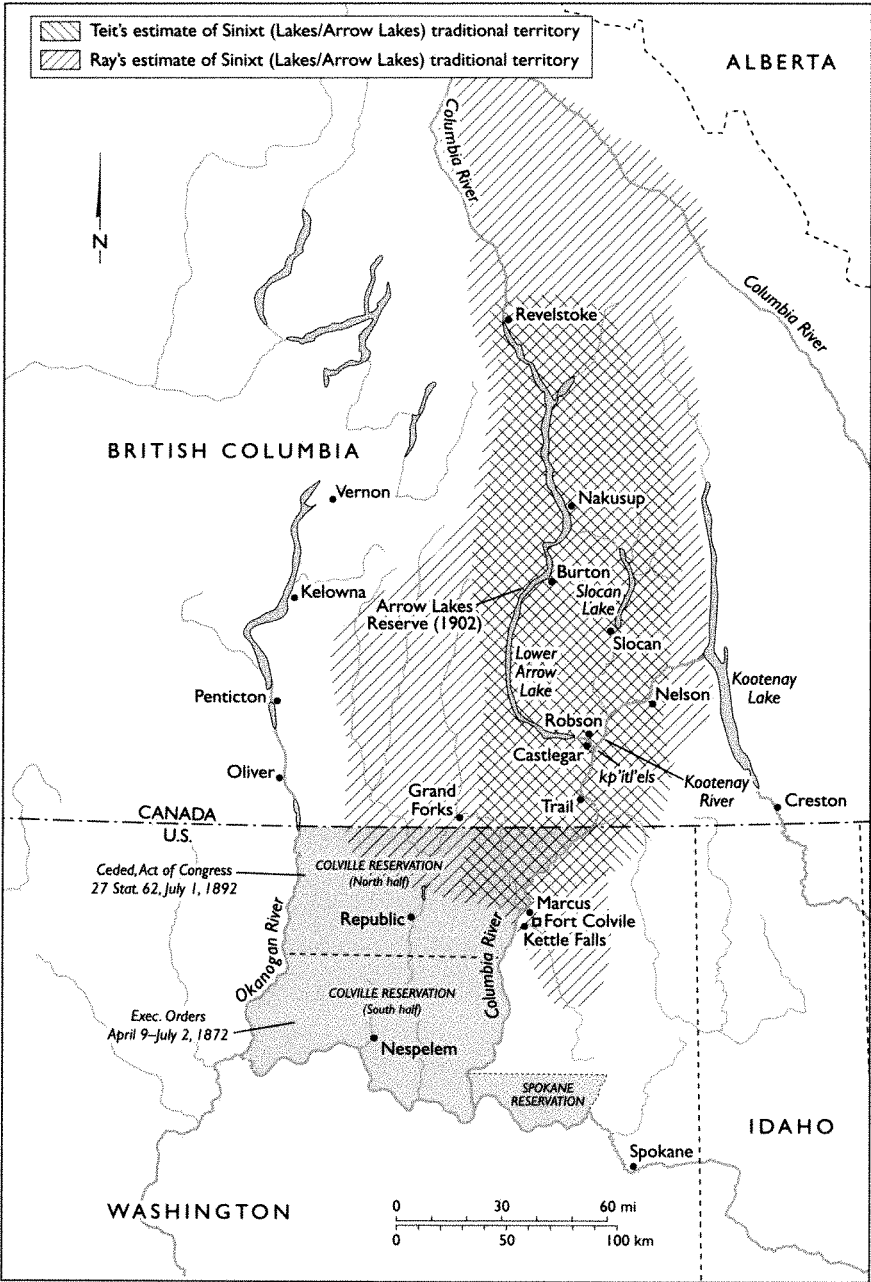
it "exceedingly difficult to make the proper distinction between those entitled to benefit from our government and those of British Columbia."⁵ Although the border had no immediate impact on the ability of the Sinixt to travel freely throughout their traditional territories, by 1880 government officials on both sides of the Canada-U.S. border contemplated using force to prevent the continued migration of trans-border peoples.⁶ Over time, heightened enforcement of the international border made it more and more difficult for the Sinixt to sustain traditional economies by reconfiguring the environments through which they moved and limiting the resources to which they had access. The net effect would be to render them vulnerable in the same regions that had once sustained them both physically and spiritually as a people.

By the end of the nineteenth century, the influx of non-Natives into the area had brought to a head the issue of resolving Native land claims on both sides of the border. On the U.S. side, the Arrow Lakes were included among those permitted to reside on the Colville Reservation, established in northeastern Washington by executive order in April 1872, less than one year after British Columbia joined the dominion of Canada.⁷ As first established, the reservation extended north to the forty-ninth parallel and included a large pocket of fertile land east of the Columbia River. In response to the demands of settlers in the region who also wanted access to the rich agricultural lands east of the river, the U.S. Congress acted almost immediately to redraw the reservation's borders, limiting it to the far rockier and inhospitable terrain west of the Columbia River. When Congress severed the north half of the reservation in 1892 in order to open it to miners, Sinixt territory was among

⁵George A. Paige, Report to the Superintendent of Indian Affairs, 8 July 1865, United States, 39th Cong., 2^d sess., quoted in Bouchard and Kennedy, *Lakes Indian Ethnography*, 17–18.

⁶See Bouchard and Kennedy, *Lakes Indian Ethnography*, 19–20, quoting Canada, Report of the Privy Council (1881), 2–9; United States, Department of State (1882), 1–2.

⁷See attached map. United States, Executive Orders of 9 April 1872 and 2 July 1872 (Ulysses S. Grant); *An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes*, 27 Stat. 62, 1 July 1892. The Arrow Lakes were one of twelve tribes eventually assigned to the Colville Reservation. Others included the Methow, Okanogan, Sanpoil, Colville [both a constituent group and the name assigned the reservation], Nespelem, Chelan, Entiat, Moses-Columbia, Wenatchi, Nez Perce, Palus. Collectively, these tribes are now known as the Confederated Tribes of the Colville Reservation; informally, they are often referred to simply as the Colville Tribe(s), members of which may have ancestral ties to one or more of its constituent groups.



The agreement in 1846 to fix the international border at the forty-ninth parallel divided Sinixt territories between the United States and Britain. (Map by Bill Nelson)

that most affected. Although the U.S. government issued allotments to Native people living in the area that was opened for settlement, many were forced out by newcomers, settling instead on the remaining south half of the Colville Reservation.⁸

The process of establishing a reserve for the Arrow Lakes on the B.C. side of the border was also fraught with delay and ambivalence from the start, partly engendered by the refusal of British Columbia to enter into treaties with a majority of the First Nations whose territories had been incorporated within its boundaries. Instead, B.C. decided to set aside small and scattered reserves that would deny Native peoples in western Canada the larger contiguous land base retained by some U.S. tribes.⁹ In 1875, the provincial and dominion governments appointed a joint commission to determine the number, size, and location of the small reserves to be "allowed" indigenous nations in British Columbia. Although the Indian Reserve Commission was instructed to consider "the habits, wants and pursuits of [each] nation" in determining the location and size of its reserves, the commission also was to take into account "the amount of territory available in the region . . . and claims of white settlers." Both governments assumed that once reserves were established, all remaining land would be available for settlement.¹⁰ Reserves might increase or decrease in size or number over time as the Native population fluctuated, and land no longer used as a reserve would revert to the province.¹¹

On October 4, 1884, Peter O'Reilly, who served as Indian reserve commissioner from 1880 to 1898, reported to the Department of Indian Affairs that he had completed the adjust-

⁸Jessie A. Bloodworth, *Human Resources Survey of the Colville Confederated Tribes, A Field Report of the Bureau of Indian Affairs, Portland Area Office, Colville Agency* (June 1959), 46. See also Lillian A. Ackerman, *A Necessary Balance: Gender and Power among Indians of the Columbia Plateau* (Norman, OK, 2003), 136–37.

⁹See, e.g., Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver, BC, 2002), 86–96.

¹⁰Canada, *Correspondence, Memoranda and Reports submitted to the Royal Commission on Indian Affairs* (Blue Book 12), G.M. Matheson Report, 30 December 1921, 8; Annual Report of the Department of Interior for 1875, pp. xl–lxix, "Indian Land Question in British Columbia." Library and Archives Canada, Record Group [RG] 10.

¹¹Matheson Report, 9. See also Report of the Royal Commission on Indian Affairs for the Province of British Columbia ["McKenna-McBride Commission"], vol. 2 (Ottawa, ON, 1916), Terms of Reference. The commission was appointed in 1912 to resolve ongoing disputes regarding the location and size of reserves in British Columbia. Its popular name was drawn from the names of the two special commissioners who headed it, J.A.J. McKenna and provincial premier Richard McBride. See also Harris, *Making Native Space*, 96.

ment of reserves for the Indians in the Kootenay district, which included areas historically occupied by the Sinixt people. For reasons that are not entirely clear in the written record, no reserve was set aside on behalf of the Arrow Lakes at that time.¹² One factor may well have been that the Sinixt—like other indigenous groups in the region—continued to utilize their lands in traditional ways, traveling within their territories to access resources throughout the year. O'Reilly himself explained that it was difficult to determine the number of Indians who were to live on the reserves he had established because indigenous peoples in the area were “migratory, moving from place to place in different seasons of the year, as suited to their pursuits and requirements.”¹³

Also a factor, however, may have been a reluctance on the part of the Sinixt—like other Native groups in south-central British Columbia—to recognize the authority of the Indian Reserve Commission, in the absence of treaty agreements, to confine them to areas that comprised a mere fraction of their traditional territories. R.L.T. Galbraith, who was present at the time of O'Reilly's original pass through the area and later served as Indian agent for the Kootenay district, would testify before the McKenna-McBride Commission in 1914 that, although O'Reilly had taken into account the “little gardens” of the Indians where he had seen or learned of them, they were not consulted in the definition and creation of reserves. As a result, small groups of Indians continued to “squat” outside the reserves O'Reilly had set aside. These Indians, Galbraith explained, were of the opinion that they had proprietary rights in the land and had been opposed from the beginning to British Columbia's efforts to restrict them to reserves.¹⁴ Local settlers were even more adamant. “The Indians appear to be laboring under the impression that all the land is theirs and we think it is high time they were disillusioned,” complained the authors

¹²Matheson Report, 8, 10; GR 933, B 1391, Canadian Indian Affairs, vol. 1273–78, at 250–51.

¹³O'Reilly to Chief Commissioner of Lands and Works, n.d., vol. 1273–78, 258–60, 265–67. Although this reference is not specific to the Arrow Lakes, it does not exclude them and is consistent with other evidence reflecting such patterns of movement by Arrow Lakes people. See notes 4–6 and note 21.

¹⁴McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 28 October 1914, 72, 75, 78–79. Although this statement does not single out the Arrow Lakes, the attitude is generally attributed to Native groups in the Kootenay area during the period of early settlement; the Sinixt were one of those groups.

of one letter to the commission.¹⁵ "The whole trouble seems to arise from the belief which the Indian has that the whole of this country belongs by right to him," a group of local farmers complained. "So well grounded is this belief in the Indian mind that he lets slip no opportunity of asserting his rights when he is in a position to do so."¹⁶

Native groups in the area were also aware that Canada was unwilling to set aside reserves as large as those established by the United States. O'Reilly explained in 1884 that he had the "utmost difficulty in persuading the Kootenays [a neighboring band] to agree to the boundaries fixed on by me, and which they looked upon as meagre in the extreme, compared with the millions of acres set apart by the United States Government for American Indians, a few miles south of the line."¹⁷ Although local settlers insisted that the amount of land reserved to the Indians was already too great, the Indian agent for the Kootenay Agency—the agency responsible for the region that included Sinixt traditional territories in Canada—expressed concern that the proposed reserves were not large enough to meet the needs of the Indian population in that district.¹⁸ Also an issue, as O'Reilly himself conceded, was the quality of the land set aside as reserves. In 1884, he observed that when he had first arrived "the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their horses and cattle in the most favoured spots." In contrast, he admitted the reserves he had established were, for the most part, "utterly worthless for agriculture, and very inferior for grazing"—implicit evidence that the wishes of Native people had not been taken into account notwithstanding the mandate of the Reserve Commission.¹⁹

Only when the body of an elderly aboriginal man was found on the railroad tracks near Castlegar, B.C., in 1902, did Indian agent for the Kootenay district R.L.T. Galbraith "discover" two bands of Sinixt people. One group was located about five miles from Burton across Lower Arrow Lake and the other at the

¹⁵Acting Secretary of the Creston Board of Trade to McKenna-McBride Commission, 15 May 1915, RG 10, vol. 11024, file 691.

¹⁶Undated memorial from Creston District Farmers Institute and Creston Board of Trade, RG 10, vol. 11024, file 691.

¹⁷British Columbia, *Sessional Papers*, 4th Parl., 3^d sess., 1885, p. xxi following p. 410, quoted in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver, BC, 1974), 220, n. 32.

¹⁸O'Reilly to Superintendent General of Indian Affairs, telegram, 1 September 1887; O'Reilly to Chief Commissioner of Lands and Works, n.d., vol. 1273–78, 259–60.

¹⁹*Ibid.*, 258–60, 265–67.

mouth of the Kootenay River near Robson—a place they called *kp'itléls*. Galbraith later told the McKenna-McBride Commission that neither he nor his predecessor was aware that they were in the area, although they knew that “in the early days many of the Colville Indians had been in the habit of ascending the Columbia river to fish and hunt.” He also admitted, however, that he had encountered a small band he called Gregoire Indians—Gregoire was a Sinixt chief—in the Kootenay region in 1871 but that he lost track of them after they “drifted south of the line.”²⁰ A. Megraw, inspector of Indian agencies, in contrast, reported in 1915 that Galbraith’s predecessor was aware of the band at the mouth of the Kootenay River, but “did not consider them as belonging to his Agency and paid no attention to them.”²¹

On October 25, 1902, the Office of the Indian Reserve Commissioner set aside a reserve of 255 acres for the Arrow Lakes on the northwestern shore of Lower Arrow Lake. Also known locally as Oatscott, the reserve was located some five miles south and across the lake from the town of Burton. According to the Minute of Decision establishing the reserve, six families numbering twenty-two people were assigned to the reserve, half of which consisted of “precipitous granite bluffs.”²² Despite repeated requests by the second group of Arrow Lakes located near the confluence of the Kootenay and Columbia Rivers, Canada failed to set aside an additional reserve on their behalf.

In June 1914, Alexander Christian, describing himself as “one of the few survivors of the band of the Lake (or S. Nai-Toekstet) tribe living at the mouth of the Kootenay River,” contacted the McKenna-McBride Commission on the advice of James A. Teit, a British Columbia ethnographer, to complain that the site on which they lived had not been set aside as a reserve, even though they had requested that this be done two decades earlier.²³ Christian explained that he had been born and lived

²⁰McKenna-McBride Commission, Kootenay Agency, Hearing Transcript, Examination of Indian Agent R.L.T. Galbraith, 28 October 1914, 84–85.

²¹A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, 24 July 1915, RG 10, Department of Indian Affairs, Ottawa.

²²A.W. Vowell to Deputy Commissioner of Lands and Works, Victoria B.C., 25 October 1902, enclosing Minute of Decision—Arrow Lake Indians. British Columbia Archives, GR 2982, box 6. The reserve was confirmed for the “Arrow Lake Tribe” by the McKenna-McBride Commission on March 24, 1915. McKenna-McBride Report, vol. 2, 370. Family names associated with the reserve included Klome, Joseph, and Christian. Census, Kootenay Agency, June 30, 1903.

²³Leslie H. Tepper, *The Interior Salish Tribes of British Columbia: A Photographic Collection* (Ottawa, ON, 1987). Alexander Christian was also referred to as Alex or Alec Christie. McKenna-McBride Commission, Hearing Transcript, 84–85.

his entire life in the area, as had both of his parents and three of his grandparents.²⁴ Recently, however, their land had been encroached upon by members of a neighboring Doukhobor community (a Russian immigrant group that embraced both pacifism and communal land ownership).²⁵ Although the Doukhobors had offered them each one hundred dollars for their homes, Christian and his family—including his brother Baptiste—had refused to leave.²⁶

This was not the first Canadian authorities had heard of the matter. In 1910, it had been brought to the attention of the Department of Indian Affairs by John McDougall, a special commissioner assigned to review the allocation of reserves. He had explained that the small band of Indians living at the mouth of the Kootenay River had “occupied this part from time immemorial[;] the graves of their ancestors as also of their own families are here.”²⁷ The band’s rights in the area were well established, he reported, and the block of land, as surveyed, was designated a government reserve. Kootenay Indian agent R.L.T. Galbraith concurred, noting that the band and their forefathers had long occupied the area and had considered it a primary fishing and camping site before they settled on it all year round.²⁸ Based on this evidence, A.W. Vowell, Kootenay Indian agent at the time of O’Reilly’s visit in 1884 and now superintendent general of Indian affairs, requested that the B.C. lands commissioner withhold the site from preemption or purchase by settlers until the matter was resolved; the commissioner responded that he had directed that the land not be alienated.²⁹

²⁴Declaration of Alexander Christie or Christian, recorded by James A. Teit, 25 June 1914, and submitted to McKenna-McBride Commission, RG 10, vol. 4047, file 356, 200-1.

²⁵Ironically, the Doukhobors’ practice of owning their land in common “like the Indians” was itself the basis of a complaint by one of their neighbors to the Royal Commission appointed to investigate their activities in 1912. W. Blakemore, *Report of the Royal Commission on Matters Relating to the Sect of Doukhobors in the Province of British Columbia*, Inquiry at Nelson, B.C., 29 August 1912, GR 793.

²⁶Declaration of Alexander Christie or Christian, 25 June 1914, RG 10, vol. 4047, file 356, 200-1.

²⁷John McDougall to Superintendent of Indian Affairs, 8 January 1910, RG 10, vol. 4047, file 356/200-1.

²⁸R.L.T. Galbraith to A.W. Vowell, Indian Department, Victoria, B.C., 25 January 1910, stating that the Arrow Lakes at the mouth of the Kootenay River were a “bright and intelligent little band, bear a good character, [and embrace] the habits of industry,” RG 10, vol. 4047, file 356/200-1.

²⁹A.W. Vowell to Price Ellison, Chief Commissioner of Lands, Victoria, B.C., 21 February 1910; Price Ellison, Chief Commissioner of Lands, to A.W. Vowell, 22 February 1910, RG 10, vol. 4047, file 356/200-1.



Alexander Christian, who described himself as one of the few surviving members of the Lakes tribe living at the mouth of the Kootenay River, complained to the McKenna-McBride Commission that the site on which they had lived for generations had not been set aside as a reserve. (Photo by James Teit, 1914. Courtesy of Canadian Museum of Civilization, 26619)

Further inquiry, however, revealed that the site had been included in a 198-acre Crown grant to a settler named J.C. Haynes in December 1884, just two months after O'Reilly's visit to the Kootenay district.³⁰ Galbraith contacted the executor of Haynes' estate in an effort to arrange for the purchase of ten or fifteen acres on behalf of the band residing there, noting that it was a long-established fishing site and that graves were also located on the property. Although the executor was not in a position to sell at that time, he promised to give the Department of Indian Affairs an opportunity to purchase ten acres. Galbraith, however, heard nothing more from the executor, and just one month later the department concluded that it lacked the funds to pursue the matter further that year.³¹

When no further action had been taken by 1912, ethnographer James Teit himself raised the issue with superintendent of Indian affairs Vowell in Ottawa. He explained that the band at the mouth of the Kootenay River, whom he identified as "Indians of the Lake tribe," had, since 1894, repeatedly requested that a reserve be established at that site. Teit noted that, at the time the matter was brought to McDougall's attention in 1910, the Doukhobors were located on the other side of the Columbia River on land they regarded as less desirable. At the time of writing, however, the band had just learned that the land on which they lived had been purchased that spring by the Doukhobors, who had informed them that they would be evicted in three weeks if they did not leave voluntarily by that date.³²

In response to Teit's report, the Department of Indian Affairs made belated attempts to negotiate the purchase from the Doukhobors of a five- or ten-acre portion of the land on which Alexander Christian and other Lakes band members lived, but these attempts failed. The Doukhobors admitted, however, that the band had long occupied the site, and the Russian immigrants were willing to allow the band members to continue to live on "the same spot where they have been staying for years" as long

³⁰A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, RG 10, Department of Indian Affairs, Ottawa, 24 July 1915, referring to records of the registrar of land titles at Nelson, B.C.; Price Ellison, Chief Commissioner of Lands, to A.W. Vowell, 3 March 1910, RG 10, vol. 4047, file 356/200-1.

³¹R.L.T. Galbraith to Secretary, Department of Indian Affairs, Ottawa, 7 June 1910. See also McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85-86; Assistant Deputy Minister, Department of Indian Affairs, Ottawa, to R.L.T. Galbraith, 15 July 1910, RG 10, vol. 4047, file 356/200-1.

³²James A. Teit to Superintendent of Indian Affairs, Ottawa, 16 May 1912; R.L.T. Galbraith to Secretary, Department of Indian Affairs, Ottawa, 2 July 1910, RG 10, vol. 4047, file 356/200-1.

as they kept to themselves.³³ In September 1912, the Department of Indian Affairs instructed Galbraith to inform the Sinixt Band that it could—or would—do nothing more for them. Instead, they were told not to trespass on land now owned by the Doukhobors to hunt or trap, and to be good neighbors.³⁴

In an effort to arrive at a more satisfactory solution, Teit contacted the inspector of Indian agencies, T.J. Cummisky, but Cummisky was dismissive of the Lakes' claims. If they had really cultivated and occupied the land for as long as two decades, he declared, O'Reilly surely would have dealt with their request.³⁵ In other words, O'Reilly's failure to establish a reserve itself constituted evidence in Cummisky's view that the band's claim had no merit.³⁶ Although the McKenna-McBride Commission would later disagree with Cummisky and find that the band had "suffered grievance both as to their land holding and as to their graves," some of which had been destroyed by the Doukhobors, Cummisky's failure to pursue the matter when he was contacted helped to reduce the alternatives still available.³⁷ On March 24, 1915, the commission designated the land on which the band resided as a "temporary reserve" that was "occupied by consent of the Doukhobors." Because the site had already been granted by the Crown, the commission believed it lacked the authority to designate it a permanent reserve. Instead, it forwarded the evidence it had received to the dominion government, expressing its hope that

³³S. Bray, Chief Surveyor, to Deputy Minister, Department of Indian Affairs, 28 May 1912; Assistant Minister and Secretary, Department of Indian Affairs to R.L.T. Galbraith, 19 July 1912; J.R. Sherbinin, Doukhobor representative, to Galbraith, 7 September 1912. See also Declaration of Abraham Hirst, Justice of the Peace, 6 June 1914 [stating that Christie and his relatives were living on the site when he first encountered them and at the time that the Doukhobors acquired title to the land], RG 10, vol. 4047, file 356/200-1.

³⁴Assistant Deputy Minister, Department of Indian Affairs, to R.L.T. Galbraith, 2 October 1912; Galbraith to Deputy Minister, 2 October 1912, RG 10, vol. 4047, file 356/200-1.

³⁵T.J. Cummisky, Inspector of Indian Agencies, to J.D. McLean, Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 21 December 1912, RG 10, vol. 4047, file 356/200-1.

³⁶Cummisky's view is especially ironic given O'Reilly's observable lack of communication and interaction with the Native bands for whom he was setting aside reserves in favor of a focus on efficiency. See Harris, *Making Native Space*, 172–74.

³⁷J.G.H. Bergeron to Secretary of State, Ottawa, 25 March 1915, RG 10, vol. 4047, file 356/200-1.

the government would act on the Indians' request so that the needs of the band could be provided for.³⁸

In response to the commission's request, the Department of Indian Affairs sent A. Megraw—who had replaced Cummisky as inspector of Indian agencies—to attempt yet again to negotiate with the Doukhobors for the purchase of five acres on behalf of the small band. Although the department instructed Megraw to inform the Doukhobors that the department intended to consider legal action to recover the property if they did not cooperate, the Doukhobors again refused to sell any part of the land.³⁹ Megraw himself discouraged any legal action on behalf of the Sinixt. Although there was reason to believe that the Crown grant to Haynes had been based on his fraudulent declaration that the land was unoccupied and not "part of an Indian Settlement," Megraw argued that the failure of the Sinixt to object "to issuance of the Crown Grant or subsequent possession under the Crown Grant" made "the chances of obtaining cancellation . . . rather remote." It was also unlikely that the department would prevail in such an action, he added, because Haynes was deceased.⁴⁰ Ironical as it would have been for the courts to require that the band object to the Crown grant in 1884 when the department itself was unaware of the grant as late as 1902, and even though the death of a person who has made a false declaration is not dispositive of the resulting claim, the department did not pursue the matter.⁴¹

In addition to discouraging any legal action to protect the interests of the Sinixt, Megraw urged the department not to

³⁸McKenna McBride Commission, "Minute" of 24 March 1915, RG 10, vol. 4047, file 356/200-1.

³⁹S. Bray, Chief Surveyor, to Duncan Scott, Department of Indian Affairs, 10 April 1915; J.D. McLean, Assistant Deputy Minister and Secretary, Department of Indian Affairs, to A. Megraw, Inspector of Indian Agencies, Vernon, B.C., 19 April 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁰A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915, citing the Land Act of British Columbia, RG 10, vol. 4047, file 356/200-1. Ironically, Haynes was involved in at least one other questionable land acquisition. In 1875, he applied to purchase 4,245 acres near Osoyoos known to be used by Native peoples in the area but not yet reserved to them. Although the Indian Reserve Commission allotted that land to the Indians who occupied it in 1877, a clerk mistakenly changed the township numbers in transcribing its Minute of Decision. Haynes, reportedly aware that the commission had intended to reserve the land for the Indians, took advantage of the clerk's error to obtain a Crown grant before anyone else realized the mistake. Cail, Land, Man, and the Law, 222–23. If a person who made a false declaration has died, the question becomes whether the subsequent owner had notice of the defect in the title.

