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Cover photo: Kelli McCoy's article focuses on the Mann Act of 1910, which ostensibly aimed at ending what was believed to be an international slave trade in women and girls. (Illustration from *Fighting the Traffic in Young Girls or War on the White Slave Trade* by Ernest A. Bell)

REGULATING RESPECTABLE MANLINESS IN THE AMERICAN WEST: RACE, CLASS, AND THE MANN ACT, 1910–1940

KELLI MCCOY

On the Fourth of July holiday in 1925, Justus Bonness, John Grimes, and two young women decided to take a vacation together. They traveled by automobile from Seattle, Washington, to Vancouver, British Columbia, and got two hotel rooms. They explored the city, went out to dinner, drank some alcohol, and drove home the next day. A year later, when the men found themselves in court on charges of violating the Mann Act, they recalled innocently sharing one room, while the young women stayed in the other. However, the young women, Grace Holland and Mildred Sites, testified that the men had not stayed in their own room on that fateful night, but had instead split up and each stayed in a room with one of the women. Like many other Mann Act cases in the first decades of the twentieth century, this one revolved around a crucial detail involving the hotel rooms: was there at least the appearance of sexual impropriety between the men and the much younger women, to whom they were not married? The answer to that question stood to determine the difference between freedom and incarceration for the men, who were ultimately convicted and sentenced to eighteen months in the federal

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penitentiary at McNeil Island, Washington. There would be no legal consequences for the women.¹

In this case, as in many others, the Mann "White Slave Traffic" Act was interpreted broadly to include a range of noncommercial relationships. An examination of such cases in the American West reveals the ways in which the Mann Act was used to enforce the ideal of respectable manliness and constrain the highly mobile working class that seemed to threaten the social order.

The Mann Act was ostensibly an effort to end "white slavery," or the forced prostitution of women and girls. At the dawn of the twentieth century, Americans responded with increasing alarm to reports that young women were being drugged, raped, kidnapped, and locked up in brothels as sex slaves. They called this traffic in women "white slavery." The stories of white slavery told by newspapers and social reformers—often recounted in lurid and sensational detail—made it clear that the modern world held many dangers for young women. White slavers, as the story went, preyed on the natural moral purity of women and their naïveté about all of the dangers that lurked in the ever-growing industrial cities. Although the individual stories differed, white slavery narratives typically told of the downfall of an innocent young white woman, often from the countryside, who was tricked or coerced by a man into going to one of the many unsafe places in the city—the dance hall, the saloon, even the ice cream parlor—where,

¹*U.S. v. Justus I. Bonness and John R. Grimes*, case file 10116, Criminal Case Files, U.S. District Court for the Western District of Washington Northern Division (Seattle), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Alaska Region (Seattle). The men were in their forties, and the young women were probably ages sixteen and eighteen at the time of the transportation, although there is some disagreement in the trial transcript about their exact ages. All four of them were white. Grace Holland was the younger sister of Justus' deceased wife. Grimes worked for Bonness in his grocery store. Holland and Sites knew each other because they both lived at the Ruth School for Girls, a Protestant reformatory home and school for girls over the age of sixteen who had either been in trouble or were homeless. Despite the young age of the girls, that does not seem to have played much of a role in the trial or sentencing (much heavier sentencing was allowed when girls were minors). Perhaps part of the reason for the relatively light sentence was that Holland and Sites differed in some important parts of their stories, leaving the impression that they had perhaps instigated the whole trip, and were now telling this story to protect themselves from getting into trouble at the Ruth School. We have more information about this case than most, because Justus Bonness had the financial resources to appeal the case, and in that process a trial transcript was created. Most Mann Act cases from this time period did not have trial transcripts.

away from the watchful eyes of her parents, she was drugged and woke up in a brothel, ruined.²

The white slavery panic clearly reflected a variety of concerns that Americans had in the early twentieth century, including fears about the independence of women, urbanization, and immigration. Although the young women in white slavery stories were almost always white, native-born Americans, the predatory men were often described in vague terms as, in some way, "dark" or "foreign." Social reformers, based particularly in Chicago and New York City, raised the alarm about white slavery in books, pamphlets, novels, and ultimately even plays and motion pictures. Throughout the early 1900s and 1910s, the country's newspapers, including the *New York Times*, regularly included white slavery stories.

In 1910, the U.S. Congress took up the fight against white slavery by passing the Mann "White Slave Traffic" Act. The

²For a perfect example of this, see Ernest A. Bell, ed., *Fighting the Traffic in Young Girls or War on the White Slave Trade* (Chicago, 1910).



**DANGEROUS AMUSEMENTS—THE BRILLIANT ENTRANCE TO
HELL ITSELF**

Young girls who have danced at home a little are attracted by the blazing lights, gaiety and apparent happiness of the "dance halls," which in many instances lead to their downfall.

White slavery narratives typically described the downfall of innocent young white women who were tricked or coerced by men into going to unsafe places, such as dance halls. (Illustration from *Fighting the Traffic in Young Girls or War on the White Slave Trade* by Ernest A. Bell)

"FOR GOD'S SAKE DO SOMETHING"—General Booth

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the human race.**

Mann Act declared that "any person who shall knowingly transport or cause to be transported . . . in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony [italics added]." It decreed maximum fines of \$5,000 and/or prison sentences of five years, unless the victim was under the age of eighteen, in which case those maximums were doubled. Although a violator of the Mann Act could be male or female, the victim had to be a "woman or girl."³

No other federal law quite like it existed at the time. The individual states had the power to regulate licit and illicit sex. Therefore, to regulate this "traffic in women," Congress turned to the Interstate Commerce Clause to give them the authority for federal regulation of sexual morality. At the time, the Interstate Commerce Clause was not yet the broad tool it is today; it had been used to regulate only the transportation of a few things, including diseased cattle. The Mann Act added the transportation of women to that list. There also was no federal police agency in place to enforce a law like this, so Congress poured funding into a small, new organization called the Federal Bureau of Investigation—what would quickly become known to Americans as the FBI.

Although the Mann Act ostensibly was aimed at ending what was believed to be an international traffic in women and girls, in reality it became a heavy-handed tool for moral regulation and social control, as David Langum demonstrated in *Crossing over the Line: Legislating Morality and the Mann Act*.⁴ The Mann Act strayed far from any direct connection to sex slavery and quickly became a way of regulating the interstate travel of people engaged in consensual affairs.

However, the question that has never truly been answered is, Who were those people? Who were the ordinary Americans whose lives were constrained and even upended by the passage of the Mann Act? Who were the thousands of American men (and a few dozen women) who went to county jails and federal penitentiaries from 1910 through the 1940s for violating the Mann Act? Understanding who the alleged perpetrators and victims were adds to our understanding of how and why the Mann Act was enforced and reveals the ideas about masculin-

³That remained true until 1986, when the Mann Act underwent significant revisions to narrow its focus, make it gender neutral, and eliminate the terms *debauchery* and *immoral purposes*.

⁴David Langum, *Crossing over the Line: Legislating Morality and the Mann Act* (Chicago, 1994).

ity, femininity, race, and class, that were at the heart of Mann Act prosecutions.⁵

An examination of the more than one thousand Mann Act cases from California, Oregon, Idaho, and Washington, as well as the records of the FBI and the federal penitentiary at McNeil Island, Washington, makes it clear that in the West, the Mann Act was used to regulate respectable manliness and enforce a particular type of social order, particularly among the highly migratory working class. These western states make for a particularly good regional case study on the Mann Act, since they had a relatively high number of Mann Act prosecutions and yet were removed in many ways from the people—almost all of whom lived in Chicago or New York City—who were the driving forces behind the white slavery narratives and the passage of the Mann Act. Oregon, Washington, and Idaho had particularly high numbers of Mann Act prosecutions, with about nine hundred total. Although the Pacific Northwest had merely 2.2 percent of the population of the United States, it had almost one-tenth of the total Mann Act cases and at least 8 percent of the total convictions.⁶

Although the Mann Act was ostensibly meant to end forced prostitution, it very quickly became a way of prosecuting men involved in a variety of noncommercial relationships. These

⁵In an effort to know more about the women and men who found themselves bound up in Mann Act cases, I looked at over a thousand Mann Act cases in California, Oregon, Washington, and Idaho. These federal cases are stored in the regional branches of the National Archives, located in Riverside (formerly in Laguna Niguel), California; San Bruno, California; and Seattle, Washington. The process of finding these cases is very labor-intensive, as no index of them exists. Finding the Mann Act cases requires going through every page of the docket books for every year, identifying the white slavery/Mann Act cases, then using the file number to request the particular case file. As of my last visit, none of that was digitized. Many of the case files contain very little information—always an indictment, and often a judgment and sentence. Beyond that, the contents varied widely. Court transcripts (even partial ones) typically were included only if the case was appealed. Nevertheless, sometimes there were gems to be discovered in these files, most often in the form of evidence that was used in the trial. The evidence could be hotel or ship registers, photographs, and—the very best—love letters written between the man and the woman, before things went terribly wrong and the man ended up in court.

⁶According to the thirteenth, fourteenth, and fifteenth national censuses, from 1910 to 1930 the U.S. population averaged about 118,659,377 people, while the average population of Oregon, Idaho, and Washington combined totaled about 2,558,146. I used the population statistics for the U.S. that included "outlying possessions," since the Mann Act also covered the territories. Even if the Pacific Northwest is compared to just the population of the continental U.S., it is still a mere 2.4 percent of the total. The proportion of convictions in the Pacific Northwest may have been even higher, but many of the verdicts were unknown because of incomplete docket or file records.

noncommercial cases are particularly useful as a way of investigating culturally dominant ideas about masculinity and femininity. In particular, the Mann Act provided a tool for enforcing middle-class standards of sexual normativity in the face of perceived threats from "sexual deviants," the working class, immigrants, and the younger generation.

Cases involving commercial vice, like prostitution, fit broadly into the anti-white slavery movement behind the Mann Act, even if the women were not actually kidnapped and raped as in the white slavery stories. However, within a few years after the passage of the Mann Act, prosecutions of noncommercial cases involving consenting couples who were not looking for commercial gain had become commonplace and were far removed from the stories of white slavery. Indeed, as early as 1913, *The Washington Post* criticized the broad wording of the Mann Act for swamping the Department of Justice with "so-called white slave cases which bear no resemblance to the traffic in girls and women" and creating a situation in which "any misconduct incident" that involved a woman crossing a state line could be considered a crime.⁷

Noncommercial, consensual cases belied the white slavery rhetoric that underlay the Mann Act and revealed that, from the 1910s to the 1930s, this law was most actively employed in the American West as part of an effort to construct and reinforce normative sexuality and gender roles and regulate the movement of the working-class men who posed the greatest threat to the middle-class social order. In such cases, prosecutors emphasized the ways in which the male defendants had allegedly failed to behave in respectable, controlled ways. The Mann Act punished men who let physical desires take precedence over the protection of women and the home. These western Mann Act cases exhibit a tension between the belief that men had naturally base instincts and the ideal of restrained, respectable manhood that was supposed to keep such desires in check.

⁷"Law Aids Blackmail," *The Washington Post*, June 30, 1913. There is no way to determine precisely which Mann Act cases belonged in the commercial or noncommercial category. Therefore, the conclusion that the noncommercial cases were more common is admittedly an educated guess, based in large part on the number of indictments that include words like *cohabitation* instead of *prostitution*. However, both David Langum and I reached this conclusion independently; I examined cases from the West Coast, and he included a brief discussion of cases from two different regions: Providence, Rhode Island, and Mobile, Alabama. He concluded that, from 1910 to 1944, more of the prosecutions were for noncommercial than commercial cases in both of these locations. Langum, *Crossing over the Line*, 150.

RESPECTABLE MANLINESS AND THE MANN ACT

Prosecutors began pursuing noncommercial cases far removed from white slavery very soon after the passage of the law in 1910. A case soon emerged in California to test the broad application of the Mann Act in situations involving purely consensual, adult affairs. Drew Caminetti and Maury Diggs were friends who lived in Sacramento, California, in 1913. Both men were in their mid-twenties and had wives; Caminetti had two children, and Diggs had one. They had respectable jobs and were from wealthy, powerful families. Caminetti's father had been a state senator in California and was then appointed commissioner of immigration for the Wilson administration.⁸ In September 1912, the two men met and eventually became romantically involved with two unmarried young women, aged nineteen and twenty, whom newspapers described as "members of prominent local families," "society girls," and "sorority girls."⁹ By early March 1913, many people in Sacramento knew about the affairs, and the pressure on the four was growing intense. On March 10, in a frenzied effort to escape the growing scandal—and the possibility of resulting legal action—the foursome decided to leave town together. Although they had considered taking a train south to Los Angeles, the first departing train they could board was headed east, to Reno, Nevada. Their decision to go east instead of south, and thus cross a state line, would drastically alter the next several years of their lives.

After the four were arrested in Reno, the two men were charged with Mann Act violations. Caminetti and Diggs had separate trials in San Francisco and—although there was not even a hint of commercial motive or force used on the women—both were convicted. During their sentencing on September 17, 1913, Judge William C. Van Fleet acknowledged that their crime was not as serious as those motivated by commercial interests, but he argued that it was nevertheless a serious breach of moral behavior. "This was a crime of opportunity," he declared:

The laxity of social conditions and the lack of parental control made it possible. All through this case there is

⁸Langum, *Crossing over the Line*, 98.

⁹*Ibid.*; "Two Men Missing: Two Girls Strangely Disappear," *Los Angeles Times*, March 13, 1913; "Warrants Issued for Two Elopers: M. Diggs and Drew Caminetti Accused of Fleeing with Two Society Girls," *San Francisco Chronicle*, March 13, 1913; "Sacramento Elopers Are Traced to Reno," *Los Angeles Times*, March 14, 1913.

evidence that drink had its paralyzing influence upon the morals and the minds of these men and the young girls with whom they went on that trip to Reno. The terrible, debasing influence of the saloon and the roadhouse is too disgustingly apparent, and I make the observation here that society must pay the price for permitting the existence of these highly objectionable places.¹⁰

The judge sentenced Maury Diggs to a fine of \$2,000 and two years in the federal prison at McNeil Island, Washington, and Drew Caminetti to a fine of \$1,500 and eighteen months at McNeil.

Diggs and Caminetti appealed their cases to the Ninth Circuit Court, which upheld the verdicts, and then to the Supreme Court. Their attorney argued that the Mann "White Slave" Act did not apply in cases that were solely noncommercial in nature, and that the very definition of "white slavery" implied victims who did not go along willingly.¹¹ The Supreme Court, however, disagreed. It said that once a law goes into effect, the interpretation of that law relies solely on its wording, and not on the intention of Congress. Therefore, the words *immoral purpose* could mean any number of things, including debauchery and illicit sex.¹² As the *Chicago Daily Tribune* put it, this meant that the Mann Act could now be used to target "private escapades as well as commercialized vice."¹³

The *Caminetti* Supreme Court decision threw open the door for prosecutions based entirely on noncommercial, consensual sex. What this meant is that the question of the woman's consent could be ignored altogether. No longer did prosecutors have to make the case that women were coerced or forced into transportation; their consent was simply irrelevant and legally unnecessary. This served not only to negate the legal significance of any sort of initiative on the part of the women, but also to place the primary site of moral responsibility or sexual deviance on the male, rendering the female "victims" in Mann Act cases legally invisible, other than as the objects of the transportation and the man's "immoral" purposes.

The *Bonness and Grimes* case in Seattle bore many similarities to the *Diggs* and *Caminetti* cases, including the assumptions made by the prosecuting attorney and the judge about

¹⁰"Prison for Diggs and Caminetti," *New York Times*, September 18, 1913.

¹¹Langum, *Crossing over the Line*, 112–13.

¹²*Ibid.*, 113–14.

¹³"Mann Act Given Wide Scope by Supreme Court," *Chicago Daily Tribune*, January 16, 1917.

what respectable manliness looked like. The jury instructions from Judge Jeremiah Neterer reflected what he understood to be common ideas about masculinity, encouraging the jury to think about how the men's actions—particularly with regard to sex—should be interpreted in their particular social context. Although the defense attorney for Justus Bonness objected to how the jury instructions were delivered, the appeals court did not overturn the verdict. These jury instructions can therefore serve as a window into how the federal courts and juries were interpreting the actions and intentions of men charged with violating the Mann Act.

The jury instructions implied that there was no reasonable presumption of innocence where male sexuality was concerned; the judge suggested that men essentially always had the intention of having sex with women. Bonness and Grimes had been charged with transporting the women for "prostitution, debauchery, concubinage and other immoral purposes," and in the jury instructions the judge first set about giving the legal definitions of these terms.¹⁴ He explained that *prostitution* applied to women who "offer their bodies to indiscriminate sexual intercourse with men," whether or not they were hired.¹⁵ This very broad understanding of prostitution—in which no exchange of money was necessary—left very little distinction between any sex outside of marriage and sex for economic gain. The judge did go on to note that there was no evidence of prostitution in this case which, given his stated definition, seems to have exonerated the women's moral character rather than the men's.

The judge also defined *debauchery* quite broadly, saying that it "means to corrupt, to lead into unchastity, and has been defined as being seduction from virtue or purity [*sic*]. A person who would have intercourse unlawfully with a woman would be debauching the woman, because he would be taking her from the path of purity, and corrupting her character or morals. It would be polluting the woman."¹⁶ This left no distinction between debauchery and sex with a previously chaste woman; they were one and the same. The only way in which extramarital sex would not be debauchery, therefore, was if the woman had previously engaged in indiscriminate sexual intercourse and had thus already fallen off the "path of purity." Like many of the other elements of the *Bonness and Grimes* case, this

¹⁴*Bonness*, case file 10116, Criminal Case Files, U.S. District Court for the Western District of Washington Northern Division (Seattle), 145.

¹⁵*Ibid.*

¹⁶*Ibid.*

definition left no room for the will of the woman: debauchery was defined as something done to a woman, not with her, and was certainly not something a woman could do to a man.

The explanations of *concubinage* and *immoral purposes* were further elaborations on the definitions already given for *prostitution* and *debauchery*. The judge simply said that *concubinage* meant "cohabitation with a woman without legal marriage."¹⁷ Immoral purposes, then, described all of the intentions that led to the aforementioned actions: the purpose of having a concubine, the purpose of indulging "in sexual intercourse not under the sanctity of legal marriage," and the purpose of transporting a woman for these intentions.¹⁸ None of these definitions required force or coercion, and they all suggested the unimportance of consent on the part of the woman.¹⁹

After he gave these definitions, the judge went on to explain how the law related to the facts of the case. He addressed the issue that had been raised during the testimony about whether the women had initiated the trip and "solicited" the men, arguing that under the law it was not material "that the girls went voluntarily or willingly. It is not necessary that any force or compulsion shall be employed to induce or bring about the transportation of the women for the purposes denounced by the statute."²⁰ That is, a Mann Act violation required only that women were transported for immoral purposes, not that they were transported against their will. Indeed, the travel itself was the physical act that constituted the crime, when combined with a certain mindset. No actual sexual relationship was necessary to a Mann Act violation.

The crime itself involved two key components: intent and transportation. However, something more than just knowingly and willfully transporting a woman was necessary for a Mann Act violation; the transportation also had to be accompanied by a specific intent to lead the woman into immorality. Indeed, according to Judge Neterer, "Intent is the ingredient of the offense."²¹ Only the man's "impure" thoughts needed to

¹⁷*Ibid.*, 146.

¹⁸*Ibid.*

¹⁹Indeed, there was a fairly common belief during the nineteenth and early twentieth centuries in the U.S. that women were more inherently moral than men, and that it was therefore impossible for any woman to consent to immoral behavior—that is, sex outside of marriage—without force or coercion. According to that idea, it was actually impossible for a woman to consent to immoral sexual behaviors.

²⁰Bonness and Grimes transcript, 146.

²¹*Ibid.*, 150.

be present at the precise moment that the woman crossed the state line. His intentions both before and after she crossed the state line were not legally relevant, only his thoughts at the time of the crossing. This meant that in Mann Act trials, the physical act of transportation could be proven fairly easily, but it was left up to judges and juries to use their own good sense to discern the man's intentions. And since any jury's "good sense" operates in a specific historical context characterized by certain understandings about masculinity and femininity, their verdicts tell us something about how a man's intent was perceived in the 1920s.