⁴¹Alexander Christian, Statement Submitted to McKenna-McBride Commission, 25 June 1914.

establish a permanent reserve on behalf of the Lakes band. Ignoring the corroborating statements of other settlers who had lived in the area for years, Megraw insisted that Christian's declaration that he had lived on the land near Robson for years was "at so many points" untrue. The absence of any evidence that their presence was brought to O'Reilly's attention in 1884, Megraw reiterated, reflected that the Lakes' claim to that site was a "comparatively recent discovery on their part."⁴²

Megraw saw the presence of the Canada-U.S. border as an additional reason to discount the Lakes' claim: he urged the department to take the position that it was absolved of any responsibility for this group of Lakes because they also had ties to areas outside Canada. Reports he had received suggested that "this particular Band or family of Indians . . . appear to have been Nomads and distinctively American in their affiliations." An old boat captain familiar with the Columbia River and the Arrow Lakes, he explained, had told him that these Indians "followed the freeze-up from Arrow Head to Robson" every year.⁴³ Yet Megraw's admission that these Indians had formerly "looked upon the entire length of the Arrow Lakes and the Kootenay River between Kootenay Lake and the Columbia River as hunting and fishing ground" is itself evidence that both he and the Department of Indian Affairs were aware that the small band located at the mouth of the Kootenay River was part of a larger group with longstanding ties to the Arrow Lakes region.

It was also Megraw's opinion that, even if the department was responsible for the band at the mouth of the Kootenay River, the government had already done all that was necessary by establishing a small reserve near Burton. Ignoring Galbraith's efforts to have a reserve set aside for this band even after the Oatscott reserve was established, Megraw surmised that Galbraith had set aside the 255-acre reserve on the western shore of Lower Arrow Lake near Burton based on the assumption that the Robson band would also move there. Although Galbraith had expressly told the McKenna-McBride Commission that it was not feasible to move this band to the Oatscott reserve because of "friction between the Indians of the two localities arising out of an old murder case," Megraw insisted that their refusal to move to that reserve negated any claim they had to a reserve of their own.⁴⁴ If they had been "bona fide British Columbia Indians and there were reasonable grounds for hoping that they

⁴²Megraw to Department of Indian Affairs, 24 July 1915.

⁴³*Ibid.*

⁴⁴McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85–86; Megraw to DIA, 24 July 1915.

would make some effort to live on and cultivate any land in British Columbia that might be procured for them," Megraw declared, he would be willing to overlook what he considered their disregard of the truth. But, in his opinion, the entire matter could be summed up simply as a plan to obtain \$1,000 in return for the land they had lost and to "spend it down in Washington."⁴⁵

Megraw also wrote to Alexander Christian, south of the border at the time, to inform him that he believed that much of what Christian had sworn to in the declaration submitted to the McKenna-McBride Commission was untrue. Christian, he suggested, had hidden from the commission the fact that a reserve had been established on behalf of the Arrow Lakes Band near Burton. "I want you to tell me why you have not lived on that land up the Columbia River and are not living on it now?" Megraw demanded in his letter. "British Columbia Indians should not be living in Washington state."⁴⁶

Christian responded that he did not know of anything he had declared that was untrue, noting that Megraw had not stated in his letter just what he thought he had lied about. Describing himself as a B.C. Indian, Christian explained that the \$1,000 he had requested as compensation for the land he had lost would allow him to buy a new piece of land in Canada and to build a home there.⁴⁷ The Department of Indian Affairs, however, was content to rely on Megraw's assessment of the matter and disregarded Christian's response. Instead, it decided to take no further action to secure the land at the mouth of the Kootenay River for the band that resided on it, to compensate them for its loss, or to find an alternate site for a permanent reserve.⁴⁸ Those who remained had effectively been rendered squatters in their own homes, surrounded by Doukhobors who had "ploughed the land right up to the Indians' fence," destroying graves and parts of an orchard that they had planted.⁴⁹

⁴⁵A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915, RG 10, vol. 4047, file 356/200-1. The Doukhobors had reportedly paid \$95 an acre for the land that Galbraith had estimated two years earlier could be obtained for \$35 to \$40 an acre. R.L.T. Galbraith to Department of Indian Affairs, 2 August 1912.

⁴⁶A. Megraw, Inspector of Indian Agencies, to Alec Christian, Roseburg, Washington, 14 June 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁷Alec Christie to A. Megraw, Inspector of Indian Agencies, 25 June 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁸J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, to R.L.T. Galbraith, 4 August 1915, RG 10, vol. 4047, file 356/200-1.

⁴⁹McKenna-McBride Commission, Hearing Transcript, Testimony of R.L.T. Galbraith, 85-86.

By 1915, both Baptiste and Alexander Christian, realizing the implications of a situation that had resulted in their being confined to a fraction of the land on which they had lived at the sufferance of the new owners, had moved to Marcus, Washington, just south of the Canada-U.S. border. There their wives, both Arrow Lakes individuals listed on the rolls of the Colville Reservation, had each been allotted 160 acres.⁵⁰ One witness before the McKenna-McBride Commission urged Canada to work in concert with the United States to limit Canada's obligations to its indigenous peoples. All land in which Indians had an interest on both sides of the border should be considered in determining whether they were entitled to a reserve in Canada, he argued, so accepting an allotment on the U.S. side of the border would also operate to bar any claim on the Canadian side. He had been told by a U.S. senator that it was U.S. policy to do this only with Indian consent, but he had been assured that Canada's adoption of a more stringent policy would have "considerable influence" in Washington, D.C., pressuring policy-makers there to tighten their rules.⁵¹

Galbraith, in contrast, refused to remove Baptiste Christian's name from the Kootenay Agency rolls even after he moved to Marcus, noting that Baptiste insisted he held the allotment only on his wife's behalf and would one day return to Canada. Although he chose not to live on the Oatscott reserve or on the few acres now in the hands of new owners near Robson, he continued to consider himself "a King George man."⁵²

THE TERMINATION OF THE ARROW LAKES RESERVE AND THE "EXTINCTION" OF THE ARROW LAKES

The failure to establish a permanent reserve on behalf of the Sinixt whose homes were located at the confluence of the Kootenay and Columbia Rivers was just one factor that con-

⁵⁰Extract of *Precis Report of the Testimony of R.L.T. Galbraith before the Royal Commission, Victoria, B.C., 28 October 1914*; A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, RG 10, vol. 4047, file 356/200-1. In 1906, Canada's Indian Act was amended to provide that five years' foreign residency was grounds for denying Indian status. This section, however, would not yet have applied to Baptiste and Alexander Christian, who had only recently moved south to join their wives. Indian Act, R.S.C. 1906, c.81, s.13.

⁵¹Guy Lowenberg [mining engineer] to McKenna-McBride Commission, 13 October 1914, RG 10, vol. 11024, file 691.

⁵²Extract of *Précis Report of the Testimony of R.L.T. Galbraith before the Royal Commission, Victoria, B.C., 28 October 1914*.

tributed to Canada's eventual finding that the Arrow Lakes were extinct in Canada. Also important in producing this result was the Department of Indian Affairs' management of the one reserve it did establish near Burton, as well as its persistent—and extra-legal—habit of conflating place and identity, reserve and band.

Located on the western shore of Lower Arrow Lake on land edged by steep cliffs, the Oatscott reserve was virtually inaccessible by road. For that reason, several of the Sinixt families that had settled there moved to Burton, five miles to the north across Lower Arrow Lake, where they could find work and their children could attend school.⁵³ In 1916, the McKenna-McBride Commission had identified steamboat as the only means of access to the reserve.⁵⁴ By the time the termination process had been set in motion, steamboat service was no longer available, and it was possible to reach the reserve only by traveling "83 miles from Vernon over a very poor road" often blocked by snowslides in winter.⁵⁵ Given the inaccessibility of the reserve, the number living on it had dropped to eight by 1924 and to six by 1936.⁵⁶

In 1932, the Department of Indian Affairs, increasingly interested in effecting a sale of the timber on the reserve after B.C. declared its intention to build a road through the area, raised the question of whether the Arrow Lakes Reserve should even be retained by the Indians. The immediate trigger was a report that Frank Joseph, who, the department assumed, was the only living male member of the Arrow Lakes Band, had been seriously injured by a heifer that wandered onto his property. Unwilling to pursue any action for damages against the owner of the heifer on Joseph's behalf, the department instead instituted an investigation to determine whether it could relieve its own financial and administrative responsibility to remaining band members by selling the timber on the reserve before it reverted to the province.⁵⁷

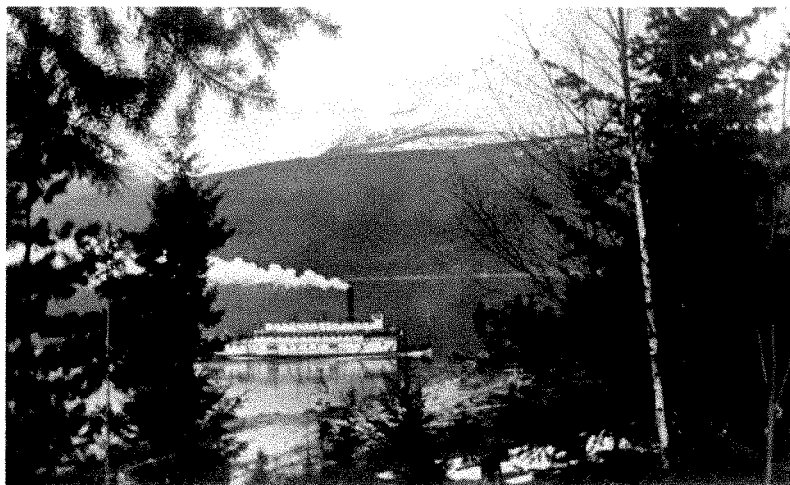
⁵³A. Megraw, Inspector of Indian Agencies, to Assistant Deputy Minister, Department of Indian Affairs, Ottawa, 24 July 1915; A.W. Vowell to Deputy Commissioner of Lands and Works, Victoria B.C., 25 October 1902 [for description of landscape], British Columbia Archives, GR 2982, box 6.

⁵⁴McKenna-McBride Report [table listing "steamboat" as the only means of access in 1916].

⁵⁵R.H.S. Sampson, Superintendent, Okanagan Indian Agency, to U.S. Arneil, Indian Commissioner for British Columbia, 9 September 1953, file 164/1-11.

⁵⁶D.M. Hett, Superintendent, Okanagan Indian Agency, memorandum re censuses prepared for the Arrow Lakes Reserve, 20 September 1955; F.S. Ryckman to James Coleman, 18 March 1935, RG 10, Department of Indian Affairs, file 982/1-1.

⁵⁷F.S. Ryckman to Chas. C. Perry, Assistant Indian Commissioner for British Columbia, 14 August 1932, RG 10, Department of Indian Affairs, file 982/1-1.



The disappearance of sternwheelers such as the *S.S. Minto*, above, ca. 1920, increased the isolation of the Arrow Lakes Reserve. (Courtesy of Royal BC Museum, BC Archives, 193501-001)

Joseph, however, was clearly concerned that both Arrow Lakes identity and the reserve be preserved. A few weeks before he died of his injuries on September 7, 1932, he inquired whether his four stepchildren could be made members of the Arrow Lakes Band under the terms of the Indian Act.⁵⁸ The stepchildren were willing to become Arrow Lakes Band members, but only if transfer of their band membership was not conditioned on the requirement that they live on the reserve, since they did not want to live in such an inaccessible place. Joseph also inquired whether the Columbia Lake Indian with whom he shared his trap line could be adopted as a member of the Arrow Lakes Band, even though the trap line partner was also concerned about the inaccessibility of the reserve in

⁵⁸Frank Joseph to F.S. Ryckman, 26 August 1932; F.S. Ryckman to R.H. MacIntosh, Provincial Constable, 7 September 1932; F.S. Ryckman to Chas. C. Perry, Assistant Indian Commissioner for British Columbia, 10 September, 1932, RG 10, Department of Indian Affairs, file 982/1-1. The stepchildren were members of the Lower Kootenay Band. Although the Indian Act would have provided for the automatic transfer of his wife's band membership to his own after their marriage, the membership of his stepchildren was not assumed because it was derived through their natural father. Canada, Indian Act, R.S.C. 1906, c.81, ss.2(f) (ii) and (iii), s.15.

winter.⁵⁹ The B.C. Indian commissioner deemed it unclear why Joseph had not moved his family to the reserve, but he agreed that they were not required to live on the reserve to effect a transfer of band membership. The commissioner was unwilling, however, to allow the man with whom Joseph worked to transfer his membership.⁶⁰ Although Canada's Indian Act presumed that the band membership of a woman was readily transferable—and her Indian status erasable—on her marriage to a non-band member or a non-Native regardless of her own wishes, it did not allow for the transfer of a man's band membership based on close personal ties or even a request from an individual who was effectively the chief of the band.⁶¹

The gendered provisions of the Indian Act also would prove useful in the decades following Frank Joseph's death, during which the Department of Indian Affairs became increasingly concerned with securing the sale of the timber on the reserve. To do so, the department had to obtain a release of that timber, either by determining that no surviving band members existed or by identifying a sole surviving member able to sign such a release. This process was facilitated by Indian Act provisions that allowed the department to eliminate from consideration women who married non-band members. The situation would be complicated by the department's own carelessly kept and often inaccurate records, as well as its lack of understanding of the complex interrelationships among Native peoples in an area that extended along both sides of the international boundary.

By the mid-1930s, the department's efforts to identify a sole surviving member of the band had come to focus on a woman named Annie Joseph, who had been listed as the wife of Louis Joseph on the 1903 census for the Arrow Lakes Reserve. In March 1935, James Coleman, Okanagan Indian agent, contacted Kootenay Indian agent F.S. Ryckman regarding an Annie Joseph living on the Okanagan Reserve with a partner who was an Okanagan Band member. If Louis Joseph was still alive, Coleman declared, she "should be returned to where she belongs," even though she had lived on the Okanagan Reserve since around 1920 and had "caused no trouble." On being informed that Louis Joseph was indeed deceased, Coleman summarily announced that he would simply add Annie Joseph's name to the Okanagan

⁵⁹Ryckman to R.H. McIntosh, Provincial Constable, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁰Chas. C. Perry, Assistant Indian Commissioner for British Columbia, to F.S. Ryckman, 18 August 1932, RG 10, Department of Indian Affairs, file 982/1-1.

⁶¹Canada, Indian Act, R.S.C. 1906, c.81, s.2(f)(iii), s.15.

register, ignoring that she was not married to her Okanagan partner. "So that," he declared, "settles that!"⁶²

Annie Joseph, however, refused to agree to this proposal. Instead, she insisted on continuing to identify herself as an Arrow Lakes Band member even though she lived on the Okanagan Reserve. Given her resistance to the proposed transfer, Coleman agreed that she could be retained on Arrow Lakes Band records. Annie Joseph did not know of any other surviving members of the Arrow Lakes Band, he added, and was willing to sign a surrender of the timber on the Arrow Lakes Reserve. Should the Indian Act require that a male band member sign a surrender of timber, however, Coleman suggested that her companion could be made a "temporary member" of the Arrow Lakes Band for purposes of signing the surrender.⁶³ Doubly ironic in light of the department's earlier refusal to permit the adoption into the Arrow Lakes Band of the male Indian with whom Frank Joseph shared his trap line, Coleman's proposal also ignored that the Indian Act made no provision for such "temporary" transfers of band membership, whether for a man or a woman.

Early in 1937, Andrew Irwin, who had replaced Ryckman as Indian agent for the Kootenay region, took it upon himself to resolve the outstanding matter of the sale of the timber on the Arrow Lakes Reserve, informing the Department of Indian Affairs that it had been conclusively established that Annie Joseph was "the last surviving adult member" of the Arrow Lakes Band and that she was willing to sign a surrender of the timber at any time.⁶⁴ D.M. MacKay, now Indian commissioner for British Columbia, asked Irwin to let him know whether the reserve was actually used or occupied by the Indians. In the same letter, MacKay also requested Irwin's opinion as to the

⁶²James Coleman, Indian Agent, Okanagan Reserve, to F.S. Ryckman, 14 March 1935, RG 10, Department of Indian Affairs, file 982/1-1. Annie Joseph's move to the Okanagan Reserve appears to have been motivated by tragedy. She left the Arrow Lakes Reserve to go live on the Okanagan Reserve after her husband and all their children had died. George S. Pragnell, Inspector of Indian Agencies, to Andrew Irwin, Indian Agent, Kootenay Agency, 14 May 1937.

⁶³James Coleman to F.S. Ryckman, 22 March 1935, RG 10, Department of Indian Affairs, file 982/1-1. The Indian Act had replaced traditional governing structures with an exclusively male band governance structure in which women had no role. See, e.g., Jo-Anne Fiske, "Political Status of Native Indian Women: Contradictory Implications of Canadian State Policy," in *In the Days of Our Grandmothers: A Reader in Aboriginal Women's History in Canada*, ed. Mary-Ellen Kelm and Lorna Townsend (Toronto, 2006), 339-41.

⁶⁴Andrew Irwin to Department of Indian Affairs, 11 February 1937. Although Annie Joseph had borne three sons, all three were deceased. F.S. Ryckman to James Coleman, 18 March 1935, file 9/3827, RG 10, Department of Indian Affairs, file 982/1-1.

"quantity, quality and value" of both the land and the timber on the reserve, noting that the province had recently applied for a right-of-way to build a road through the area.⁶⁵ Irwin responded that the primary value of the reserve was in its trees: much "good quality of fir that would make excellent timber," cedar trees that would make "the best of telephone and telegraph poles," as well as some "birch and fir of a poorer quality" that would provide "a good cordwood proposition after the highway had been completed." It would be possible to obtain a good price for the timber, he added, because the reserve was accessible from Lower Arrow Lake.⁶⁶

But Irwin had to retract his pronouncement that there was only one surviving member of the Arrow Lakes Band. His records also listed three others who, at the very least, would be entitled to a share of any proceeds from a sale of timber: Frank Joseph's daughter and two of the stepdaughters whose band membership had been transferred to the Arrow Lakes in the months before his death in 1932.⁶⁷ Although Irwin believed that Joseph's remaining stepdaughter had died, he would learn, on tracking down Joseph's widow, that all three of her daughters were very much alive.⁶⁸ The fact that two had married Indians living on other reserves, however, meant that their band membership had been transferred to their husbands' bands based on the operation of the Indian Act regardless of whether this was their own intention or desire. Just one was still unmarried and thus was an Arrow Lakes Band member in the eyes of the Department of Indian Affairs.⁶⁹

Inconsistencies in the department's own records caused officials repeatedly to conflate the identities of individuals with similar names; these inconsistencies also were a persistent source of confusion throughout the decades leading up to the department's eventual determination that the Arrow Lakes

⁶⁵D.M. MacKay, Indian Commissioner, to Andrew Irwin, Indian Agent, Kootenay Agency, 17 March 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁶Andrew Irwin to D.M. MacKay, 27 March 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁷Irwin to Department of Indian Affairs, 11 February 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁶⁸Irwin to George S. Pragnell, Inspector of Indian Agencies, 4 June 1937, RG 10, Department of Indian Affairs, file 982/1-1. Frank Joseph's widow was excluded from consideration by her remarriage to a Lower Kootenay Band member.

⁶⁹Irwin to D.M. MacKay, 13 August 1943; MacKay to Irwin, 20 August 1943, RG 10, Department of Indian Affairs, file 982/1-1. See also Canada, Indian Act, R.S.C. 1906, c.81, ss.14, 15.

Band was extinct.⁷⁰ The officials' impatience at each juncture, however, focused not on the quality of their own recordkeeping but on the people they sought to categorize. "The woods," Irwin complained at one point, "are full of Annie Josephs." At another, he was forced to admit that he had spelled even the English married name of one of Joseph's daughters in two entirely different ways, and that the two people his records seemed to describe were in fact one person.⁷¹

In June 1937, new questions were raised regarding Annie Joseph's apparent ties to the Colville Reservation on the U.S. side of the international border. George Pragnell, inspector of Indian agencies, reported that she had told him during an interview that she had been baptized in Ward, Washington, near Kettle Falls on the Colville Reservation, but had been born on the Arrow Lakes Reserve. Given her place of birth, Pragnell was willing to identify her as an Arrow Lakes Band member able to sign a surrender of timber on the reserve. Should a male be required for that purpose, he added, her companion, an Okanagan Band member, remained ready and willing to become a temporary member of the Arrow Lakes Band. The problematic—and extra-legal—nature of this maneuver, first proposed by Coleman, is evident in Pragnell's own uncertainty about the effect of such a temporary transfer of band membership on the Okanagan man's wife—from whom he was separated but not divorced—and their children, all Okanagan Band members.⁷² Because both band membership and Indian status itself was derived through a woman's father or husband under Canada's Indian Act, they would presumably lose their status during that period.

In June 1943, Irwin informed the secretary of the Indian Affairs Branch, now a part of the Department of Mines and Resources, that "it is becoming more apparent daily that the Arrow Lakes Band of Indians will soon become extinct." The Arrow Lakes Reserve, Irwin reported, had long since been abandoned and "[n]ot one of these Indians will ever return."⁷³ Although the department was satisfied that no one continued

⁷⁰Irwin to MacKay, 16 October 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷¹Irwin to Pragnell, 4 June 1937; Irwin to MacKay, 16 October 1943 [conflating Auld and Ott].

⁷²Pragnell to Irwin, 14 May 1937, RG 10, Department of Indian Affairs, file 982/1-1.

⁷³Irwin to Secretary, Indian Affairs Branch, Department of Mines and Resources, 23 June 1943, RG 10, Department of Indian Affairs, file 982/1-1. [For clarity and convenience, I continue to use "department" as the short form for what was formerly the Department of Indian Affairs, even though it was temporarily designated a "branch."]

to reside on the reserve, the problem of determining who could be authorized to sign a surrender of the timber remained. To complicate matters further, the Okanagan Band member who had agreed to a temporary transfer of band membership to the Arrow Lakes Band had died. Irwin thus inquired anew of Alfred Barber, who had replaced Coleman as the Indian agent for the Okanagan Agency, regarding Annie Joseph's whereabouts. Barber replied that she continued to live on one of the Okanagan reserves, although she spent extended periods of time with friends and relatives in Washington State, no doubt including Sinixt who lived on or near the Colville Reservation.⁷⁴ In the meantime, however, B.C.'s Indian commissioner, D.M. MacKay, appears to have concluded that the department would be best served by a finding that there were no surviving Arrow Lakes Band members. He called into question Annie Joseph's claim that she had been born on the Arrow Lakes Reserve. If there was no surviving male member of the band able to sign a surrender of the timber, he added, the department could simply sell the timber, after which the reserve itself and any associated funds "would revert to the Province."⁷⁵

In his eagerness to reach the conclusion that the Arrow Lakes Band was extinct, however, MacKay had also overlooked Frank Joseph's still unmarried stepdaughter, and, in September 1943, she was identified as the sole surviving member of the Arrow Lakes Band.⁷⁶ In October, MacKay also identified an alternate reason to deny Annie Joseph's status as an Arrow Lakes Band member, questioning whether the Louis Joseph to whom Annie had been married was in fact an Arrow Lakes Indian—notwithstanding that he was listed on the original 1903 census for the reserve—and not "an American Indian of the Colville Reserve." If it could be determined that he was an American Indian, MacKay declared, this would resolve the matter.⁷⁷ MacKay appears to have assumed that this would mean that Annie Joseph had become a Colville tribal member by marriage and thus need no longer be considered a member of the Arrow Lakes Band on that basis—extending the logic of the Indian Act across the international boundary into the United States,

⁷⁴Alfred H. Barber, Indian Agent, Okanagan Agency, to Andrew Irwin, 5 August 1943, RG 10, Department of Indian Affairs, file 982/1-1. Coleman had been appointed inspector of Indian agencies.

⁷⁵D.M. MacKay to Irwin, 20 August 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁶Irwin to MacKay, 13 September 1943, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁷MacKay to Irwin, 7 and 19 October 1943, RG 10, Department of Indian Affairs, file 982/1-1.

although U.S. law did not provide for the automatic transfer of a woman's tribal membership on her marriage to a non-tribal member or a non-Indian man. In March 1944, MacKay followed up with a request that Irwin send him a copy of an earlier statement Annie Joseph had signed declaring "that she was the wife of Louie Joseph and married him at Colville some years ago."⁷⁸ Irwin complied but noted that her identity as an Arrow Lakes Band member—the subject of repeated inquiries over the course of the preceding decade—was "pretty well established" even though the marriage itself had taken place at the Colville Indian Agency.⁷⁹

Having decided that Annie Joseph was indeed a member of the Arrow Lakes Band and, apparently, able to sign a surrender of the timber on the reserve even though she was not male, the department allowed the matter to rest. When Annie Joseph inquired in fall 1944 about the long-anticipated timber sale, Irwin informed her that the timber had been sold in November 1943.⁸⁰ Over the course of the next year, Annie Joseph wrote repeatedly to Indian Affairs officials asking why she had not yet received her share of the proceeds from the timber sale. Each of her inquiries was met with the explanation that the department was continuing its investigation of Arrow Lakes Band membership and that she would be notified when a distribution date was identified.⁸¹ In March 1946, MacKay declared Annie Joseph the sole surviving member of the Arrow Lakes Band and directed that she receive a monthly payment of \$25

⁷⁸MacKay to Irwin, 13 March 1944, RG 10, Department of Indian Affairs, file 982/1-1.

⁷⁹Irwin to MacKay 28 March 1944; James Coleman, Inspector of Indian Agencies, to Annie Joseph, 15 May 1944, RG 10, Department of Indian Affairs, file 982/1-1.

⁸⁰Irwin to Annie Joseph, 2 October 1944, 13 November 1944, RG 10, Department of Indian Affairs, file 982/1-1. Curiously, there is no signed surrender of timber in the file.

⁸¹Annie Joseph to Indian Agent, Kootenay Agency, September 1944 [undated], 10 November 1944, 20 January 1945, 6 February 1945, 12 March 1945, May 1945 [undated], and 9 June 1945. Indian Agents, Kootenay Agency, to Annie Joseph, 2 October 1944, 13 November 1944, 13 January 1945, 26 January 1945, 10 February 1945, 21 March 1945, and 4 June 1945. Andrew Irwin left the Kootenay Agency during this time, and James Coleman filled in until he was replaced by J.D. Caldwell in 1945 and then by J.V. Boys in 1946, RG 10, Department of Indian Affairs, file 982/1-1.

as compensation for the timber that had been sold.⁸² No other disbursement of the monies received from the sale of timber on the reserve appears to have been made.

In December 1948, responsibility for the Arrow Lakes Reserve was transferred from the Kootenay to the Okanagan Indian Agency. In 1952, the superintendent for the Okanagan Indian Agency, R.H.S. Sampson, proposed that the Arrow Lakes Reserve be amalgamated with that of the Okanagan Band near Vernon, British Columbia, in order to preserve the remaining timber resources for "the Indians." Sampson noted that Annie Joseph, now 74 and still deemed the only surviving Arrow Lakes Band member, had lived on the Okanagan Reserve for roughly forty years. He assured his superiors that Annie Joseph's consent to the amalgamation of the Arrow Lakes Reserve would be forthcoming and that the matter had been discussed with the Okanagan Band Council, which was prepared to recommend it. In November 1952, the Okanagan Band Council agreed to the amalgamation. Five months later, on April 17, 1953, Annie Joseph signed a declaration averring that she was the only surviving member of the Arrow Lakes Band and consenting to the amalgamation of the Oatscott reserve with that of the Okanagan.⁸³ What Annie Joseph almost certainly did not realize was that this would mean that the remaining capital funds held in trust for the Arrow Lakes Band would be transferred to the Okanagan Band for the benefit of its members alone and that she and former Arrow Lakes Band members "would gain nothing" from the amalgamation.⁸⁴

Ironically, the Indian Affairs Branch, now transferred from the Department of Mines and Resources to the Department of Citizenship and Immigration, also balked, suddenly concerned that the real purpose of the amalgamation was to circumvent the dominion government's agreement with British Columbia that unoccupied and unused Indian reserves would revert to the province.⁸⁵ R.H.S. Sampson, superintendent for the Oka-

⁸²D.M. MacKay to J.V. Boys, Indian Agent, Kootenay Agency, 5 March 1946, RG 10, Department of Indian Affairs, file 982/1-1. The \$25 was \$10 per month more than the \$15 that MacKay would normally have distributed and took into account Annie Joseph's age and life expectancy. In March 1946, department records reflect that "the balances to the credit of the Arrow Lakes Band" were \$1,534.40 in capital and \$108.10 in revenue. *Ibid.*

⁸³R.H.S. Sampson, Superintendent, Okanagan Indian Agency, to U.S. Arneil, Indian Commissioner for British Columbia, 27 September 1952, RG 10, Department of Indian Affairs, file 164/2-2 [Okanagan Agency].

⁸⁴L.L. Brown, Superintendent, Reserves and Trusts, to R.H.S. Sampson, 23 June 1953, file 164/1-11.

⁸⁵See note 11 and accompanying text.

nagan Indian Agency, candidly admitted that this had indeed been the purpose of the proposed amalgamation.⁸⁶ When Annie Joseph died on October 1, 1953, the amalgamation was allowed to lapse.⁸⁷ Although she had been persuaded to agree to the amalgamation of the Arrow Lakes Reserve in the last years of her life—concerned, perhaps, as an old woman, with making ends meet—she died an Arrow Lakes Band member. On January 5, 1956, the Indian Affairs Branch declared the Arrow Lakes Band extinct and transferred the Arrow Lakes Reserve to the province of British Columbia.⁸⁸ During the years that followed, much of the site where the Arrow Lakes Reserve was located, together with a substantial section of traditional Sinixt territories, was submerged by the flooding behind High Arrow Dam at Castlegar, British Columbia.⁸⁹

THE INTERSECTING PATHS OF LAW AND HISTORY

The Canadian government's determination that the Arrow Lakes were extinct brought to a close a decades-long investigation marked by an inherent conflict between the government's duties to Canada's indigenous peoples and its own interest in limiting its obligations to them.⁹⁰ The primary objective of that investigation was always to secure the sale of the timber on the Arrow Lakes Reserve in the wake of British Columbia's decision to build a road through the area. Another element leading

⁸⁶L.L. Brown, Superintendent, Reserves and Trusts, Department of Citizenship and Immigration, Indian Affairs Branch, to R.H.S. Sampson, 23 June 1953, RG 10, Department of Indian Affairs, file 164/1-11.

⁸⁷R.H.S. Sampson to U.S. Arneil, 5 October 1953, RG 10, Department of Indian Affairs, file 164/1-11.

⁸⁸Canada, Order in Council P.C. 1956-3 (5 January 1956).

⁸⁹Cathy English, Curator, Revelstoke Museum, to Father Kowrach, 27 October 1984. The dam is now known as the Hugh Keenleyside Dam. Although no records have been found that provide a direct link between the decision to terminate the Arrow Lakes Reserve and plans to flood the area, the potential of this area as a source of hydroelectric power was first studied in the 1920s. By 1944, the United States and Canada had established a joint international commission in anticipation of utilizing the Columbia River basin for this purpose. Neil A. Swainson, *Conflict over the Columbia: The Canadian Background to an Historic Treaty* (Montreal, 1979), 39–41; Canada, Departments of External Affairs, Northern Affairs, and National Resources, *The Columbia River Treaty and Protocol: A Presentation* (April 1964), 21.

⁹⁰See, e.g., Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3^d ed. (Saskatoon, SK, 2004), 8, noting that "this enforceable, equitable, and fiduciary obligation has placed a high onus on the Crown when acting or making decisions on behalf of Indians."

to the finding of extinction was the government's inaction at critical junctures, including its failure to establish a sustainable reserve either at the mouth of the Kootenay River or near Burton. The flawed procedures involved in each of these processes combined to produce the conditions that allowed the government to erase the Arrow Lakes as a people formally recognized as indigenous to Canada under the law.

Canada's ability to declare the Arrow Lakes Band extinct was in part a product of its strict application of the Indian Act's criteria for determining band membership. By allowing the government, unilaterally, to strike women who married outside the band from band rolls, these provisions proved, at least in the short term, to be an even more efficient tool for eliminating band members from consideration than the blood quantum requirements of U.S. law.⁹¹ Canadian officials treated these rules as inviolable when their purpose was to limit access to rights associated with Indian status. Their treatment of the Arrow Lakes, however, demonstrates the extent to which they were willing to manipulate the same criteria when their object was otherwise, as reflected, for example, in their presumed authority to transfer people from one band roll to another temporarily or without regard for individual identity, even when the Indian Act made no provision for such arbitrary transfer.⁹²

Another critical factor that colored the ways in which Indian Affairs representatives interpreted and applied the Indian Act were colonialist—and sometimes extra-legal—assumptions about who an "Indian" was and how he or she should live.⁹³ For example, nothing in the Indian Act's definition of *Indian* required that a band member reside on a reserve to retain Indian status, yet Indian agents regarded the refusal of Arrow Lakes Band members to move to or remain on the one small reserve set aside for them as evidence of lack of interest in maintaining their identity as Arrow Lakes. This in spite of the agents' own records stating that the absence of a usable road into the reserve made it inaccessible for all practical purposes. Indian

⁹¹See, e.g., *Indian Reorganization Act*, 1934, P.L. 73-383. And see Canada, *Indian Act*, R.S.C. 1906, c.81, s.2(f)(iii), s.15.

⁹²For a discussion of the constructed nature of tribal identities south of the border, see Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley, CA, 1998).

⁹³For a discussion of the destructive binaries that framed colonialist assumptions such as those espoused by Indian Affairs officials, see Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham, NC, 2005), 7. The binaries that were applied to Natives-newcomers included, for example, traditional-modern, subsistence-capitalist, past-future, collective-individual. *Ibid.* See also Harris, *Making Native Space*, 265.

Affairs representatives' persistent habit of conflating the terms *band* and *reserve* and referring to membership not in a band but in a reserve also contributed to their conclusion that those who did not live on reserves were not interested in maintaining their identity as aboriginal people. At every stage, the Sinixt people's ability to negotiate the changing political and economic landscape around them by adapting older ways of constructing kinship, economic, and social organization was turned against them, even as their continued mobility within their traditional territories was seized upon by Indian Affairs officials as a means to dismiss their claims. The Sinixt, in short, were both too modern and too traditional to fit neatly within the colonialist assumptions that structured the Indian Act and informed the way in which it was applied by Indian Affairs officials.

Similar biases that assumed the inevitable demise of indigenous ways of life were reflected not only in the terms of the Indian Act itself but also in the assumption of Indian Affairs officials that migration or relocation was both willful and permanent, even though their own failure to respond to requests for a sustainable reserve had helped to produce these movements. The notion that indigenous peoples were already doomed was also reflected in their choice of the term *extinct* to describe the circumstances of the Arrow Lakes in 1953. Even though they were well aware that Arrow Lakes people with clear ties to areas incorporated into Canada's land base continued to exist just south of the international border, their characterization of the Arrow Lakes as extinct destroyed any ready vehicle for reestablishing a presence in Canada, in effect substituting legal fiction for historical fact.

Also key to Canada's ability to sever its ties to the people who had historically occupied the region surrounding the Arrow Lakes was the U.S.-Canada boundary, which allowed Canada repeatedly to eliminate individuals who maintained ties to kinfolk or traditional territories across the international border from consideration as Canadian Indians. Without the presence of a parallel system of law based on similar foundational principles south of the border, Canada might have found it more difficult to truncate its obligations to Sinixt who had cross-border ties or to adopt a policy of presumed reciprocity pursuant to which the acceptance of an allotment on one side of the international boundary operated to bar the same on the other, even if there was evidence that parts of Sinixt traditional territories had been incorporated by both nations.

Canadian officials also ignored the extent to which the decision of Sinixt people such as the Christian brothers to settle across the border was essentially coerced—a product of Canada's

own failure to establish a permanent reserve or to investigate the apparent fraud associated with a settler's acquisition of Crown title to Sinixt land at the mouth of the Kootenay River without the Sinixts' knowledge or consent. Instead, the Christian brothers' recognition that Canada's failure to establish a permanent reserve meant they would be best served by joining their wives on the Colville Reservation was seized upon by the Canadian government to characterize them as American Indians for whom it had no responsibility—effectively “defining [them] out of existence.”⁹⁴ The international border, in effect, served as a conceptual veil, utilized both to obscure the claims of those who went south and to mark those who returned as intruders.

Canada's decision to terminate the Arrow Lakes Reserve became a foregone conclusion following Annie Joseph's death in 1953, the same year that the United States restructured its own Indian law and policy around the newly articulated goal of termination. Ironically, the Colville Reservation was among those identified for termination by the U.S. government; it survived only after a hard-fought battle that lasted more than a decade between reservation-based leaders and off-reservation advocates of termination.⁹⁵ Although Canada did not emulate the United States in adopting a formal termination policy and the experience of the Arrow Lakes Band stands as an exception insofar as the formal finding of extinction is concerned, this episode demonstrates the extent to which the Indian Act was capable of being used to reach the same result, particularly effective when deployed in conjunction with the border to sever aboriginal claims.⁹⁶

In recent years, Canadian law and policy has undergone profound changes. In 1982, the Charter of Rights and Freedoms formally recognized the rights of those who qualify as aborigi-

⁹⁴See Patricia Nelson Limerick, *Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987), 338, noting that law was an effective tool for “defining Natives out of existence.” In excluding those who relocated south of the border from consideration as Arrow Lakes Band members, Canada imposed a far higher standard on the Arrow Lakes and other Native peoples than it did on British subjects of European ancestry, who would not have lost their status as British subjects simply by residing or owning land in Washington State.

⁹⁵See, e.g., Alvin J. Zions, *A Lawyer in Indian Country: A Memoir* (Seattle, WA, 2009), 135–36; Ackerman, *A Necessary Balance*, 175–78.

⁹⁶Canada made just one brief foray in the direction of adopting a formal termination policy in 1969, when the Trudeau government tabled the White Paper that proposed that the Indian Act be abolished and that the Canadian government's obligations to all Indians in Canada be terminated. *Canada, The Statement of the Government on Indian Policy, 1969*, often referred to as the White Paper. The White Paper was later withdrawn in the face of intense opposition from Native leaders across Canada.

nal peoples of Canada.⁹⁷ Canadian courts are still in the process of determining who qualifies. To date, courts have held that formal band status is not a requirement in this context. Courts have also held that the identification of an indigenous group as an aboriginal people of Canada—even where no formal treaty relationship was established, as is the case in large parts of British Columbia—gives rise to a duty on the part of the Canadian government to consult with that group regarding the use of land and resources lying within the boundaries of its traditional territories.⁹⁸ This raises the legal question of who is entitled to assert existing rights—never relinquished by treaty—on behalf of the Sinixt Nation. It also raises complex questions about the historical significance of the international border in the eyes of the Canadian courts.

Yet to be determined by the courts is whether Sinixt descendants of individuals listed on Canadian band rolls or others identified as Arrow Lakes who settled on the Colville Reservation are entitled to recognition as an aboriginal people of Canada even though they have dual status as American Indians. Given the termination of the Arrow Lakes Reserve in British Columbia, to deny the historical ties of their descendants living in Washington State to Sinixt territories north of the border is, arguably, to absolve Canada from its duty to consult with the indigenous people who once occupied the Arrow Lakes area regarding the use of their ancestral territories.⁹⁹ In the context of considering this question, it is worth noting that the lack of tolerance for dual status is itself a legacy of the same colonial structures, the consequences of which section 35 of the Charter of Rights and Freedoms was intended to rectify. Ironically,

⁹⁷*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.35, providing that (1) "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"; and (2) "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

⁹⁸See *Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 2004 SCC 73, 245 D.L.R. (4th) 33.

⁹⁹Individual Sinixt born on the Colville Reservation have made increasing efforts, despite the lack of formal recognition, to attend to sacred sites and ancestral graves north of the border. See, for example, Paula Pryce, *Keeping the Lakes Way: Reburial and Re-creation of a Moral World among an Invisible People* (Toronto, ON, 1999). Individual Sinixt who are members of the Colville Tribes have filed cases in B.C. courts in an effort to establish a right to be consulted or to protect areas of historical importance to the Sinixt people. See, e.g., *Campbell et al. v. Minister of Forests and Range of British Columbia*, Vancouver Registry, No. S107353 (2011). Several Indian bands in Canada, including both the Kootenay and the Okanagan, also assert rights to some sections of Sinixt traditional territories based on descent or other considerations.

in demonstrating the ability to adapt to various imposed identities even as they maintained a clear sense of themselves as Arrow Lakes, it is the Sinixt who reflected the more sophisticated understanding—now shared by historians in various fields—of identity as multiple and inherently layered.

Paradoxically, by creating a space where a distinct Arrow Lakes identity could be preserved, the reservation and allotment system in the United States, together with the international border—which had served as an effective tool in cutting off the rights of Sinixt people who wanted to preserve their ties to their traditional territories in Canada and to maintain their identity as an aboriginal people of Canada—may have helped to preserve claims that would otherwise have no chance of recognition. On the one hand, the inclusion of the Sinixt as one of the Confederated Tribes of the Colville Reservation depleted the numbers of those who remained on Canadian band rolls, aiding in Canada's determination that they were extinct. On the other hand, clumsy as its own reservation system was, U.S. tolerance for larger reserves allowed some Sinixt to maintain ties to one part of their traditional land base—a relationship that itself remains central to their identity as a distinct people—and, in so doing, to preserve their formal identity as Arrow Lakes, even as other descendants were incorporated into other bands or denied Indian status altogether through the application of Canada's Indian Act.

In much the same way that indigenous people have been able to redirect the category of "Indian"—originally deployed to facilitate their eventual demise—to protect their historic rights, the same border that both nations' governments used to sever their traditional territories also served, in this instance, to create a space that helped to sustain the Arrow Lakes as a formally recognized people. The fact remains, however, that their location on the U.S. side of the international border and their classification as American Indians is less a product of any intention to cross a boundary that post-dated their presence in the area by many centuries than it was of the fact that "the border crossed them."¹⁰⁰

As long as the law continues to rest on the flawed premise that non-Indians are best able to determine the authenticity of aboriginal identities, whether Canadian or American, the

¹⁰⁰This is a slogan that has been embraced by peoples along the U.S.-Mexico border and elsewhere whose traditional territories have been divided by newer national boundaries. See, for example, "'We didn't cross the border, the border crossed us': Students Protest Operation Gatekeeper," *San Diego City Times*, July 10, 2008; "'We didn't cross the border, the border crossed us': Movements and Struggles of Migration in and around Europe," The Frassanito Network [website posting newsletters], <http://www.allincluded.nl/index.php/crossing-borders-newsletter/203-frassanito>, May 2006.

process of decolonization contemplated by Canada's Charter of Rights and Freedoms remains incomplete. One of a growing number of scholars who have argued for the decolonization of both U.S. and Canadian Indian law and policy, Paige Raibmon asks "what a just, less destructive notion of authenticity might look like."¹⁰¹ Acknowledging the trans-border histories and identities of borderlands peoples whose traditional territories spanned the Canada-U.S. boundary offers one place to begin; the likelihood that Canadian courts will be asked to issue a definitive ruling on the matter raises for their U.S. counterparts the reciprocal question of how American courts will respond.

¹⁰¹ Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham, NC, 2005), 207. See also Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, BC, 2011), 228–30; James Youngblood Henderson, "Postcolonial Ledger Drawing: Legal Reform," in *Reclaiming Indigenous Voice and Vision*, ed. Marie Battiste (Vancouver, BC, 2000), 161–71; Harris, *Making Native Space*, 293.

THE LAW, LEGAL PRACTICE, AND LAMAR TOOZE, JR., 1948–1985

HARRY H. STEIN

No other human "is so malleable as a trial lawyer," said Lamar Tooze, Jr., a leading Oregon trial lawyer. "Coping with novelty and innovation is the routine of his career." Tooze's career, I suggest, illuminates major trends in American law, legal institutions, and legal practices during the forty years after World War II. Vastly expanded local, state, and federal laws and administrative rules, hosts of new and altered legal doctrines, significant court transformations, big increases in case filings, and new and revised institutional and social demands marked trial bars everywhere. Attorneys like Tooze affected and contended with these trends, which might befall them in different legal areas and jurisdictions at different times. The trends contributed to and were influenced by the postwar legal profession's increase in activity, reach, and size, including its great swelling in the 1960s and afterward. There were fewer solo practitioners and more and larger law firms than before the war. Outside experts, specialized attorneys, and tough-minded legal negotiators had won heightened authority in litigation and court processes. The costs of court awards, settlements, and legal services had escalated. As court filings soared and judges felt inundated, they and lawyers more

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readily negotiated and settled legal controversies rather than try them.¹

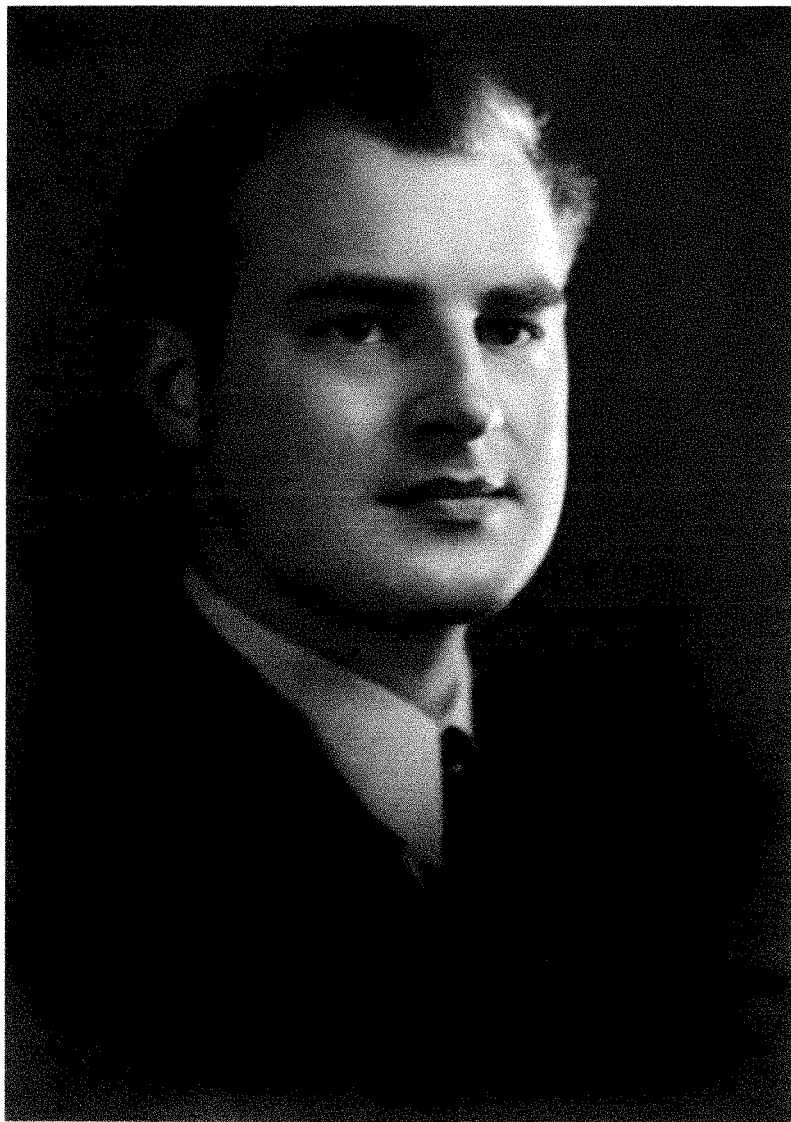
Tooze, a veteran and new law school graduate, joined his father's thriving business law firm in Portland in 1948. Subsequently this able attorney built a successful career—largely in the West—advising, negotiating, and litigating on behalf of insurers and businesses in state and federal courts. From handling disputes over sprains and small accidents, he progressed to complex multimillion-dollar, multiparty business and insurance disputes and to cases involving deaths and grave human suffering. As a sideline for more than ten years, this conservative attorney also passionately represented individuals suing powerful aluminum companies for polluting the air.

Tooze was born in Eugene, Oregon, on October 27, 1922, into a family connected politically, socially, and economically to a long-dominant Oregon establishment of prosperous white Protestant businessmen and conservative Republicans. His father, Lamar E. Tooze, soon began developing a successful business law practice in Portland and some prominence in Oregon Republican politics. He and his wife steeped their only son in establishment beliefs in business virtues, limited government, low taxes, individual striving, patriotism, filial respect, and white male authority. They also encouraged his curiosity, love of nature and outdoor activities, and mechanical ability. The senior Tooze shared a patent with his wife's father, a paper mill executive.² He liked his namesake's constant tinkering and his adult appetite for building, repairing, and operating steam engines, wood stoves, water wheels, and many other devices.

The younger Tooze welcomed his strong Oregon connections, which also provided later career benefits. He was quietly proud of an Oregon ancestry he traced from grandfather Walter Lincoln Tooze, an Ohioan and Oberlin College graduate who

¹Lamar Tooze, Jr. (hereinafter LT), "The Coordination of Defense," address to the 1980 meeting of the Federation of Insurance Counsel, San Francisco, July 24, 1980, p. 1, in Mary Auspund Tooze Papers (hereafter MTP), as are all other privately held letters and speeches, unless otherwise cited; Robert W. Gordon, "Money! Power! Ambition Gone Awry! A Frank History of the Big-time American Lawyer," *Legal Affairs* (March–April 2006), www.legalaffairs.org/issues/March-April-2006/feature_gordon_marapr06.msp, and Robert W. Gordon, "The American Legal Profession, 1870–1920," in *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (Cambridge, England, 2008), 3:115; Harry H. Stein, *Gus J. Solomon: Liberal Politics, Jews, and the Federal Courts* (Portland, OR, 2006), 82–83, 109, 138–39, 141.

²William Sheahan and Lamar Tooze, 1925. Felt cleaner, U.S. patent 1,526,094, filed Dec. 28, 1922, www.freepatentsonline.com/1526094.html; Michael Kern interview by author, June 2, 2010. See also E. Kimbark MacColl with Harry H. Stein, *Merchants, Money and Power: The Portland Establishment* (Portland, OR, 1988).