Even when prosecutors could prove that a couple had traveled together, how could they prove that there were immoral purposes or intentions? The intentions and immorality were assumed from the travel itself. In a sort of circular reasoning, a man who traveled alone with a woman, and perhaps even stayed in the same hotel room with her, had done something that looked immoral, and therefore was immoral in that the appearance of immorality tarnished a woman's reputation. This appearance of immorality, generated by traveling together, made the travel itself a criminal act. Merely the potential for immorality to occur when men and women were alone together, away from the watchful eyes of relatives and neighbors, was evidence enough of a man's bad intentions. After all, a respectable man would not call a woman's reputation into question by driving her off in his automobile.

In the jury instructions for the *Bonness and Grimes* case, the judge elaborated on the question of intent, reasoning that the jurors could determine the intentions of the men from what they understood about the nature of masculinity. He reminded the jurors that the men were not charged with having sex with the women, but rather with transporting them with the intention to have sex. The testimony of the women about their sexual relationships with the men was only allowed to show "the intent of the parties at the time, the object and purpose of taking the girls over there. If they were fornicating on this side and fornicating on that side in direct sequence, then the jury would have the right to conclude that the intent and purpose of going was for the purpose of having the illicit relations."²² Illicit sexual acts in and of themselves fell under the laws of Washington State or Canada. Instead, under the Mann Act, the jury was charged with deciding whether the women's claim that they had sex on both sides of the line necessarily meant that the men crossed the line for the specific purpose of having

²²*Ibid.*, 147.

sex with the women. If the men did not transport the women for that reason—if instead their intent was to see Vancouver and the sex was merely incidental to their trip (or did not happen at all, as the men claimed)—then they would be innocent of the Mann Act charges. However, juries in the 1910s through 1930s rarely acquitted male defendants charged with violating the Mann Act, even in noncommercial, consensual cases, and Judge Neterer's opinion about how to interpret the men's intent helps to explain why.

The judge encouraged the jury to think about what "any man" would be thinking in this situation and expressed his skepticism that a man could be pure-minded under such circumstances:

Then if you believe that they fornicated that night in Bellingham [Washington] . . . and they got up [the] next morning pure minded without evil intent, and with pure purposes took the girls across the line, then after they got across the line they became vile again and began to form the desire and intent of fornicating, and if they were pure minded without any evil intent when they went across the line, of course they would not be guilty; but it is for you to say, as a question of fact, whether *any man* would be impure just on this side with the same woman, and pure going across the line, and impure just after he got across the line on the other side.²³

Judge Neterer asked the jury to think of the behavior of Bonness and Grimes in light of how they believed that all men would behave, as though male characteristics were a matter of "fact." He clearly implied that he did not believe it was possible for a man to commit these acts and follow them with a "pure" mind. The judge seems to assume that the men did actually have sex with the women, in spite of the men's testimony to the contrary and Justus' protestation that he was too upset about the recent death of his wife to be romantically engaged with anyone. Although he begins by saying "if you believe that they fornicated," he quickly slips into speaking as though the "impure" actions were a matter of certainty. The judge's assumption was in keeping with his apparent perspective on masculinity—that male sexual urges are uncontrollable, and therefore that the men must have had sex with the women they took on vacation to Vancouver.

This view of masculinity presumed a guilty male sexuality and a passively innocent female sexuality. Respectable

²³Ibid., 148. Emphasis added.

manhood stayed within the bounds of approved family life. When it strayed outside of that, argued the judge, "any man" would be "evil," "vile," and "impure" when taking a similar trip with a woman. He reminded the jurors that Grimes had registered for a hotel in Seattle with Mildred Sites under assumed names, but that Grimes claimed not to have slept in the hotel with her. The judge openly criticized such an assertion. As he said to the jurors in disbelief, "Now then, would a man, what would be the conclusion to be drawn. The *natural* inference would be deduced from conduct such as that . . . he registered her in the hotel as Mr. and Mrs. Taylor, and he said she stopped there but he did not; now do you believe it? Now, were these men pure minded?"²⁴ And in describing the alcohol that the men purchased and shared with the women in their hotel room, the judge asked, "What deduction is to be made from these circumstances?"²⁵

In an echo of what the prosecutor said in his closing arguments, that Bonness should have thrown his protection around Grace Holland, the judge told the jury that pure-minded men would have guarded the virtue of these women, rather than exposing them to shame. "If the intent of the men was pure," the judge argued, they would not have taken the women to a hotel under questionable circumstances, but rather would have "placed them where there could have been no question as to . . . the immediate physical protection of the girls, and likewise their names and reputations."²⁶ In these instructions, respectable manhood and aggressive masculinity existed in tension with each other, and the latter could easily and uncontrollably take over if men were not properly restrained by laws and social mores. Therefore, in this particular line of thought, men who traveled with women intended to have sex with them simply because men were men. As Judge Neterer suggested, it was not reasonable to assume that a man would not intend to have sex with a woman with whom he traveled, particularly if that man and woman had sex either before or after the travel. As he asked the jury, rhetorically, would the men have done all of these things "if their purpose had been a proper one?"²⁷

The judge's instructions to the jury did not emphasize the innocence or previous condition of chastity of the young wom-

²⁴Ibid., 148. Emphasis added.

²⁵Ibid., 150.

²⁶Ibid.

²⁷Ibid., 151.

en, as had rape and seduction trials in the nineteenth century.²⁸ His comments were not aimed at making the young women seem like victims, but rather at making the men seem like violators of a moral code of manliness to which they should have adhered despite the "natural" passions that would have tempted "any man." Perhaps the judge understood that juries, by the mid-1920s, were increasingly aware of women's sexual agency, and may have been less likely to convict on the idea of women's victimization alone.²⁹ However, the end results were more similar than not. Both lines of argument—that of women's victimization or that of men's predation—still ultimately placed the moral responsibility on men and denied any meaningful level of consent to women.

The prosecutor and judge both relied on the women's claim that they had sex with the men, as a way of "proving" that the men had immoral purposes in mind when they traveled with the women. However, conviction under the Mann Act itself did not depend on sexual intercourse having actually occurred. Sex need never occur, as long as the man could be assumed to have thought about it while transporting a woman. The very act of the transportation suggested the intent. Therefore, after the Supreme Court's *Caminetti* decision, the courts consistently interpreted the most fundamental element of a Mann Act violation to be the transportation itself, rather than the sexual acts that may or may not have accompanied it.³⁰

When Bonness and Grimes took Holland and Sites from Seattle to Vancouver, all four of them evaded the prying—and potentially protective—eyes of neighbors, family members, and the officials of the girls' reformatory school. In the end, both men were convicted of Mann Act violations, and both were sent to the federal penitentiary at McNeil Island, Washington, for eighteen months. The women, meanwhile, were legally

²⁸Seduction laws varied from state to state, but all ostensibly provided redress for young women (or their fathers) when their chastity was "stolen" from them by men who lied, manipulated, or coerced them. For more on seduction laws in the United States, and how they blurred the boundaries of consensual sex in the nineteenth century, see Susan Gonda, "Strumpets and Angels: Rape, Seduction, and the Boundaries of Consensual Sex in the Northeast, 1789–1870" (Ph.D. diss., University of California, Los Angeles, 1999). See also Stephen Robertson, "Seduction, Sexual Violence and Marriage in New York City, 1886–1955," *Law and History Review* 24:2 (Summer 2006): 331–73, and Lea VanderVelde, "The Legal Ways of Seduction," *Stanford Law Review* 48 (April 1996): 817–901.

²⁹Regarding the changing ideas about women's sexuality in the 1920s see John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (Chicago, 1997), 233–34.

³⁰Langum, *Crossing over the Line*, 64–65.

defined as "victims," despite their admitted complicity in the affair. The conviction reinforced the idea that men were the guardians of women's virtue, and that they would be held legally responsible for the social transgression of extramarital sex in which both partners of a couple participated.

RACE, IMMIGRATION, ETHNICITY, AND THE MANN ACT

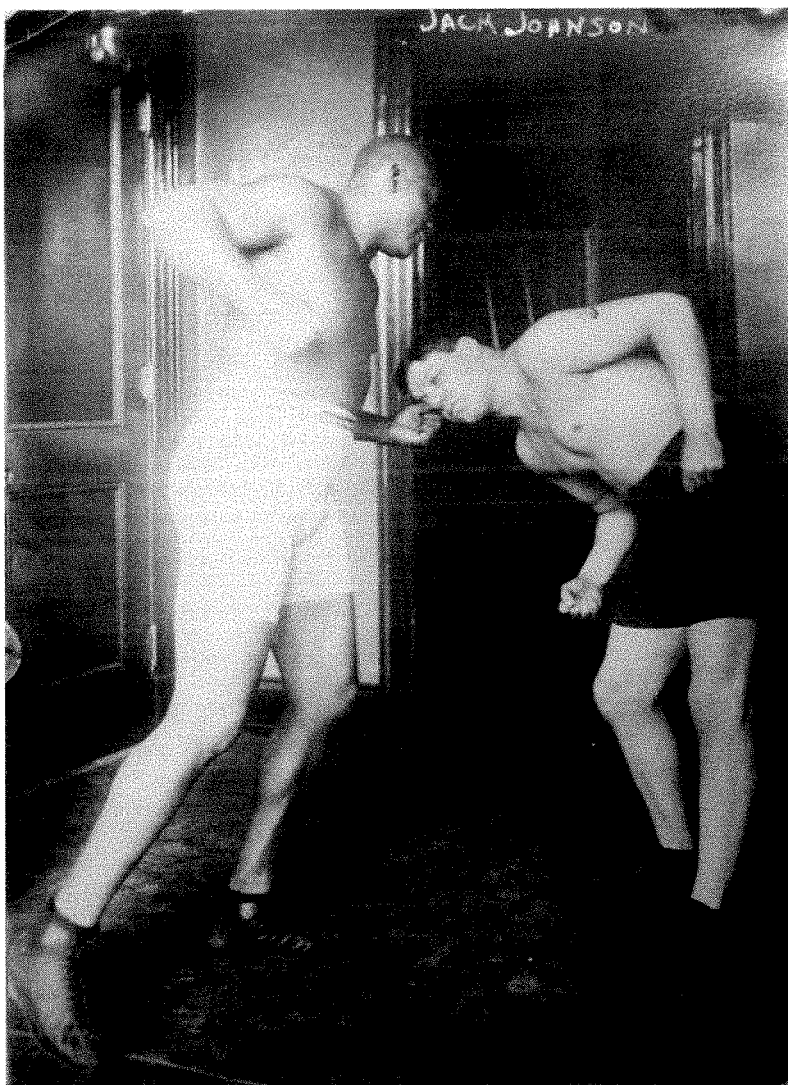
In the early summer of 1910, the whole country waited in anxious anticipation of the biggest boxing match of the decade. On the Fourth of July, Jack Johnson, the first African-American world heavyweight boxing champion, would fight Jim Jeffries, the white former heavyweight champion. Newspapers delivered regular updates on their training regimens, and Americans explicitly discussed the match as a fight between the races. Jeffries was known as the "Hope of the White Race," and Johnson as the "Negroes' Deliverer."³¹ On the day of the big match, 20,000 people were gathered in Reno, Nevada, to watch the fight. Tens of thousands of others around the country gathered in places where they could hear blow-by-blow reports.³² When Johnson resoundingly defeated Jeffries, it outraged white Americans and led the FBI to watch for ways to punish him. Johnson was ultimately prosecuted and convicted of a Mann Act violation, for traveling with his white mistresses.

Much has been written about the *Jack Johnson* case and the role that racial prejudice played in his prosecution and conviction.³³ However, little is known about whether racial or ethnic persecution was a common element in Mann Act cases. The heavily racialized language of white slavery narratives would

³¹Gail Bederman, *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917* (Chicago, 1995), 2.

³²*Ibid.*, 1.

³³*Ibid.*; Al-Tony Gilmore, "Jack Johnson and White Women: The National Impact," *The Journal of Negro History* 58:1 (Jan. 1973): 18–38; Gilmore, *Bad Nigger! The National Impact of Jack Johnson* (Port Washington, NY, 1975); Annette Gordon-Reed, *Race on Trial: Law and Justice in American History* (Oxford, UK, 2002); Thomas R. Hietala, *The Fight of the Century: Jack Johnson, Joe Louis, and the Struggle for Racial Equality* (New York, 2002); David Langum, *Crossing over the Line*; Kevin J. Mumford, *Interzones: Black/White Sex Districts in Chicago and New York in the Early Twentieth Century* (New York, 1997); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford, UK, 2008); Randy Roberts, *Papa Jack: Jack Johnson and the Era of White Hopes* (New York, 1983); Geoffrey C. Ward, *Unforgivable Blackness: The Rise and Fall of Jack Johnson* (New York, 2006). See also the documentary film by Ken Burns, *Unforgivable Blackness: The Rise and Fall of Jack Johnson* (PBS, 2005).



Jack Johnson, left, the first African-American world heavyweight boxing champion, was known as the "Negroes' Deliverer." [Courtesy of the Library of Congress, Prints and Photographs Division, George Grantham Bain Collection, LC-B2-2388-2[P&P]].

seem to suggest that race and ethnicity played a significant role in Mann Act prosecutions. Judging by the white slavery hysteria, it seems particularly plausible that both white immigrant men and men of color were the main targets of this law. However, no thorough study of the demographics of Mann Act defendants and victims has been published. That is largely due to the extremely difficult nature of identifying personal information about the people involved in these prosecutions. While the details about famous cases like Jack Johnson's are known in depth, little—if anything—is known about the masses of ordinary Americans who found themselves caught up in Mann Act cases. And yet, such information is crucial to understanding the factors that drove such prosecutions.

Surprisingly, a close examination of Mann Act enforcement in the American West reveals that race and immigration did not figure as prominently as the white slavery narratives and the prosecution of Jack Johnson suggest. Instead, class seems to have been a major factor in who was prosecuted and convicted. The earliest prosecutions in the western U.S. did involve a relatively high proportion of immigrant defendants, but within a few years the vast majority of defendants were native-born white men. What most of the men and the women in western Mann Act cases had in common was that they were white and part of a highly mobile working class. Their high level of geographical mobility made them more likely to undermine ideas about respectable manliness. And their very search for work, which moved them from state to state, made them more likely to violate the Mann Act, since they were sometimes accompanied by girlfriends, prostitutes, or women who were also traveling around in search of work. They were also members of families and communities that proved very willing to call upon the policing power of the federal government to enforce their ideas about manliness, respectability, and the protection of white womanhood.

It seems reasonable enough to assume that race and ethnicity were significant factors in Mann Act cases; after all, white slavery narratives, the impetus behind the Mann Act, had played on white Americans' fears and encouraged their nativism. On the West Coast, nativism often manifested itself in a virulent anti-Chinese sentiment that resulted in multiple large-scale acts of violence, including an 1886 episode in Seattle in which white working-class men and women forced two hundred Chinese residents to board a ship for San Francisco.³⁴ In his study of same-

³⁴John C. Putman, *Class and Gender Politics in Progressive-Era Seattle* (Reno, NV, 2008), 11.

sex affairs in the early-twentieth-century Pacific Northwest, Peter Boag argues that immigrant and working-class men were particularly targeted by police. As he explained, the same-sex relationships that were prosecuted did not stem from an objective application of the law, but rather from purposeful police surveillance used to "persecute working-class men of racial and ethnic minority backgrounds, particularly the foreign-born. The urban middle class perceived these men as sexual threats . . . to the middle-class American family."³⁵

There were notable similarities between the Mann Act and the laws against same-sex relationships in the West; both were used to reinforce certain ideas about the family and respectable manliness. There were, however, some significant differences in the enforcement of these laws. Although both primarily involved working-class men, the biggest difference is that men of racial and ethnic minority backgrounds and foreign-born men were not disproportionately prosecuted under the Mann Act in the West. That difference is likely the result of the way in which Mann Act crimes were reported.

Unlike the laws prohibiting same-sex sexual relationships, the Mann Act did not rely primarily on the police to seek out potential violators. Although the Mann Act did depend on a system of FBI surveillance to some extent, it was primarily enforced at a grassroots level, in which family and community members sought governmental help in policing each other. For instance, given the large number of Asian immigrants on the West Coast during the early twentieth century, it is surprising that very few Asian immigrants faced Mann Act prosecutions there. Although I found no explicit explanation for this, it seems most likely that they did not seek the "help" of the FBI as freely as native-born, white Americans. Asian Americans had already experienced the tribulations of intense government surveillance and regulation, and had very little to be gained from encouraging the FBI to investigate them. For female immigrants, seeking help from the FBI was particularly risky. Immigration laws allowed for the deportation of women who worked as prostitutes, and, indeed, some foreign-born women who were "victims" of Mann Act violations were subsequently deported after the trial. That gave foreign-born Americans, particularly those in as precarious a position as Asian Americans in the West, very little incentive to report potential violations. The enforcement of the Mann Act centered on those groups who reported the possible Mann Act violations of their family

³⁵Peter Boag, *Same-Sex Affairs: Constructing and Controlling Homosexuality in the Pacific Northwest* (Berkeley, CA, 2003), 46–47.

or associates. In different regions with different demographics, the role of race and ethnicity in Mann Act prosecutions may have played out very differently. For example, in places like Chicago, where the *Jack Johnson* case was tried, African Americans may have been targeted more often than they were in the West. Only through more regional case studies can those questions be answered.

The official court documents in Mann Act cases almost never alluded to the race, ethnicity, or country of origin of the defendant or the victim.³⁶ However, clues about race, ethnicity, and nationality do exist in other sources. The hundreds of FBI files investigating potential Mann Act violations sometimes included comments describing the alleged perpetrator or victim. When these individuals can be located in the U.S. census—which is not always possible—their races are available. Some of them can also be found in newspaper articles. The intake records for the federal penitentiary at McNeil Island list the most details, but only about the men who were convicted and sent there. Taken together, these pieces of information allow for an investigation into the demographic makeup of the men and women involved in Mann Act cases in the American West.

One of the ways in which the race, ethnicity, and national origin of defendants and victims in Mann Act cases can be determined is through their absence. In the official legal documents, it was standard not to include descriptive details about the parties involved in the case. However, in the FBI case files, the agents could, and did, describe the defendant or victim with words like *colored*, *negro*, *Italian*, or *Greek*. Out of dozens of randomly selected files, only a minority of cases from around the country included such descriptions of race or ethnicity. The absence of identifying information in the remaining files suggests that the defendants and victims were native-born whites; the agents assumed that the normative American was white and native born, noting only those people who differed. The agents described people as white only in situations where the reader could not safely assume that all involved parties were white. For example, on one occasion three witnesses were questioned: "Arch Edwards (colored) and W.E. Ivory (colored), and also the Superintendent . . . (a white man)."

This was true of newspapers as well, when the Mann Act case involved non-white or foreign-born individuals, reporters made sure to mention it. For instance, the *Chicago Daily Tribune* reported in the same section of an article that "Paul

³⁶Occasionally the witness statements or other miscellaneous materials in the file provide some information, but the vast majority of files contain little more than an indictment and judgment.

Schoop . . . [was] charged with trafficking in women," as was "Edward Powers, a negro," whose wife was "a white woman."³⁷ No description was necessary for Paul Schoop; readers could assume he was white. The only reason that *white* was used in conjunction with the wife of Edward Powers was that readers would otherwise incorrectly assume she was "a negro" like her husband. Therefore, the large number of Mann Act cases mentioned in American newspapers without any discussion of race or national origin suggests that those cases involved white, native-born defendants and victims.

The intake records for the McNeil Island Penitentiary allow for a more systematic examination of the race and ethnicity of the men convicted of violating the Mann Act in the western United States.³⁸ Not all of the men convicted were sent to McNeil Island, only the ones whose sentences exceeded one year. Those sentenced for one year or less served their time in the local jail. McNeil Island, located just off the coast from Seattle, was the only federal penitentiary west of Kansas until the 1930s, so its records represent the most complete cross-section of men convicted of Mann Act violations in the West.³⁹ Prisoners were sent to McNeil Island primarily from California, Oregon, Washington, Idaho, Utah, Nevada, and Alaska, and as far away as Hawaii and the Philippine Islands.⁴⁰

The McNeil Island intake records show the notes that prison officials made about each man as he entered the penitentiary. This included information about his physical appearance—complexion, scars—as well as his birthplace and date, the address of his parents, the address of his wife if married, his occupation, religion, whether this was his first offense, and whether

³⁷"Plan National War on Vice: Sims, Back, Says Crusade Will Start in Several Cities," *Chicago Daily Tribune*, October 27, 1910.

³⁸McNeil Island Penitentiary Records of Prisoners Received, 1887–1951 (National Archives Microfilm Publication M1619, Roll 2), Records of the Bureau of Prisons, Record Group 129.

³⁹With the "Three Prisons Act" of 1891, Congress established the federal prison system, and the first three U.S. penitentiaries were established at Leavenworth, Kansas; Atlanta, Georgia; and McNeil Island, Washington. McNeil Island had been a territorial jail for decades and was turned into a federal penitentiary in 1909, just in time for it to start receiving Mann Act violators in 1910. No other federal penitentiaries were built until the increasing number of federal laws, like Prohibition, required more prisons in the late 1920s. Mary Bosworth, *The U.S. Federal Prison System* (Thousand Oaks, CA, 2002), 4.

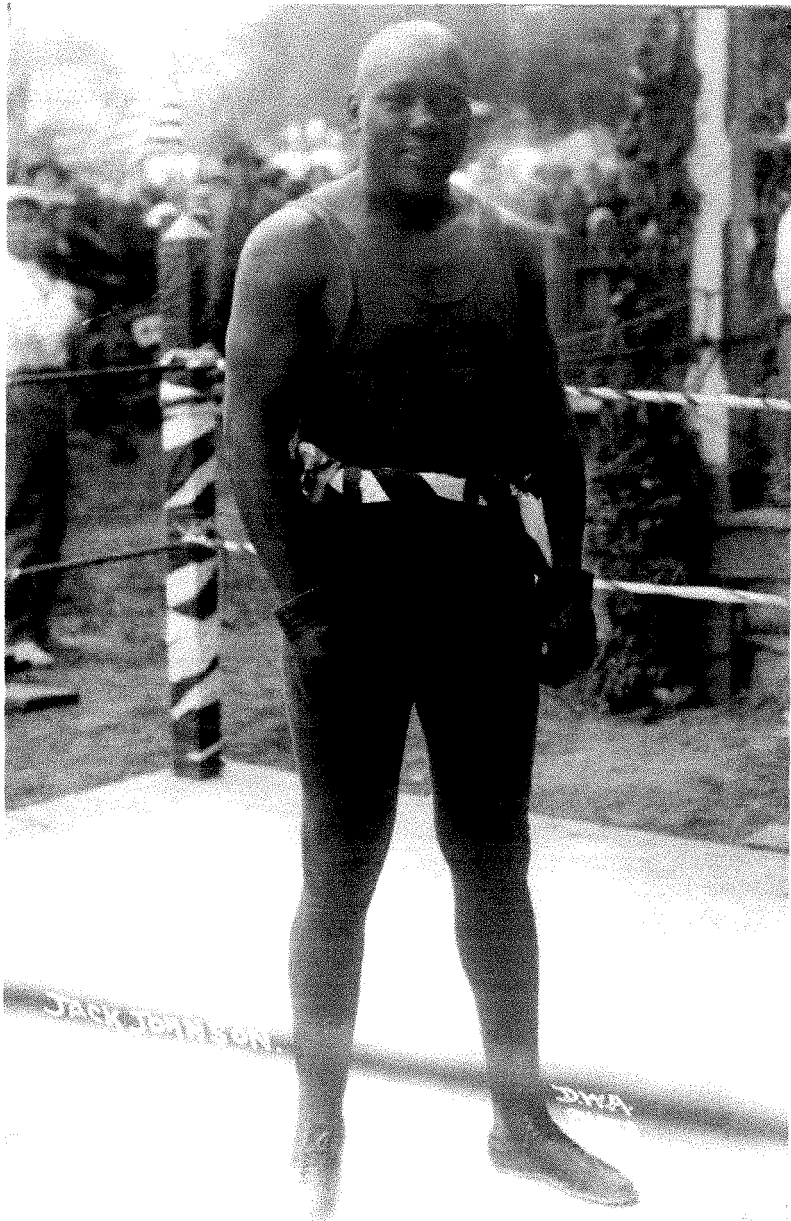
⁴⁰Department of Justice, *Annual Report of the Warden of the United States Penitentiary, McNeil Island, Washington, for the Year Ending June 30, 1914* (Washington, DC, 1914), 4; Department of Justice, *Annual Report of the United States Penitentiary, McNeil Island, Washington, for the Year Ending June 30, 1921* (Leavenworth, KS, 1921), 10.

he owned any property. The information on the form was produced by prison officials in conjunction with the prisoners, but it was ultimately officials' words that were preserved. Almost every entry in the "number of offenses" column notes "claims first offense," which reminds the reader that we are not viewing what these men wrote about themselves, but rather what prison officials wrote about them. Some answers to straightforward questions, like time and place of birth, can be presumed to have answers that were dictated by the prisoner and simply recorded by the official. However, at other times, the official used his own judgment about what to enter, and nowhere is this truer than in the column labeled "complexion."

In the "complexion" category, the officer described the skin color, race, or ethnicity of the man standing before him. If a description did not seem readily evident to the officer, he likely asked the prisoner about his race or the country where he or his parents were born. This register does not tell how prisoners thought of their own identity in terms of race, ethnicity, or nationality. What it does provide is a glimpse of how other people in the early-twentieth-century United States may have seen these men. After all, perceptions mattered when an officer saw a young couple traveling together, or when a hotel owner registered a man and woman as husband and wife. Even in extreme cases like Jack Johnson's, it was not how he defined his race that ultimately led to his Mann Act conviction, but how others perceived it, particularly in relation to how they perceived the race of his mistresses.

The most common descriptions in the complexion category were, in the words of the officers: dark, fair, medium, ruddy, Chinese, negro, Japanese, Indian, or Mexican, with an occasional sallow, sandy, and at least one yellow (for a man born in the West Indies). The words *dark*, *fair*, *medium*, and *ruddy*, seem to have been used to describe white Americans, whether they were native- or foreign-born. This is consistent with the ways in which FBI agents described subjects, since they noted race or country of origin only when it differed from their idea of normative "Americanness." In the case of ostensibly white prisoners, officers at McNeil Island attempted to describe the differences in physical appearance in relatively nuanced ways, through the use of words like *fair* or *ruddy*, without referencing an overarching racial or national identity. However, in the case of immigrants from Asia or Mexico, or native-born Americans of color, officials collapsed a description of physical appearance into one big category of racial or national designation.

From passage of the Mann Act in 1910 through the 1930s, 724 were imprisoned at McNeil Island for violating the act. Whether these men were foreign-born is easy to determine



Jack Johnson's defeat of white boxer Jim Jeffries outraged white Americans and ultimately led to his conviction on a Mann Act violation. (Courtesy of the Library of Congress, Prints and Photographs Division, George Grantham Bain Collection, LC-USZ6-1823)

from their birthplaces. This helps to answer the question of whether immigrant men were disproportionately targeted with Mann Act prosecutions. Of the more than 700 represented in this study, approximately 80 percent were native-born Americans, with the 20 percent of foreign-born prisoners coming from a wide array of places around the globe [Table 1]. After those born in the various U.S. states, the second-largest group, consisting of only twenty-three prisoners and making up only 3 percent of the total, was born in Mexico. Mexican-born prisoners were followed by those born in Italy and Greece, at seventeen and sixteen prisoners, respectively, and then Canada and Russia, each with eleven.

Even if the southern and eastern Europeans are grouped together, since they were part of the much-denigrated class of "new" immigrants in the early twentieth century, they number only fifty-seven, or about 8 percent of the total Mann Act prisoners at McNeil.⁴¹ The northern and western Europeans, grouped together, add up to forty people, or about 5.5 percent of the total.⁴² This means that the largest number of foreign-born Mann Act prisoners at McNeil Island were from southern and eastern Europe, but they still represented only a small fraction of the total, and their size was in close proportion to their part of the overall population in the western United States. Of the foreign-born Mann Act convicts, no single nationality stands out as having been particularly targeted; the largest single nationality, consisting of men born in Mexico, is still just 17 percent of the total foreign-born population.

The U.S. Census data from 1900 to 1930 show that during those thirty years, the foreign-born white population in the West averaged about 15 percent of the total population. When the Mann Act convicts at McNeil Island from Canada and Australia are included with all of the Europeans, they average almost exactly 15 percent of the total number of men at McNeil Island convicted of violating the Mann Act. Therefore, their numbers were in direct proportion to foreign-born white immigrants within the western population at large. Where just the adult male population of the West was concerned, foreign-born white men were about 25 percent of the total adult male population from 1910 to 1930. That means that foreign-born white men sentenced to McNeil Island for violating the Mann

⁴¹I included Italy, Greece, Russia, Poland, Czechoslovakia, Hungary, Yugoslavia, Bohemia, Bulgaria, and Romania.

⁴²I included England, Austria, Spain, Germany, Ireland, Finland, France, Portugal, Austria-Hungary, Denmark, Norway, Scotland, Sweden, and Switzerland.

Act were actually significantly underrepresented in proportion to their presence in the total adult male population.

This finding is particularly significant, because some kinds of sex-related prosecutions in the West clearly did target immigrants. For instance, in Peter Boag's study of the prosecution of same-sex sexual relationships in the Pacific Northwest, he uses a similar process to conclude that immigrants were disproportionately targeted by police. As he says, "While foreign-born white males were less than 20 percent of the male population of Portland through the years 1900–1920, they made up more than 44 percent of those arrested for same-sex crimes between 1870 and 1921. Similarly, African Americans and men of Chinese, Japanese, and 'other' origins constituted about 4 percent of the Portland male population during this era, but they represented about 13.5 percent of these arrests."⁴³ Therefore, while immigrant men and men of color were particularly likely to face prosecution for same-sex relationships, the same does not seem to have been true in regard to the crime of transporting a woman for "immoral purposes."

The nativity of the McNeil Island prisoners is relatively easy to determine, since their countries of birth were noted in the intake register. That still leaves a significant question about race, however, as the relative lack of foreign-born white convicts does not preclude the possibility that native-born African Americans, Asian Americans, or Mexican Americans were disproportionately targeted because of their race or ethnicity, as was Jack Johnson. Although the race or ethnicity of native-born prisoners is more difficult to identify, it can generally be determined by a careful reading of the "complexion," "place of birth," and "religion" categories in the intake records. Two representative years from the McNeil Island register provide good examples of what information is available about the prisoners and how race and ethnicity can be gleaned from it.

The first of these years, 1912, represents the early wave of Mann Act prosecutions, when the quantity of cases was near its peak for the 1910s, and when there were still relatively

⁴³Boag, *Same-Sex Affairs*, 50. A major difference between the police records Boag used and the McNeil Island intake register is that his study covers all of those arrested, while the intake register contains only information about those who were also tried, convicted, and given a lengthy sentence. However, the low percentage of foreign-born white men who ended up in McNeil seems to indicate that immigrants and men of color were not targeted in Mann Act investigations and prosecutions. It also stands to reason that those subject to the greatest prejudice would be subjected to the greatest punishments, as in the *Jack Johnson* case. Therefore, it makes sense that the proportion of immigrants and men of color within the total population of those convicted would not be significantly less than their proportion of those accused.

few noncommercial cases (those involving consensual couples simply traveling together). Of all Mann Act prosecutions, cases from these years should most resemble the classic white slavery narratives, since they took place while the white slavery hysteria was at its most intense. The second year, 1926, represents the mid-1920s surge in Mann Act prosecutions, at which point noncommercial prosecutions were commonplace. The years 1912 and 1926 are when the following prisoners were registered at McNeil Island; for some of them, their arrests would have occurred during the previous year.

Forty men entered McNeil Island in 1912 on Mann Act convictions, with an average age of thirty [Table 2]. Twenty-two of them were born in the U.S. (including one in the territory of Hawaii), and eighteen were born outside of the U.S. The largest numbers of foreign-born prisoners in this group came from Russia and Italy; only one came from China. Therefore, in 1912, the prosecution of white immigrant men did happen at a disproportionately high rate; they made up 45 percent of this sample and were just under 30 percent of the total adult male population in 1910. Although immigrant men may actually have been underrepresented as a proportion of Mann Act convictions over the course of thirty years, the nativity of the 1912 prisoners suggests that immigrants were more likely targets in the earliest years of prosecution. Indeed, the proportion of immigrants within the Mann Act convicts at McNeil Island steadily decreased throughout the subsequent decades [Chart 1].

In 1926, thirty-six men were registered at McNeil Island for having violated the Mann Act, and they had an average age of thirty-three [Table 3]. Unlike the group from 1912, these men were overwhelmingly native born. Twenty-nine of them had been born in various U.S. states, plus one born in the Philippines. The other six came from Mexico, Poland, Italy, Yugoslavia, Germany, and Australia. This means that only 16.7 percent of the men in this sample group were foreign-born whites, well under the proportion of foreign-born whites in the total male population. The native-born Americans also seem to have been perceived by the prison officials as overwhelmingly white, since twenty-nine of them were described as either *fair*, *ruddy*, or *medium*. It is impossible to determine for sure the race or ethnicity of the four men described as *dark*, but, in 1912, it had been most likely used to describe men who were still considered white. I reached this conclusion in part from the presence of *negro* as a descriptor for one of the other men and *Filipino* for the man born in the Philippines. These two entries suggest that the viewer saw them as racially distinct, while not reaching the same conclusion about all of the men labeled with *fair*, *ruddy*, *medium*, or *dark*.

Therefore, in 1926, the men convicted of violating the Mann Act and sentenced to the McNeil Island Penitentiary were overwhelming white, native born, and predominantly Protestant. The cases from 1912 and 1926 represent the shift from prosecuting foreign-born white men at a disproportionately high level in the first few years of Mann Act prosecutions to prosecuting them at a disproportionately low level during the 1920s and 1930s. There is no evidence in either case to suggest that native-born men in racial minority groups were particularly targeted. This finding is consistent with what Marlene Beckman discovered in her study of women convicted of violating, or conspiring to violate, the Mann Act. She examined the records of 156 women committed to the federal prison at Alderson, West Virginia, between 1927 and 1937, which encompasses 87 percent of the total women incarcerated for Mann Act violations during these ten years.⁴⁴

Of the 156 women in Beckman's study, 150 were white, and the other six were black.⁴⁵ She argues that, in contrast to the anxiety about the prostitution of "alien women," only six women "were of foreign citizenship and, of those, five were 'procurers' rather than 'victims.'"⁴⁶ Although it has yet to be proven definitively, Beckman's study adds weight to the evidence that both the female victims and the violators of the Mann Act were usually white. However, some cases and investigations from earlier than 1927 show that white, foreign-born women were occasionally identified as the "victims" of male defendants, despite their lack of presence at Alderson in the late 1920s and 1930s.

Despite the racist and anti-immigrant messages embedded in the white slavery narratives and witnessed in the persecution of Jack Johnson for his "unforgivable blackness," an examination of the race and nativity of Mann Act convicts at McNeil Island makes it clear that in the American West the Mann Act was not used primarily to control a growing immigrant population or to police black men. Indeed, prosecutions of native-born white men actually increased dramatically throughout the 1910s and 1920s, both in terms of real numbers and as a proportion of the total cases. What these men had in common was

⁴⁴Marlene D. Beckman, "The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women," *Georgetown Law Journal* (February 1984): 1111–42. Alderson was the first federal prison for women; before 1927, female prisoners were housed in state institutions.

⁴⁵*Ibid.*, 1128.

⁴⁶*Ibid.*, 1130.

not that they were racial or ethnic minorities, but rather that they tended to be part of the highly mobile working class.

WORK AND MOVEMENT IN THE AMERICAN WEST

The male convicts housed at McNeil Island for Mann Act violations in 1912 and 1926 came from a wide variety of states and countries, spanned multiple generations, and committed offenses ranging from a weekend vacation with a lover to forcing their wives into prostitution. But in one area these men were remarkably similar: their occupations. The vast majority of these men were part of a property-less, migratory, working class. In the register column marked "Property," only two of the seventy-six men represented in the 1912 and 1926 intake records have notations in the affirmative—one entry simply reads "yes," and another reads "farm." With the exception of a few blank spaces, every other entry reads "none."⁴⁷ Of these seventy-six men, at least fifty-nine had working-class occupations, making them almost 78 percent of the total.⁴⁸ For thirty of the men, about 40 percent of the total, at least one of their jobs was listed as cook, baker, bartender, waiter, or barber. Although such occupations did not require movement around the country, they did allow for it. They were positions easily occupied by men who traveled around in search of work or fortune. Other occupations required a high level of mobility: nineteen of the men were teamsters, construction workers, miners, steel workers, or mechanics, or worked on railroads in some capacity. For instance, when one man who eventually served time at McNeil was arrested for a Mann Act violation, he described his occupation as, "Most any kind of work; general laborer, section

⁴⁷The lack of property ownership is not a perfect indicator of class standing, since the entries for Diggs and Caminetti—both sons of wealthy and powerful families—also read "none." The entries for Bonness and Grimes, however, do list their property. Although the "Property" column cannot be taken as evidence of working-class status or poverty in and of itself, when combined with the "Occupation" column, it offers a window into the economic lives of these men.

⁴⁸For the purposes of this study, a working-class occupation is one in which the worker does not control the means of production, and is also not a professional position, like teacher, doctor, or police officer. I have used a conservative estimate of how many working-class occupations are listed. Based on the brief register entries, it is impossible to determine whether or not some of the jobs were working class. For instance, I did not classify a vague entry like "musician" as working class. I counted occupations like "baker" or "barber" as working class if there was no property listed, as that suggested that those men did not own the means of production.

foreman, locomotive fireman, blacksmith, I am an all around railroad man."⁴⁹

Not only did their jobs not allow these men to accumulate property, but the very lack of such property enabled their high level of mobility as they freely traveled from state to state in search of the next opportunity. Although these migrating workers were generally male, women also traveled in search of work. Indeed, the very nature of Mann Act cases required that two people (one of whom had to be female) be on the move together; in many cases both of them were hunting for jobs. This high level of mobility made it particularly easy for men and women who were not married—at least, not to each other—to slip away together, but also created the context in which family and community members called on the increasingly long arm of the federal government to reach, return, and punish men and women whose travels violated standards of morality and respectability.

The following cases illustrate some of the ways in which people moved about the West in conjunction with their search for work and found themselves facing Mann Act charges as a result. Some of the women traveling about in search of work were professional prostitutes, who were frequently on the move to escape law enforcement or jealous lovers, or were simply searching for greener pastures. Such may have been the case for Della McDermott, who corresponded via telegram in 1914 with H.L. Morrison, inquiring about the job opportunities in Boise, Idaho. From San Francisco, she wrote, "Howard telegraphed tickets for my neice [sic] . . . as we want work. My niece is 18 and just graduated, and I know she could do the work that Ethel did, and if things turned up that you didn't want me I would go to some other town. . . . Do something at once."⁵⁰ Authorities saw her cryptic telegrams as evidence that she was trying to transport women for prostitution; she claimed that she was talking about waitressing jobs. Regardless, she saw opportunities in Idaho for both herself and other women.

Another case involving professional prostitution demonstrates the high level of interstate movement engaged in by

⁴⁹*U.S. v. Leroy Edson Elliott*, case file 8437, Criminal Case Files, U.S. District Court for the Northern District of California (San Francisco), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Region (San Bruno).