Lamar Tooze, Jr., built a successful career advising, negotiating, and litigating on behalf of insurers and businesses in state and federal courts. (Courtesy of Mary Ausplund Tooze/Boychuk Studio, Portland)

began as a penniless farmhand and teacher in Newberg in 1877. There and successively in Buteville, Woodburn, and Falls City, he owned stores, held local offices, acquired farmland and Portland property, and filled Republican Party positions. After his Falls City store burned, Republicans arranged his appointment as registrar in Portland's federal land office. One son, small-town lawyer Walter L. Tooze, Jr., became a Portland judge in 1929, a delegate to the 1940 Republican national convention, and ultimately an Oregon Supreme Court justice.³

Lamar E. Tooze, the justice's younger brother, was a Harvard Law School graduate, night law school professor, and important University of Oregon alumni figure. In 1924, he and Nicholas Jaureguy, a future authority on Oregon probate law and practice, established a Portland law firm. They joined Ralph A. Cake in 1926 to form the business law firm of Cake, Jaureguy & Tooze. The three partners came to preside over state and local bar groups and blue-ribbon organizations, and Cake and Tooze started rising in the state Republican Party. World War I veteran Tooze also climbed through army reserve ranks to colonel in 1940, wartime major general, and postwar command of the reserve's 104th (Timberwolf) Division. He "was used to being in command [and was] very austere, very directed," Mary Ausplund Tooze, his son's wife, said. The General, as everybody called him, liked everything "just so."⁴

Lamar and sisters Virginia Keuerten Tooze and Leslie Ann Tooze were reared comfortably on Portland's Willamette Heights. Their mother, Marie Sheehan Tooze, headed numerous local organizations. Friends considered her husband austere but tolerant of their only son's "irrepressible" behavior. The boy ranged through the outdoors, spent a summer on a ranch, hunted and dissected squirrels and rats, and dragged home discarded mechanical devices for rebuilding. In high school and college he rebuilt antique and junked cars. In 1943, Tooze graduated from Reed College, where he had attended classes by day and welded in the evenings at Portland's Kaiser Shipyard. Late in life he said that he might have been happier in engineering than in the law.

³George W. Minor, "Tooze Immigrants & Descendants in America" (privately published, 1976), 65–66; "Walter L. Tooze, Sr." in *History of the Columbia River Valley from the Dalles to the Sea*, ed. Fred Lockley (Chicago, 1928), 2:769–70; "Walter Lincoln Tooze" in *Portrait and Biographical Record of the Willamette Valley* (Chicago, 1903), 777; "Walter L. Tooze," http://ewikipedia.org/wiki/Walter_L._Tooze.

⁴Minor, "Tooze Immigrants," 65–66; Lamar Tooze [Sr.], "Ten Million in Ten Years" *Old Oregon* 5 (Oct. 1922): 1–2; *The Oregonian*, Feb. 28, 1926, July 15, 1958, Nov. 30, 1971, and Jan. 22, 1991; *Oregon Journal*, Dec. 2, 1971; Nicholas Jaureguy and William E. Love, *Oregon Probate Law and Practice* (St. Paul, MN, 1958); Mary A. Tooze interview by author, May 21, 2010.

His serious adult avocations of machinist, apparatus builder, steam engine operator, outdoorsman, and amateur arborist alternately bolstered and provided escape from the law.⁵

YOUNG LAWYER

In 1948, Tooze graduated in the top 10 percent of his Stanford Law School class, joined his father's firm, and passed the Oregon bar exam. The following year he entered federal practice. Apart from the general prosperity he shared in, it was an excellent time for the bulk of white male business lawyers. A stable institutional order prevailed. Companies seldom switched law firms, and partners seldom left them, as legal historian Robert W. Gordon wrote. Young associates could reasonably expect to move almost seamlessly into partnerships and lives of comfort, security, and social esteem.⁶

Tooze's apprenticeship with Cake, Jaureguy & Tooze was all but guaranteed. He began work just before his twenty-sixth birthday. "The sad and irrational fact is that nothing regulates the fortunes of a law career more than the quality of the first employer," he later reflected, "and the employer hires the best law school he can afford. 'Best' by image." West Coast business attorneys prized Stanford law degrees. Tooze joined a "white shoe" firm, one composed of generally conservative white, Anglo-Saxon Protestants. Its partners were reservists who favored males and veterans. (He had narrowly escaped death as a naval gunnery officer in the Pacific campaign, and was beginning twenty years in the naval reserve's legal branch.) And he was a Tooze. In a family firm, the son also rises.⁷

Cake and the General were now prominent Republicans. Some considered Cake, a Republican National Committeeman from Oregon from 1940 to 1952, a kingmaker. He was close to 1940 presidential candidate Wendell Willkie and Oregon's Senator Charles McNary, and became Dwight Eisenhower's 1952 convention floor manager and President Richard Nixon's informal adviser. The General was one of those nominating

⁵Mary Tooze interview; Dudley F. Church interview by author, Feb. 8, 2010; John C. Beckman interview by author, Feb. 10, 2010; LT to Ben Steverman, 2 Aug. 1979, and LT to Richard H. Bakalor, 8 July 1980, Michael Gentry Papers (hereinafter MGP); LT to Dudley F. Church, 9 Sept. 1980.

⁶LT to the chief of the Bureau of Naval Personnel, 14 Oct. 1953; Richard Abel, *American Lawyers* (New York, NY, 1989), 178; Robert W. Gordon, "Money! Power!"

⁷LT to Capt. P.D.C Dumas, 1 July 1971, MGP.

Earl Warren for vice president at the 1948 Republican convention. In 1952, he too was an Eisenhower delegate and, briefly, in 1956, he was a contender for the Republican nomination for the U.S. Senate. Two years later, he managed the gubernatorial campaign of Republican Mark O. Hatfield. Assisted by his son, he turned back a legal challenge to incoming Governor Hatfield's appointment of his successor as secretary of state.⁸

Cake, Jaureguy & Tooze served a mix of powerful and sophisticated business clients, less knowledgeable small businesses, and middle-class and wealthy individuals. The firm advised companies and handled their legal issues, defended many personal injury claims, and dealt with gifts, trusts, estates, real estate, and taxes. Associates were its subalterns. However, the associate Tooze did not proceed in a customary direction: multiplying billable hours. "He was a nine-to-five guy," his wife said. "He was the only young man" among the four associates "who didn't get a raise after a year."⁹

Little intellectual excitement attached to his four years as an associate. Work mostly involved routine processing of such low-stakes, repetitive matters as accident suits and real estate contracts, preparation of memoranda on legal points, and review of facts in pending cases. Most of his first year was devoted to adding to a file that the John Deere Plow Company might have used if the federal government had not dropped its anti-trust prosecution of agricultural implement makers. Tooze's first federal court appearance, in a very junior role and about a small sum but an important issue, ended in his client's defeat. The appellate opinion helped establish in federal law that a life insurer cannot maintain an action against a person causing the death of the insured.¹⁰

Tooze struggled for autonomy. "To be the Junior of an active and proficient Senior, involves a good deal of self-abnegation," Tooze volunteered. Unlike the General, he normally avoided club, alumni, and bar participation. And in this very Republican firm, and in an Oregon bar that reportedly numbered four-and-a-half registered Republicans for every Democrat in 1949,

⁸Ralph A. Cake obituary, *Gamma Delta Magazine*, <http://fiji.hea.biz/history/Lists/Positions/bios/RalpCake.txt>; "Willkie: He Makes Friends and Improves Fortunes in Quick Tour of West," *Life*, Feb. 28, 1944, 28; "National Affairs: Arrangements Were Made," *Time*, June 23, 1955, <http://www.time.com/time/magazine/article/0,9171,859770,00.html>; *State of Oregon ex rel. O'Hara v. Appling*, 215 Or. 303 (1959).

⁹Mary Tooze interview.

¹⁰LT to Judge Gus J. Solomon, 21 Nov. 1949; "Commercial Lawn Care," <http://commercialawnlawn.net/history-company-backgrounds/john-deere-history/>; *Maryland Casualty Co. v. Paton*, 194 F.2d 765 (1952).

Tooze—otherwise indifferent to parties—voted Democratic. “He was largely a Democrat because his father was a Republican,” a subsequent partner, Paul R. Duden, decided. When the General, a man of military bearing and cadence, started marching in step beside him, the son repeatedly broke step until the older man gave way. Still, he was not one to challenge his father or his father’s generation in their social and professional attitudes.¹¹

PARTNER

Tooze was the junior-most founder of Tooze Kerr Hill & Tooze in 1953. Reputed “personality clashes” between him and Herbert Hardy prompted both Toozes to leave Cake, Jaureguy & Tooze. Robert M. Kerr and Stuart Hill brought over a sizeable clientele of Oregon agricultural cooperatives. The new office provided narrowly defined legal services. It was a trial firm “more than a cause firm,” Duden said. “Much of the cause work was done *pro bono* [but never by the younger Tooze] on the side.” By 1985, after successive name changes, it numbered almost twenty lawyers—a middle-sized office by Oregon standards of that time.¹²

The firm shared what Gordon called the dominant libertarian ideology of twentieth-century American attorneys. Their “driving ethics are those of zealous advocacy: their job is to help clients pursue their freely chosen projects within the limits of the law and to push for interpretations and applications of law that bend those limits in their client’s favor.” Business attorneys, furthermore, saw “their job not just as representing clients in courts or rendering legal opinions, but as facilitating their clients’ business plans, helping them design structures and transactions so as to steer them through mazes of regulations and minefields of liability.”¹³

¹¹LT to Dud & Phiz, 13 Feb. 1950; LT to Harry E. Gurian, 13 Feb. 1950; LT to Thomas E. Haven, 6 Nov. 1972; Taxation Bonds for Rebuilding Auditorium (Municipal Measure 52), *City Club of Portland* 45 (Oct. 16, 1964); LT to Mrs. W.E. Naylor, 3 Dec. 1969; “Oregon Lawyers 4 1/2-to-1 Republican,” 1949 newspaper clipping in 1933 scrapbook in Gus. J. Solomon Papers, MSS 2886, Oregon Historical Society; LT to Barry Mount, 25 Oct. 1971; Paul R. Duden interview by author, March 19, 2010; Arden E. Shenker interview by author, April 1, 2010; Kern interview.

¹²Edwin J. Peterson to author, 12 Jan. 2010; Paul R. Duden interview, March 19, 2010; Duden to author, 10 Aug. 2010; Michael Gentry interview by author, March 1, 2010.

¹³Robert W. Gordon, “The American Legal Profession,” in *Looking Back at Law’s Century*, ed. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, NY, 2002), 290–91.

While representing plaintiffs from time to time, the expanding partnership primarily defended such large, self-insured companies as Chrysler and Johnson & Johnson, and major insurers. If settlements failed, the younger Tooze, with mixed results, largely tried civil actions in state courts and handled or assisted in some appeals there until the 1970s. (The "overwhelming majority of suits [continued to be] filed in state courts" even after the explosion of federal legislation in the 1960s, noted legal historian Lawrence M. Friedman.) Federal actions were in the minority. The Hartford, Travelers, Aetna, and other insurers employed firm members as "panelists," local counsel directed by local claims offices, for representation in drug reaction cases, so-called slip-and-falls, "fender bender" accidents, and similar matters. Tooze also represented Portland's Rose City Transit Company in many collisions, sudden stops, and falls in its buses. In this era, almost all personal injury and property damage claims were based on legal negligence theory, which, as will be seen, was changing. Juries and, less often, judges chiefly determined the responsibility for the injury or damage and whether the fault was shared.¹⁴

Tooze occasionally handled property disputes and patent cases. He counseled clients, incorporated companies, prepared their documents, drew up and executed wills, and negotiated settlements sometimes as small as \$25 or \$50. His normal run-of-the-mill fare, while providing litigation and courtroom experience, interested only the parties concerned. The stakes were not high except possibly to them. The issues and evidence in them were not complex. They required no expert testimony and established no legal precedents. And, as his wife and friends realized, they deeply bored him. A different and emerging legal area did rouse him, however.¹⁵

¹⁴*Safeway Stores v. Fannan*, 308 F.2d 94 (1962); *Stanich v. Buckley*, 230 Or. 126 (1962); *Hassebroek v. Norman*, 236 Or. 209 (1963); *Larson v. Allen*, 236 Or. 228 (1963); *David v. London Shirt Co.*, 259 F.Supp. 848 (1966); *Stevens v. Pacific Inland Navigation Co.*, 220 F.Supp. 654 (1963); *Travelers Insurance Co. v. Peerless Insurance Co.*, 287 F.2d 742 (1961); *Armbrust v. The Travelers Insurance Co.*, 232 Or. 617 (1962); Lawrence M. Friedman, "The Litigation Revolution" in *The Cambridge History of Law in America*, 3:176-79, 181; *Layne v. Portland Traction Co.*, 212 Or. 658 (1958); *McNealy v. Portland Traction Co.*, 213 Or. 659 (1958); *Rose v. Portland Traction Co.*, 219 Or. 1 (1959); *Smith v. Portland Traction Co.*, 220 Or. 215 (1960); *Smith v. Portland Traction Co.*, 226 Or. 221 (1961); *Herron v. Rose City Transit Co.*, 247 Or. 616 (1967).

¹⁵*McKee v. McKee*, 232 Or. 377 (1962); *Gray v. Montgomery Ward*, 224 F.Supp. 760 (1963); *Silvey v. Nielsen Corp.*, 437 F.2d 1159 (1971); H.E. Butler to LT, 25 May 1961; William F. Hoefs to LT, 17 Aug. 1962; LT to Alfred T. Sulmonetti, 4 March 1955; Edwin J. Peterson to author, 4 May 2010; Thomas Holce interview by author, April 3, 2010; Mary Tooze interview; Church interview.

ENVIRONMENTAL LAWYER

Tooze was a conservative, pro-business lawyer of libertarian sensibility. This sensibility, historian Jennifer Burns explained, involves both "a deep suspicion of government action" and flexible adherence "to other impulses, ideologies, and priorities," in Tooze's case a lifelong love of nature that led to prioritizing environmental protection. He advocated at least limited government regulation, partly effected through the courts, to overcome American businesses' environmental mistakes and evils. He genuinely sympathized with criticisms of modernized tort law's painful effects on business firms and labored as an attorney for their relief. But business, he publicly said, was not a single organism. Oregon paper mills, heavy polluters, "have seen their social duty and are fixing to perform it" in 1972, but not American automakers, who refused to install the "fairly simple [air pollution] technology" foreign automakers had adopted. Tooze assailed polluting industries, especially in his state, in publications, letters, and legal proceedings for more than ten years. He "loved sticking it to the government and didn't particularly like people messing around with his land, that being Oregon," Duden recalled. He "was very conservative." But it "is hard to put a label on him. One would be surprised by his views on things—regularly."¹⁶

Tooze described himself in 1972 as "a genuine zealot" about the environment and as someone who had "been fighting aluminum companies for a decade" in the courts. "Environmental law has been my hobby because I feel strongly about the damage, and the fraud, and the insult." He and his partners were "the best in the business." They had "gotten huge verdicts, but the companies [keep] them on appeal forever." In air pollution cases, "we have never received one, single cent of income or fee," except once.¹⁷

Tooze's existence as an avid nature lover, hunter, fisher, camper, gardener, and arborist undergirded a legal commitment that preceded the coining of the term *environmental law*

¹⁶Jennifer Burns, "O Libertarian, Where Is Thy Sting?" *Journal of Policy History* 19:4 (2007): 465; LT to *The Oregonian*, 1 Nov. 1972, and 20 April 1973; LT, "Speech to ASAE" [1980], 4; LT to *Business Week*, 25 Aug. 1972; LT to William D. Ruckelshaus, 14 June 1972; Paul R. Duden to author, 12 Dec. 2010; Duden interview.

¹⁷LT to Ruckelshaus, 14 June 1972; LT to Roxanne Park, 27 March 1972. A losing Harvey Aluminum Company, sometime after 1972, finally paid the big fees and expenses owed Tooze's office.

in September 1969. The mountains, deserts, rivers, and lakes of Arizona, New Mexico, Oregon, and other western places fed his full-throated appetite for living and his broad curiosity. They provided welcome natural solitude or, with numerous friends and colleagues, joyful hunting, fishing, and camping comradeship. To reach fishing spots, he gleefully powered cars over rutted roads, around gates, and through pastures. He "loved the wilds," his friend John C. Beckman recognized. An arborophile, dendrologist, and planter of trees around his home, Tooze knew the Latin names of many plants, trees, and shrubs. "He hated being away from Oregon [and] his trees," remembered secretary Ronald Haakmeester. According to daughter Kris Kern, "He wanted to protect the state from being overrun by outside influences."¹⁸

During the 1950s, Tooze joined fellow outdoor recreation and nature enthusiasts, many of them new suburbanites, in calling for preservation or cleanup of the environment. According to historian Samuel P. Hays, America's major environmental issues from the mid-1950s to the early 1960s were outdoor recreation, open space, and wilderness preservation. Outdoor amenities and wilderness continued growing in mass popularity. From the mid-1960s until the early 1970s, the issues of air and water pollution and "the search for natural environments" dominated the environmental agenda.¹⁹

Local grassroots groups appeared in the 1950s and 1960s to legally challenge the booming chemical, plastics, petroleum, aluminum, utility, automotive, aviation, and munitions industries. Scattered private attorneys and law school faculty and law students in the East established environmental-minded public-interest law firms during the 1960s. They and allied scientific experts aided the new groups in filing suits and

¹⁸Richard J. Lazarus, *The Making of Environmental Law* (Chicago, IL, 2004), 47; Robert Bents to author, 20 March 2010; Beckman interview; Edwin J. Peterson to author, May 4, 2010; Ronald Haakmeester interview by author, April 2, 2010; Michael Kern interview.

¹⁹Adam Rome, *The Bulldozer in the Countryside: Suburban Sprawl and the Rise of American Environmentalism* (Cambridge, England, 2001); Samuel P. Hays, "Three Decades of Environment Politics: The Historical Context" in *Government and Environmental Politics: Essays on Historical Developments Since World War Two*, ed. Michael J. Lacey (Baltimore, MD, 1990), 30, and Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985* (Cambridge, England, 1987); Phillip Garone, "Rethinking Reclamation: How an Alliance of Duck Hunters and Cattle Ranchers Brought Wetland Conservation to California's Central Valley Project" in *Natural Protest: Essays on the History of American Environmentalism*, ed. Michael Egan and Jeff Crane (New York, NY, 2009). See also John F. Reiger, *American Sportsmen and the Origins of Conservation* (Corvallis, OR, 2001) and Lawrence M. Lipin, *Workers and the Wild: Conservation, Consumerism, and Labor in Oregon, 1910-30* (Urbana, IL, 2007).

administrative complaints, some successful, against private and public actions that might degrade or had already degraded natural aesthetics or threatened public health. Historian Kevin R. Marsh states that some challenges inspired national action, as when local opposition in the 1950s and 1960s to logging in Oregon and dam construction in Utah mobilized "the national wilderness movement" and catalyzed passage of the Wilderness Act of 1964.²⁰

Late in 1969, attorneys forming what became the litigation-oriented Northwest Environmental Defense Center at Portland's Northwestern College of Law—later Lewis & Clark Law School—invited Tooze and others to help launch it. For years, Tooze had made his sympathies clear in letters to newspapers and national publications and in a prolonged battle against the Harvey Aluminum Company's Oregon smelter. His letters assailed various firms and industries to acknowledge that nature had to be protected for the common good, including from the harm done by shortsighted companies. He pilloried the Western Kraft Company pulp mill in Albany, Oregon, for causing "rotten odor" smells and thick, filthy smoke that reached high into the sky and impeded nearby highway visibility. Oregon attorney general Lee Johnson "croaks about states' rights" to excuse his failure to sanction polluters, specifically this mill. Tooze the libertarian excluded from his growing attacks on bureaucrats Oregon's Columbia-Willamette Air Pollution Authority and, in 1975, Environmental Protection Agency head William D. Ruckelshaus for imposing national auto emission standards.²¹

²⁰Betsy Mendelsohn, "Law and the Environment" in *The Cambridge History of Law in America*, 3:492–93, 507–509; Jack Lewis, "Looking Backward: A Historical Perspective on Environmental Regulations," *EPA Journal* (March 1988), <http://www.epa.gov/history/topics/regulate/01.htm>; John E. Bonine, "Private Public Interest Environmental Law: History, Hard Work, and Hope," *Pace Environmental Law Review* 26 (Summer 2009): 466–68; Kevin R. Marsh, *Drawing Lines in the Forest: Creating Wilderness Areas in the Pacific Northwest* (Seattle, WA, 2007), 34–35; Lazarus, *Making of Environmental Law*, 48–55.

²¹Northwest Environmental Defense Fund [letter] to Fellow Oregonians, 2 Dec. 1969; LT to *The Oregonian*, 3 March 1968, and 31 March 1968; LT to *The Oregonian*, c. 1968–1977, copy in MTP; LT to Ruckelshaus, 14 June 1972; David Stradling, *Smokestacks and Progressives: Environmentalists, Engineers and Air Quality in America, 1881–1951* (Baltimore, MD, 1999); Frank Uekoetter, "A Twisted Road to Earth Day: Air Pollution as an Issue of Social Movements after World War II," in *Natural Protest*; Donald MacMillan, *Smoke Wars: Anaconda Copper, Montana Air Pollution, and the Courts, 1890–1924* (Helena, MT, 2000); Gordon Morris Bakken, "Was There Arsenic in the Air? Anaconda Versus the Farmers of Deer Lodge Valley," *Montana* 41 (Summer 1991): 30–41; Timothy LeCain, "The Limits of 'Eco-Efficiency': Arsenic Pollution and the Cottrell Electrical Precipitator in the U.S. Copper Smelting Industry," *Environmental History* 45 (July 2000): 339; Lazarus, *Making of Environmental Law*, 50–52.

While never calling himself a preservationist, a conservationist, or an environmentalist, Tooze voiced sentiments basic to all three related traditions. The modern American environmental movement wanted state and federal policies adopted and enforced that went beyond older conservationists' goals of protecting and efficiently managing the natural environment, especially its productive resources. In 1959, Tooze supported home-state Senator Richard L. Neuberger's ultimately victorious effort to establish the Oregon Dunes National Seashore. Yet he wanted more than the preservation of pristine nature, which he called "an obsolete myth, relatively," in the American West. Like the environmentalists, he wanted policies adopted that cleaned up and controlled pollution.²²

Environmental concerns and professional interests drew Tooze and colleagues Paul R. Duden and Arden E. Shenker to the activist attorneys helping to create modern environmental law during the 1970s. They offered their firm's resources to the new Northwest Environmental Defense Fund (later Center) and generally promoted and drew in their environmental litigation on the talents of the expanding Lewis & Clark Law School's environmental law section. Over the next ten years, their firm contributed materials from its suits and conducted seminars at, and made grants to, the Center. Similarly, Tooze made the firm's extensive air pollution files available to the Center for Science in the Public Interest, an outgrowth of Nader's Raiders that, in its early stage, was interested in environmental issues.²³

Lengthy litigation over the Harvey Aluminum Company's smelter near The Dalles, Oregon, made Tooze a skilled environmental lawyer with a command of the leading-edge science and technology of air pollution. His office, he bragged in 1972,

²²Richard L. Neuberger to LT, 17 Nov. 1959; LT to Kathryn McGeer, 19 April 1982; Stacy J. Silveira, "The American Environmental Movement: Surviving Through Diversity," *Boston College Environmental Affairs Law Review* 28:2 (2001): 497–532, <http://lawdigitalcommons.bc.edu/ealr/vol28/iss2/7>; Karl Boyd Brooks, *Before Earth Day: The Origins of American Environmental Law* (Lawrence, KS, 2009).

²³Northwest Environmental Defense Fund to Fellow Oregonians, 2 Dec. 1969; LT to Bill Williamson, 9 Dec. 1969; Shenker interview; Duden to author, 22 Dec. 2010; LT to Michael J. Prival, 22 March 1972. A "host of once-disparate strands of law and related social movement converged" in the 1970s "after decades to become what we now think of as modern environmental law," Lazarus writes. The signing of the National Environmental Policy Act, creation of the President's Council on Environmental Quality, the first Earth Day, creation of the Environmental Protection Agency, and passage of the Clean Air Act's air pollution control program happened in 1970, and in the next few years Congress passed comprehensive legislation "aimed at water pollution control, solid and hazardous waste management, endangered species protection, and a host of other regulatory targets." Lazarus, *Making of Environmental Law*, 48–49.

possessed "more hard-rock, court-tested data on [the] animal and botanical effects" of aluminum smelters' fluorine pollutants, and had "the experts to present it [more] than anyone else in the country." As legal historian Betsy Mendelsohn declared, American environmental disputes for some fifty years had been framed largely "as conflicts between scientific information about the world on one hand and established principles of private right and state practice on the other." Tooze's scientific and technical abilities and interests meshed with this approach. And environmental law afforded a fulfilling sense that he labored in a socially useful legal area.²⁴

In Oregon and across the Columbia River in Washington, aluminum reduction plants created air pollution generally localized to areas immediately adjacent to the smelters. Wasco County, Oregon, horticulturalists, claiming damages to their vegetation and livestock, engaged Tooze's firm to sue a Harvey Aluminum Company smelter in the U.S. District Court for Oregon for \$2.2 million in damages and subsequently for an order to install emission control devices in the plant. "The claimants started out as Daniel in the lion's den," Shenker remembered, but "eventually the lion lay down with the lamb." The smelter, opened in 1958, was The Dalles' largest employer and part of an iconic and formidable northwestern industry. To Tooze, though, it was a "ruthless giant that casually poisoned the land for a decade." More than ten years of litigation, punctuated by settlement talks and arbitration, ensued in *Renken v. Harvey Aluminum* in federal courts and in *Meyer v. Harvey Aluminum* in Oregon courts, where the Oregon Supreme Court ultimately agreed with the plaintiffs that Harvey had created a continuing trespass and a nuisance. Tooze was the growers' chief legal and technical strategist, Shenker said. "Lamar's crucial role in the litigation was to answer the aluminum company's argument that [it] could not do any better, technically." After "rounding up the expertise from around the world, he was able to establish to a fare thee well that there was much that could be done to improve" its pollution control system.²⁵

²⁴LT to Prival, 22 March 1972; Mendelsohn, "Law and the Environment," 3:473.