⁵⁰*U.S. v. Dolly McDermott*, case file 5507, Criminal Case Files, U.S. District Court for the Northern District of California (San Francisco), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Region (San Bruno).

both men and women. In 1911, an Austrian citizen wrote a statement in the presence of the U.S. immigration inspector explaining how he knew his "victim," a prostitute named Etta:

My name is S. Postel. I am 26 years of age. . . . My occupation is a designer and fitter. I have been in San Francisco Cal 7 months. . . . I knew [Etta] first in New York City. I next met her in New Orleans L.A. I met her in a sporting house in New Orleans, LA. She was practicing prostitution I then met her again about 8 months ago in Houston Texas—where she was practicing prostitution. I wrote to her to come to San Francisco Cal. I sent her \$15.00 to help her pay her passage. . . .⁵¹

The immigration inspector then reported Postel for violating the Mann Act; Postel was tried, found guilty, and sentenced to seven months in the Alameda County Jail. Although there is no evidence that immigrant men were particularly targeted for Mann Act prosecutions, the increasing level of surveillance on the part of immigration authorities during the early twentieth century made it particularly likely that they would get caught if they traveled with women to whom they were not married.

When women traveled domestically and internationally in search of work, they jeopardized their potential to continue their romantic relationships freely, since a woman's consent to an unmarried sexual relationship would not prevent her male companion from being charged under the Mann Act. In 1914, an Italian citizen named Antony Ginnetti was working as a smelter in British Columbia, Canada. He left a wife and child in Italy and was in Canada presumably because of the work opportunities. Meanwhile, Angelena Trambetti, who had no relatives in Canada, had also struck out on her own to find work—in this case, selling milk. Also of Italian ancestry, she was a U.S. citizen because her father, who lived in the state of Washington, had been naturalized. While working in British Columbia, Ginnetti and Trambetti began living together. Their open cohabitation disturbed people in their little town, and police told the woman, but not the man, that she had to leave town because of her "immoral" behavior. Antony Ginnetti then bought her a train ticket to Washington State and told her that within the next day or two, once he could get his affairs in order, he would meet her in Spokane and they would resume living together.

⁵¹*U.S. v. Sam Postel*, case file 4987, Criminal Case Files, U.S. District Court for the Northern District of California (San Francisco), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Region (San Bruno).

Neither Ginnetti nor Trambetti seems to have known that these actions potentially violated the Mann Act, as they each frankly related these events and their future plans to live together and travel to New York to U.S. immigration officials stationed near the border between British Columbia and Washington. Ginnetti was then denied entry because he had "brought the Trambetti woman to the United States for immoral purposes." In response to this information they also labeled him a "procurer," another word for a white slaver, and turned his case over to officials in Spokane who charged him with a Mann Act violation.⁵²

As prosecutions of noncommercial Mann Act cases increased throughout the 1910s and 1920s, so did the number of native-born white men convicted of violating the act. Some of these men, like Bonness and Grimes or Diggs and Caminetti, had stable, stationary jobs and just went on weekend jaunts with their girlfriends. However, many other noncommercial prosecutions involved working-class couples who traveled in search of work or in the interest of starting a new life together. The enforcement of the Mann Act in the American West existed in this context, in which both men and women participated in a highly mobile working class for whom interstate movement was a common, necessary means of finding work. These men and women were an essential segment of the workforce, particularly in the West, where much of the work was seasonal or temporary. But they were also a socially disruptive force, moving on rather than setting down roots, preferring, like Antony Ginnetti and Angelena Trambetti, to leave town rather than adhere to social conventions. The readiness with which this group of people, particularly young men and women in their twenties, engaged in interstate travel eroded the ways in which communities could regulate their behavior. Therefore, individuals who believed that they had witnessed a transgression against morality and respectability could ask the government to enforce moral standards by tracking down and punishing couples deemed too freewheeling in their sexual affairs.

RESTRICTING MOBILITY

The Mann Act created a legal category for a form of travel that was immoral and criminal, not because such travel in-

⁵²*U.S. v. Antony Ginnetti*, case file 2098, Criminal Case Files, U.S. District Court for the Eastern District of Washington (Spokane), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Alaska Region (Seattle). He was eventually found not guilty.

volved any specifically illegal sex act, but because the travel itself was illegal for people with a certain set of "immoral" ideas or intentions. The physical action over which this federal law had authority was movement, not sex; sexual acts themselves fell under state laws. As the judge in the *Bonness and Grimes* case noted, "These men are not indicted for fornicating with the women on this side, or fornicating with the women on that side. That is an offense against the local laws. Under this Act of Congress the offense is the transportation."⁵³

The language of the law itself revolved around travel, making the felony not the immoral acts or purposes themselves, but rather the geographical movement that accompanied them. To be guilty under this law, a man need only have given the woman money with which to buy a ticket for a train or a ship, or have provided the automobile for her to ride in. The jury could then simply make a determination about whether the man's purposes were immoral. For this reason, Mann Act trials often revolved around the details that proved said transportation had taken place: the ticket stubs and hotel registries that showed the couple had traveled and boarded together as "man and wife." In order to get past the careful scrutiny of hotel clerks, usually the woman would assume the man's last name, or they would both register under false names. In trial after trial, these large, leather-bound registries were subpoenaed and brought to court to prove that a man had violated the sacred bounds of marriage and broken the law by pretending to be married to someone who was not his wife.

The Mann Act specified that the man must have provided the transportation for the woman, in broad language that included having directly transported her, having assisted in her transportation, having purchased or assisted in purchasing the tickets for her transportation, or having persuaded, induced, enticed, or coerced the woman into traveling interstate for immoral purposes.⁵⁴ With such a definition, any man who accompanied a woman on an interstate trip, especially if he contributed financially to that trip, could very well have violated the Mann Act.

The element of transportation was clear in the *Bonness and Grimes* case; the men directly transported the women in Grimes' automobile. However, in the vast majority of the cases before the 1920s, the couple traveled by rail or ship. In such situations, the woman may have purchased her own

⁵³*Bonness and Grimes* trial transcript, 147.

⁵⁴These represent parts of Sections 2 and 3 of the Mann Act. Defendants could be charged with one or more counts of violating the Mann Act.

ticket, but with money the man had given her; or the man may have purchased the woman's ticket, but with money she gave him. Or the man may have bought the woman's ticket himself, with his own money. Each of these (if accompanied by "immoral purposes") was a Mann Act violation, as the man had assisted in the process of transporting the woman. Even if she bought her own ticket with her own money, it could still be a Mann Act violation if the man had encouraged her to travel with him.⁵⁵ It was important in these cases for the prosecutor to demonstrate the man's involvement in the transportation.

In a 1912 case in Portland, a man was accused of transporting his wife for the purpose of prostitution, and the prosecutor grilled the uncooperative wife about the train tickets:

Q: Who got the ticket for you and your husband to travel West?

A: I don't remember.

Q: Did you buy it? Did you buy the ticket?

A: I don't remember.

Q: Did you ever see that ticket before?

A: Yes, sir.

Q: Where did you see it?

A: That was the ticket we traveled on.

Q: Whose signature is that on the line marked "Purchaser" for self and party?

A: It is not my signature?

Q: I asked you whose signature it was. Is that your husband's?

A: I think it must be.

Q: . . . Isn't that your husband's? Look at it carefully.

A: It must be.

Q: And you recognize that to be his, don't you?

A: Yes.

Q: Now, you didn't buy that ticket, did you?

A: No, sir.

Q: Your husband bought it, didn't he?

A: Yes, sir.

...

Q: You traveled with him on that ticket, didn't you?

A: Why, yes.

⁵⁵These were also the situations in which women could be prosecuted for violating the Mann Act, because occasionally female brothel owners or prostitutes would pay for the transportation of other women who were looking for work as prostitutes.

Q: You came from Cleveland, Ohio, to Portland, Oregon, did you not?

A: Yes, sir.⁵⁶

That conversation was at the core of the government's case, since it showed that the husband had provided for the wife's transportation. The defendant later pleaded guilty and received the longest sentence possible: five years in the federal penitentiary at McNeil Island.

It was only through the element of interstate transportation that Congress was able to regulate "immoral purposes," by broadly interpreting the congressional power to regulate commerce. By defining a "traffic in women," Congress could regulate this transportation in much the same way as it would the interstate commerce in meat or stolen automobiles. The Supreme Court supported the right of Congress to use the Commerce Clause in this broad fashion when it upheld the Mann Act in the 1913 *Hoke* case. As one Seattle prosecutor argued, referencing *Hoke*, the Mann Act prohibited the movement of the people who were "outlaws of commerce."⁵⁷

The Mann Act was, most fundamentally, a law about who could travel with whom. One lawyer argued that the Mann Act was unconstitutional because Congress had far overstepped its authority with this use of the Commerce Clause. He said, "[T]he purpose of the act is not to regulate interstate commerce, but does attempt to regulate the movements of undesirable characters from state to state, and thereby invades the inherent police powers" of the states.⁵⁸

As that attorney recognized, the Mann Act functioned not only to regulate morals or protect women, but also to restrict the mobility of certain types of "undesirable" people. In this sense the Mann Act was similar to the laws against vagrancy

⁵⁶*U.S. v. Jacob Gronich*, case file 5660, Judgment Roll #5238, Criminal Case Files, U.S. District Court, Oregon (Portland), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Alaska Region (Seattle).

⁵⁷*U.S. v. Vinton T. Bosserman*, case file 2826, Criminal Case Files, U.S. District Court for the Western District of Washington Northern Division (Seattle), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Alaska Region (Seattle).

⁵⁸*U.S. v. George Marlowe*, case file 1416, Criminal Case Files, U.S. District Court for the Eastern District of Washington (Spokane), Records of District Courts of the United States, Record Group 21, National Archives and Records Administration, Pacific Alaska Region (Seattle).

and tramping, which made it a crime for certain types of people to move about the country in certain ways.⁵⁹

In the late nineteenth and early twentieth centuries, many state vagrancy laws gave way to tramp laws. This was in response to a "tramp scare" that ensued when millions of American men and women took to the rails as "hobos" or "tramps," migratory workers and non-workers, respectively. The series of depressions in the U.S. from the 1870s through the 1930s sent people "restlessly riding the boxcars from 'no place in particular to nowhere at all.'"⁶⁰ Tramps were believed to be exclusively male, and were legally defined as such in some states, meaning that a woman who hitched a ride on a railroad car would not be considered a tramp. This resulted in a panic that envisioned tramps as a moral and physical danger to women and the home. Part of the fear about tramps was due to their high level of mobility; they could be in your home, with your wife, while you were at work, and be out of town before nightfall. As Tim Cresswell explained, "A tramp was defined as an idle person who roamed from place to place and who had no lawful occasion to wander. Making the tramp-railroad connection explicit, the vagrancy law of Massachusetts made riding a freight train *prima facie* evidence of tramping." ⁶¹ Therefore, a tramp was defined by his movement, and his movement defined him.

The Americans who supported tramp laws and, later, the Mann Act were fighting against a world in which they believed that the ideals of nineteenth-century manliness—honor, respectability, and restraint—were being degraded by the forces of modernity: cities, railroads, automobiles, and mass migrations of people. Railroads and automobiles changed American culture, law, and gender norms. Automobiles altered the rela-

⁵⁹Vagrancy laws may have been ostensibly about work, but they were actually about controlling people based on their class, race, and gender. As historian Linda Kerber said, "Vagrancy is a status offense; the crime is not what a person has done but what the person *appears* to be," namely, that the person appeared to be unemployed and unmoored from societal expectations of stability and respectability. And those appearances had everything to do with gender and race, so that a white housewife who traveled to visit relatives would not be considered a vagrant for being unemployed and away from home, while a black man or woman under the same circumstances could have been arrested for vagrancy. Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York, 1998), 54.

⁶⁰Clark C. Spence, "Knights of the Tie and Rail—Tramps and Hoboes in the West," *Western Historical Quarterly* 2:1 (Jan. 1971): 7.

⁶¹Tim Cresswell, "Embodiment, Power and the Politics of Mobility: The Case of Female Tramps and Hobos," *Transactions of the Institute of British Geographers*, New Series 24:2 (1999), 181.

tionships between young men and young women, threatened to undermine family unity, and allowed for the creation of sprawling cities.⁶² These increasingly available modes of transportation provided plenty of opportunities for a man to abandon his family or engage in extramarital affairs. As Lawrence Friedman noted in his article "Crimes of Mobility," Americans had a great deal of anxiety about the unprecedented level of geographic mobility in the late nineteenth and early twentieth centuries: "This was a society that had shucked off certain old and traditional fixities—fixities of place, of station in life, of thought, and of ideas. . . . It was a society of immigrants, but also a society of migrants—of restless, transient people who shuttled across the vast face of the landscape."⁶³

The increased mobility afforded by trains and automobiles resulted in a widespread fear that men would abandon their families or corrupt "decent" women whom they had no intentions of marrying. Alongside the tramp laws, Progressive Era Americans sought ways to ensure that men stayed at home and did not desert their families. Michael Willrich detailed the growth of legislation in the Progressive Era aimed at "the criminalization, regulation, and punishment of able-bodied male breadwinners who failed to support their families."⁶⁴ He argues that these laws were a means of legislating and governing masculinity, and that while they privileged men as breadwinners, they also created consequences for men who failed to fulfill their role properly. Therefore, "the breadwinner norm empowered private charities, state agencies, and local courts to police the behavior of workingmen, holding them liable, to their wives and the state, for family poverty in industrial America."⁶⁵

Willrich's study of husbands who deserted or did not provide for their families, and the criminalization of their behavior, demonstrates that the obligation of a man to take care of his

⁶²On railroads and the law, see Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York, 2001); on automobiles and dating, see Beth L. Bailey, *From Front Porch to Back Seat: Courtship in Twentieth-Century America* (Baltimore, 1989); on the automobile and gender, see Virginia Scharff, *Taking the Wheel: Women and the Coming of the Motor Age* (New York, 1991); on the automobile and family unity, see Michael L. Berger, *The Devil Wagon in God's Country: The Automobile and Social Change in Rural America, 1893–1929* (Hamden, CT, 1979); on the automobile and the city, see Scott L. Bottles, *Los Angeles and the Automobile: The Making of the Modern City* (Berkeley, CA, 1987).

⁶³Lawrence Friedman, "Crimes of Mobility," *Stanford Law Review* 43:3 (Feb. 1991): 638.

⁶⁴Michael Willrich, "Home Slackers: Men, the State, and Welfare in Modern America," *The Journal of American History* 87:2 (Sept. 2000): 462–63.

⁶⁵*Ibid.*

family was one of the central concerns for a large number of Progressive Era reformers. The legislative effort to force male breadwinners to provide for their families came from a "growing awareness of the moral and fiscal costs of desertion" and out of a desire "to preserve traditional gender roles when the new realities of wage labor threatened to turn those roles into obsolete legal fictions."⁶⁶ Like the tramp and breadwinner laws that regulated the movement of men when it seemed to undermine the social and family structure, so also the Mann Act attempted to regulate sex in its most socially disruptive form: when it involved the interstate movement that posed a threat to men's presumed role as husbands and providers. Although the Mann Act allowed for the possibility that women as well as men could be prosecuted for transporting a woman, there were very few female defendants; like tramp laws and breadwinner legislation, the Mann Act effectively was a law aimed at regulating masculinity.

The men who violated the Mann Act did more than just walk into a brothel and spend an hour with a prostitute. These men deviated much more seriously from the early twentieth-century ideals of masculinity; they abandoned their wives and children, or they posed the danger of abandoning women and children in the future by not legally binding themselves to those with whom they had sexual relationships. As the superintendent of the Oregon Prisoners' Aid Society said about one such Mann Act violator when he refused to help pay for treatment for the disease that a sixteen-year-old had contracted from him, as well as the baby she bore, "Men of his type . . . surely need to be taught the lesson that they cannot play with innocent, simple womanhood."⁶⁷ When men took advantage of the anonymity provided by large cities and the ease of long-distance travel, they threw off the protective cloak of community supervision that was supposed to ensure that women were provided for by the men who had sex with them.

The particular ways in which the Mann Act was enforced show the tension between nineteenth-century ideas about respectable, gentlemanly behavior and the rapidly changing contours of twentieth-century American life that were threatening to undermine Victorian ideals. At the same time, the understanding of "intent" in these cases lent itself to the belief

⁶⁶*Ibid.*, 467.

⁶⁷Letters from Superintendent W.G. MacLaren to Warden O.P. Halligan, October 23 and 28, 1914, in David Westman file, no. 1971, Inmate Case Files, Records of the U.S. Penitentiary at McNeil Island, Washington Records of the Bureau of Prisons, Record Group 129, National Archives and Records Administration—Pacific Alaska Region (Seattle).

that men were naturally sexually aggressive and required social and legal structures to ensure that they protected and provided for women and children. These cases demonstrate attempts to both define and regulate masculinity: the Mann Act made it a crime for a man to engage in the "unmanly" behavior of interstate travel with a woman to whom he was not married.

TABLE 1:
BIRTHPLACES OF PRISONERS CONVICTED OF MANN ACT
VIOLATIONS AT McNEIL ISLAND, 1910-39

Birthplace	Prisoners
U.S. states	577
U.S. territories:	
Phillipines	5
Alaska	1
Hawaii	1
Puerto Rico	1
Mexico	23
Italy	17
Greece	16
Canada	11
Russia	11
England	7
Austria	6
Spain	6
Germany	5
Ireland	4
Poland	4
China	3
Australia	2
Czechoslovakia	2
Finland	2
France	2
Hungary	2
Japan	2
Portugal	2
Yugoslavia	2
Austria-Hungary	1
Bohemia	1
Bulgaria	1
Denmark	1
Norway	1
Romania	1
Scotland	1
Sweden	1
Switzerland	1
Unknown	1
Total	724

TABLE 2:
MANN ACT VIOLATIONS:

INTAKE RECORDS OF FEDERAL PENITENTIARY AT McNEIL ISLAND, WASHINGTON, 1912

Birthplace	Complexion	Married	Occupation	Property	Religion	Age
Russia	dark	yes	jewelry salesman	none	Jewish	32
Virginia	fair	yes	merchant	none	Protestant	69
			ice business/ com labor			
Nebraska	fair	no	[sic]	none	Catholic	28
Arkansas	fair	yes	farmer	none	none	44
California	fair	no	waiter/bartender	none	none	22
California	fair	no	[illegible]/engineer	blank	none	44
Italy	fair	blank	blacksmith	none	Catholic	23
Russia	ruddy	yes	[illegible]	none	Hebrew	52
Idaho	fair	yes	waiter/farmer	none	Protestant?]	25
New York	medium	yes	druggist	none	Protestant	34
Russia	fair	blank	tailor/coatmaker	none	Jewish	21
Washington	fair	no	barber/restaurant man	none	Protestant	32
England	fair	blank	electrician	none	Protestant	27
Hawaii	dark	blank	musician/ [teamster?]	none	Catholic	26
Russia	fair	yes	waiter/tailoring	none	Jewish	23
Oregon	fair	yes	hardwood floor layer	blank	Catholic	31
France	medium	no	cook	none	Catholic	36
Austria	fair	yes	painter	none	Jewish	30
Ireland	ruddy	yes	cook/waiter	blank	Catholic	32
Wisconsin	fair	no	huselman	none	none	17
Greece	swarthy	yes	cook	none	Catholic	26
Denmark	fair	no	bartender	none	Protestant	22
North Carolina	fair	no	cook	none	none	22
Washington	ruddy	no	[nursery?]/sailor	blank	Protestant	21
			boiler maker/steel			
Illinois	fair	yes	construction	blank	Protestant	23
Kansas	fair	yes	bartender	none	Catholic	30
Norway	fair	no	car repairer	none	Protestant	23
Michigan	fair	no	[illegible] and barber	none	none	21
Minnesota	fair	yes	miner/saloonkeeper	none	none	40
Italy	dark	no	barber	none	Catholic	26
North Carolina	fair	blank	baker	none	none	27
Russia	dark	yes	clothing merchant	none	Russian Jew	29
Italy	fair	no	bartender/waiter	none	Catholic	23
Austria	medium	no	waiter/salesman	none	Hebrew	27
Illinois	fair	no	barber	none	none	29
Maine	medium	yes	telegrapher	none	none	35
Italy	dark	yes	coal miner/cook	none	Catholic	25
Wisconsin	medium	yes	gasoline engineer	none	none	25
Iowa	ruddy	yes	horse trainer	none	Protestant	29
China	Chinese	yes	cook/laundryman	none	none	50

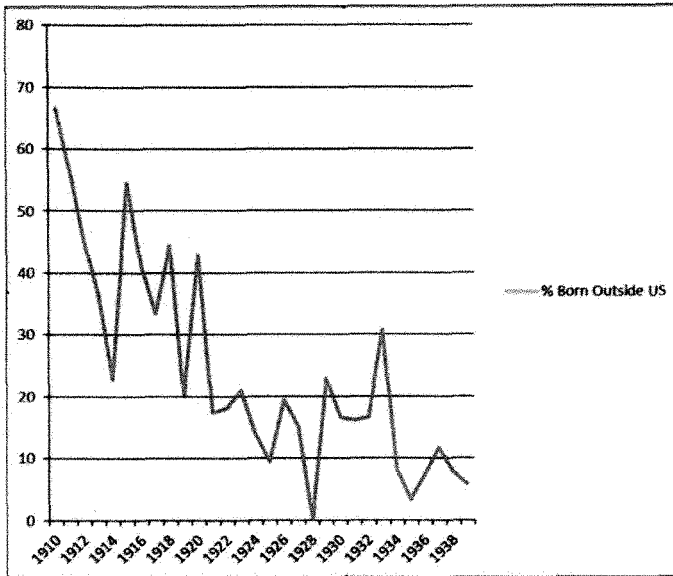
Note: Occasionally the register has blank spaces, or, more commonly, lines drawn through boxes. Since I do not know exactly what such a line was meant to indicate, I have called all non-answers of any form "blank" in the table. The entries that say "none" actually had the word "none" in the register. The ages were not listed in the register; they are my approximations of age, based on the year (but not the month and day) of the prisoner's birth.

TABLE 3:
MANN ACT VIOLATIONS:

INTAKE RECORDS OF FEDERAL PENITENTIARY AT McNEIL ISLAND, WASHINGTON, 1926

Birthplace	Complexion	Married	Occupation	Property	Religion	Age
Oklahoma	ruddy	yes	baker	none	Protestant	23
Illinois	ruddy	divorced	writer	none	Protestant	40
Tennessee	fair	yes	cook	none	Protestant	46
Illinois	fair	yes	hotel keeper	none	Methodist	34
New York	dark	divorced	stationary engineer/fireman	none	Protestant	36
Washington	light	divorced	entertainer	none	Catholic	24
Oregon	fair	blank	carpenter and stationary engineer	none	Catholic	18
Indiana	ruddy	yes	musician	none	Protestant	44
Kentucky	ruddy	yes	plasterer	none	none	46
Kansas	negro	yes	waiter	none	Protestant	31
Oregon	light	yes	waiter	none	Protestant	20
Nebraska	ruddy	no	teamster/waiter	none	Catholic	30
Florida	ruddy	yes	cook/waiter	none	Catholic	25
Idaho	dark	yes	blacksmith helper and farmer	none	Catholic	22
Mexico	dark	no	laborer	none	Catholic	blank
Washington	fair	yes	sailor/lumber grader/cabinet maker	none	Protestant	28
Poland	fair	yes	miner/farmer	none	Catholic	37
Oregon	fair	yes	physician/surgeon	none	Protestant	40
California	ruddy	no	painter	none	none	35
Pennsylvania	sallow	no	plumber's helper	none	Catholic	25
New York	ruddy	yes	mechanic	none	Catholic	28
Italy	ruddy	no	moulder/barber	none	blank	32
Iowa	ruddy	yes	rancher	yes	none	59
Michigan	ruddy	divorced	hotel clerk	none	Protestant	36
Oregon	ruddy	blank	police officer	farm	Protestant	42
California	ruddy	no	waiter/farmer	none	blank	29
Colorado	dark	yes	barber and waiter	none	none	31
Iowa	fair	no	printer	none	Methodist	25
Yugoslavia	medium	yes	miner	none	Protestant	40
Germany	ruddy	no	ba[k]er	none	Catholic	46
Australia	fair	yes	steam fitter	none	Protestant	46
Kansas	medium	no	teamster	none	Protestant	25
Georgia	fair	blank	waiter	none	Methodist	24
Washington	fair	blank	baggage man	none	Methodist	44
Michigan	fair	yes	steel worker and chauffeur	none	blank	32
Philippine Islands	Filipino	blank	cook	none	Catholic	21

Chart 1:
Percentage of Men at the McNeil Island Penitentiary Convicted of Violating the
Mann Act Who Were Foreign-Born
1910-1939



Note: This graph shows a general trend toward a reduction in the number of foreign-born men convicted of violating the Mann Act only as a *proportion* of the total. For instance, in 1910, two of the three prisoners at McNeil Island on Mann Act convictions were foreign-born, making them 66 percent of the total. In 1922, two were again foreign-born, but out of a total of eleven, making them only 18 percent of the total.

JOHN W. DWINELLE¹

CHARLES MCCLAIN

Dwinelle Hall is the largest classroom building on the University of California, Berkeley, campus, known best, perhaps, for its rather bewildering floor plan. Among those who daily wander its corridors, doubtless only a few will know that the building is named after John W. Dwinelle, a prominent nineteenth-century California lawyer, and one of the founders of the University of California. Very few, one would guess, will be aware that this same John Dwinelle, in 1874, brought a lawsuit on behalf of African American plaintiffs challenging the maintenance of separate schools for black and white children in San Francisco, one of the first cases to ground an attack on segregation on the then recently-adopted Fourteenth Amendment to the U.S. Constitution. (A dozen years earlier, Dwinelle and his law partner had represented Chinese litigants in a major attack on discriminatory tax legislation passed by California.)

Dwinelle's sponsorship of the 1868 legislation that established the University of California and his decisive actions on the institution's behalf at its founding and in its early years when he sat on its governing board would be enough to earn him a respectable place in any chronicle of California history. But, as the above examples illustrate, Dwinelle's impact on the state's affairs went well beyond the field of higher edu-

¹I wish to thank Christian Fritz for very helpful comments on an earlier draft of this text. I wish also to acknowledge, with gratitude, the archival assistance of Katherine Collett, archivist, Hamilton College; Patricia Keats, director of the library and archives, Society of California Pioneers, San Francisco; and the reference staff at the Bancroft Library, University of California, Berkeley. Finally, I thank Kony Kim for her valuable research assistance.

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cation. Dwinelle practiced law for over three decades, arguing cases of considerable importance in the state and federal courts, several of very large financial consequence to the city of San Francisco. He was also a bar leader and spokesman, who played a role in shaping California's lawyering landscape. He was, finally, a very visible figure in the state's public square, weighing in often in print on large issues of the day, such as Reconstruction, the relations between capital and labor, and a miscellany of other subjects, including history and literature. (Dwinelle fancied himself something of a man of letters.) Somewhat surprisingly, he has attracted very little attention from historians.²

EARLY LIFE IN NEW YORK

Education and Law Practice

John W. Dwinelle was born in Cazenovia, Madison County, New York, a small town in the central part of the state, on September 9, 1816, the son of Justin Dwinelle, a local lawyer who would later serve as a Republican congressman and then as presiding judge of the county's Court of Common Pleas. His father was of Huguenot refugee stock. His mother, Louise Whipple, was a descendant of William Whipple, one of the signers of the Declaration of Independence. Little is known of Dwinelle's very early life, other than that for a time he attended Cazenovia Seminary, a Methodist Episcopal school in the town, registered under his given name, Jeremiah, a name he seems to have used throughout his youth.

In 1830, at age fourteen, he enrolled in Hamilton College, some thirty miles away, graduating in 1834. Hamilton's curriculum was heavy on classical languages, but with a decent sprinkling of courses in math, science, philosophy, and economics. Dwinelle's years at the college left a lasting imprint on him, it seems. For one thing, it gave him a lifelong interest in Latin and Greek and in languages generally (he came to know several). It may also have given him a strong belief in the value of a liberal education, a belief that would manifest itself in efforts to promote higher education as a Californian. In 1871,

²The only publication I am aware of is Peter T. Conmy, *John W. Dwinelle: Mayor of Oakland and Father of the University of California* (Oakland, 1971).



Dwinelle's years at Hamilton College, pictured in this 1847 engraving, made a lasting impression on him. (Courtesy of Hamilton College Library Archives)

the school would confer an honorary doctorate on its by-then-distinguished alumnus.³

After graduation, Dwinelle studied law in his father's office and in 1837 was admitted to the New York Bar, under the name of Jeremiah. Two years later he moved to Rochester, New York, to establish his own law practice. Around this time or shortly afterward he changed his name to John, the change requiring a new admission to the New York Bar. He appears to have prospered in Rochester, achieving sufficient reputation to be named city attorney in 1844, a post he would hold until 1849. It is probable that he would have lived out his professional career in that city had news of events on the other side of the continent not caused him to make a radical change in life plan.⁴

The Lure of Gold

Reports of James Marshall's discovery of gold on California's American River in January 1848 began to receive coverage

³For Dwinelle's freshman listing at Hamilton College, see Hamilton College Catalog for 1830–31, <http://contentdm6.hamilton.edu/cdm/ref/collection/arc-pub/id/101>. Decades after graduation, Dwinelle wrote to a former Hamilton teacher, asking for clarification of a point of Greek grammar. In the letter he informed the teacher that it was his habit to review his Greek and Latin textbooks each year. Dwinelle to Dr. A.C. Kendrick, June 10, 1880, John W. Dwinelle Papers, folder 4, Society of California Pioneers, Alice Phelan Sullivan Library, San Francisco.

⁴The two separate bar admissions, in 1837 and 1841, are documented in John W. Dwinelle Papers, folder 6, Society of California Pioneers.

on the East Coast that summer, although the coverage was tinged with some skepticism. President James Polk's message to Congress in December, stating that federal officers had independently confirmed the accuracy of the reports and had estimated that the supply of gold to be found in the area was extremely large, ended all doubt in the matter. As the historian J.S. Holliday notes, "skepticism gave way to unrestrained enthusiasm." Nowhere in the eastern states was this truer than in New York. A month later the *New York Herald* was reporting, "[T]he spirit of emigration which is carrying off thousands to California . . . increases and expands every day." It went on, "Men of property and means are advertising their possessions for sale, in order to furnish them with means to reach the golden land. . . . [P]oets, philosophers and lawyers all are feeling the impulse."⁵

Among the lawyers was John Dwinelle. Exactly what motivated him to abandon his law practice and his presumably comfortable life and leave New York for California in mid-August 1849 we will never know, although evidence strongly suggests he had not planned to stay there permanently. In an 1866 address he gave to the Society of California Pioneers, a San Francisco historical society, he spoke of those, like himself, who crossed the continent in 1849 in pursuit of gold as men who planned "to gather our share of the mineral treasures of the land, and then return to the homes of our youth, there to spend the remainder of our lives."⁶

Dwinelle chose to take the so-called Panama route to California, rather than the longer one around Cape Horn. This meant traveling by ship to the east coast of Panama, crossing the swamps and jungles of the Isthmus of Panama to Panama City on the Pacific side and taking a steamer from there to San Francisco. He kept a diary the whole time, entries running from August 16, the day he left New York harbor, to October 31, three weeks after he arrived in California. The trip was a miserable affair. He was bothered by dysentery during both legs of the sea voyage. While in Panama he caught something he calls "Isthmus fever," most probably a type of malaria endemic to Panama. He also encountered financial problems. Travel across the Isthmus cost him much more than he had bargained for, and he found his

⁵J.S. Holliday, *The World Rushed In: The California Gold Rush Experience* (New York, 1981), 48–49. The *New York Herald*, Jan. 11, 1849, quoted in Holliday, p. 48.

⁶John W. Dwinelle, "Address on the Acquisition of California by the United States delivered before the Society of California Pioneers, September 10, 1866" (San Francisco, 1866), 31.

funds so depleted that he had to borrow money to book passage to San Francisco.⁷

The preponderance of Dwinelle's diary entries concern his own physical condition and state of mind during the trip, but he was at times moved to record observations about others. This was especially true of the time spent in Panama. One thing that struck him forcefully was the confident and independent demeanor of the free blacks with whom he came into contact there. "I find," he wrote, "that one does not retain his prejudices against the negro when he comes into contact with him such as a state of political freedom and equality has made him, even in a very imperfect condition of civilization." In them, he went on, he found entirely wanting what he called the "furtive, thievish expression which I have often noticed among negroes, and especially among slaves in the United States."⁸

FIRST YEARS IN THE GOLDEN STATE

Choosing the Law over the Mines

Dwinelle was still suffering from dysentery and other ailments and was nearly broke when he arrived in San Francisco harbor on October 10. He was immediately enthralled by the city, a busy, raucous place where it was clear that money was being made and spent freely. "San Francisco is a most wonderful town," he wrote, "sprung up, as it were, by magic." He complained about the ubiquitous gambling he saw but was pleased to note that the "business classes" did not participate. He was put off, too, by the prevalence of disease in the city, and worried that it might not be the healthiest place for him to live. However, he soon felt completely recovered from his illnesses and concluded that he had done the place an injustice.⁹

Dwinelle discovered he had acquaintances in San Francisco, who urged him to abandon the gold fields for the field of law, one of them telling him that "his diggings were here." It did not take him long to be persuaded or to set to work. In a diary

⁷John W. Dwinelle, "Diary, New York-San Francisco, 1849," Bancroft Library, University of California, Berkeley, 29, 41. References to dysentery are scattered throughout the diary.

⁸Ibid., 31.

⁹Ibid., 59, 66, 68.

entry dated October 13, he notes that he earned fifty dollars for three-quarters of an hour's legal work done in a banker's office. A "satisfactory" fee, he observes. Within a week, having in the meantime rented space in another lawyer's office, he had been retained in several important lawsuits, a couple of which he predicted would "pay well."¹⁰ It is not surprising that Dwinelle had no trouble finding clients. There were at the time a mere hundred lawyers in a city with a population approaching 25,000, and there were few lawyers at all outside that city. Dwinelle's older brother, Samuel, arrived in San Francisco several months later and joined him in law practice. There is no record of how long this partnership lasted. Samuel would himself go on to a distinguished legal career in California, eventually being appointed to a San Francisco trial court and holding that position for many years.

Dwinelle quickly rose to a position of some prominence in the state bar. And so we find his name appearing on a petition, dated January 17, 1850, asking the legislature to establish a municipal court for San Francisco. Two weeks later, his was the first name on a petition asking the legislature to make the continental European civil law, as opposed to the English common law, the rule of decision in major areas of California jurisprudence. This latter petition requires some comment.

In Support of the Civil Law

In his first message to the legislature, California's first governor, Peter Burnett, asked the body to adopt the Louisiana Civil Code and the Louisiana Code of Practice as California's law, retaining the English common law of crimes, evidence, and commerce. He cited both theoretical and practical reasons. California had an opportunity, he said, to "adopt the most improved and enlightened code of laws to be formed in any state." Louisiana's civil code had been compiled by the most able of jurists. It reflected the "most refined, enlarged, and enlightened principles of equity and justice." Furthermore, he noted, given the state's Spanish and Mexican heritage, a large proportion of cases to be decided in the future would have to be decided according to the principles of European civil law.¹¹

¹⁰Dwinelle, "Diary," 63, 68-69.

¹¹Peter Burnett, governor of California, *Message of Gov. Peter Burnett to the California Assembly*, Journals, California Legislature, 1850, 599-600.

A memorial in opposition to Burnett's proposal and reflecting the views of a majority of the San Francisco bar was soon submitted to the legislature. The petition submitted by Dwinelle and sixteen other San Francisco lawyers was meant to show that this was not a unanimous view. Not narrowly focused on Louisiana's codes, it spoke generally of the superior features of the European civil law tradition. Unlike the governor, the petition went out of its way to denigrate English common law, a system it characterized as needlessly technical and complex, the product of feudalism, a system favoring the landed interest over the interests of all other sectors of society. It was also a matter of justice to the Hispanic inhabitants of California, the signers said, that the legislature retain a system of law that "for centuries had formed a part of their well understood customs."

Dwinelle's petition had no impact. It was decisively rejected by the legislature, which in early 1850 adopted the common law of England as the rule of decision in all the courts of the state. What prompted Dwinelle, a man from a common-law state, with no prior experience of the civil law, to put his name to the petition may forever remain a mystery. Was this but the choice of one who, becoming acquainted with the civil law first hand, had become convinced of its superior merits? Throughout his life Dwinelle seems to have been a man of cosmopolitan outlook. He was conversant in foreign languages and open to new ideas, including ideas from abroad, but he had been in California a mere four months. This scenario therefore seems unlikely. Might adoption of the Louisiana codes have worked to the advantage of certain clients? There is no evidence on any of these points, and one is relegated to speculation.¹²

First California Supreme Court Cases

As noted earlier, Dwinelle was, for a time, associated with his brother and, on a separate occasion, with an attorney named Thomas Holt (this partnership dissolved in early

¹²See Bartholomew Lee, "The 1850 Petition to Adopt the Civil Law: Competing High-Stakes Rules of Decision in Gold Rush California," *Western Legal History* 23:2 (Summer/Fall 2010). Dwinelle's petition can be found in Richard Powell, *Compromises of Conflicting Claims: A Century of California Law 1760-1860* (Dobbs Ferry, NY, 1977), Appendix D, 283-86. The full story of the adoption of the common law is told in Edwin Young's "The Adoption of the Common Law in California," *The American Journal of Legal History* 4:4 (1960): 355-63.

1851).¹³ From the outset, Dwinelle handled appeals. He is listed as counsel of record in a case appearing in the first volume of the state appellate reports, and he appears regularly in subsequent volumes. In several of these cases he represented the city of San Francisco. He must have seemed a logical choice, given his years of prior experience as city attorney for Rochester, New York. In one case, decided in 1851, he successfully defended a judgment for the city in a suit brought by a citizen who had been injured when city employees used force to stop him from removing planks from a public wharf. The court held that no more force had been used than was necessary.¹⁴ The other cases, much more important, grew out of a fire that occurred on Christmas Eve, 1849, one of a series of devastating fires that would rage through the largely wooden city between that date and the summer of 1851. (The fire of May 4, 1851, destroyed one-quarter of the city.)

To halt the spread of the Christmas Eve fire, John W. Geary, then the *alcalde* of San Francisco, in consultation with his *ayuntamiento*, or city council, had ordered numerous houses to be either torn down or dynamited. Some affected property owners brought suit against the city, arguing that this amounted to a taking of their property by the city, entitling them to compensation. Others filed suit against Geary in his individual capacity. Trials in several of the cases resulted in judgments for the property owners. Although there was no California law on the subject, the consensus among lawyers was that the city could not escape liability. Thomas Holt, the city attorney, consulted with his law partner, John Dwinelle, who disagreed, expressing confidence that an appeal might be successfully brought to the Supreme Court. Invoking an ordinance that permitted him to hire outside counsel to assist him, Holt hired Dwinelle to bring the appeals. At the time of his hiring, there were almost \$500,000 in judgments or potential claims against the city.¹⁵

Dwinelle was well placed to make the judgment that he did. As the former city attorney of Rochester, he doubtless would have known about and seen the relevance of the series of appellate cases that had arisen out of the great fire that had raged in New York City in December 1835. There, as in San Francisco, the mayor had ordered properties blown up to halt the fire's

¹³The notice of dissolution, dated April 3, 1851, appears in the *Daily Alta California*, April 6, 1851.

¹⁴*McFadden v. Jones*, 1 Cal. 453 (1851).

¹⁵*Daily Alta California*, April 9, 1851. See also Roger Lotchin, *San Francisco, 1846–1856: From Hamlet to City* (New York, 1974), 155, 174–75.

spread. The cases had been distinctly unfavorable to the property owners' claims, even in the face of a New York statute that allowed for compensation in situations of this sort.