²⁵Oregon State University Advisory Committee on Environmental Science and Technology, *Environmental Quality in Oregon 1971* (Corvallis, OR, 1971), 5; *Meyer v. Harvey Aluminum*, 230 Or. 204 (1970); Arden E. Shenker, "Preventing Pollution," *Oregon State Bar Bulletin* 66 (Nov. 2005): 5; LT to Aaron Teller, 22 Oct. 1970; Shenker to author, 10 Aug. 2010; *Renken v. Harvey Aluminum*, 226 F.Supp 169 (1963); 347 F.Supp. 55 (1971) aff'd 475 F.2d 766 (1973); William H. Rodgers, Jr., *Corporate Country: A State Shaped to Suit Technology* (Emmaus, PA, 1973), 161–88.

Between 1957 and 1968 "fluoride was responsible for more damage claims against industry than all twenty [nationally monitored air pollutants] combined," a Consumers Union technical expert wrote. Importantly, Tooze opposed smelter pollution in a time just before modern, statutory-based environmental liability developed, particularly in landmark federal legislation in the 1970s. In the early 1960s, when *Renken* was under way, plaintiff lawyers possessed few legal tools beyond the doctrinally limited state common law torts of trespass and public nuisance. Federal air pollution laws were minimally helpful. The 1955 Air Pollution Act provided only for studies of air quality standards and criteria, some of which buttressed the suit against Harvey. The 1963 Clean Air Act, while establishing air quality criteria repeated in later statutes, addressed only interstate pollution by stationary sources, not this plant's intra-state pollution. Nearly everywhere at the municipal and state level, "agencies regulated 'odors' under statutory mandates that prohibited air-pollution emissions constituting a 'nuisance,'" law professor Noga Morag-Levine noted. (Tooze did use Oregon's public nuisance law to help stop a rock crusher's operations because of the violent concussions, vibrations, and fumes suffered by its neighbor.) Underfunded and understaffed administrative agencies in the 1950s depended on the courts to make the final decisions about "the traditional common law public-nuisance doctrine," Morag-Levine added. In Oregon, the State Sanitary Authority, 1959 successor to the Air Pollution Control Board established in 1951, was generally ineffective. State officials, for instance, obtained their first air monitoring equipment only after the 1963 Clean Air Act provided purchase funds.²⁶

"The old tort system was quite comfortable with car accidents but not with such things as pollution," libertarian attorney-engineer Peter W. Huber stated. The old system contoured the Harvey battleground. Confronting what Tooze termed "the intrigues of the aluminum industry" meant relying on the common law. He extolled the common law as "the only effective device in the hands of a plain citizen" to protect

²⁶Ned Groth, "Air Is Fluoridated," *Peninsula Observer*, Jan. 27-Feb. 3, 1969, <http://www.hiddenknowledge.net/2009/01/12/the-air-that-we-breathe/>; Bonine, "Private Public Interest," 463-91; Shenker interview; Shenker to author, 25 Jan. 2011; *Bither v. Baker Rock Crushing Co.*, 249 Or. 640 (1968); DEQ Historical Timeline, <http://www.deq.state.or.us/about/historytimeline-pl.htm>; Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton, NJ, 2003), 130-31, 133. Studies used by the Harvey plaintiffs are mentioned in Ronald R. Ott and Richard E. Hatchard, "Control of Fluoride Emissions at Harvey Aluminum, Inc. Soderberg Process Aluminum Reduction Mill," *Journal of the Air Pollution Control Association* 13 (Sept. 1963): 437-42.

against nuisance or harm. Still, "nuisance law imposes liability only after pollution is occurring," tort scholar Kenneth S. Abraham said. "And nuisance, like all causes of action in tort, requires proof of a causal connection between the defendant's conduct and the harm of which the plaintiff complains. When that harm is immediate and visible, nuisance law may be able to function effectively."²⁷

Obstacles had to be overcome. Plaintiffs had to depend on the common law's identification of air quality as a public health matter, get beyond market factors and any contract issues, and prove a great number of points against defendants normally able to outspend and outlast them. The "threat of common law liability for pollution did not result in the reduction of pollution to optimal levels, especially as industrial pollution increased in the period following World War II," Abraham concluded.²⁸

After the U.S. District Court for Oregon applied Oregon trespass and nuisance statutes and ordered pollution reduction hoods installed, Harvey appealed *Renken*. The company argued that it would cost \$15 million for effective fluoride pollution control equipment and would require hiring one hundred more employees. If ordered throughout the industry, fluoride pollution elimination supposedly would cost billions of dollars. It was cheaper to pay claims than to control fluorides, one Oregon smelter manager stated.²⁹

Tooze exploited company missteps, Shenker recalled. Harvey first said that earlier improvements had solved the pollution problem and offered sampling evidence. When, after appeal, the district court was ordered to reexamine the facts, Tooze asked for an order that the smelter cap the pollution at the so-called current level. Harvey had to admit that it had found the problem solved only on one day. The fact emerged that, before testing, Harvey had turned off the power, which turned off the fluorides, and now it swore that the day's power records had disappeared. Tooze's firm persuasively substituted smelter power records

²⁷Peter W. Huber, "The Bhopalization of American Tort Law" in *The Positive Sum Strategy: Harnessing Technology for Economic Growth*, ed. Ralph Landau and Nathan Rosenberg (Washington, DC, 1986), 193; LT to Clancy Gordon, 6 Nov. 1971; Mendelsohn, "Law and the Environment," 3:509–10; LT to Teller, 22 Oct. 1970; Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 1912* (Cambridge, MA, 2008), 149.

²⁸Gordon Morris Bakken, "Western Legal History: The State of the Field," *Western Legal History* 20:1 & 2 (2007): 13; Abraham, *Liability Century*, 149. See also William L. Prosser, "Private Action for Public Nuisance," *Virginia Law Review* 52 (Oct. 1966): 997–1027.

²⁹Ned Groth, "Air Is Fluoridated"; Rodgers, *Corporate Country*, 164.

from the Bonneville Power Administration. Judges, not amused by pared data and lost records, ruled for the plaintiffs. The Ninth Circuit Court of Appeals ordered Harvey to pay plaintiffs' counsel a then-stunning quarter of a million dollars in attorney fees. At Tooze's suggestion, the district court sent him, at company expense, to Japan and Germany to examine and report on the best emission devices available.³⁰

The parties agreed to settle in 1964. After nearly a year of negotiation, they established an arbitration panel of plant pathologists and engineers to decide on damages. Its big 1971 monetary award to the horticulturalists for fifteen years of losses (but no punitive damages) was sustained by the district and appellate courts. Harvey installed a defined pollution control system, having spent, Tooze complained, "over \$2,000,000 on legal costs to avoid installing a system that could have been built for far less, and was built for slightly more last year."³¹

Tooze and some colleagues next advised the Montana Department of Health and Environmental Sciences on copper smelters and control equipment. They also represented a Washington dairy farm family, the Barcis, alleging pollution harm from a nearby Intalco aluminum smelter. Experiences here heightened significant misgivings. Ordinary "legal proceedings, such as the *Barci* case, are and probably always will be relatively futile, at least where the public is as sluggish as they are in Whatcom County," Tooze decided. Additionally, corporations never surrender in litigation, and they co-opt almost all regulatory agencies. The case exemplified "the quandary that extends far beyond . . . pollution into the more intricate malady of corporate control of government and of society," and for this malady he had no panacea. Should the Barcis win, he anticipated receiving no more than three dollars an hour for work performed. "That's why you probably won't see me again." He would "be somewhere else . . . doing my thing, which is products liability and grand calamities," where a defense could be based primarily on scientific or engineering, not contract, elements. This is exactly what he did, although he continued to support his colleagues' environmental plaintiff work. So the burst of federal legislation, administrative rules, and court opinions in the 1970s and 1980s and the revisions in the tort of public nuisance in the 1977 *Restatement of the Law Second*

³⁰Shenker interview.

³¹Shenker interview; LT to Ruckelshaus, 14 June 1972; Shenker to author, 25 Jan. 2011. The consent decree containing the arbitration award eventually was broadened to resolve all federal and state cases and to maintain monitoring panels.

gave his colleagues, not him, stronger environmental law positions than they previously had possessed in the common law.³²

THE *BEALL* CASE

Beall Pipe & Tank Corp. v. Shell Oil Co. launched Tooze's career defending complex product liability suits in Oregon and elsewhere. Representing Shell "was a turning point in Lamar's [business] practice. Up to then it was sheer drudgery," his wife and friends said. *Beall* made him "a happy camper." *Beall* "got him a foot in the door when the explosion arrived in products liability cases," Duden added. At question was Shell's hot asphalt product. Beall applied it to smooth pipes, ordinary steel ones sold to carry pressurized water in water and irrigation systems throughout the Oregon country. In 1960, Beall stopped applying the compound after farmers complained that the asphalt separated from the inside and clogged their irrigation sprinklers.³³

Beall sued Shell in federal court for negligence and breach of express and implied warranties. The main question was what caused the asphalt's failure to adhere. Was it the Shell product, whose worth Tooze had to demonstrate, or, as he argued, how Beall applied the compound? He traced Beall's mistakes to its speedup of the coating process. To prove the tar's effectiveness, he relied on a costly new Shell study of the compound's basic properties and on expert witnesses. Earlier, in his typical hands-on way, Tooze stuck a screwdriver into the interior of the rejected pipe and found pristine tar. He argued that the tarred outside of the pipe interacted poorly with the ground, making Beall's exterior application the cause of the problem. He was looking for the "one point" needed to win a jury decision, "some simple thing that people could understand," he told Duden. As he repeatedly said, "There is no law; there are only facts" when juries considered technical matters. Then, as later, Tooze prided himself on making

³²Shenker to author, 8 Jan. 2010, and 20 Jan. 2010; Roxanne Park, "The Barci Case" [Bellingham] *Northwest Passage*, March 2, 1974; LT to Roxanne Park, 27 March 1972; Duden interview; Shenker to author, 20 Dec. 2010; LT, "Coordination of Defense," 4; David R. Hodas, "Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm," *Ecology Law Quarterly* 16 (Jan. 1989): 883-908.

³³Mary Tooze interview; Duden to author, 16 Dec. 2010, and 24 Jan. 2011. Because the district court's memorandum opinion is unpublished, I rely for the district and appellate opinions on *Beall Pipe Tank Corp. v. Shell*, 370 F.2d 742 (1967).

complex products or situations appear simple and understandable to juries.³⁴

This jury nevertheless found for Beall and awarded damages. The judge set the judgment aside in 1964, concluding that no reasonable jury should have reached that decision. As Tooze had demonstrated, Beall "misused a good asphalt." Also, he found Shell's expert witnesses more credible and trustworthy than Beall's. He ruled that both Beall's negligence and warranty claims failed against Shell. Beall appealed. The Ninth Circuit in 1967 fully concurred in the lower court opinion. It accepted Tooze's principal legal point that, in Shenker's words, "the user of a product has a responsibility to apply it properly, that the maker of the product is not responsible if the product is not applied properly." In his office, Tooze proudly displayed the offending irrigation pipe section and, later, a tagged "Order of the Nut" from a different case. This faulty nut was alleged to have caused a bad accident. He freed the manufacturer from responsibility by proving that the factory originally had installed one of a different size.³⁵

PRODUCTS LIABILITY LAWYER

A populist or consumer revolution "struck the American legal system in the late 1960s and early 1970s" causing an undesirable explosion in litigation, Tooze charged. "Old doctrinal barriers to lawsuits against doctors and hospitals, against manufacturers and municipalities" actually had started breaking down before World War II, Friedman wrote. Afterwards, "new legislation and new doctrines allowed or even encouraged litigation." Courts now tended to expand the reach of the negligence theory, particularly by recognizing expanded "duties of care—the identification of new classes of persons toward whom one was obligated to act carefully or the identification of new classes of harms against which certain actors were obliged to take care not to cause," according to two tort law experts. "Other doctrinal changes that helped fuel the expansion included the modifi-

³⁴Shenker interview; Duden interview; Shenker to author, 21 July 2010. Space limitations prevent discussion of Tooze's use of unique but simple expressions and other ways he had to influence clients, depositions, trials, negotiations, settlements, and appeals.

³⁵Shenker interview; Duden interview; Haakmeester interview; Church interview.

cation or elimination of certain affirmative defenses that had been available to negligence defendants.³⁶

And then there was the doctrine of strict product liability. Tooze said that the textile and fabric industries that he came often to defend were almost free of major claims until they became "the target of a flood of lawsuits for appalling injuries, under the aegis of the new doctrine of strict product liability." First adopted by the courts in the early 1960s, "strict liability" made sellers of products, including both retailers and manufacturers, responsible for damages caused by their actions or defective products. There was no need to prove that the seller was careless or inattentive to the danger in question. Rather than having to prove negligence, a consumer needed to prove that a product was defective, less safe than it ought to be, and that the defect caused the injury. The product had to meet a reasonable expectation of freedom from defect in its design, manufacture, or marketing.³⁷

The previous law of product liability in Oregon and most other states essentially employed tort and contract principles from common law. Most product liability actions had needed to prove manufacturer negligence or breach of warranty. The rare no-fault action was a "quasi-contract" matter applying warranty principles under common law doctrines. But contract law limitations made recovery against remote manufacturers uncertain. "Strict liability" as a tort doctrine weakened defendant sellers' traditionally favorable legal treatment and shifted the main burden of proof to them. Human fault disappeared as a cardinal legal issue. (The degree of fault might still affect the amount of money awarded.) Meanwhile, consumers grew increasingly aware of their new tort rights and exercised them in courts. Judges and juries appeared more sympathetic to plaintiff harm than they had in the past, and they felt that wealthy insurers, not losing defendants, actually did the paying. "These changes pro-

³⁶John C.P. Goldberg and Benjamin C. Zipursky, *Torts* (New York, NY, 2010), 17–18.

³⁷LT, "Speech to ASAE" (1980), 3; Friedman, "Litigation Revolution," 3:176; LT, "Coordination of Defense," 5; Sheila L. Birnbaum, "Recent Developments in Product Liability Law as It Applies to Manufacturers," in *Product Liability of Manufacturers: Prevention and Defense*, ed. Kenneth Ross and Martin J. Foley (New York, NY, 1979); Fred W. Morgan, "Marketing and Product Liability: A Review and Update," *Journal of Marketing* 46 (Summer 1982): 71–75; Goldberg and Zipursky, *Torts*, 18. A long-running dispute since Tooze's time has focused on "whether there was a litigation 'explosion' at some point during the last three decades, or merely an avalanche of asbestos claims and modest increases in other classes of claims." Abraham, *Liability Century*, 159.

duced the so-called explosion of products liability cases, and Lamar was off to the races," Duden believed.³⁸

In the 1960s and 1970s Oregon and most other states also adopted the Uniform Commercial Code. It updated and opened up new routes in the commercial contract law that previously oversaw the sale of goods in a manufacturer's favor when liability was claimed. (In Oregon, *Beall* was one of the earliest applications of the code, in effect since September 1963.) In addition, many states and courts adopted Section 402A of *Restatement of the Law Second*, which applied strict tort liability in product accident suits. The Oregon legislature adopted the section and its comments in 1975 and 1979. Despite Tooze's complaints about strict liability, he repeatedly won under this emerging doctrine.³⁹

The strict liability doctrine regulated much of Tooze's product liability practice in his final decades. It reinforced his strong preference, evident in *Beall*, to ground factual legal accountings on the applicable science or technology in order to demonstrate, he said, "the technological quality of the tangible substance, or equipment, or service, that allegedly causes the accident." Trial attorneys in 1980, he generalized, needed "a degree of scientific expertise that would have been incredible to a lawyer" in 1960. Winning or losing these tort cases ultimately depended on "how well the lawyer is able to present the technology [to juries] through learned experts." His own experts received minute instructions on what he sought or suspected and what might need countering on the stand, in depositions, or elsewhere.⁴⁰

³⁸Friedman, "Litigation Revolution," 3:185; LT, "Coordination of Defense," 1-6; Duden to author, 16 Dec. 2010; Amy C. Bushaw to author, 27 Feb. 2011. See also Sarah S. Lochlann Jain, *Injury: The Politics of Product Design and Safety Law in the United States* (Princeton, NJ, 2006).

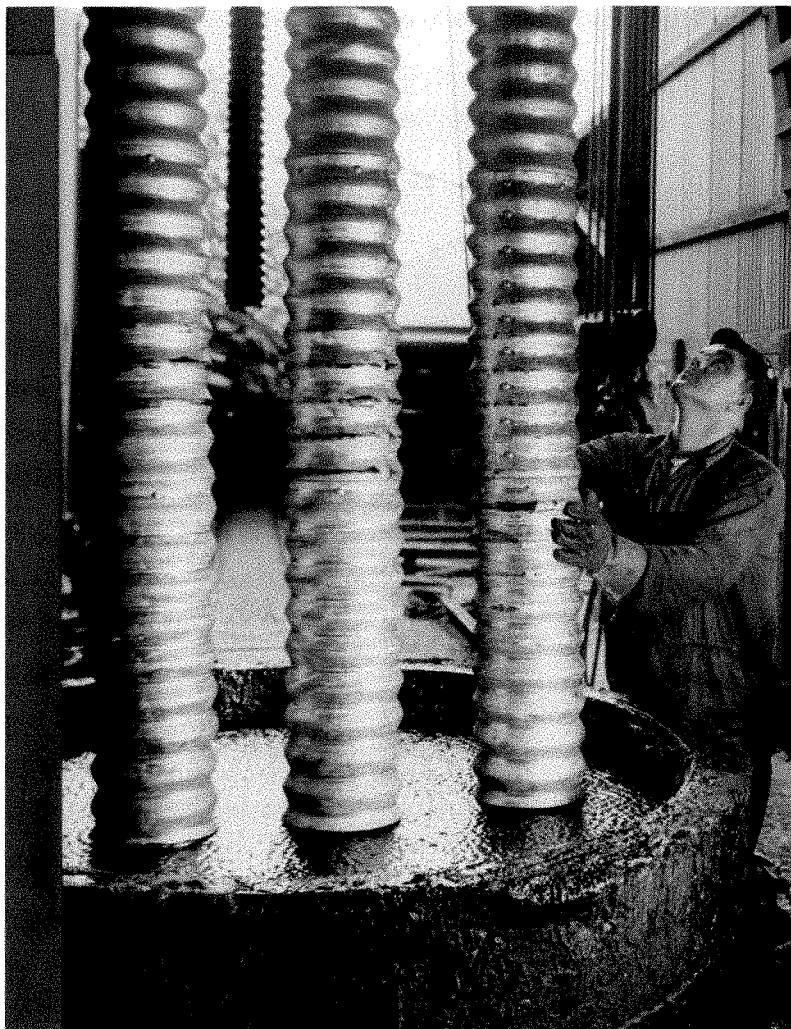
³⁹Friedman, "Liability Explosion," 176-81, 185; Duden interview; Duden to author, 13 July 2010; LT, "Speech to ASAE," 8, 11; LT to John J. Millen, 21 Dec. 1979, MGP; *Quirk v. Ross*, 257 Or. 80 (1970). For Oregon, see Dominick Vetri, "Legislative Codification of Strict Products Liability Law in Oregon," *Oregon Law Review* 59 (Dec. 1980): 363-423; *Heaton v. Ford Motor Co.*, 280 Or. 467 (1967) [which adopted the "consumer expectation" test based on Section 401A]; and Bullivant Houser Bailey PC, *Digest of Insurance Law: Oregon* (Portland, OR, n.d.), 55-73.

⁴⁰LT, "Speech to ASAE," 8, 11; LT to Clancy Gordon, 22 Nov. 1971; LT, "How to Help Your Members Avoid (and Defend) Product Liability Suits," *Association Management* 30 (Jan. 1978): 41-42; LT to Floyd J. Tucker, 6 July 1970; LT to Roger D. Olleman, 14 Aug. 1975; LT to Jack Redhair, 29 July 1980; LT, "Coordination of Defense," 1; LT to K.R. Bents, 26 June 1985; LT to Jerome I. Berget, 19 May 1992. Three of Tooze's five regularly employed experts—Aaron Teller, Clancy Gordon, Moyer D. Thomas, Joseph Schulein, and Alan D. Morris—later had national scientific awards created in their honor.

Occasional professional negligence and plaintiff representation in the 1970s and early 1980s did not slow his booming product liability defense work for insurers and companies. "Before 1970 companies rarely sued for breach of contract; by the end of the century, corporate contract suits accounted for the largest share of new lawsuits filed in federal courts," Gordon noted. Tooze helped firms in Oregon and elsewhere to settle or try allegations that their concrete floors, truck equipment, pipelines, motorcycles, elevators, scaffolding, aerosol sprays, and post hole diggers were defective or inherently dangerous and had caused suffering, disabilities, or deaths. As in the Harvey Aluminum Company litigation, success in these cases demanded shrewdness, persistence, and even guile because, Tooze believed, "the most outrageous inventions of [one's] opponent are . . . customary." Some witnesses and lawyers simply lied or engaged in questionable, evasive, or deceptive tactics.⁴¹

Law partner Michael Gentry noticed that Tooze was "brought in on the more challenging regional or national cases." His lost lawsuits involving burns from clothing, Tooze estimated, merely bruised insurers with \$100,000 or more in payouts and expenses, "not terribly large" sums by 1980. Others he fought reached into the millions of dollars. After suing the manufacturer for an industrial helicopter crash, Tooze's Oregon client was awarded some eight million dollars and interest of about \$60,000 a month until the parties settled on appeal. A successful three-month trial over construction of a (non-Beall) pipeline brought a favorable judgment of more than \$17 million. (It remains the longest jury trial in Oregon history and the one with the largest contract recovery.) In the mid-1970s, Tooze spent months aiding an Alaska lawyer prepare a defense of the exterior coating product used on four hundred miles of the Trans-Alaska Pipeline. Following lengthy depositions and periods during which he developed a theory of proper pipe bending, a scheme to have the coaters secretly watched, and a plan to sway a jury with a hog fat demonstration, Tooze

⁴¹Gordon, "American Legal Profession," 114; *Erickson Air-Crane Co. v. United Technologies Corp.*, 303 Or. 281 (1987), as modified by 303 Or. 281 (1987), as modified by 303 Or. 452 (1987); *Owings v. Rose*, 262 Or. 247 (1972); *In re Complaint as to the Conduct of Alan M. Ruben*, 228 Or. 3 (1961); *State ex rel Oregon State Bar v. Lenske*, 243 Or. 477 (1965); LT, "Speech to ASAE," LT, "Coordination of Defense," 1. Responding to client Jack Erickson's anger about the opposing counsel's submission of a false document, Tooze said, "Jack, you don't understand how the system works." Lawyers "are taught that." Jack Erickson interview by author, May 5, 2010.



A worker at the Beall Pipe & Tank Corp. plant coats pipe with asphalt in a process similar to the one used on the Trans-Alaska Pipeline. (Courtesy of Oregon Historical Society, #006118).

finally arranged that his insurance client and other insurers settle for \$37 million.⁴²

Flammable wearing apparel, which set off high emotions, intricate legislation and rules, and monumental insurance claims, verdicts, and settlements, was “just about the most spectacular product-liability risk in [my] whole spectrum,” Tooze said. (He admitted, “I have always refused to look at photographs of the [burned] plaintiffs, having inspected one early on, which haunts me still.”) In 1972, claims and suits—some filed under the 1953 Flammable Fabrics Act’s just-effected children’s sleepwear standard—suddenly engulfed the makers, sellers, and handlers of textile and garment products accustomed to weak and highly permissive regulation. There had been many incidents of children’s nighttime clothing catching fire on a small flame or kitchen burner. In 1972, staggering monetary losses threatened this industry and its insurers. (Manufacturers, except those who tried to get around the new federal standards by mislabeling and other tricks, next applied flame-retardant Tris to children’s wear, only to have the chemical banned in 1977 for causing cancer.) Late in 1973, Tooze proposed a new model of national coordinating lawyer to long-time client Travelers Insurance Company. The company hired him to coordinate all the efforts and costs of its panel lawyers in its many flammable fabric suits. On a smaller scale, Tooze extended his nationwide system of education and administration to the defense teams of other fabric insurers and to those used by four new “captive” insurance firms established outside the United States by non-fabric manufacturing trade associations. He “monitored and partially controlled some 250–300 product liability cases” in forty states during the first ten years, he reported.⁴³

⁴²Gentry interview, March 1, 2010; LT to R. Nicholas Peck, 26 Dec. 1980; *Erickson Air-Crane Co. v. United Technologies Corp.*, 303 Or. 281 (1987), as modified by 303 Or. 281 (1987), as modified by 303 Or. 452 (1987); Shenker to author, 27 Dec. 2010; *Bannister Continental Corp. v. Northwest Pipeline Corp.*, 76 Or. App. 282 (1984) aff’d 76 Or. App. 282 (1985) vac. 301 Or. 763 (1986); [Pendleton] *East Oregonian*, Nov. 13, 1982; *Wall Street Journal*, Feb. 15, 1983; LT to Peter Baldwin, 4 Oct. 1984; Shenker & Bonaparte, LLP, <http://www.ashenkeresq.com/lawyer-attorney-1191725.html>; LT to Edward Roemke, 10 April 1974, LT to Church, 22 July 1975; LT to M. John Bright, 17 Sept. 1974, 1 June 1976, and 22 Sept. 1976; Duden to author, 20 Dec. 2010; W. George Bassett to author, 17 Jan. 2011.

⁴³Tooze implied that what he did in coordinating for Travelers was generally what the American Trial Lawyers’ Association already had been doing for plaintiff attorneys. LT to Robert W. Kasten, Jr., 20 July 1982; LT, “Speech to ASAE,” 9–10, 15; LT, “Coordination of Defense,” 6; Alan Morris, “Captive Insurance and Template,” Oct. 1988, http://www.captive.com/newsstand/articles/article1_morris&ward.html; LT to Baldwin, 4 Oct. 1984.