In Dwinelle's first appeal, *Dunbar v. The Alcalde and Ayuntamiento of San Francisco*, decided in December 1850, the California Supreme Court reversed a lower court decision in favor of a property owner but without addressing the takings claim on the merits. It held, rather, that since the lawsuit had been brought against the defendants in their corporate, i.e., official, capacity, the appellee's claim could prevail only if Mexican law had conferred on the mayor and his council members authority to take the decisions that they did (since the decisions had been taken before statehood, Mexican law applied) and that no such authority could be found.¹⁶ Another appeal, *Surocco v. Geary*, involved a suit against Geary in his individual or private capacity.

In a long brief, replete with references to Spanish and Mexican law, to English common law, to the New York cases, and to principles of natural equity, Dwinelle argued that individuals had always been privileged to do what Geary had ordered done. Although the suit was against Geary individually, the respondents had made an argument for compensation under the eminent domain clause of the state constitution. Dwinelle argued that there was no support in the law for such a claim. The destruction of property was not a taking within the meaning of the constitution, he contended. Furthermore, if there had been a taking it had been for a private or a local use, not for a public use within the meaning of the constitution.¹⁷

In an opinion largely echoing Dwinelle's brief, chief justice Hugh Murray agreed. The "highest law of necessity," rooted in the natural law, Murray wrote, absolved individuals of liability who destroyed property in order to halt the spread of fire. The common law both of England and America agreed. Cases from New York and New Jersey had definitively settled the matter, he declared. He rejected the "takings" claim as well, concurring with Dwinelle's analysis, although sensing, perhaps, that the law as applied worked some unfairness; he expressed the hope that the legislature might in the future make some provision for compensation in circumstances such as these.¹⁸ The *Surocco* case has been a staple in the torts literature ever since, standing for the proposition that a person acting either in his

¹⁶*Dunbar v. The Alcalde and Ayuntamiento of San Francisco*, 1 Cal. 355 (1850).

¹⁷Appellant's Points, case file, *Surocco v. Geary*, California State Archives, Sacramento.

¹⁸*Surocco v. Geary*, 3 Cal. 69 (1853), at 73, 74.

individual or official capacity may destroy property to prevent the spread of fire or to avert some other looming disaster, and that in the absence of statute the owner of the property is not entitled to compensation.¹⁹

In the wake of the *Dunbar* decision, Dwinelle submitted a bill to the city for legal services for \$29,000, a tidy sum, to say the least. It provoked some negative comment in the press, but the *Daily Alta California* came to his defense, noting that Dwinelle had agreed to take \$25,000 in scrip (worth about \$10,000) in full payment and that the *Dunbar* decision had saved the city a much larger amount of money. It was a bargain, in the paper's view: "Only ten thousand dollars for a year's hard work and for the saving the city a half million dollars!" Dwinelle eventually settled for less than this amount, although how much exactly is unclear. Nor is it clear how much he was paid for services rendered in connection with the *Surocco* case.²⁰

NEW YORK INTERLUDE

In 1853, after the triumph in *Surocco*, Dwinelle's reputation as a lawyer must have stood high, yet later that year he left San Francisco and moved back to Rochester. There he would remain for the next eight years, practicing law and, after 1857, serving as president of the Bank of Rochester. The bank was then in a parlous state, half of its capital having been embezzled, but Dwinelle, in his own telling, carried it through its crisis and, as he put it, "turned it over to my successor in a solvent condition."

Dwinelle did maintain ties with the Golden State while in Rochester. He traveled to San Francisco at least once, advertising in the *New York Times* in early 1854 that he would be in the city for a few months and was prepared to take care of any law business New Yorkers might have. In November 1859, he delivered an oration at a memorial held in New York City for California senator David Broderick, who had been killed in a duel with the state's chief justice, David Terry, two months earlier. In it he spoke warmly of his

¹⁹See Prosser and Keeton, *Handbook of the Law of Torts*, 5th ed. (St. Paul, MN, 1984), 146–48. *Restatement of the Law, Torts*, 2d, Sec. 196.

²⁰*Daily Alta California*, April 16, 1851. References to Dwinelle's bill for services in connection with the fire cases and recommendations by city officials for or against payment can be found in the *Daily Alta California*, April 22, May 1, and June 21, 1851, and September 16, 1852.

relations with Broderick, even while acknowledging political differences, praising him in particular for his steadfast opposition to slavery. He condemned the custom of dueling, but defended Broderick's decision to accept Terry's challenge, saying it was unavoidable.²¹

RETURN TO CALIFORNIA: MAJOR LAW CASES

In the Broderick oration, Dwinelle described himself as "one who was formerly a citizen of California,"²² but in February 1861, he left New York and returned to San Francisco, this time, as it would turn out, to stay. He linked up there with H.P. Hepburn, an established local attorney, forming a partnership that lasted for a number of years. The firm handled a large range of mainly civil cases, a fair number of which went up on appeal, one of considerable significance in the history of immigration law.

Lin Sing v. Washburn

In April 1862, the California legislature passed an act captioned "An act to protect free white labor against competition with Chinese coolie labor and to discourage the immigration of the Chinese into California." The measure imposed a tax of \$2.50 per month on all Chinese living in the state, exempting those who had taken out business or mining licenses and those involved in the production of sugar, rice, coffee, or tea. Employers were made liable for the payment of the tax due from their employees. The Chinese determined to test the law. To set up a challenge, a San Francisco Chinese merchant paid the tax assessed against an employee under protest and sued for a refund. A lower court ruled against him, and the case was appealed to the state supreme court, the firm of Hepburn and Dwinelle representing the merchant.

The crux of the appellant's argument in *Lin Sing v. Washburn* was simple and straightforward.²³ California, in seeking to discourage Chinese immigration in this indirect fashion, was trenching on an exclusive federal power. The high court agreed, holding that foreign immigration was part of foreign commerce, a subject of interest to the entire country and one

²¹*New York Times*, Feb. 16, 1854. John W. Dwinelle, *A Funeral Oration upon David C. Broderick, Late Senator from California* (Rochester, NY, 1859).

²²Dwinelle, *Funeral Oration*, 12.

²³20 Cal. 534 (1862).

which Congress alone could regulate. Since at the time no appeal lay to the U.S. Supreme Court from a state high court decision striking down a law on U.S. constitutional grounds, the court's ruling was final. It did not, however, prevent the state or its municipalities from passing numerous other laws aimed at discouraging Chinese immigration.²⁴ The appellant's brief was filed under the firm name, Hepburn and Dwinelle, so one cannot say exactly how much Dwinelle contributed to its drafting, but, given his extensive appeals experience, it is hard to believe that he would not have had a substantial hand in it. One final comment on the case: *Lin Sing* was a significant victory for the Chinese, the outcome in no small part due to the very capable brief submitted by Dwinelle's firm. But, as will become clear, Dwinelle would prove to be no special friend of that ethnic minority.

Pueblo Land Litigation

Dwinelle was involved in two other notable pieces of litigation during the Civil War years (the second commencing the month after conclusion of hostilities but arising out of the conflict). In the first he was retained by the city of San Francisco to represent it in an important land title case pending in the federal courts.

In 1851, Congress set up an elaborate system for ascertaining the validity of title to land in California claimed by individuals by virtue of grants from the Spanish or Mexican governments. Claims were to be submitted to a board of land commissioners for approval or disapproval, its decisions subject to review in the federal courts. Cities and towns claiming land by virtue of Spanish or Mexican law were subject to the same requirements.²⁵ On July 2, 1852, San Francisco submitted a claim for four square leagues of land, roughly six and three-quarters square miles, to the commissioners, basing its claim on Spanish and Mexican law, which entitled cities and towns recognized as *pueblos*, to four square leagues of contiguous land. The federal government opposed the city, claiming the land in question as property of the United States. San Francisco's claim affected the rights of many private landowners. During both the Mexican and American periods, local authorities had granted lots within the four square leagues to numerous private

²⁴Charles McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley, CA, 1994), 27–29.

²⁵9 Stat. 631., 31st Cong., 1851.



Exactly what motivated John Dwinelle to abandon his law practice in New York and go to California in 1849 is unknown, although evidence strongly suggests he believed it would be only a temporary move. (Courtesy of the Bancroft Library, University of California, Berkeley)

individuals. The validity of these grants depended on the approval of the city's claim.

On December 31, 1854, the commissioners confirmed San Francisco's right to part of the land but rejected its claim for the balance. Both the city and the United States government filed appeals in the United States District Court in San Francisco. The litigation would linger in the federal courts, first in the district court, later in the circuit court, for many years and would go through many convoluted twists and turns before it was finally decided in San Francisco's favor in 1864.

In 1862, San Francisco hired Dwinelle as special counsel to weigh in in support of its claim to pueblo status and to the full complement of land attached to it. To call the brief he submitted compendious would be an understatement. With appendices running to more than two hundred pages, it amounted to no less than a richly detailed history of San Francisco during the Spanish and Mexican periods, "with documents of the greatest importance in the history of California land titles," as a leading historian of California land claims, W.W. Robinson, observed.²⁶ The brief was not crucial to the decision Justice Stephen Field handed down in 1864, vindicating all of San Francisco's claims. The United States had already given up opposition to parts of the city's case. And Field relied as much on the reasoning in a recent California Supreme Court decision as he did on Dwinelle's arguments. But Dwinelle's "able and exhaustive brief," he declared, had eliminated any doubt that remained.²⁷ In 1863, Dwinelle published the argument separately as a book, under the title *The Colonial History of San Francisco*. It went through several editions and is still in print today.²⁸

²⁶W.W. Robinson, *Land in California: The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads* (Berkeley and Los Angeles, 1948), 233.

²⁷*San Francisco v. United States*, 21 F. Cas. 365, 368 (Circ. Ct., N.D. Calif., 1864). The California case was *Hart v. Burnett*, 15 Cal. 530 (1860). The technical question there was whether certain land claimed by the city as part of its pueblo status could be levied upon in execution of a judgment against it. In deciding the issue the court was compelled to go into the origin of the city's rights in the property. This decision, of course, was not binding on the federal courts. On the maneuvering Justice Field went through to see that he, as opposed to District Court Judge Ogden Hoffman, wrote the opinion for the court, see Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891* (Lincoln, NE, 1991), 197.

²⁸John W. Dwinelle, *The Colonial History of San Francisco* (1863; reprint, Carlisle, MA, 2011). The eminent historian of California, Kevin Starr, argues that the work, with its exhaustive survey of Spanish and Mexican legal history, "anchored San Francisco's conception of itself deeply, irretrievably, onto the Hispanic past." Kevin Starr, *Americans and the California Dream, 1850-1915* (New York, 1973), 392.

The Hogg Case

In May 1864 a Confederate naval officer and his subordinates were ordered to purchase passage on a commercial steamer in the port of Panama, and once at sea to seize the vessel, arm her, and use her to prey on Union shipping in the Pacific. They proceeded to Panama, but the plot had been discovered earlier; shortly after leaving port and before the plotters could effect their design, the vessel they had boarded was intercepted by a Union warship, and they were taken prisoner. They were transported to San Francisco and, on May 24, 1865, were arraigned before a military commission and charged with violating the laws and usages of war; the offense consisted of boarding the steamer in the guise of civilian passengers, with no military insignia and with the intention of seizing her by force of arms when she reached the high seas.²⁹

As might be imagined, barely a month after the conclusion of the Civil War, with vengeful feelings against the rebellion running high, the defendants did not have an easy time finding counsel (at least one attorney flatly refused the invitation), but three eminent lawyers proved willing to represent them: Frank Pixley, former attorney general of California, John Dwinelle and his law partner, E.L. Goold.

Proceedings got under way on May 24, with Pixley serving as trial counsel. A little over a month later the commission found the defendants guilty of all charges and sentenced them to be hanged. The sentence was subject to mandatory review by General Irvin McDowell, commanding officer of the Department of the Pacific, and Dwinelle and Goold submitted a brief on the defendants' behalf, addressing the legal issues raised by the case. Given the evidence, they faced a steep uphill task. In their brief they argued that stratagem and deceit were permissible in the conduct of war and that what the defendants had done was an allowable kind of deceit. Only treacherous or perfidious stratagems were forbidden by the laws of war, and their plans did not rise to the level of perfidy. Furthermore, they had been captured before they could put their plan into execution and so they had committed no overt act, something necessary to constitute an offense. McDowell rejected these arguments but, citing the fact that the defendants had not succeeded in their aims, did reduce the sentence of the ringleader, T.E. Hogg, to life imprisonment, and of his subordinates to ten-year terms. (Dwinelle and Goold had analogized the defendants' failed

²⁹The incident is more fully described in Aurora Hunt, *The Army of the Pacific* (Mechanicsburg, PA, 2004); see the chapter "The Pacific Squadron of 1861–1866."

effort to an attempt to commit a crime not characterized in the law, they said, with the same heinousness as a crime actually committed.)³⁰

THE UNIVERSITY OF CALIFORNIA

Dwinelle and the Founding of the University

After the Civil War, Dwinelle embarked on what would turn out to be a rather brief career in elective politics. In 1866, he was elected for a one-year term as mayor of Oakland, the city where he lived, commuting to work in San Francisco by ferry every day. In November 1867 he was elected as a Republican to the state assembly and served a single term in that body. (Dwinelle had entered California politics as a Democrat but by the 1860s had become a staunch Republican.) He was a busy legislator, taking an active part in debates and introducing more than twenty bills, several of which passed into law. One would prove to be of immense moment for the future of the state.³¹

The establishment of a public university is contemplated in California's original constitution, adopted in 1849. It required the legislature to use land granted the state by the United States and others as the basis for creating a permanent fund for the eventual founding of a university.³² But it would take two decades before this commitment, if so it can be styled, was brought to fruition.

³⁰*United States v. T.E. Hoog [sic] et al.*, "Argument of E.L. Goold and John W. Dwinelle for the Defendants" (San Francisco, 186?), Bancroft Library, University of California, Berkeley. The document is also accessible through the Hathitrust. For Gen. McDowell's order, see *Daily Alta California*, July 7, 1865. In their brief, Dwinelle and Goold acknowledged that the defendants' alleged crimes were "revolting to patriotism," but insisted that it was their duty as lawyers to conduct their defense as well as it could be conducted. Brief, pp. 4-5. Frank Pixley, the third lawyer on the case, was excoriated by many for the vigorousness of his advocacy. See *Daily Alta California*, June 12, 1865.

³¹In 1852 Dwinelle served as a delegate to the Democratic state convention. See *Daily Alta California*, March 15, 1852. One legislative measure introduced by Dwinelle was a bill to repeal a law passed during the Civil War that allowed litigants in civil actions to force their opponents to take an oath of loyalty. Attorneys were required to take the same oath in order to practice in the courts. Several other repeal bills were introduced during the session. One emanating from the Senate was eventually adopted. On Dwinelle's introduction of the bill and ensuing discussion, see *Sacramento Daily Union*, Dec. 11, 1867.

³²California Constitution (1849), art. 9, sec. 4.



Dwinelle Hall, the largest classroom building on the University of California, Berkeley, campus, is named for John W. Dwinelle, one of the founders of the University of California. (Courtesy of the author)

The legislature in the 1860s did take steps in the direction of establishing an institution of higher education. In 1866, it passed legislation authorizing establishment of an agricultural, mining, and mechanical arts college. But the real ancestor of what would become the University of California was a private college chartered in 1855, the College of California. Founded by Protestant missionaries and modeled on liberal arts colleges founded in the East, it aimed at providing a liberal and (Protestant) Christian education to the state's young men. One of its first trustees was John W. Dwinelle.

The college took in its first class in 1860 and had some initial success, but by the mid-1860s it had become clear that lack of funds made it unlikely that it would ever be able to realize its ambitions fully. Accordingly, at a meeting on October 9, 1867, a committee of trustees, chaired by Dwinelle, passed a resolution offering a parcel of land in what would later be the city of Berkeley to the state's fledgling Agricultural, Mining and Mechanical Arts College, expressing the hope that this would lay the groundwork for the creation of a true university, and authorizing the trustees to disincorporate the college when

this happened. (A month later the directors of the state school would accept the offer.) On the same day, a committee consisting of Dwinelle and three others was given the job of drafting legislation to create the institution envisioned.³³

Reverend James Eells, a Presbyterian minister, wrote a first and, it appears, rather sketchy draft of a proposal, but it was left to Dwinelle to fill in the numerous details and to write a full, final version, one that would stand a good chance of winning approval when submitted to the legislature. In doing this, he faced a major challenge. Himself the product of a classical, liberal arts education, he was clearly a person who believed in the value of the liberal arts. His support for the College of California is evidence of this belief. He had spoken publicly about the need for California to develop what he called "aesthetic culture" and "the cultivation of the arts," which would be reflected, among other ways, in the founding of schools and colleges. At the same time, as the first historian of the University of California observed, he was aware that there was "a certain popular jealousy of classical culture" in the frontier state and that the proposed university would need to speak to the demand for practical education as well.³⁴

The bill that Dwinelle drafted and introduced in the legislature on March 5, 1868, sought to balance these competing interests. The new university was to provide education in all the departments of science, literature, and the arts, and specialized professional education in fields like agriculture, mining, engineering, law and commerce. (Significantly, a college of agriculture was to be the first created.) Running to over ten closely printed pages, it included detailed provisions about organization and financing. It constituted the regents as a separate corporation (the actual articles of incorporation would be filed in June), with full authority to govern the university and with the obligation to manage gifts strictly according to the terms of the donation. Though generally well-drafted, probably because of the need to satisfy the different interests, it had parts that were not as clear as they might have been. The measure met with only slight opposition and was approved and signed by the governor on March 23.³⁵

³³Verne A. Stadtman, *The University of California, 1868-1968* (New York, 1970), 4-34. The text of the College of California resolution is found on page 31.

³⁴William Carey Jones, *Illustrated History of the University of California*, rev. ed. (Berkeley, 1901), 43.

³⁵In an article published some years later, Dwinelle explained the rationale for structuring the university the way it was. *Daily Evening Bulletin*, March 26, 1876.

Role in Recruitment of First Faculty

The law chartering the University of California—the Organic Act, as it came to be known—vested ultimate authority over the institution in a board of regents, twenty-two in number, eight of whom were to be nominated by the governor and approved by the state senate. Dwinelle was one of those appointed in May by then-Governor Henry Haight to the first board, and he would remain on it until 1874. He was also appointed to a regents committee, charged with taking the first steps toward implementing the law's provisions. A high priority was obviously the recruitment of faculty, and Dwinelle would become a key player in this effort.

As it happened, two men of national renown were interested in positions. The brothers Joseph and John LeConte were then both teaching at the University of South Carolina. Joseph taught geology and natural history, having trained at Harvard under the eminent geologist Louis Agassiz. John taught physics and chemistry. During the war John had served as superintendent of the Confederate Niter and Mining Bureau, which was in charge of supplying armaments materiel to Confederate forces. Joseph had worked under him as a chemist. Each of the LeConte brothers viewed his prospects as dim under the Reconstruction government of South Carolina. Neither, given their significant involvement in the Confederate war effort, harbored any hope of finding a university position in the North.

Agassiz had written to Joseph, informing him of plans to establish the University of California and urging him to apply for a position. Sometime during the winter of 1867–68, Joseph wrote to Benjamin Silliman, the noted Yale chemist, inquiring about the university and stating that he and his brother would be interested in faculty positions, and Silliman showed the letter to Dwinelle. In June 1868, a friend of the LeContes, General Barton Alexander, wrote John that he had sounded out Dwinelle about his and his brother's interest and, according to an account by Joseph's daughter, had been assured that their politics would in no way interfere with their candidacies.