The Travelers prototype developed into the "centerpiece of my career." His responsibility "was tightly focused on the technical aspects of the [flammable fabric] claims," remembered Travelers executive R. Nicholas Peck. The company was highly satisfied with how much money Tooze ultimately saved it in settlements, payouts, legal expenses, and executives' time, he added. By 1980, Tooze had reviewed the active files of some 150 of its panelists, aided in numerous case preparations, encouraged counsel interactions, identified and vetted witnesses, prepared and updated practice manuals, lent panelists materials, and addressed technical issue seminars that Travelers organized. Because a burn case often turned on how the incident happened, he stressed relating it to the science of fabric burning. Travelers occasionally had him attend trials and sent him abroad to identify state-of-the-art fabric technologies useful for its defense. He also alerted the insurer to counsel in need of relief or replacement. Once his position was established, Tooze boasted that all his coordination "requires one lawyer, a couple of hours a week, and a very intelligent secretary." Travelers employed other lawyers to coordinate its defenses in different areas, and attorneys independently began offering a similar service.⁴⁴

CONCLUSION

Lamar Tooze, Jr., labored within a legal-institutional climate undergoing great changes. Between 1948 and his death in 1985, he participated in the growth, in the West and in the nation, of specialized, expansive, expensive, and client-centered civil law practices. The exploding legal claims against businesses in the 1960s and 1970s, and the heightened demand for counsel and witnesses with scientific or technical expertise and for lawyers with keen negotiating skill, worked to his professional advantage.

Before the 1960s, he used the common law to mount effective insurance defenses in Oregon. The new reign of strict liability, which he keenly disliked, forced him in a new direction. Defending insurance claims became more difficult, but he still could win settlements and court victories acceptable to his clients. The introduction of strict liability ironically provided Tooze an escape from humdrum insurance defense work. Rising product liability claims and similar costly actions led to his ultimately negotiating and trying multimillion-dollar controversies in Oregon and elsewhere. Pioneering the role of

⁴⁴LT to Bright, 28 May 1982; Peck to author, 22 March 2010; LT, "How to Help," 42; LT, "Coordination of Defense," 12.

attorney-coordinator for insurance defense teams, he built a national legal career.

Tooze's reliance on the common law (in which he believed) to stop an aluminum smelter's air pollution—a suit that ended in victory after a frustrating decade—ironically helped him decide to stop doing environmental plaintiff work. He quit before a burst of state and federal legislation, administrative rules, and court opinions gave environmental complainants and their counsel far stronger legal positions than they had had in the common law. "Modern statutory-based environmental liability developed later than products liability, and largely in response to the inadequacies of the traditional common law rules," as Abraham noted.⁴⁵

⁴⁵Abraham, *Liability Century*, 149.

THE 1850 PETITION TO ADOPT THE CIVIL LAW: COMPETING HIGH-STAKES RULES OF DECISION IN GOLD RUSH CALIFORNIA

BARTHOLOMEW LEE

On January 29, 1850, San Francisco Gold Rush attorney John W. Dwinelle and more than a dozen other lawyers petitioned the new California legislature to adopt the civil law as the rule of decision. They did so in response to a memorial from other San Francisco lawyers in favor of the English common law.¹ It is the purpose of this article to publish that petition, the original of which is in the California State Archives in Sacramento.²

The petition catalyzed a reaction that locked in the common law in California. Both the printed documents contemporary with the petition and the immediately subsequent texts in response and implementing that reaction, along with the debates of the constitutional convention and the journal of the first session of the senate, were published at the time. The petition was not. Taken together, these are, as it were, the urtexts of California legal history.

¹The later interplay between the common law and the civil law in the context of the 1872 California Civil Code gave rise to my article, Bartholomew Lee, "The Civil Law and Field's Civil Code in Common Law California: A Note on What Might Have Been," *Western Legal History* 5:1 (Winter/Spring 1992): 13–36.

²Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law 1760–1860* (Dobbs Ferry, NY, 1977), 281ff (Appendix D, a photocopy). This petition is otherwise not known to have been published elsewhere.

Bartholomew (Bart) Lee practices law in San Francisco. He has taught law as an instructor at the University of Chicago Law School (JD, 1971) and as an adjunct professor in law and economics at Golden Gate University, San Francisco. He has published primarily in legal history and the history of technology.

This article also hopes to provide a context for the petition, now more than a century-and-a-half later. In that regard, three old histories, closer to the times, are invaluable for color as well as light. The first is the 1855 *Annals of San Francisco*.³ The second is the 1901 book of essays and remembrances, edited by Oscar T. Shuck, *History of the Bench and Bar of California*.⁴ On submission of the petition, Shuck points out, no one knew which way things would break. "The civil law, already entrenched on the field of action, and thus powerfully recruited, seemed to have as secure a tenure here as in Louisiana."⁵ The inevitability of the common law, in retrospect, even given the common law backgrounds of so many of the immigrants, could not have been a foregone conclusion in the winter of 1849, a season of high excitement, near anarchy, and spectacular ambitions.

Judge R.A. Wilson describes the flavor and color of this period in his 1850 history of California, which appears in the appendix to the first volume of *California Reports* (1851), "The *Alcalde* System of California," and related materials.⁶ Modern historians have explored these times in California with insight and diligence. This article can only rely with admiration on both the histories more contemporary to the Gold Rush and the comprehensive, more recent explorations of this unique time and place. California's complex of social, economic, and legal interactions made it the most modern of American states. But as of the time of the petition, no one

³Frank Soulé, John H. Gihon, and James Nesbit, *The Annals of San Francisco* (1855). (Frank Soulé had been the editor of the *San Francisco Chronicle* and hence had access to contemporary accounts.) The *Annals* were first printed in 1855 by D. Appleton & Co. in San Francisco; then in a facsimile edition from Lewis Osborne, Palo Alto, 1966; then also reprinted in facsimile in 1998 by Berkeley Hill Books.

⁴Oscar T. Shuck, ed., *History of the Bench and Bar of California* (Los Angeles, 1901); see also William J. Palmer and Paul P. Selvin, *The Development of Law in California* (St. Paul, MN, 1983), a somewhat effusive pamphlet published by the West Publishing Company.

⁵Oscar T. Shuck, "Adoption of the Common Law," in *Bench and Bar*, 48.

⁶R.A. Wilson, "The *Alcalde* System of California," in *Reports of Cases Argued and Determined in the Supreme Court of California*, ed. Justice Nathaniel Bennett [San Francisco and New York, 1851]; [hereinafter *California Reports* or, in case citations, 1 *Calif.*] Wilson's essay is the appendix at 1 *Calif.* at 559). Judge Wilson, a judge of the Criminal Court of the First Instance, serving in Marysville in January 1850, had a man flogged with fifteen lashes for violent and contumacious misconduct in court, with twenty more to follow if he did not also pay a fine of \$400. See <http://www.yubacourts.org/general-info/history>.



San Francisco Gold Rush attorney John W. Dwinelle, above, was one of a group of more than a dozen lawyers who petitioned the new California legislature to adopt the civil law as the rule of decision. (Photo by Edouard J. Cobb, carte de visite, PT-Dwinelle Family, California Historical Society)

knew what would happen with California's promised riches and nascent institutions.⁷

"THAT WAS THEN . . ."

San Francisco enjoyed the professional attentions of about a hundred American lawyers in early 1850. Many had already asked the new 1849 legislature to enact the common law as the rule of decision, an issue arising from Mexico's recent sovereignty. Dwinelle and his cohort thought the civil law the better choice for the future. This was especially so inasmuch as the Louisiana Code of 1825 had earned the admiration of the national law reform movement. The first elected governor of California, Peter H. Burnett, also admired the code. He urged its adoption in December 1849 (along with "The English Commercial Law," "The English Law of Evidence," the common law of crime, and the Louisiana Code of Practice), as recorded in the 1849 *Journal of the Senate*.⁸

The petitioners argued their case, playing to some extent off the substance of Governor Burnett's recommendation, especially as to the equity of the code. They refrained, however, from a perhaps even stronger argument appearing from the day-to-day operation of the San Francisco courts before which they practiced. In the end, however, the petitioners bore Apollo's curse of Cassandra: "Always see the future, always tell the truth, and never be believed."

The Text of the Petition

The petition to the California Legislature to adopt the civil law follows:⁹

⁷Neal Harlow, *California Conquered: War and Peace on the Pacific* (Berkeley, CA, 1982); David Alan Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* (Berkeley, CA, 1992); Leonard Pitt, *The Decline of the Californios* (Berkeley, CA, 1966; repr. 1998); W.W. Robinson, *Land in California* (Berkeley, CA, 1948; repr. 1979).

⁸*Journal of the Senate of the State of California at Their First Session Begun and Held at the Puebla de San Jose on the Fifteenth of December, 1849* (San Jose, CA, 1850), 30, 33; Shuck, "Adoption," in *Bench and Bar*, 47. Peter Hardeman Burnett later served as a justice of the California Supreme Court and founded the Pacific Bank.

⁹Transcription of the January 29, 1850 petition "To the Honorable Legislature of the State of California" by certain members of the San Francisco Bar for the adoption of the civil law as had been proposed by the governor in December 1849, as presented in photocopy as Appendix D of Powell, *Compromise*, 281ff; this transcription (spelling as original) is done for the Ninth Judicial Circuit Historical Society; John W. Dwinelle et al., "[Petition] To the Honorable Legislature of the State of California [1850]," in Powell, *Compromises*, 281.

To the Honorable the Legislature of the State of California:

The undersigned, practising members of the Bar of San Francisco would respectfully represent:

That whereas a memorial has been forwarded to the Legislature by the majority of the members of the Bar of this city in favor of the adoption of the English Common Law instead of the Civil Law, the undersigned feel it their duty to themselves and to the community of which they are citizens to protest against that memorial being considered as embodying the unanimous expression of the Bar of San Francisco, and as by no means containing the views of the undersigned upon that subject.

The undersigned prefer the Civil Law, as relating to civil matters, for the following, among other reasons:

That the Common Law of England was based upon and grew out of the feudal system, in which the landed interest has ever prevailed over the interests of commerce, manufactures and labor; and personal liberty has ever been subject to the restrictions and assaults of prerogative and arbitrary power;—under which the legislatures and the courts have built up a system of artificial and technical law, which it requires long study to understand, and great skill to apply, even to the ordinary affairs of life;—a system under which, in the words of Sir James MacKintosh, an eminent English lawyer, “the minds of the most acute men of the age, or of the nation, are often unable to find their way through its labyrinths, and are compelled, by their doubts of what is law and what is not, to add in a most ruinous degree to the expenses of the suitor;”—and before which, notwithstanding Magna Charta, Bills of Right and acts of Habeas Corpus, personal rights have always been insecure, and the government has been uniformly successful in its political prosecutions:

Whereas the Civil Law contains the results of the civilization of the Roman people during the time of the Republic, under which one description of property does not preponderate over another in the eye of the Law;—a people who were extremely jealous of personal liberty, and whose revolutions were generally occasioned by an assault made upon the rights of private citizens, and has come down to modern times influencing and contributing largely, by the richness of its materials, to the character and improvement of the liberal institutions, as well of Europe as of our own country—It is a system founded

upon natural justice, whose principles are written in the heart of every man who has received a moral education, and which is therefore practically better understood by the masses than a system of arbitrary law; and which does not lose its value because it was merely reduced into form and re-enacted by an enlightened Christian Emperor.— And in recommendation of its comprehensive views and solid principles, we cite one of the brightest ornaments of American Jurisprudence, Chancellor Kent, who, educated under and dispensing the Common Law and therefore permitted to follow and apply the principles of the Civil Law so far only as they are engrafted upon or form the basis of the Common Law, passed this encomium upon that system whose adoption we advocate: "The whole body of the Civil Law will excite never failing curiosity, and receive the homage of scholars, as a singular monument of wisdom. It fills such a large space in the eye of human reason; it regulates so many interests of man as a social and civilized being; it embodies so much thought, reflection, experience and labour; it leads us so far into the recesses of antiquity, and it has stood so long 'against the waves and weathers of time,' that it is impossible while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitude of a majestic ruin."

Many of the undersigned have been educated in the school of the Common Law and are not unmindful of the fact that the adoption of the Civil Law will require from them time and labor to familiarize themselves with its principles and its simple rules of practice, a task reserved to them, at all events, in order to investigate properly and decide upon the vast interests which have already become vested under it; and were it otherwise, we cannot recognize the right of the legal profession to ask for the substitution of one system of laws for another, merely to answer purposes of their own convenience.

Something, too, is due to the rights of the people who became a part of the American Union, by the acquisition of California. Whatever may be said of the smallness of their number, or the degree of their social or moral culture, still the Civil Law has for centuries formed a part of their well understood customs; and the more depressed their condition, the more should an intelligent legislature guard against such changes as shall compel them either to submit to the expense of employing legal counsel in

the most common transactions of business, or submit themselves as an unresisting prey to dishonest schemers.

And we believe that there is no force in the assertion that the artificial system of the English Law is better understood by the mass of the people than the system of natural justice contained in the Civil Law, which finds a response in the breast of every man of sense and moral culture; for every such man knows what he ought to do and will experience no hardship in living under a law which compels him so to do.

As an illustration of the truth of these views we refer to the fact, that it is only where the Common Law System has prevailed, that the Courts have become odious for their technicalities and wearisome delays, and that the legal profession has been subjected to unfavorable prejudice for "quibbles" sanctioned by that system with its technicalities and controlling precedents; that this system has been found to be too severe a burden to be borne by the American people, and that much of the time and labor of the legislatures of the several States of the Union has been and is now being devoted to the softening of its provisions and approximating them to the Civil Law.—

For the above, among other reasons, we respectfully ask the Legislature to retain in its substantial elements the System of the Civil Law, preferring for that purpose the scheme proposed by his Excellency the Governor in his first annual message to the Honorable the Legislature

San Francisco, January 29th 1850.

John W. Dwinelle
C.S. McKay[?]
W.M. Stafford
N.W. Chittenden
Bring & [?] Smith[?]
A.F. Hinchman
J.B. Hart
Sal. Sor. Fryem[?]
P.A. Morse
E.C. Fitzhugh[?]
Rod.ic N. Morrison
Thomas H. Holt
Jn. Montgomery
Edwd C. Marshall
Saml Flower

Curry Boswick[?]
L.A. Besançon¹⁰

ALTA CALIFORNIA LIBRE AND THE COMING OF
THE FORTY-NINERS: *RUSTICUM JUDICIUM*

Mexican Upper California had had little need of lawyers or courts. Indeed, very little had been going on at all since the establishment of the presidio by the Spanish in 1776. The land saw some farming, some ranching, and some trading at Yerba Buena.¹¹ One acute observer characterized Alta California's state as one of "lawless blessedness."¹² The law of the *alcaldes* before the immigration of the 1840s appears to have been informal, perhaps even collaborative, dispute resolution, well suited to a stable population sharing values. The Mexican revolution of 1821 had not changed much. Even the sleepy 1836 republic of Alta California Libre was no more, with the coming of immigrants in the early 1840s and then the American military occupation of July 1846.¹³ Early California traveler Thomas J. Farnham published, in 1844, the story of Alta California Libre (a "republic" that was quickly but almost incidentally re-Mexicanized).¹⁴ He reported, "The end of this [serio-comic] revolution came! The schooner *New Bedford* was purchased, and the Mexican officers shipped to San Blas. . . . Juan Baptiste Alvarado,

¹⁰End of transcription. The conventions of abbreviation and flourish of the time make it hard to read many of the signatures to the petition. Richard Powell indicates this to be the petition (variously) of nineteen or eighteen San Francisco lawyers. I count seventeen signatures, although it is possible that the fifth and eighth signatures are those of law partners. With the exception of the lawyer whose name is noted as "L.A. Besançon," there would appear to be no one whose surname would suggest descent from a civil law country, or the civil law jurisdiction of the state of Louisiana. (Besançon is a nineteenth-century family name in New Orleans and environs, and in a town in France). There is no other perhaps Mexican or Spanish surname recognizable among the signatures of the petitioners, besides perhaps the indecipherable Fryem[?].

¹¹Robinson, *Land in California*, chapters 1–7, *passim*.

¹²Thomas O. Larkin is quoted in Harlow, *California Conquered*, 333; Larkin noted that with respect to Mexican laws, "the oldest residents have no remembrance of them. . . ." Larkin arrived in California in 1832, prospered as a merchant, and a decade or so later found himself U.S. consul in Monterey and later a land developer. The town of Benicia was his creation.

¹³Donovan Lewis, *Pioneers of California* (San Francisco, 1993), 373ff. See also Powell, *Compromises*, 53, and Harlow, *California Conquered*, 27.

¹⁴T[homas] J[efferson] Farnham, *Travels in the Californias, and Scenes in the Pacific Ocean* (New York, 1844).

customs clerk, proclaimed *Alta California* an independent republic, and himself its first governor."¹⁵ *Alta California Libre*, with the discovery of gold, transmogrified into a prosperous, populous, and litigious American commonwealth, having been reabsorbed into Mexico and then conquered by the United States in July 1846. The military government did not abolish the *alcaldes* and indeed supported the continuing efforts of that office to do justice in the new circumstances. Yet as a structure for dispute resolution, the office of *alcalde* was simply overtaken by events. The need for law was palpable at the time of the near-anarchy of the Gold Rush. Want of civil structure gave rise to demands for law and government in the territory.¹⁶

Reliable reports of the law in action in Gold Rush San Francisco explain why some American lawyers nonetheless would plead for the civil law and the code of the state of Louisiana as a rule of decision. Any rule of decision would have been a material advance, although the alacrity of judgment was always to the plaintiffs' advantage. Rough country justice, *rusticum iudicium*, characterized practice in San Francisco in 1849–50. Yet the petitioning lawyers who had to practice before this summary court could hardly criticize it in their petition, if only because they owed it to their clients not to antagonize or insult the only sitting judge likely to decide their cases. Moreover, his rulings gave rise to their fees.

Some fifty years later, one San Francisco lawyer recalled, "[I]n San Francisco was a wonderful tribunal. Here the Judge of First Instance assumed a jurisdiction unlimited as to parties or subject matter. All was fish that came to his net. His was a court, civil and criminal, taking cognizance of matters spiritual or in probate, matters maritime or in admiralty, matters at Common Law or in equity, yet always recognizing the rule of

¹⁵Quoted in much additional detail by Wilson in "The *Alcalde* System of California," 581–82, citing Farnham, *Travels*, 60.

¹⁶In 1849, some sixty San Franciscans, both citizens and firms, called for a "Mass Meeting Of the Citizens of San Francisco! [in order] . . . to Take Into Consideration the Necessity of Electing Delegates to a Convention to Form a Government for Upper California. . . ." [orthography original]. The printed broadside (likely printed by signatory Sam Brannan) of June 11, 1849, displays a proud eagle. It was reprinted by Thomas W. Norris in facsimile from the only known extant copy (Livermore, CA, 1943); privately printed and reproduced at the Grabhorn Press, San Francisco, in Norris' Christmas facsimile series, California historical documents reprinted. Congressional inaction has been attributed to paralysis about permitting slavery or not in a new state. In January 1847, Sam Brannan, one of the citizens calling for the 1849 meeting, had, in his *California Star* newspaper, thundered, "What laws are we to be governed by . . . all suits are now decided by the *Alcalde's* notions of justice. . . ." quoted in Rand Richards, *Mud, Blood and Gold: San Francisco in 1849* (San Francisco, CA, 2009), 109.

the Civil Law as paramount when anybody could tell him what was the rule of the Civil Law."¹⁷

Judge Wilson tells the story in 1851:

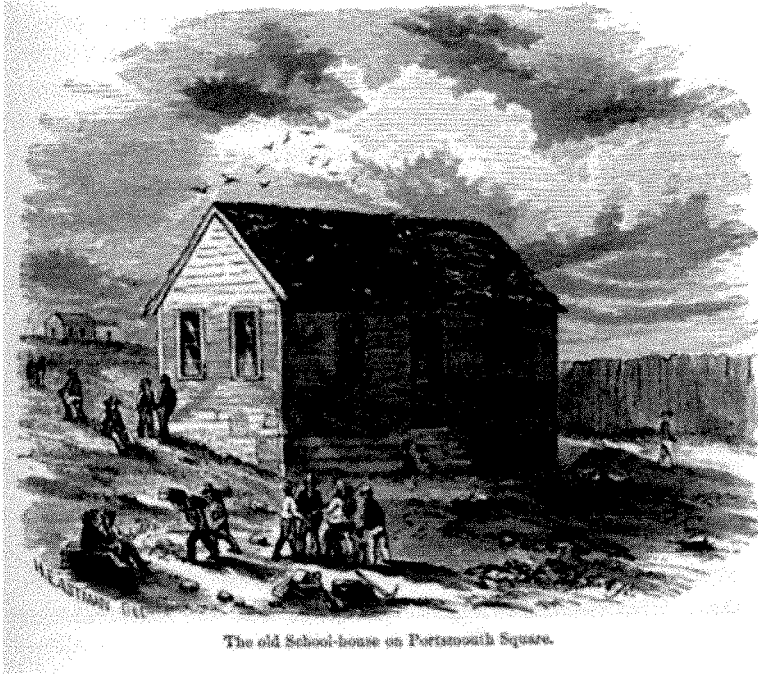
[A]n unparalleled immigration had brought with it an unparalleled amount of litigation—an amount of litigation that at this day [1851] appears almost incredible. With the daily accruing causes of legal controversy, crowds assembled at the school-house on the Plaza of San Francisco, where from morning to night the Judge of First Instance in civil cases might be seen at the desk dispensing off-hand justice. In front of him sat three or four clerks, conducting the business of the court, while on the bench opposite or standing within the rail was a crowd of lawyers, waiting a hearing for their clients, who, with their witnesses filled the remainder of the room, and formed groups about the door. The crowd was not composed of idlers, but it was the representation of the ordinary accumulation of business for the day, which was to be disposed of before the adjournment of the court. All were anxious to be heard and to have their several controversies disposed of within in the shortest possible time. Speedy justice was more desirable than exact justice, when labor was valued at an ounce of gold a day. And none among the multitude were more desirous for speed than the lawyers, whose compensation would depend much upon a speedy judgment.

[A]s soon as he [the Judge] comprehended a case, his authoritative voice was heard, closing the discussion, and dictating to a clerk the exact number of dollars and cents for which he was to enter up a judgment. . . . And as for long speeches to juries, they were not allowed. All orders asked for by a respectable attorney were granted *ex parte*—the judge remarking that if the order was not proper, the other party would soon appear and move to set it aside, and then . . . he could ascertain the real merits of the case.¹⁸

The 1855 *Annals* report the judge in the schoolhouse to have been William B. Almond from Oregon. "[T]he novel and summary manner in which he conducted his business and disposed of sometimes very important cases, was a source of much mer-

¹⁷Henry H. Reid, "The Historical Views of the Judiciary System of California" in *Bench and Bar*, xv, xviii [emphasis in original].

¹⁸Wilson, "Alcalde System," in 1 *Calif.* at 577.



The old School-house on Portsmouth Square.

"With the daily accruing causes of legal controversy, crowds assembled at the school-house on the Plaza of San Francisco; where from morning to night the Judge of First Instance [Judge William B. Almond] in civil cases might be seen at the desk dispensing off-hand justice." (Drawing by Harrison Eastman)

riment to some and mortification to others. . . ." The *Annals* add, however, "that his decisions generally were far more just than those more recently given in courts claiming far greater legal knowledge . . . where tampered juries are influenced more by bribes than testimony."¹⁹

Judge Almond, appointed by Alcalde John White Geary on December 12, 1849, "quickly gained a reputation as one of the more colorful characters in town."²⁰ Judge Almond later practiced law in San Jose, as did Governor Burnett before his appointment to the California Supreme Court.

The old schoolhouse on the east side of Portsmouth Square was not the larger alcalde's office, seen in old prints, bearing

¹⁹Soulé, *Annals*, 238–39.

²⁰Richards, *Mud, Blood, and Gold*, 138.

the legend above its door "Justice Court."²¹ The schoolhouse courtroom had earlier hosted at least one criminal trial of several members of the murderous, pillaging Hounds gang, in the summer of 1849.²²

The court of first instance's "rush to judgment" did, however, make Gold Rush San Francisco one of the few ports in the world where a sailor could find justice against a ship's master. This was so because only in San Francisco could such cases be heard before the ship sailed away. The Barbary Coast may not have been the only reason sailors liked "Frisco," as the port came to be known to the sailors of the world.²³ The *Annals* reports one case by a plaintiff ship's surgeon who won a judgment in fifteen minutes for \$150. This amount then would be worth approximately \$66,000 in terms of income in today's dollars, and the lawyer likely took half of it.

Abused passengers (and abused they often were) also enjoyed quick justice, so that "Judge Almond's court became such a terror to merchants and captains of ships, that they would sooner compromise, even at a sacrifice, a disputed point with a sailor or a passenger, than submit the case to Judge Almond."²⁴ There is, however, some suggestion, at least as of a few years later, that when seamen turned to a "sailor lawyer" to collect wages, they often found themselves in the hands one of the twenty-three rings of kidnappers that supplied ships leaving San Francisco with seamen and other victims, usually drugged and drunk, to replace the all-too-often deserting crews of the vessels that came into the harbor. In 1849, at least three thousand sailors "jumped ship," according to an estimate of the day.²⁵ San Francisco's Rev. William Taylor in 1855 railed against "Shanghaeing [sic] the Sailors." In his lecture "Shanghaied!" he

²¹Soulé, *Annals*, 718; see Richards, *Mud, Blood, and Gold*, plate 13. Richards cites, at page 245, note 139, "Almond's Records" as "WPA Alcalde 386" at the San Francisco History Center and reprints the same schoolhouse image from *Annals*, twelfth plate after his page 80.