In August, Joseph wrote to Dwinelle, formally applying for faculty posts for himself in geology and his brother in physics. Dwinelle responded quickly, a letter reaching Joseph on September 19 stating that he had been chosen for a faculty chair. But the offer was for a chair in physics! The same day Joseph wrote back saying he was sure that he and his brother were being confused, something that happened often, he said, and asking for clarification. That came soon enough. John was officially appointed to the chair in physics in mid-November, the first faculty member hired by the new university. Joseph got notice of his appointment to the chair in geology, botany, and natural history two

weeks later. Both would go on to have long and distinguished research and teaching careers at the University of California. (The eminent historian of the state, Kevin Starr, calls Joseph LeConte "California's single most influential teacher.") John would also serve as president of the university from 1876 to 1881.³⁶

The recruitment of the LeContes was not wholly the work of Dwinelle, but he surely deserves principal credit. He was the main point of contact with the two, recognized the left they could bring to the new institution, and seems to have been primarily responsible for moving their appointments so rapidly through the regents. Decades later, Robert Gordon Sproul, the university's longest-serving and possibly greatest chief executive, reflected on the far-reaching effect the LeContes had had on the growth and development of the university and said Dwinelle should be given special thanks for their "splendid selection."³⁷

The Carr Controversy and Dwinelle's Resignation from the Regents

The university opened in September 1869 in Oakland, in buildings it had received from the College of California (it would move to Berkeley in 1873). It had some forty students and ten faculty. Its early years would be attended with great controversy—controversy in which Dwinelle became enmeshed and which would eventually cause him to leave the Board of Regents prematurely. The controversy's roots lay in competing visions of the university's mission.

From the university's inception, complaints could be heard from groups like the California State Grange and organizations representing workers in the skilled crafts that the institution was devoting too many resources to theoretical pursuits (initial appointments had been overwhelmingly in the sciences and liberal arts) and not enough to education in agriculture and the mechanic arts, supposedly a priority. This emphasis, they contended, ran counter to the Organic Act and to the requirements of the federal land grant legislation, the Morrill Act, under whose terms the university had received substantial valuable acreage. Some said, too, that it reflected a class bias, the university catering primarily to the wants of the children of the well off. Similar criticisms came from within the university community. Most prominent among these critics was Ezra

³⁶Starr, *Americans and the California Dream*, 425.

³⁷Sproul to W.F. Chipman, July 20, 1931. Sproul was thanking Chipman, Dwinelle's stepson, for his donation of the Dwinelle Papers. John W. Dwinelle Papers, Bancroft Library, University of California, Berkeley.

Carr, a professor of agriculture, who publicly charged that the university was being faithless to its original mandate.

The chorus of complaints reached a high pitch during the administration of the university's fourth president, Daniel Coit Gilman (in office 1872–74), a man with a broad vision of the university's future and with little sympathy for what he probably saw as the overwhelmingly vocational vision favored by the grangers.³⁸ Eventually, the grangers and their allies submitted a memorial to the legislature, calling for the abolition of the independent Board of Regents and its replacement by a new board, the majority of whose members should be popularly elected. No doubt to forestall any action on these suggestions, the regents invited the legislature to investigate their management of affairs, an invitation that was accepted. After a month-long inquiry, in March 1874 a legislative committee gave the regents essentially a clean bill of health, finding their management to be reasonably sound and rejecting criticisms of the direction in which they were taking the institution.

Dwinelle had a mixed reaction to the committee report. In a letter to Gilman in April, he expressed satisfaction that the regents' management had been vindicated, but he said the whole affair had left him pessimistic about the university's future. Indeed, he said he thought it was doomed to fail. The problem, as he saw it, was that the institution would always be prey to legislative interference. "From some popular quarter or another," he wrote, "the university will always be the object of legislative attack." The regents had successfully defended themselves in the recently concluded legislative investigation, but many more such inquiries could be anticipated (he predicted that the grangers and mechanics would control the next legislative session), and those might not have such happy outcomes.³⁹

Dwinelle certainly shared President Gilman's broad view of the university's mission. He was, however, more attuned than Gilman to political realities. Although he had no great love for the granger and mechanics organizations, he recognized that the university needed the support of the constituencies and the concerns they represented if it was to succeed over the long

³⁸Gilman did recognize that the university had been created in part to meet the practical needs of the state. This he made clear in his inaugural address. He spoke there of the university as an institution "organized to advance the arts and sciences of every sort." But, he stressed, the new university was not to be a copy of Yale or the University of Berlin. It needed to be adapted to the people of California, "to their peculiar geographical position, to the requirements of their new society and their undeveloped resources." Stadtman, *The University of California*, 64.

³⁹Dwinelle to Gilman, April 1, 1874. Daniel Coit Gilman Papers, Milton S. Eisenhower Library, Johns Hopkins University.

term. As noted earlier, these concerns were addressed, to some extent, in the university's founding statute, which he had had such a large hand in drafting. And in 1870, in an appearance before the Academic Senate, he had spoken forcefully of the need for the faculty to "popularize" the university, and had urged it to establish a preparatory (pre-college) course of instruction and to sponsor lectures on practical subjects at the San Francisco Mechanics Institute. Both suggestions were (grudgingly, it appears) accepted.⁴⁰

In the months following the legislative investigation, tensions between Ezra Carr, the agriculture professor, and the regents and administration heated up. He and Gilman were particularly at odds. In August 1874, when he refused a request from Gilman to resign, the regents unceremoniously dismissed him. In the wake of his dismissal, Carr published a pamphlet, revealing, among other things, that during the investigation Dwinelle had given a pledge to a legislative leader that, no matter what the outcome, Carr would suffer no ill consequences. Once this news became public, Dwinelle resigned from the board. He wrote Gilman that he thought he had no other choice. He regretted having given the pledge, he said, and having not been able to deliver on it, although he understood his fellow regents' refusal to honor it.⁴¹ (In December, Gilman himself resigned to take the presidency of Johns Hopkins University.) The coda on this episode and indeed on Dwinelle's tenure as regent, written by historian of the university Verne Stadtman, seems apt. "He had been, on the whole," Stadtman writes, "one of the most thoughtful and articulate members of the Board. If Gilman had understood the University as a doctor might understand a patient, Dwinelle had understood it as a father might understand a son. Even the desperate act that brought about his resignation was one of loyalty to the institution that his pen and his advocacy had brought into being six years earlier."⁴²

Dwinelle continued to take an interest in university affairs after leaving the board. In 1876 he published an article in the *San Francisco Evening Bulletin*, railing against proposals in the

⁴⁰Stadtman, *The University of California*, 55.

⁴¹Dwinelle to Gilman, October 15, 1874. Daniel Coit Gilman Papers.

⁴²Stadtman, *The University of California*, 78. In a letter to Dwinelle written some years later, Gilman spoke of the "paternal affection" with which Dwinelle had watched over the university's affairs during its formative years. Gilman to Dwinelle, March 20, 1878. Daniel Coit Gilman Papers. The legislative investigation and the Carr affair are chronicled in Stadtman, *The University of California*, 71–78. See also John Aubrey Douglass, "Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879," *History of Education Quarterly* 32:1 (1992).

legislature to abolish the Board of Regents or submit it to more political control. (He claimed later that the piece helped pull the rug out from under them.) In 1878 he received overtures about resuming his seat, but he rebuffed them. In a letter to Gilman he explained that he didn't think the regents had the stomach for the battles they would have to continue to fight against those who wished to convert the university, as he put it, "into a machine shop, or into a cowyard, presided over by Dr. Carr." His only hope for the long-term future of the institution, he declared, was that someday the constitution might be amended to turn it into a "close, self-perpetuating" corporation.⁴³ In the end, something like that happened. The 1879 state constitution constitutionalized the university's status as set forth in the Organic Act and declared that it should forever be free of "all political or sectarian influence."

LIFE AFTER THE BOARD OF REGENTS: THE 1870S

Political Writings

Dwinelle's tenure as regent ran from May 1868 to September 1874. Needless to say, the university and its travails were not the only thing occupying his time. These were, in fact, very busy years. He had, of course, a demanding law practice. In addition, he wrote prolifically, contributing regularly to the *San Francisco Evening Bulletin* on subjects ranging from history and politics to literature, to his travels overseas. Apart from these columns, in 1870 he published, in London and Paris, a long essay on the dispute between Britain and the United States arising out of the former's outfitting of the Confederate raider, the *Alabama*. In it he sought as well to give an overview of the American political system, a subject about which he claimed Europeans harbored grave misconceptions. In 1871, a pamphlet entitled "The Republican Party and the Rights of Labor" appeared. It was based on a speech he had given in August of that year and has a contemporary resonance.⁴⁴

Dwinelle observed that there was a growing perception on the part of many that the relationship between capital and labor was not a just one, that while the rich were getting richer,

⁴³*San Francisco Bulletin*, March 22, 1876. Dwinelle to Gilman, March 8, 1878. Daniel Coit Gilman Papers.

⁴⁴John W. Dwinelle, *The Republican Party and the Rights of Labor* (San Francisco, 1871).

the poor were getting poorer. He had sympathy for this belief, he said, pointing to the examples of what he called "stock-jobbing millionaires" like Vanderbilt and Fisk on the one hand, and the able-bodied men who struggled to find a decent job on the other. But capital was a necessary element in the economy, he contended, and there was no necessary conflict between capital and labor. Each had its task to perform. But labor could perform its role only if it were organized and educated. "Educated labor can stand face to face with capital," he declared. So the Republican Party believed in compulsory education. It also believed that the relations between capital and labor were legitimate subjects of regulation. Thus it had supported the eight-hour day at both the national and state levels. In his essay on "The Alabama Claims," in a section captioned "the rights of labour," Dwinelle had sounded a similar theme. "[L]ike all other powers, if left unchecked," he wrote, "capital becomes tyranny. The proposition that competition will regulate the relations of labour and capital, was long accepted in theory, but in practice has proved to be wholly deceptive. It therefore requires other checks from public opinion and from legislation, as a protection of the productive classes."⁴⁵ Whatever else he was, Dwinelle was no advocate of the unregulated market.

The Commission to Examine the Codes

In June 1873 Dwinelle received a prestigious appointment—a sign, no doubt, of his standing in the legal community. He was asked by Governor Newton Booth to join Stephen Field, associate justice of the U.S. Supreme Court, and Jackson Temple, former justice of the California Supreme Court, on a commission whose job it was to examine California's four new law codes—the Civil Code, Code of Civil Procedure, the Penal Code, and the Political Code—and propose any amendments that seemed necessary. These codes, adopted in 1872, were the first ever enacted by the state and aimed to order and collect in one place (or, to be more exact, in four places) the scattered provisions of these main bodies of substantive and procedural law, eliminating redundancies, resolving inconsistencies, clarifying language that was ambiguous or imprecise. The commission met from June to December 1873, taking input from judges, lawyers, and members of the public, and submitted slates of proposed amendments to the four codes, most of which were later adopted by the legislature. Since the commission kept no record

⁴⁵Ibid. Dwinelle, *American Opinions on the "Alabama" and Other Political Questions* (London, 1870), 26.

of its proceedings, it is impossible to parcel out credit among the commissioners for the work done, but it seems safe to conclude that one proposed amendment emanated from Dwinelle.

The Political Code contained a chapter on the University of California, reenacting most of the provisions of the 1868 Organic Act but making one major change. The original statute, as noted above, in giving the regents the power in their separate corporate capacity to accept donations of property or moneys, bound them to manage such gifts according to the terms of the donations. The Political Code elided the distinction between the state and the regents and contained no such obligation. The proposed amendment, later passed, restored the distinction and the obligation.

Dwinelle believed that the university would always have to depend for its financial well-being on donations from private individuals, and that such donations would be forthcoming only if benefactors were convinced that their donations would be used for the purposes for which they were given. They would have some assurance of that, Dwinelle thought, if the regents maintained their separate corporate existence.⁴⁶

Dwinelle's belief that the university would depend heavily on private funding for its operations was by no means unusual. There appears to have been no expectation in these early years that the state would be the main, or even a regular, source of financial support for the university. The expectation was, rather, that the university would support itself from income on its endowments, including proceeds from the sale of federal and state land grants, with the state stepping in from time to time to fund select capital projects or to cover unexpected deficits. The state would not commit itself to regular funding until 1887, when the legislature, responding to pressure from faculty and administrators, enacted a tax earmarked for university purposes and designed to be permanent.⁴⁷

⁴⁶Section 1415, 1872 California Political Code. Acts Amendatory to the Codes, 20th sess., 1873–74, sec. 57, amending sec. 1415. The amended section of the Political Code makes clearer than does the Organic Act that the state and the regents are distinct corporate entities. For Dwinelle's views on funding, see Dwinelle to Gilman, April 1, 1874, and March 8, 1878, Daniel Coit Gilman Papers.

⁴⁷The act levied an annual tax of one cent on each one hundred dollars of taxable property in the state. "An Act to Provide for the Permanent Support and Improvement of the University of California," 1887 Stats. of California (Extra Session of the 1885–86 Legislature), 2–3. For the history of its enactment, see Stadtman, *The University of California*, 112–14. Commenting on the earlier period, Stadtman writes, "Most Californians believed that the endowments being amassed with the proceeds of federal and state land grants would, in due course, sustain the University comfortably." Stadtman, 107.

A MAJOR CHALLENGE TO SEGREGATION: WARD V. FLOOD

Background

As was the case with most lawyers at the time, Dwinelle's law practice was varied, with an assortment of both criminal and civil cases on the docket. In April 1872 he would take on what, in retrospect, can be seen as his most historically significant, if not most consequential, case: a challenge to racial segregation in the San Francisco public schools.

Discrimination against African Americans in California dates back to the founding of the state. The original state constitution limited the franchise to white males. And two of its earliest statutes forbade blacks to testify against whites in criminal proceedings or to be witnesses in civil cases where whites were parties. The Fifteenth Amendment to the U.S. Constitution and Reconstruction-era civil rights legislation effectively voided these measures. But this did not put an end to the passage of racially discriminatory laws.⁴⁸

In April 1870 a law was passed requiring that children of African and American Indian descent be educated in separate schools. Before that, school boards had had the authority under certain circumstances to admit such children to white schools.⁴⁹ Soon thereafter, school boards in several cities, San Francisco included, established separate colored schools. California's small but politically alert and active African American community reacted angrily to the new law and, the following year, began to mobilize to repeal it. In November 1871 a convention of African American citizens was held in Stockton for the purpose of deciding on a course of action (dubbed the Stockton Educational Convention). One result was the adoption of a resolution that a petition be sent to the legisla-

⁴⁸California Constitution (1849) art. 2, sec. 1; 1850 Cal. Stat. 229, 230; 1851 Cal. Stat. 51, 114. The Fifteenth Amendment stated that the right of citizens to vote should not be abridged on account of race. The Civil Rights Act of 1870, 16 Stat. 140, reaffirmed the right to vote free of racial discrimination, imposing penalties on those who interfered with the right; it also guaranteed nonwhites the same rights to testify as white citizens.

⁴⁹1869–70 Cal. Stat. 824, 839. Boards were allowed to admit colored children to white schools unless a majority of white parents in the district objected in writing. "Act to Provide for a System of Common Schools," secs. 57–58, 1865–66 Stat. of California, 398. On the checkered history of school segregation in California, see "Racial Minorities and the Schools: A Look at the Early Decisions of the California Supreme Court," *California Supreme Court History Society Yearbook*, vol. 1, 1994.

ture praying that the words "children of African descent" be stricken from the new law and that these children "be allowed educational facilities with other children." Another resolution empowered the convention's executive committee to challenge the law in court and to collect money throughout the state to cover litigation expenses.⁵⁰

Notwithstanding the freshness on the books of the segregation law, hopes for change through the California political process were by no means chimerical. The fall elections had returned a Republican governor and a more Republican state legislature. And in the months following the Stockton convention, there appeared to be concrete basis for hope. In his inaugural address, delivered in December, Governor Booth called for an end to segregation in the schools. "All badges of distinction that are relics of the slaveholding era should pass away," he said. "The doors of our schools should be open to all, without prejudice of caste." When the new legislature convened, bills were introduced in both houses to amend the 1870 law and abolish segregation. But these hopes proved short lived. There was substantial Democratic opposition in the body, and neither measure could be pushed through to enactment. It was clear then that if change were to come, it would have to come through the courts. In April 1872 black leaders announced at a community meeting that they had interviewed several prominent attorneys and had settled on John W. Dwinelle as the man to bring their test case.⁵¹

Dwinelle's Views on Black Rights

Dwinelle was a logical choice. He was an experienced and highly regarded member of the bar. He was a sitting regent of the university and, since his days as a trustee of the College of California, had long been associated with the field of education. More to the point, perhaps, he had publicly voiced his support for black aspirations on more than one occasion, each time singling out black Californians for special mention.

In an address delivered after an Independence Day parade in San Francisco in 1865, one in which a delegation of African Americans had participated, Dwinelle spoke of the four mil-

⁵⁰*San Francisco Chronicle*, Nov. 21, 1871.

⁵¹Newton Booth, governor of California, "Inaugural Address," Dec. 8, 1871, <http://governors.library.ca.gov/addresses/11-Booth.html>. There is an account of the legislative proposals and Dwinelle's hiring in the black newspaper, the *Elevator*, April 27, 1872. Black leaders told the meeting that they expected that the litigation would cost between \$1,000 and \$1,500 and appointed a committee to supervise fundraising.

lion slaves recently liberated by the Civil War. He had no fear, he said, of this population. They had "the germs of the same intellect" as Caucasians, as many examples could show. He instanced Frederick Douglass, a gentleman, orator, and scholar who was, in his words, his equal and the equal of any of his hearers. To be sure, blacks had been debased by slavery, and it might take several generations to lift them from that degraded state. But the experiment was worth the try. That free blacks could sustain themselves was shown by the examples of Jamaica, Barbados, and Liberia. The example of the African Americans who had taken part in the day's parade in San Francisco gave cause for optimism as well. If the liberated slaves of the South should rise to the level of these "sober, well conducted and intelligent colored men," he declaimed, who should say "that they are not worthy of freedom, and able to endure its burdens."⁵²

In a speech Dwinelle gave in Oakland in October 1868 before the Grant and Colfax Club, an organization founded to support the presidential campaign of Ulysses Grant and his running mate, Schuyler Colfax, he expanded more fully on his racial views. The speech was delivered in response to one given two months earlier by Eugene Casserly, the Democratic senator-elect from California, which was a sustained attack on the Republican Reconstruction program in general and on the grant of the franchise to Southern blacks in particular. Casserly flatly denied that blacks were capable of intelligent participation in the political process.⁵³

Dwinelle began his address with a long harangue against Casserly's Democratic Party, a party which, he said, before the Civil War had always bowed to the interests of Southern slave owners. He defended Reconstruction generally and, unlike Casserly, showed no sympathy for the complaints of Southern whites about its allegedly oppressive character. "If the South prefers military rule to the peaceful government of the United States," he declared, "let her have it." One thing the region should be clear about was that the North would "never desert nor betray the colored races of the South." He praised laws such as the Civil Rights Act of 1866, which gave blacks the same contractual rights as whites (why shouldn't they have such rights, Dwinelle asked) and invalidated the so-called Black Codes passed by white Southern legislatures. These laws,

⁵²*Daily Evening Bulletin*, July 5, 1865. These remarks were printed in *The Liberator*, the famous magazine published by abolitionist William Lloyd Garrison and a publication widely distributed in the black community. *The Liberator*, Aug. 18, 1865.

⁵³*Daily Alta California*, Aug. 20, 1868.

he argued, which, among other things, criminalized vagrancy and breaches of employment contracts, were little more than disguised attempts to reintroduce slavery.

Dwinelle described the grant of the franchise to Southern blacks as the only way to keep white secessionists from regaining power. It was primarily a matter of expediency, he seemed to be saying, though, at least in the case of the blacks who had fought for the Union, a matter of right as well. Casserly had spoken of the ignorance of the freedmen as a bar to their voting, but, Dwinelle asked, what about the ignorance of many whites? "Judging from the colored people of California," he said, "we may safely infer that the negro is quite as capable of exercising the elective franchise as the poor ignorant white trash of the South, or the howling mob of Horatio Seymour's 'friends' in the city of New York." At the same time, Dwinelle went out of his way to make clear that he did not equate political or civil rights with "social" rights. The grant of the franchise and other civil rights to blacks did not make them the "social" equals of whites, he stressed.⁵⁴ Sentiments like these may grate on modern sensibilities, but one should remember that they were by no means uncommon among white supporters of black civil rights in the nineteenth century.