²²Richards, *Mud, Blood, and Gold*, 102ff.

²³"Frisco" was indeed a maritime usage, originally for a safe harbor for repairs; see "Call it Frisco!" in Malcolm E. Barker, comp., *More San Francisco Memoirs, 1852-1899* (San Francisco, CA, 1996), 24.

²⁴Soulé, *Annals*, 238-41.

²⁵J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington, DC, 1850), Appendix, xxiii.

comments, "The lawyer may, by possibility, be an honorable man, but he will bear watching."²⁶

CIVIL, NOT COMMON, LAW AS A CURE FOR DISORDER AND A PROTECTION FOR CALIFORNIOS

But even if Judge Almond's rough justice seemed satisfactory to many, without the guidance of law, his successors might do worse. The petition may have refrained, for practical reasons, from too close an examination of the law at work in the winter of 1949, but its longer view also sought to protect against the arbitrary and the law's delay in the future.

The petition, however, saw the common law as part of the disorder and the civil law as the cure. At the constitutional convention of September 26, 1849, General Mariano Guadalupe Vallejo was the leading Californio delegate.²⁷ As he and several other Californios put it in the records of the convention, he had lived in California "[a]ll my life."²⁸ General Vallejo proposed to the convention that commissioners draft a code of laws to report to the first legislative session.²⁹ With some discussion of the convention's authority, Vallejo's proposal was adopted September 28, 1849. The civil law, Vallejo's tradition, knew primarily enacted codes of law, going back to Roman times. The common law of the immigrants knew the judicial processes of *stare decisis*, and derogated statutes.

General Bennet Riley, the second military governor of California after the war with Mexico, put Californio William Hartwell, editor of *The Californian*—the first newspaper—to the task of compiling and then printing Mexican and English laws applicable to California, although he did not issue or

²⁶Rev. William Taylor, "Shanghaied," in *More San Francisco Memoirs*, 78; see also David Neal Keller, "Shanghaied!" *American Heritage Magazine* 46:5 (Sept. 1995), accessible at www.americanheritage.com/content/shanghaied.

²⁷Lewis, *Pioneers*, 475ff.; Vallejo had been something of an intellectual rebel in his youth. Pitt, *Decline*, 2ff. A brief biography may be found in Zoeth Skinner Eldredge, *The Beginnings of San Francisco: From the Expedition of Anza, 1774, to the City Charter of April 15, 1850: with Biographical and Other Notes* (San Francisco, 1912), 348–57, accessible at www.sfmuseum.net/bio/vallejo.html. See also Alan Rosenus, *General Vallejo and the Advent of the Americans* (Berkeley, 1999).

²⁸Browne, *Debates*, 478. California's population quadrupled from 26,000 to at least 107,000 in the year 1849; *ibid.*, xxiii.

²⁹*Ibid.*, 224.

promulgate them.³⁰ To some extent mooting the issue of applicable Mexican law, General Riley proclaimed the constitution resulting from the convention on October 12, 1849.³¹ It was adopted by vote of the people November 13, 1849. The new constitution scheduled the legislature to convene December 15, 1849, and it did. Along with General Vallejo, many of the rest of the constitutional delegates were Californios and pre-Forty-Niners. Of forty-eight delegates, some nine members bear Hispanic names and identify themselves as Californians. One was a Spaniard and one a mestizo with Native American blood. The average age of the Californios who were members was just over forty, the senior being Jose Antonio Carillo at fifty-three, who had lived in California "[t]oda la vida."³² The average age of the others was just over thirty-five. Two (including James McHall Jones) were twenty-five, and two were twenty-six. Lawyers accounted for fourteen of the delegates, just under a third. One delegate, B.F. Moore, twenty-nine, of San Joaquin, described his profession as "[e]legant leisure."³³

The debates among these mostly young men touch with color and vigor on the question of common law and civil law broadly and in connection with marital community property and the prospect of sole property for women. A more equitable law of property offered a legal device to lure women of fortune and quality to California for marriage, as first noted by Ray August.³⁴ The doctrine of separate property for women did not, however, derive directly from Mexican law.

³⁰Lewis, *Pioneers*, 229–30; Browne, *Debates*, xv.

³¹Browne, *Debates*, iii ff.

³²Carillo may have delivered the 1846 "last-stand" speech attributed to Governor Pio Pico: "We find ourselves suddenly threatened by hordes of Yankee immigrants. . .," which may be found in Robinson, *Land in California*, 59. Carillo had also been a signatory the Mexican constitution.

³³See the table at the end of Browne, *Debates*, 478–79, from which these descriptions and calculations derive. In a similar analysis, Judge Palmer notes that the signatories to the American Constitution were themselves of an average age of forty-three (Palmer, *Development*, 13, note 17). Johnson, *Founding*, 101ff, is illuminating on the makeup of the delegates, presenting a more nuanced, interesting, and complicated picture than Browne's tabular summary.

³⁴Ray August, "The Spread of Community Property Laws to the Far West," *Western Legal History* 3:1 (Winter/Spring 1990): 35. Delegate Henry W. Halleck, then just late of the United States Army and unmarried, spoke of providing a law of separate property to make immigration to California by single women of fortune (i.e., with independent means) more likely: "It is the very best provision to get us wives that we can introduce into the Constitution." Browne, *Debates*, 259. Not for nothing was he known, in his later Civil War role of general officer in the Union army, as "old brains."

The petition to the new legislature saw the Louisiana Code as an off-the-shelf prophylactic, an equitable and deep-rooted governing code of law, along the lines of General Vallejo's call, as did Governor Burnett. Formal relations with Mexico also inclined in this direction. The Treaty of Guadalupe Hidalgo of February 2, 1848, proclaimed on July 4, by which so much Mexican territory became the territory of the United States (nominally by purchase), had guaranteed the liberty and property of the Mexicans in the war-won lands, including California: "The Mexicans . . . shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." The treaty contemplates that most Mexicans in the territory will become citizens of the United States and thus fully protected by American law.³⁵ Of course, neither the resident Mexicans nor anyone else had the benefit of the post-Civil War amendments, which made anticipated state law protections all the more important.

The Treaty of Guadalupe Hidalgo had also specifically protected the rights in land of Mexicans, resident or otherwise: "The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."³⁶ The convention, fully aware of the treaty, adverted to the principle that the constitution should protect the minority, which appeared to satisfy the Californios in attendance.³⁷

Most of the Californios of upper California were Mexican, in about fifty major "families," each of which was a multidimensional social institution. The *Debates* do not note explicitly

³⁵Treaty of Guadalupe Hidalgo of February 2, 1848, 9 U.S. Statutes at Large (1851): 922, in *Treaties and Conventions between the United States of America and Other Powers since July 4, 1776* (Washington, DC, 1871), Article 9, accessible at Yale Law School's Avalon Project at http://avalon.law.yale.edu/19th_century/guadhida.asp, and Robinson, *Land in California*, Appendix 1, 249.

³⁶Treaty, Article 8, in Robinson, *Land in California*, 251.

³⁷Browne, *Debates*, 22. The new constitution denied African Americans and Native Americans the franchise (Article 2, Section 1). The racism reflected in the debates was not uncommon for the time. See, e.g., *People v. Hall*, 4 Calif. 399 (1854), which holds that Chinese cannot testify against whites. The mestizo delegate to the 1849 constitutional convention, Manuel Dominguez, was in 1857 precluded from testifying for the defense in *People v. Elyea*. Nonetheless California, having organized itself as a free state, not a slaveholding state, was so admitted to the Union on September 9, 1850, 9 U.S. Statutes at Large (1851), at 452; reprinted in Robinson, *Land in California*, Appendix 2, p. 252. Had Congress not acceded to California's petition to join the Union on its own terms, it could have found itself with a gold-rich Texas-like republic on the West Coast, not as easy to reconquer as the Californios had been.

any invocation of a need to preserve Spanish or Mexican law. Mexican law, to the extent known or perhaps intuited, seemed to be understood to remain in force, *pro tanto*. This was consistent with earlier pronouncements by the military authorities (except with respect to mining). All depended on the results of the legal architecture in whose cause many labored, every day and often at night. As delegate William M. Gwin said, "[T]his Constitution was to be formed with a view to the protection of the minority: the native Californians. . . . [The immigrant majority] are to be restrained from infringing on the rights of the minority."³⁸

Much the same concern appears in the petition argument that the application of the civil law in what had been a civil law jurisdiction would best protect the Californios: "Something, too, is due to the rights of the people who became a part of the American Union, by the acquisition of California." The property rights of the Californios, specifically "the vast interests which have already become vested . . ." under the law of Mexico, also enjoyed treaty protection. What that would mean in fact was hardly clear and ultimately would form a bitter lesson about American law and character.

Moreover, as the petition notes, the Californios would often have to engage counsel to protect their own vested interests soon to be governed by unfamiliar law. To the petitioners, it looked like the mills of the common law would grind the Californios exceedingly fine. Indeed they did.

Many of these protected interests in land—real or purported and fraudulent—underlay the land title cases of the next several decades. But the land grant laws and procedures as implemented after statehood³⁹ worked great iniquity by making it very difficult, as predicted in the petition, for Spanish-speaking,

³⁸Ibid. Gwin was later one of California's first U.S. senators, an ambition articulated long before California became a state. In the end, during the Civil War his Southern sympathies led him to a repetition of something like the treason of Aaron Burr, aiming to establish an American-populated state of Sonora in northern Mexico. Nonetheless, he persisted in California politics until he died in 1885. See Johnson, *Founding*, 263.

³⁹By congressional enactment on March 3, 1851, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," 9 U.S. Statutes at Large, at 631. The text is accessible in Robinson, *Land in California*, Appendix 3, p. 253. The law resulted from California's first two senators, Gwin and John C. Frémont, with different views about California's land titles. Gwin prevailed in the notion that the titles were defective and should be proved or forfeited. Robinson, *Land in California*, 99. Gwin thus facilitated the creation of the procedural barriers to appropriate retention of Californio lands, despite his earlier argument that a goal of the California Constitution should be the protection of the Californios.

cash-poor, and unsophisticated Californios to maintain ownership of their own land.

A particularly egregious abuse resulted from the vacatur of already perfect Mexican titles not presented in a timely manner to the federal Board of Land Commissioners.⁴⁰ Thus operation of law, in an invidious discrimination, voided the perfect titles of Californios who did not bring them to the land commission for expensive contest for ratification. That process looked to take years and in fact often took decades, and "long-time land-owners would be thereby despoiled. . . ."⁴¹

This draconian procedure effected a bill of attainder, inflicting the non-judicial punishment of forfeiture of title and land by congressional enactment, violating present understandings of Article 1, Section 9 of the United States Constitution (as well as the takings and due process clauses of the Fifth Amendment). The petition foresaw these evils. It specifically warned of the likelihood that the land-owning Californios would become the "unresisting prey to dishonest schemers" as they did.⁴²

As it happens, several of the lawyers who served as delegates to the constitutional convention also went on to make their fortunes in ownership of Mexican grant lands that they absorbed as attorneys' fees in defending them.⁴³

⁴⁰See John Currey, "The Treaty of Guadalupe Hidalgo and Private Land Claims" in *Bench and Bar*, 57, decrying *Botiller v. Dominguez*, 130 U.S. 238, 9 S.Ct. 525 (1889), holding no due process deprivation in the forfeiture and finding the court unable to enforce the Treaty of Guadalupe Hidalgo, and reversing the California Supreme Court in *Botiller v. Dominguez*, 13 Pacific 685 (Cal. 1887). Ironically, in the context of the concerns of the petitioners, the common law California Supreme Court did protect Californio titles while it could. General Vallejo also lost his land to legal abuse. *United States v. Vallejo*, 66 U.S. 541, (1861); the dissents of Justice Grier et al. are compelling.

⁴¹Harlow, *California Conquered*, 332. The land commission itself, once it adjudicated, "ordinarily confirmed the titles of persons who could prove possession and actual occupancy by themselves or predecessors in the Mexican period. . . ." according to Robinson, *Land in California*, 69. That, however, was only the beginning of the process.

⁴²See, generally, Pitt, ch. 5, "The Northern Rancho Decimated," in *Decline*.

⁴³For example, James M. Jones, who died in 1851, young at 26, and rich, as he had expected from land disputes; Henry W. Halleck, who later served honorably if ineffectually as a general in the Union Army in the Civil War, and who had put his knowledge of Mexican law to good use as a lawyer in San Francisco. Johnson, *Founding*, 240, 259, 261. Some few land lawyers of the day stood out as honest men. Pitt, in *Decline*, p. 91, counts on one hand the honest ones. In addition to Halleck, Pitt includes William Carey Jones, Elisha Oscar Crosby, Henry Hittell, and Joseph Lancaster Brent—maybe ten percent of the working land lawyers. James M. Jones, appointed to the federal bench in San Francisco, died too young to make the list.

FEAR OF COMMON LAW ABUSE BUT HOPE FOR CIVIL LAW EQUITY

A primary point of the petition is not just the expeditious equity of a civil law code, but also the anticipation of the complication, delay, and want of equity of the common law. American lawyers and American litigants had all too much experience with these defects. The word in the petition for the courts is "odious." At the time, these concerns were also driving the nineteenth-century movement to codify American law, as noted in the petition. Not only had Governor Burnett, elected November 13, 1849, proposed to the legislature on December 21, 1849, the wholesale adoption of the Louisiana Civil Code of 1825, he also recommended wholesale purchase of copies of it in New Orleans, for ease of practice.⁴⁴

Louisiana had adopted its civil code some twenty-five years earlier. Louisiana, as a former civil law jurisdiction now within the United States, had some demographic and historical similarities to offer, having long been a Spanish colony before acquisition by the French. Louisiana's civil code was much admired in the learned profession of the law, even in frontier California, as appears from the commentary in the digest of the Spanish and 1837 Mexican law prepared on July 2, 1849, three hundred copies of which were distributed by General Riley.⁴⁵ Governor Burnett regarded the Louisiana code as "a system of the most refined, enlarged and enlightened principles of equity and justice."⁴⁶

The petitioners saw the alternative of the common law as all too often the practice of "quibbles" that brought even the legal profession into disrepute, practicing in courts regarded by many (then and now) as odious for delays and technicalities. After the enactment of the constitution, the legislature then had before it the question of applicable law. Dwinelle and his colleagues sent their petition for the adoption of the civil law

⁴⁴See Lee, "The Civil Law and Field's Civil Code," and the [1849] *Journal of the Senate*, 30, 33; also quoted in Shuck, "Adoption" in *Bench and Bar*, 48.

⁴⁵The "Translation and Digest of such portions of the Mexican Laws . . . as are supposed to be still in force and adapted to the present condition of California . . ." "by J[abez] Halleck, attorney at law" (and brother of then-military secretary of state Captain Henry W. Halleck) is reprinted in Browne, *Debates*, Appendix, xxiv.

⁴⁶*Journal of the Senate*, 30, 33; also reprinted in part in Shuck, "Adoption" in *Bench and Bar*, 48.

on January 29, 1850.⁴⁷ The *Journal of the Senate* for Friday, February 1, 1850, reflects that it was “ordered to be printed” for the legislators.

The legislature, in 1850, did not adopt the civil law nor elect to “retain” it, as the petition had asked. This followed the extensive analysis by Elisha O. Crosby. (He had also been a delegate to the constitutional convention and was later a judge.) Crosby wrote for the legislature in response to the petition. Crosby, expressing a palpable moral superiority, heralded the many virtues of the common law and explicated many vices of the civil law.⁴⁸

The legislature adopted the common law as the rule of decision on April 13, 1850.⁴⁹ It did so perhaps mostly because the common law was thought to be known to the bar and to the immigrants from eastern states (if not a known evil), and the civil law was seen as no improvement, as well as inconvenient and tainted by its relationship to the Californios and Mexico.

Dwinelle’s petition acted primarily as a catalyst to the overwhelming reaction in favor of common law processes and substance. That the common law would be detrimental to the vested interests of the Californios and inequitable in its doctrines, likely delays, and acknowledged complexities seemed to be minor considerations. The new California lawyers, who were from all over America, knew well how to play those old games, and the stakes were very high. California law was to be both old and new, a meta-law distilled from several jurisdictions, but Mexico among the least of them.

It is also perhaps not surprising that the petitioning attorneys could urge the civil law as an immediate and knowable source of applicable, sound, and equitable rules of decision. As they suggest, the civil law should have to be mastered in any event to handle emerging disputes that were still subject to it, particularly regarding land. However, they measured the future by their own diligence, without the cynicism that that future soon warranted.

Given the process of Judge Almond’s Court of First Instance, the petitioners had likely been accustomed to a more civilized practice somewhere else. But the other side of the coin is that

⁴⁷Richard Powell, in his *Compromises*, notes that Dwinelle went on to establish himself as a distinguished member of the California bar, as did many of his cosigners.

⁴⁸1 *Calif.* (1851), Appendix, 588; Elisha Oscar Crosby’s “Report” also appears in the *Journal of the Senate* for December 1849, p. 459.

⁴⁹*California Laws*, ch. 95, “An Act Adopting the Common Law,” in *The Statutes of California Passed at the First Session of the Legislature . . .* (San Jose, 1850), at 219.

they were apparently smarting under common law procedures and injustices that they rightly feared would soon reappear in California. Perhaps at work were a populist fear of landed interests in control of judge-made law and a fear of political prosecutions, in the intense slave/free political environment of pre-Civil War California, where duels were notable.⁵⁰ Unspoken was a concern with equity measured by the length of the schoolhouse chancellor's foot.⁵¹

The petitioners did, however, admire the equitable principles of the civil law. These comprehensive and published rules promised a greater uniformity of decision. The petitioners watched as California coalesced into a commonwealth during the Gold Rush. They had seen that the daily resolutions of quotidian disputes, in many of which they participated, helped bring it together. Better and more equitable resolution (and without the promised delay of the common law) could only be more unifying. Such equitable resolution could perhaps even diminish the amount of litigation. There would likely always be enough to go around for the bar. In the final analysis, the petitioners, in the spirit of the American law reform movement, spoke out *pro bono publico*.

GOLD, WATER, AND LAND IN LITIGATION

California's astonishing gilding of gold did not hide the riches of the land. The middle nineteenth century saw land as the primary productive resource, and that mostly in agricultural terms, mineral rights notwithstanding. This was particularly so in California in that most gold mining took place on the public lands on the east side of the great central valley.

The massive and complex disputes about private land ownership that followed the Gold Rush were anticipated in the petition's call for application of the civil law. Such preservation of legal principles in the civil law, affecting title to land in a formerly civil law territory, could help secure those titles. This could well benefit those in San Francisco in 1850 who perhaps hoped to succeed to some of these titles as well as litigate

⁵⁰The adoption of the civil law governing non-criminal matters could not, however, alleviate this concern by itself, but would militate toward a penal code abolishing the much-abused doctrine of common law crime feared by the petitioners.

⁵¹Specifically with respect to Judge Almond, according to the *Annals*, "Young lawyers . . . were not pleased with this summary method of disposing of business." *Annals*, 239.

them. Many a land speculation had flourished between the Mexican War and the waning of the Gold Rush.⁵²

Moreover, the San Francisco authorities, often corruptly, issued many city lots, measured in the old Spanish unit of the *vara*, which still appears in their legal descriptions. The lots were conveyed by quitclaim deeds, more in hopes of title than in good title. These vara lots gave rise to speculation and litigation.⁵³ Many a lawyer's bread and butter—and sometimes fortune—for the next many years, came from the litigation of land disputes, especially those involving purported Mexican title.⁵⁴

John W. Dwinelle's career is an example. His triumph came in the 1854 litigation by which the city of San Francisco ultimately succeeded to four square leagues of surrounding land by the Spanish Law of the Pueblo. The case culminated in the 1864 decision of Justice Stephen Field in *San Francisco v. United States*.⁵⁵ Dwinelle again prevailed for San Francisco. He turned his comprehensive brief in the 1854 litigation into an argument (a persuasive one) in book form, *The Colonial History of San Francisco*. His forensic history book went to a third edition by local printers Towne and Bacon. On the title page of the book, he noted his memberships in several historical societies, including the Ethno-Historical Societies of both San Francisco and New York.

Dwinelle was thirty-two years old in 1850, just beginning his outstanding legal career. He served as mayor of Oakland in 1866–67, then as a state assemblyman and the primary founder of the University of California. One of the university edifices in Berkeley bears his name (much to the mystification of the university's denizens). Dwinelle also appears to have done significant work on Stephen Field's 1872 *California Civil Code* (which was based on his brother David Dudley Field's draft

⁵²See, e.g., Lewis, *Pioneers*, 297.

⁵³Richards, "Scoundrel Time: Civic Chicanery" in *Mud, Blood and Gold*, 107.

⁵⁴Lawrence M. Friedman, "A Tangle of Titles," in *A History of American Law* (New York, 1973), 377. See also Powell, *Compromises*, 54, regarding the profligate land grants of the Mexican governors of California. See also Johnson, *Founding*, 240. Robinson points out that whatever the regime for securing titles, "California landowners were due to have years of trouble." *Land in California*, 109.

⁵⁵*San Francisco v. United States*, 21 Federal Cases 365, 4 Sawy. 553, case no. 12,316, Circuit Court of the United States, Northern District of California, October 31, 1864, and addendum, May 18, 1865 (per Field, J.). Four old Spanish square leagues is about twenty-eight square miles; San Francisco today is a little more than forty-six square miles in extent. Both Field and Dwinelle had participated in the precursor case, *Hart v. Burnett*, 15 Cal. 530 (1854). For the roots of "four square leagues," see the chapter of that title in Robinson, *Land in California*, 33, and for the San Francisco litigation, see page 230.



VIEW OF SAN FRANCISCO, CALIFORNIA.

San Francisco authorities, often corruptly, conveyed many city lots by quitclaim deeds, giving rise to speculation and litigation. (Drawing by William B. McMurtrie, draftsman of the U.S. Surveying Expedition, 1850)

New York codes)⁵⁶ and especially the initial 1873–74 amendments.⁵⁷ Perhaps in this work Dwinelle saw some of the same benefits of a sound code, anticipated by his petition more than twenty years earlier.

Dwinelle appears several times in the first (1851) volume of the appellate reports, for plaintiff in *Cole v. Swanson*,⁵⁸ and the next case also, *Von Schmidt v. Huntington*.⁵⁹ *Von Schmidt* involves subtle questions of Mexican procedural law and Anglo-American equity practice in a corporate dissolution of a mining company. Dwinelle appears for the city of San Francisco in *City of San Francisco v. Clark*⁶⁰ but as the plaintiff *in pro per* in the very next case claiming an attorney's fee from the San Francisco County public administrator (who had defended on the grounds that the fee sought had been contingent): *Dwinelle*

⁵⁶Shuck, *Bench and Bar*, 193.

⁵⁷According to the reminiscences of the dean of the San Francisco Bar in the 1920s, Jeremiah F. Sullivan, "How Adventurous Gold Miners Won Immortal Fame as Lawmakers . . ." originally in the *Bulletin of the San Francisco Bar Association*, September 8, 1925, accessible at www.sfmuseum.org/hist3/laws.html.

⁵⁸1 *Calif.* 53 (1850).

⁵⁹1 *Calif.* 55 (1850).

⁶⁰1 *Calif.* 386 (April term, 1851).

v. Henriquez.⁶¹ An attorney who represents himself may have a fool for a client, but what often matters is how good his lawyer is. Dwinelle won his case for his fees. The 1852 city directory shows Dwinelle's offices at the Bolton & Barron's Building on Merchant Street near Montgomery Street, along with eleven of the other ninety-eight lawyers listed, as well as many others near the intersection of the same two streets. These were the days only shortly after those "when the water went up to Montgomery Street."⁶²

One leader of the bar of the day was Annis Merrill. He had been a professor of Latin and Greek before coming to California. Later he reported that he arrived in 1849, began practicing law that year, and "cleared \$20,000 for the first year I was here."⁶³

Other lawyers who signed the petition and who also appear in the directory include N.W. Chittenden, of 110 Battery Street. R.N. Morrison appears in partnership with L. Archer at Argenti's Building, 135 Montgomery Street, in the 1852–53 city directory. Several of these petitioning lawyers also show up in the first volume of the *California Reports*. P.A. Morse appears as counsel for the defendants in one of the earliest California Supreme Court cases, *Gonzalez v. Huntley & Forsyth*—an entirely procedural ruling.⁶⁴ E.C. Marshall appears for the plaintiff in *Lawrence v. Collier* for damages for assault and battery "committed . . . while crossing the country from Santa Fe to California."⁶⁵ W.M. Stafford appears for the defendants in *Payne v. Jacobs*.⁶⁶ J.B. Hart appears for the defendant in *Palmer v. Brown* and the next case as well, for the plaintiffs.⁶⁷ Some of the petitioning San Francisco lawyers thus had respectable appellate careers, however rough trial practice in Frisco may have been.

⁶¹1 *Calif.* 387 (April 1850).

⁶²*San Francisco City Directory, Legal Directory* (1851 and 1852). I am grateful to Ruth E. Carsch, consulting information specialist, for copies of the relevant pages of the old directories and for a portrait of John Dwinelle.

⁶³Shuck, "Veterans Surviving in 1900 [Annis Merrill, report of conversation by Shuck]" in *Bench and Bar*, 486; that sum is equivalent to perhaps a million or more dollars today, although San Francisco was a very expensive town at the time, compared to eastern cities.

⁶⁴1 *Calif.* 32 (December term, 1850).

⁶⁵1 *Calif.* 38 (1850).

⁶⁶1 *Calif.* 39 (1850).

⁶⁷1 *Calif.* 42 (1850).

After the rush of gold, however, the wealth of the land soon came to issue.⁶⁸ Congress had established the Board of Land Commissioners in 1851, to adjudicate (all too comprehensively with respect to perfect titles) the competing claims to California land involving Mexican grants. In San Francisco's only federal trial court, United States District Judge Ogden Hoffman assumed land commission appellate jurisdiction and admiralty jurisdiction as well as general federal jurisdiction, upon the institution of the court and his appointment in April 1851. He adjudicated almost five hundred land cases, sitting *de novo* after land commission proceedings.

Land grant cases often turned on the validity or fraudulence of title or documentation. One such was Judge Hoffman's celebrated *Limantour* litigation in the 1850s. He found the grants covering 15,000 acres and half of San Francisco (among others) to be forgeries, reversing the land commission.⁶⁹ Judge Hoffman also decided at least a thousand admiralty cases between 1851 and 1856. His too was a plaintiffs' court.⁷⁰ This no doubt reflected the merit of the claims of sailors and others who were litigating.

Then the flows of water permeated California jurisprudence. The courts reaffirmed common law riparian rights: "The act of 1850 adopts the common law of England: not the civil law; nor the *jus commune antiquum*, or Roman 'law of nature' of some of the civil-law commentators . . . ; nor the Mexican law; nor any hybrid system."⁷¹

⁶⁸Christian G. Fritz, "The Judicial Business of a Nineteenth Century Federal Trial Court: The Northern District of California, 1851 to 1891," *Western Legal History* 5:2 (Summer/Fall 1992): 227–28, discussing "Private Land Grants." See also Johnson, *Founding*, 240.

⁶⁹Shuck, *Bench and Bar*, 472–73; *Reese v. United States*, 76 U.S. (9 Wall.) 13 (1869) (by Justice Field) exonerated Joseph Yves Limantour's sureties. Their services were required after his indictment and arrest in connection with his presentation of the grants. Limantour, with all his witnesses from Mexico, had been denied a hearing on the validity of his claims. He, naturally enough, then repaired to Mexico. Fifteen thousand acres is about twenty-three square miles, half the extent of present-day San Francisco.

⁷⁰See, generally, Fritz, "Judicial Business."

⁷¹*Lux v. Haggin*, 69 Calif. 255, 384, 10 Pacific 674 (1886) in which common law riparian rules prevailed (in California's longest reported decision). The court continues, "And the expression 'common law of England' designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law." But to reach its decision, the court nonetheless had to look extensively at Mexican law (313ff) with respect to water rights. "Land barons" such as Charles Lux, his co-plaintiff James C. Crocker, and others, notably cattleman Henry Miller, owned "estates that encompassed hundreds of thousands of acres," according to Johnson, *Founding*, 241. These lands had largely been Spanish or Mexican land grants, in particular some fifteen northern California ranchos; Pitt, *Decline*, 99.

Riparian rights stabilized agriculture and ranching, despite the success of the appropriative system that grew up for purposes of mining on public land.⁷² The appropriative system was unknown to the common law, but neither was it a creature of civil law. It arose from the mining practices and codes in the gold fields. California judges employed common law processes to resolve the disputes that got to court. "First in time, first in right" provided the rough rule of decision from 1850 on.⁷³ The societal benefit of putting valuable and public resources immediately to their highest value use may be felt as a strong undercurrent. Reaffirmation of riparian rights implemented the same policy as competing values emerged.

With the enactment of the Field Codes in 1872, statutory rules of decision came to the fore, much as the authors of the 1850 petition had hoped. But the common law processes, ratified in the enactment in 1850 of the common law as California's law, continued unabated.⁷⁴

As "Forty-Niner" lawyers jostled for rules of decision and saw their fortunes in upwelling litigation, and perhaps Mexican land grants or city lots, other young men looked to the gold fields for their futures. Some evolved working and effective codes of rules.⁷⁵ A few miners prospered, but generally not as much as those who sold mining equipment to them.

NOT ALL THAT GLISTERS IS GOLD: A SAD CODA TO GOLD RUSH HOPES AND DREAMS

Yet many an immigrant died for having looked to a bright future in San Francisco or the gold fields. An 1851 illustrated weekly in New York reported, next to a view of San Francisco, "San Francisco, [is] a place which has drawn to it so many of our citizens. And although many have found an untimely

⁷²See John D. Works, "Irrigation Laws and Decisions of California" in *Bench and Bar*, 102.

⁷³Thus the later civil code, sec. 1414 (1872), ratifies that earliest rule: "As between appropriators, the one first in time is the first in right."

⁷⁴Lee, "The Civil Law and Field's Civil Code," *passim*.

⁷⁵See John F. Davis, "The History of the Mining Laws of California" in *Bench and Bar*, 279; also Palmer and Selvin, *The Development of Law in California*, 3. These codes did not derive from civil law; they were "a special kind of law, a sort of common law of the miners," according to the argument of counsel and a note of the reporter (Wallace) in *Sparrow v. Strong*, 70 U.S. 97, 100 (U.S., Nevada, 1865).

grave, yet still the tide of immigration thither seems not at all to wane; but rather to increase in numbers and character."⁷⁶

One such immigrant wrote some last words in 1849:

Dying Californian's Request

1

Come brothers gathered round my bed
For I am dying now
The last bright hopes of life are fled
And clammy is my brow
But reason retains her thrown [sic]
Then list to what I say
And hear the message to my home
My home far far away

2

Go tell my father not to blame
His wayward erring child
But kindly speak of his dear name
On whom in youth he smiled
Go tell my mother pure and fair
That my last act shall be
To repeat that well remembered prayer
I learned beside her knee

3

And when I am dead take off this ring
And bear it to the shore
Tell Mary 'tis the last from him
Who sleeps to wake no more
And tell her in the courts above
I'll think of that dear home
When first to me she pledged
Her love in that bright sunny bower

4

And this dear tress her own hand gave
With it I cannot part
And when you lay me in my grave
Oh place it on my heart
For oh in death I fain would keep
A gift from one so dear
And Oh I fear I could not sleep
Without it being there

⁷⁶This is the interpretive text accompanying the scene of San Francisco and miners in gold country by Caseliar, in *Gleason's Pictorial Drawing Room Companion* of July 5, 1851.

5

Brothers you soon must close my eyes
And make my last cold bed
Before another sun should rise
I shall be cold and dead
Farewell my friends[,] my happy home
I nevr [sic] shall see you more
I soon shall slumber silently
On San Francisco's shores⁷⁷

⁷⁷This poem is handwritten on two sides of a very old, now-darkening sheet of paper, perhaps from the endpaper of a book, 7¼ inches by 9¼ inches, torn at the length of its left margin with some impress there, and once folded in its middle, in now fading brown—perhaps originally black—ink, in a fine but stressed nineteenth-century hand, using a fine-tipped pen often dipped in ink mid-word. It bears at its bottom in a modern hand in pencil "San Francisco-1849." It is transcribed here with the original spelling and orthography. It came from the estate of a Burlingame, California, book dealer, Vernon Howard. His estate passed this sheet (and much else) on to the late James Maxwell, the library of whose estate in turn came to the California Historical Radio Society. This sheet came to light in my assessment of the archival materials in that collection.

BOOK REVIEWS

The Opium Debate and Chinese Exclusion Laws in the Nineteenth-Century American West, by Diana L. Ahmad. Reno: University of Nevada Press, 2007; 132 pp.; notes, bibliography, index; \$21.95 paper.

Most students of American history know that Chinese immigrants faced enormous prejudice in the United States in the nineteenth century. In 1882, Congress passed the Chinese Exclusion Act barring all Chinese laborers from entering the country for ten years. Historians have identified three main reasons for this law: economic competition, pervasive racism, and politics. In *The Opium Debate*, Diana L. Ahmad adds a fourth reason fueling the demand for Chinese exclusion: the Chinese use of opium and its negative impact on American morals and culture. Although “[f]ew Chinese involved themselves in the business of the opium dens,” Ahmad argues, “the white middle and elite classes failed to acknowledge that. They saw both the narcotic and the Chinese as threats to their society and wanted them eliminated as quickly as possible” (p. xi).

Opium, like most drugs, was legal in the United States in the nineteenth century and was often used—along with morphine, a derivative of opium—as a painkiller by upper- and middle-class women. “Medicinal-opium could be taken with a doctor’s permission and consumed at home alone,” Ahmad writes, “while smoking-opium was a communal practice done in Chinatown with members of the demimonde” (p. 38). Ahmad stresses the distinction between the ingestion of *medicinal* opium, which predated the arrival of large numbers of Chinese immigrants, and the practice of *smoking* opium, which the Chinese brought with them, first to California and the West Coast during the gold rush, and later to the East. “From the 1850s to the early 1870s,” she notes, “generally only young Chinese men smoked opium” (p. 23); consequently, the practice received little attention in the press or elsewhere. But as smoking opium spread beyond Chinatown to the “so-called respectable class” that included “merchants” and “gentlemen,” as well as “married and single women” (p. 32)—just as the anti-Chinese movement was mounting—the drug drew increasing scrutiny. Smoking-opium, press reports charged,

sapped men of their virility, women of their virtue and reproductive abilities, and all Americans of their morals, money, and mental health. Declaring that "opium has furnished more patients for the lunatic asylums of the country than all other known vices" (p. 39), newspapers began referring to the drug as a "cancer," "a growing evil," and "a burning shame to our civilization" (p. 56). Many claimed that opium led directly to death and disease, the most peculiar of which was "Orientalness," which allegedly transformed the appearance of an Anglo-European to that of a Chinese "with yellow-streaked complexions and blackish and yellowish-blue circles around their eyes" (pp. 43–44).

The anti-opium campaign galvanized the anti-Chinese movement, spurring local lawmakers to act. In 1876, Virginia City, Nevada, passed the nation's first ordinance abolishing opium dens, and Nevada outlawed the drug statewide a year later. Other towns, states, and territories quickly followed. By 1881, Montana, Wyoming, Utah, Idaho, and California had all passed legislation outlawing opium and opium dens. Concurrent with these efforts to ban the drug, lawmakers on the national level made several efforts to reduce or ban Chinese immigration: Congress passed the Page Act in 1875, the Fifteen Passenger Bill in 1879, and the Chinese Exclusion Act in 1882.

It is at this point—after building a solid argument on the growing fears Americans voiced regarding opium and connecting the drug's dangers to Chinese immigration—that *The Opium Debate* falls short. In the 1870s and 1880s, anti-Chinese legislation prompted vigorous debate in Congress, inspiring passionate, often lengthy speeches from scores of lawmakers. Politicians pulled no punches, filling their rhetoric with some of the most vile, racist vitriol in American history, as they cited every conceivable reason to bar Chinese immigrants from the United States. As Ahmad herself notes, politicians "minced few words about the supposed Chinese attack on American society" (p. 75). And yet, she concedes, "senators and representatives did not name opium smoking specifically in their arguments for Chinese exclusion" (p. 74). The closest they came was "cit[ing] social reasons for ending Chinese immigration" by noting "references to dens, lust, and vice" (p. 74). Coming near the climax of the book, this is simply bizarre. At the very least, Ahmad ought to have speculated as to why national politicians opposed to the Chinese failed to mention the subject directly, especially since it would have bolstered their arguments and strengthened their positions. And no one, after all—including their opponents—would have defended opium or its use.

Although this shortcoming undercuts a key element of Ahmad's argument, *The Opium Debate* is a solid addition to the literature on both the anti-Chinese debate of the nineteenth century and the growing effort to ban addictive drugs in the United States. The book is elegantly written and meticulously researched. It is also highly relevant. By linking the spread of opium to what was, ultimately, a tiny minority of the Chinese-American population, the "opium debate" of the late nineteenth century created a stereotype that lingers to the present day.

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The Law into Their Own Hands: Immigration and the Politics of Exceptionalism, by Roxanne Lynn Doty. Tucson: University of Arizona Press, 2009; 176 pp.; notes, bibliography, index; \$50.00 cloth; \$19.95 paper.

In this slim and informative volume, Roxanne Lynn Doty examines the latest wave of anti-immigrant sentiment that has swept the United States in the wake of 9/11 as exemplified in the "border vigilante" movement most obvious along the U.S.-Mexican border since 2004. Members of this movement—composed of a variety of individuals and groups and armed civilians—have taken it upon themselves to "patrol" said border and ensure that "illegals" (i.e., people attempting to cross into the U.S. illegally) are spotted and, as the groups tell it, are reported to the Border Patrol. The author links anti-immigrant sentiment to (1) national security concerns, and (2) white supremacist and nativist ideology, and the Christian right. She notes, and rightfully so, that anti-immigrant beliefs are "subject to manipulation at the hands of well-organized groups and local leaders" (p. 9).

At the heart of the arguments against undocumented immigration, Doty writes, is the idea of "sovereignty"—especially "popular sovereignty"—which she defines as the idea that the legitimacy of a ruler or state is found among "the people" who are the source of that sovereignty (i.e., through a vote or some similar legitimate process of granting a leader or state certain powers). This notion is something that a wide spectrum of citizens may share, no matter how radically they differ in other political and social beliefs; it is an important element in the anti-immigrant movement.

Doty further notes that within both anti-immigrant sentiment and the current vigilante movement is the idea of "exceptional-

ism," which refers to political situations in which groups and individuals are turned into an "exception" through the exercise of sovereign power. In terms of anti-immigrant sentiment, those who engage in exceptionalism feel that they are being forced to accept something they don't want, and they aim their ire not only at illegal immigrants, but also at the state, which they claim has failed them with regard to securing the border. In essence, those engaged in exceptionalism believe *their* rights are being trampled; this is key to understanding the way their movement works.

The author starts her study with the Minuteman Project, based in Tombstone, Arizona, and provides her own observations (she spent time with many of these groups and individuals) as well as the theoretical basis in which she is working. In chapter 2, Doty introduces other groups and individuals, demonstrating how mainstream anti-immigrant sentiment can translate into armed action.

Chapters 3 and 4 are the meat of this study. In chapter 3, Doty shows how the mainstream media and allegedly mainstream organizations have both encouraged and validated the claims of many individuals in the border vigilante movement, thus making these individuals' extremist messages palatable. She notes that the more legitimate attention the vigilante movement gets through venues like Fox News and the Center for Immigration Studies (which gets face time on Capitol Hill, although the Southern Poverty Law Center has labeled it an anti-immigration group), the more the movement can influence policy on government levels (and certainly have). Meanwhile, academic experts and immigrant resource experts are virtually ignored or given short shrift by many TV and talk radio programs. In chapters 4 and 5, Doty points to the importance of the mainstream media and the internet in the spread of the anti-immigrant message, providing further validation not only for the main movement, but also for its fringe elements.

I would have appreciated a stronger analysis by Doty of the role that white supremacist, nativist, and rightist Christian ideology play in the border vigilante movement (and, by extension, the broader anti-immigrant movement) and what that role means with regard to policy shifts at the local, state, and federal government levels. The author does, however, provide specific examples of these links and notes why such alliances can further alienate people from each other within a context of fear. Doty's work here demonstrates the dangerous turns that can take.

Overall, *The Law into Their Own Hands* is an approachable volume that effectively combines theory, personal narrative,

and secondary and primary sources in a compact, easy-to-understand format. It should be required reading, at least in undergraduate courses that deal with American history and politics and media studies.

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Shaping America: The Supreme Court and American Society, by Edward F. Mannino. Columbia, SC: University of South Carolina Press, 2009; 328 pp; notes, index; \$44.95 cloth.

In his introduction to this chronicle of the Supreme Court's role in shaping American society, Edward Mannino points out that "the influence of the Supreme Court of the United States on our daily life is pervasive." He supports this premise with a historical overview of the Court's opinions and the political situation that existed at the time various rulings were argued and issued.

The author conveniently arranges the subject matter in a format that is easily approached by topic, such as "The Supreme Court and Civil Liberties," to take the title from one of the eleven chapters in this book as an example. Included in this historical work is a lengthy and valuable chronology that aids in understanding—from a time-line perspective—the dates and constitutionally significant events that shaped American legal history. Also included is a list of cases discussed in the book. Of significance to the reader who desires to enhance his or her understanding of many of the author's observations is the "notes" section, comprising some twenty-eight pages of supplementary references that Mannino has relied on in formulating his observations and remarks.

The author inserts personal and, quite frequently, trenchant observations and remarks regarding particular subjects or areas. In the absence of documentation for some of these comments, the reader should be cautious in adopting these observations as historically factual. In the chapter entitled "The Supreme Court and Abortion," the author writes, "Indeed the decision in *Roe v. Wade* is at or near the top of the list of the Court's most vilified opinions from the twentieth century." However, the author fails to cite specific references to support his conclusion. One might argue to the contrary, with ample justification, that *Roe v. Wade* was one of the most praised opinions by certain communities within the United States, especially those interested in "choice" regarding parenthood. The author cites an article that claimed that "a June 1972 Gallup Poll reported more liberal

attitudes toward abortion, including a response that 64 percent of the individuals polled believed that the decision on abortion should be left to the woman and her doctor." The issues raised in *Roe v. Wade*, then as now, remain contentious.

In this volume published in 2009, the author cites and surveys cases and decisions that involve and affect the relationship of the federal government and the states, the significance of the "slavery cases," and, of course, their impact on American society and culture. The author also delves into the Supreme Court's opinions as to regulation of commerce and business and discusses the "new federalism" that gained attention at the end of the twentieth century. He reviews the Court's impact on civil liberties and First Amendment issues affecting freedom of the press, religion, and association, treating each issue separately and in significant depth.

In relating cases to public attitudes, Mannino includes comments and a review of the conflicting constitutional considerations that come before the Court. He explains the due process and equal protection clauses in the U.S. Constitution in terms that a layman can understand and appreciate. In this regard, he examines the significance of shifting societal values in relation to the decisions generated by the courts. In discussing this issue, the author focuses on the individual justices, their backgrounds, when relevant (the discussions of Justice Frankfurter and the World War II internment cases were most interesting), and the various rulings and opinions that the various justices have written or participated in.

In raising this issue, the author reflects on the ongoing debate as to the proper role of the judiciary in constitutional interpretation, looking at the Constitution as a "living" document designed to address present-day needs and opinions, or looking only at "the text and original history of the Constitution." affect the outcome and the ruling of the court; He discusses in detail the question of whether it is the proper role of the Court to consider public opinion and societal factors in its constitutional considerations.

The author concludes that the Court must decide some cases even though the "dominant political culture and/or strong public attitudes will not welcome its judgment." This is a theme consistently expressed *Shaping America*; the author indicates that the Court might consider deferring some rulings that may not be popular in a contemporary sense and "ask whether and why the further passage of time will assist the Court in reaching a judgment that will receive greater public tolerance, if not acceptance."

Concluding that the Court is shaped by public sentiment and societal values that impact constitutional considerations,

the author argues that the process of determining legal issues is a two-way street that requires men and women of "vision" and perhaps "restraint."

A trial lawyer and adjunct professor of law, Mannino has written a useful and interesting study of significant legal issues that have shaped American society.

James P. Spellman
Long Beach, California

Servants of the Law: Judicial Politics on the California Frontier, 1849–1889, by Donald R. Burrill. Lanham, MD: University Press of America, 2011; 294 pp.; illustrations, notes, index; \$47.00 paper.

Most Americans, if asked to describe the life and character of a Supreme Court justice, are unlikely to discuss dueling, or to use the term *knife bearing*. If "contempt of court" is mentioned, most would expect the judge to be the calm and dignified enforcer of court decorum, not the one sentenced to six months in jail. And although it is not uncommon for justices to be accused of political or economic bias, there is rarely evidence of justices promising in writing a specific outcome to cases not yet before their court.

Most Americans would be amazed at the lives and legal careers of David S. Terry, justice of the California Supreme Court from 1855 to 1859, and Stephen J. Field, justice of that same court from 1857 to 1863, and associate justice of the U.S. Supreme Court from 1863 to 1897.

Each of these men played noteworthy roles in the development of politics and law in early California, both during their tenure on the bench and in the years before and after as practicing attorneys, politicians, and players in the economic development of the state. Although both were drawn to California by "gold fever," they brought different perspectives to life on the frontier. David Terry had fought in the Texas war of independence and later served in the Confederate army. Stephen Field was college educated and had helped his brother Dudley Field prepare the 1847 New York Codes of Legal Procedure. Terry cherished personal honor above all things. Field was recognized as one of the leading legal minds of the West.

These differences of background and temperament led to restrained disagreement during their time together on the California Supreme Court. But little restraint was shown by both men in the years after, when they played opposing roles in regard to the Vigilance Committee of 1861 (Terry stepped down

from the supreme court in order to take a more political role in "bringing the Vigilantes to justice"), and when they worked closely with opposing economic interests (Field was known as a tool of the railroads, and Terry was the favorite litigator of the growers in the Central Valley). With a public viciousness unimaginable between jurists today, Terry and Field launched personal attacks on each other in correspondence, public debate, and the newspapers.

This bitter history, however, was but prologue. In September 1884, Sarah Althea Hill, a southern belle who came to San Francisco with the goal of marrying money, filed a warrant for the arrest of Nevada senator (but San Francisco resident) William Sharon for desertion and adultery. It was the first volley in a legal battle that would be fought in state and federal court, would provide daily fodder for the tabloids and saloons, and would outlive the senator whose marital status it concerned. When David Terry joined the legal team for Hill, he tied his fortunes to hers. As her attorney and eventually her husband, he was drawn into the fray in a way that touched his sense of honor and chivalry, and led to disaster.

Donald R. Burrill's investigation into the lives of David Terry and Stephen Field is both thorough and original. He notes many instances in which the accepted versions of the events (e.g., as presented by noted historian H.H. Bancroft) are not supported by the original source documents. In doing so, he has provided a more balanced judgment of the men and a richer tale of their interactions. In *Servants of the Law*, he paints the character of each of these men, drawing from their life histories and their own writing concerning their beliefs and convictions. He explores their opinions and actions as individuals but also shows how each was in fact representative of his native region. How interesting that the seminal issues of the Civil War, which often seem so distant from California, are reflected in the career-long battles of Justices Stephen Field and David Terry.

In addition to the characterizations drawn by the text, the author has provided photographic portraits of Field and Terry, as well as many of the other participants in the key events of the narrative, including Sarah Althea Hill and Senator William Sharon. Unfortunately, there is no photograph of U.S. Deputy Marshall David Neagle, the man who shot Judge Terry while serving as Justice Field's bodyguard.

Finally, the title of this work is surprisingly staid in comparison to the story it tells. This is no dry legal history, no recitation of dates and names, no bloodless analysis of legal proceedings. Well-researched and beautifully written, *Servants of the Law* is history that reads like fiction. Anyone who doubts that California was indeed part of the "wild" West

need look no further than this book to find all the adventure, romance, and unrestrained emotion of the classic western.

Lynn C. Stutz
San Jose, California

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.

Acosta, Jesús Ángel Enríquez. "Migration and Urbanization in Northwest Mexico's Border Cities," *Journal of the Southwest* 51:4 (Winter 2009).

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Arendt, Emily J. "The Wyoming Experiment and the Case for Practical Propaganda," *Annals of Wyoming* 81 (Winter 2009).

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Baldrice, Michael, and Carrie Smith. "Research, Management, and Interpretation of Historic Sheep Camps and the East Side of the Tahoe National Forest," *Nevada Historical Society Quarterly* 52 (Winter 2009).

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Belknap, Michal. "Why *Dennis v. United States* Is a Landmark Case," *Supreme Court History* 34:3 (2009).

Bennett, Adam. "'The Up-Growth of New Industries': Transformation of Nevada's Economy, 1918-1929," *Nevada Historical Society Quarterly* 52 (Fall 2009).

Bishop, Ronald. "'Little More Than Minutes': How Two Wyoming Community Newspapers Covered the Construction of the Heart Mountain Internment Camp," *American Journalism* 26 (Summer 2009).

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Blumm, Michael C., and Jane G. Steadman. "Indian Treaty Fishing Rights and Habitat Protection: The *Martinez Decision* Supplies a Resounding Judicial Reaffirmation," *Natural Resources Journal* 49:3 & 4 (Summer-Fall 2009).

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———. "Taking Timber, Earth, and Water: The Denver and Rio Grande Railroad and the Struggle for New Mexico's Land Grants," *Natural Resources Journal* 48:4 (Fall 2008).

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Davis, Ethan. "An Administrative Trail of Tears: Indian Removal," *American Journal of Legal History* 50 (January 2008).

DiMento, Joseph, and Kazuto Oshio. "Forgotten Paths to NEPA: A Historical Analysis of the Early Environmental Law in the 1960s United States," *Journal of American and Canadian Studies* 27 (2009).

DiStefano, Diana L. "Disasters, Railway Workers, and the Law in Avalanche Country, 1888–1910," *Environmental History* 14 (July 2009).

Duchemin, Michael. "Water, Power, and Tourism: Hoover Dam and the Making of the New West," *California History* 86:4 (2009).

Fisher, Kristina G. et al. "Symposium on Land Grants and the Law: The Disputed Legal Histories of New Mexico's Land Grants," *Natural Resources Journal* 48:4 (Fall 2008).

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Floyd, Larry C. "Jake Hamon: 'The Man Who Made Harding President,'" *Chronicles of Oklahoma* 87:3 (Fall 2009).

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Gallegos, Brisa Violeta Carrasco. "Tijuana: Border, Migration, and Gated Communities," *Journal of the Southwest* 51:4 (Winter 2009).

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Greenberg, Jonathan D. "The Arctic in World Environmental History," *Vanderbilt Journal of Transnational Law* 42 (October 2009).

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