Mounting of the Case

On July 23, 1872, the *San Francisco Chronicle* reported that several African American parents had sought to enroll their children at four different elementary schools in San Francisco, all without success. It noted that legal proceedings, aimed at reversing these decisions, could be expected to commence shortly, and that John W. Dwinelle would be the attorney handling the case. One of the children who was refused admission, in this case to the Broadway Grammar School, was Mary Frances Ward, eleven-year-old daughter of Mr. and Mrs. A.J. Ward, and Dwinelle chose her to be the plaintiff, represented by her father, acting as guardian *ad litem*. In September Dwinelle filed an application for a writ of mandate in the California Supreme Court, asking the court to order the school principal, Noah Flood, to admit her. The application was accompanied by an affidavit from Mrs. Ward, describing her effort to enroll her daughter and Flood's refusal of the request, assigning as his only reason the fact that the child

⁵⁴The full text of Dwinelle's "Grant and Colfax" speech can be found in Dwinelle, "Scrapbook: entitled some of my own sins," 126–37. Bancroft Library, University of California, Berkeley.

"was a colored person" and the school board policy on separate schools for colored children. The attorney for the school board defended its policy on the grounds that the two separate schools were staffed by able teachers and afforded colored pupils equal advantages with white children. As further ground for the refusal to admit, he also claimed that Mary Ward had not completed sufficient instruction to enter the lowest grade of the Broadway school. Both sides submitted briefs, and the case was submitted on the pleadings and the briefs.⁵⁵

Existing Case Law Precedents

Segregation of pupils by color was the norm in most northern states at the time. The practice had been subjected to legal challenge in several states in preceding years with mixed results. The leading case on the subject was undoubtedly *Roberts v. The City of Boston*, an 1850 opinion by the eminent antebellum jurist Lemuel Shaw. The parents of a black child in Boston challenged a school board policy that assigned black students to separate schools, basing their case on a provision of the Massachusetts state constitution that said, "[A]ll men, without distinction of color or race, are equal before the law." Charles Sumner, representing the parents, argued that the school policy inflicted upon blacks "the stigma of caste," creating a feeling of degradation in blacks and prejudice in whites and, as such, violated the constitution. But Shaw, writing for the court, ruled that the school board was exercising a reasonable discretion and that the existence of race prejudice in the population could not be attributed to the law—the law, in Shaw's view, being powerless to affect racial attitudes.⁵⁶

A couple of pre-Civil War Ohio cases had upheld school segregation against legal attack,⁵⁷ but more recent post-Civil War

⁵⁵The application for mandate and the answer of defendant can be found in the supreme court's report of the decision. *Ward v. Flood*, 48 Cal. 36, 42–46 (1874). The application, with accompanying supporting documents, was published in the black weekly, the *Pacific Appeal*, Sept. 28, 1872. The school litigation is discussed in Charles Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1875* (Berkeley, 1978), 21–24. For a richly detailed account of the litigation as seen from the perspective of the San Francisco black community, see Jeanette Davis Mantilla, "Hush, Hush Miss Charlotte: A Quarter-Century of Civil Rights Activism by the Black Community of San Francisco, 1850–75" (Ph.D. dissertation, Ohio State University, 2000), v. 2, chap. 34.

⁵⁶59 Mass. (5 Cush.) 198 (1850). Five years later the Massachusetts legislature abolished segregation in the schools.

⁵⁷*State v. The City of Cincinnati*, 19 Ohio 178 (1850); *Van Camp v. Board of Education of Logan*, 9 Ohio St. R. 406 (1859).

opinions from Iowa (1868) and Michigan (1869), the latter by the noted nineteenth-century jurist Thomas Cooley, had gone the other way, invalidating school segregation on the basis of either the state constitution or state law.⁵⁸

Closer to home and more proximate in time was an opinion that had issued from the Nevada Supreme Court just months before Dwinelle filed his case. There, in a somewhat ambiguous decision, the court had ordered a local school board to admit a black student to a school in the district where he lived. It held that a statute barring "Negroes, Mongolians and Indians" from admission to the public schools was inconsistent with the arrangement set up by the Nevada Constitution for the organization and funding of public education. At the same time, it said that it would be within the power of trustees to establish separate schools for blacks. In oral argument, counsel for the petitioner had contended that the statute was in violation of the Fourteenth Amendment "privileges or immunities" clause, but the court emphatically refused to address this argument.⁵⁹

Dwinelle's Argument in the California Supreme Court

The argument that Dwinelle submitted to the California Supreme Court in the fall of 1872, in the case that went up under the name *Ward v. Flood*, paralleled that of Charles Sumner in the *Roberts* case, although in *Ward* it was founded on the Fourteenth Amendment to the U.S. Constitution.⁶⁰ The amendment was only four years old and was completely without authoritative judicial interpretation. Thus Dwinelle was venturing into uncharted territory. His contention was that the amendment had, for the first time, unequivocally affirmed the citizenship of blacks and placed them on a plane of perfect political equality with white citizens. This "political right," as he styled it, was fatally compromised by mandatory segregation. "The political right to attend the public schools, resides in the mode in which it is to be exercised," he declared. "When it is limited to be enjoyed only by wearing a degrading badge of

⁵⁸*Clark v. Board of Directors*, 24 Iowa 267 (1868); *People v. Board of Education of Detroit*, 18 Mich. 401 (1869).

⁵⁹*State ex rel. Stoutmeyer v. Duffy*, 7 Nevada 342 (1872).

⁶⁰Specifically on section one of the amendment, which reads, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

an 'odious distinction of caste,' founded in a deep-rooted prejudice in public opinion, then the equal political right ceases to exist." Dwinelle cited the Fourteenth Amendment generally, but parsing his argument, one might see it more as bottomed on a melding of the amendment's "citizenship," "privileges or immunities," and "equal protection" clauses. The amendment had conferred the right of equal citizenship on blacks, and segregation infringed on that right.⁶¹

The brief surveyed the case law on segregation, including the precedents mentioned above. Dwinelle noted that they had, with one exception—the Nevada case—been decided before the adoption of the Fourteenth Amendment and were thus not in any sense dispositive, although he thought the Michigan and Iowa cases apposite, inasmuch as they stood for the proposition that the equal right to attend public schools, affirmed in either the constitution or statutes of those states, was not secured by the establishment of separate colored schools. He devoted considerable space to Justice Shaw's opinion in the *Roberts* case, dismissing it as a political decision, a pandering to the public sentiments of the time. As to Shaw's argument that segregation did not stamp the segregated classes with any odious distinction, he asked the court to imagine the result if a state were to pass a law segregating Irish people or Jews. He substituted these ethnicities for African American or colored in the Shaw text, in an effort to show what he said was its absurdity.⁶²

Opinion of the California Supreme Court

Although arguments in the case had been completed by the end of 1872, the case lingered in the California high court for over a year thereafter, a delay that occasioned consternation and criticism in the San Francisco African American community.⁶³ The opinion, when it did come down in February 1874, was a disappointment to that community. Chief Justice William Wallace, writing for the court, first agreed that it would be enough to deny the mandamus writ on the grounds, offered

⁶¹Ibid. As of this time, the U.S. Supreme Court had issued no interpretation of the section's spacious terms.

⁶²John W. Dwinelle, "Argument of Mr. John W. Dwinelle on the Right of Colored Children to Be Admitted to the Public Schools," https://archive.org/details/argumentofmrjohn_00dwin.

⁶³*Pacific Appeal*, Nov. 30, 1872; *San Francisco Chronicle*, Nov. 27, 1873. The California Supreme Court may have been awaiting the decision of the U.S. Supreme Court in *The Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873), then pending in that tribunal. These Louisiana cases put the meaning of the newly adopted Fourteenth Amendment squarely before the U.S. high court.

by the defendant, that the plaintiff child had not sufficient education to enter the lowest grade of the Broadway Grammar School, but he refused to put its decision on that basis. The court would assume, said the chief justice, that African descent was the sole reason for denying the child's admission and would address Dwinelle's Fourteenth Amendment claims. It discussed each of the amendment's operative clauses. It dismissed the "due process" claim out of hand. The "privileges or immunities" clause it rejected as well on the ground that the privilege of attending school was not one of the privileges of U.S. citizenship and therefore could not be infringed by state action.⁶⁴ That left the "equal protection" clause. Stating that that clause could be assimilated to the "free and equal" clause of the Massachusetts Constitution, Wallace adopted the reasoning and large chunks of the language of Chief Justice Shaw in *Roberts v. The City of Boston*. The requirement of equality was met if the separate school facilities were substantially equal. Segregation, by itself, did not impose any mark of degradation on blacks.⁶⁵

The opinion concluded with what might be seen as a nod in the direction of Dwinelle's argument. Chief Justice Wallace stated emphatically that if separate schools were not in fact maintained, black children would have the same right as white children to attend any schools in their district for which they were academically prepared. This was a significant statement. The law as it stood was categorical and admitted of no exception. It said that school districts were to segregate children by color, *tout court*. But by clear implication, the court here was giving school authorities the option of operating a non-segregated school system.⁶⁶ In doing so, the court was in a sense rec-

⁶⁴The U.S. Supreme Court decision in *The Slaughter-House Cases* came down in April 1873. The court gave an extremely narrow interpretation to the "privileges or immunities" clause of the Fourteenth Amendment, holding that it only protected individuals against state infringement on rights that they had *qua* citizens of the United States, a rather narrow and insignificant set of rights, and did not protect them against state infringement on any rights that might be considered fundamental. The California court's holding was consistent with this decision.

⁶⁵*Ward*, 48 Cal. 36 at 52–57 (1874).

⁶⁶*Ward*, 48 Cal. 36 (1874). The black community was disheartened by the court's failure to declare segregation *ipso facto* incompatible with equality. But it was not crushed by the decision. Some saw it as a partial victory. The African American weekly, the *Elevator*, stressed the court's affirmation of a right to equal educational facilities. It urged black citizens to test the boundaries of this concept. "Wherever there is no separate school or *where said school is deficient in instruction* [emphasis added]" parents should send their children to the nearest school in their district. *Elevator*, March 7, 1874.

ognizing facts on the ground. In May 1872 the Oakland school board had voted to do away with segregation. Sacramento had done the same thing in early 1873.⁶⁷ Both of these decisions were technically in contravention of state law, but the California high court was now sanctioning them, *nunc pro tunc*, as lawyers might put it.⁶⁸ San Francisco would soon follow those examples. According to the historian Hugh Davis, black parents in San Francisco, in the wake of the court ruling, launched a boycott of the city's black schools. This and the great expense involved in maintaining separate schools caused the city board of education to revisit its policies. On August 3, 1875, it voted 7-4 to abolish separate schools for African American children.⁶⁹

DWINELLE'S LAST YEARS

Public Policy Interventions, Last Political Writings

Dwinelle continued to maintain a busy law practice through the rest of the decade of the seventies, handling several major cases, though none as important as *Ward v. Flood*. He continued to weigh in on public issues as well. In 1875 he published a long essay entitled *The History of the Rise and Fall of the Independent Party of 1873, in California*. The Independent Party was a reform group, organized in 1873, made up of disaffected Republicans and Democrats, that presented itself as an alternative to the two major parties and that had some modest electoral success before disappearing from the scene. Its stated aims, among others, were to drive out corruption at the national and state level and to curb the power of the railroads. Though bipartisan in its targets, its main barbs were aimed

⁶⁷*Pacific Appeal*, May 11, 1872; *Daily Alta California*, Feb. 15, 1873.

⁶⁸A month after the decision, the California legislature passed an amendment to the school law that essentially echoed Wallace's ruling. It reaffirmed the segregation of African and Native American children but said that school districts were obliged to admit these children to white schools if they failed to provide separate schools. Acts Amendatory of the Codes, 20th Session of the Legislature, 1873-74, 97.

⁶⁹Hugh Davis, *We Will Be Satisfied With Nothing Less: The African American Struggle for Equal Rights in the North During Reconstruction* (Ithaca, NY, 2011), 143-44. For a report of the school board vote, see *San Francisco Chronicle*, Aug. 4, 1875. The resolution ended the segregation of African American children. Segregation of children of Asian and Native American background in San Francisco and elsewhere in the state would continue into the twentieth century. See McClain, *In Search of Equality*.

at the Republican administration in Washington. Many of its adherents thought, too, that radical Reconstruction had gone too far.

In the essay, Dwinelle described his involvement in and support for the party at its founding, and his later disillusionment with it and decision to return to the regular Republican fold. The disillusionment stemmed in part from his perception that the party itself had become corrupt and had fallen into the hands of an autocratic leader. Another reason, equally important, was a change of opinion about the Grant administration and the condition of things in the South. In the wake of Democratic successes in the 1874 congressional elections (the party had taken control of the House from the Republicans), he had heard southerners say, "Now we'll burst the thirteenth, fourteenth and fifteenth amendments like a row of buttons on an old coat." Comments like these made it clear to him that if the black population of the South was to be protected, it was necessary to have a Republican administration in control in Washington. He reaffirmed his firm support for the post-Civil War amendments and hoped they would be implemented by appropriate legislation.⁷⁰

If Dwinelle's essay confirmed a continuing concern for the rights of African Americans, he would shortly show that he entertained no such sympathy for another minority group. In 1876 a congressional committee visited San Francisco for the purpose of gathering testimony on Chinese immigration, then a burning issue in California. A parade of witnesses testified before the committee, most extremely hostile to the Chinese. John Dwinelle was among their number. He denounced Chinese immigration in no uncertain terms, claiming that it degraded white labor and that the massive employment of Chinese in intensive farming of certain crops was ruining California agriculture. He said that the Chinese were incapable of assimilation and had no interest at all in American institutions, a statement flatly contradicted, of course, by the experience of his own firm some dozen years earlier in the *Lin Sing* litigation. He had, in fact, not a single positive thing to say about them.⁷¹

In 1877, whether for financial or other reasons, Dwinelle put his entire personal library out at auction. Comprising over one

⁷⁰John W. Dwinelle, *A History of the Rise, Decline and Fall of the Independent Party of 1873, in California* (San Francisco, CA, 1875).

⁷¹U.S. Senate, *Report of the Joint Special Committee to Investigate Chinese Immigration*, 44th Cong., 2^d sess., 1877, S. Rept. 689, 1067-78, testimony of John W. Dwinelle; the statement concerning alleged lack of interest in American institutions is at 1070.

thousand volumes, it was described by the San Francisco auction house responsible for the sale as the largest collection ever offered in that city. (Dwinelle had earlier donated much of his collection of Latin and Greek classics to the University of California.) A look at the auction catalog reveals a man of wide and catholic reading tastes. In addition to a large selection of the works of classical, English, and American authors, it included works in French, a selection of foreign-language dictionaries, and some unusual items, e.g., a complete collection of Byzantine historians and an Australian grammar.⁷² That same year he married Catherine Elizabeth Chipman. It was his second marriage, his first wife, Cornelia Stearns, having died in 1873. In November, his life was touched by tragedy when his youngest son, Herman Dwinelle, passed away at the age of twenty-one.

Dwinelle continued to take an interest in Republican causes and candidates through the remainder of the decade but eschewed any interest in elective office himself, refusing nomination as a delegate to the 1878–79 California constitutional convention. The year 1880 would mark his last appearance in the California appellate reports, an intervention as *amicus curiae* in the case *Ex parte Frazer*, a challenge to a state medical licensing law. He died the following year in a bizarre accident. On January 28, 1881, while rushing to catch a ferry in Port Costa, California, he fell off the end of a pier and drowned. He had either not heard or disregarded a shouted warning that the boat had already left the dock. His body was recovered from the waters of the Carquinez Strait some three weeks later.⁷³

Dwinelle in Perspective

"One of California's ablest and most widely known citizens has lost his life in a lamentable accident," the *Daily Alta* said in a story published a few days after his death. "The practice of law was his profession," it went on, "and his legal knowledge was so wide and profound that but few of our lawyers ranked as highly as he." The same day the faculty of the University of California adopted a resolution, expressing its deep sorrow at the news. It praised Dwinelle for his long record of service to the university, "as the legislator who shaped and introduced the Organic Act, as an active and valued Regent in the first

⁷²A copy of the catalog can be found in folder 7, John W. Dwinelle Papers, Society of California Pioneers.

⁷³Regarding his refusal of the nomination, see *Daily Alta California*, June 8, 1878; *Ex parte Frazer*, 54 Cal. 94 (1880). For accounts of his death see *Daily Alta California*, Feb. 2, 1881, and *San Francisco Chronicle*, Feb. 2, 1881.

years of its career, and as wise counselor and friend to the Institution to the end of his life."

A few days later the Bar Association of San Francisco weighed in with a long and effusive tribute to Dwinelle, one of its founders and first trustees. It described him as a "bold adventurer" who had abandoned a comfortable situation in the East to set out on an untried path in the West. It praised his lawyerly skills, although perhaps with the slightest hint of criticism ("he discarded the technical details of practice for the broader investigations of the jurist"), commending him in particular for his role in the *pueblo* land litigation. His efforts, the memorial declared, had "aided largely in bringing the whole system of land ownership in San Francisco into harmony and order." Acknowledging his high public profile and efforts outside the law (it heaped praise on his efforts on behalf of the university), he was, it said, a "public man" who had "exercised a commanding influence" over the early history of his community.⁷⁴

Neither the bar association memorial nor any of the newspaper obituaries said anything about the *Ward* case or Dwinelle's public support for the civil rights of blacks. At a time in California when few could be heard saying the sorts of things Dwinelle had said, he certainly stands out for his outspokenness on the issue. He was representative, in that respect, of a certain class of Republicans who supported Reconstruction, even when it was under siege, and who consistently expressed support for legislation to promote the civil rights of blacks.

Dwinelle was, by the standards of the time if not by modern standards, a racial progressive, at least when it came to blacks. His public pronouncements on the Chinese are another matter. His Sinophobia was certainly not unusual. Hostility toward the Chinese was an almost universally shared attitude among white Californians. What is disturbing about Dwinelle, as noted above, is the fact that his firm had once been paid by the Chinese to represent them. His harsh comments about Chinese immigrants must thus be considered a blemish on his record.

Dwinelle's career spans most of the early history of the California legal profession, and its trajectory is typical of many who would eventually constitute the early California bar. These were men who traveled to California to search for gold in the Sierra foothills but who came to realize, as Dwinelle did, that their "diggings were elsewhere." Some arrived at this realization gradually, usually after months of frustration in the gold fields. Dwinelle reached it almost immediately on arrival.

⁷⁴*Daily Alta California*, Feb. 2, 1881. Faculty resolution, John W. Dwinelle Papers, Society of California Pioneers. Bar Association of San Francisco, "Memorial," Feb. 12, 1881, Bancroft Library, University of California, Berkeley.

He was quick to perceive that, although this was a fractious, frontier community, it had a need for lawyers, and there were not many of them to fulfill this need—few, certainly, with the years of legal experience he carried in his baggage. The practice of law quickly became profitable, and he rose to a position of prominence in the local bar. (Why he made the decision to return to New York in 1853 is unclear.)

Several things set Dwinelle apart, however. One was, for lack of a better term, his bookishness (the bar association memorial called him a bibliophile, a scholar, and a man of letters) and, relatedly, his lifelong interest and highly consequential involvement in education. Another was the range and importance of the cases that he litigated. His frequent appearances in print on such a large range of subjects make him different from the average member of his profession. His involvement in the creation of the University of California, of course, sets him apart from all other members of the early California bar. It is exaggeration to say, as the bar association memorial did, that Dwinelle exercised a commanding influence over the early history of California, but that he had a significant impact on that history seems beyond doubt.

THE SPANISH ELEMENT IN WESTERN WATER LAW: VIEWS FROM ARIZONA

MICHAEL M. BRESCIA

Even harried visitors to Arizona notice the depleted lakes and parched river beds. Years of drought and population growth have reduced surface water supplies, while excessive pumping of aquifers to bring up groundwater has lowered the water table to alarming levels, particularly in the larger metropolitan Phoenix-Tucson corridor. Water residing in the Colorado River Basin, for example, is the most over-allocated in the world, suggesting quite strongly that limited groundwater resources will be further stressed to meet the state's future water needs.¹ Arizona and other western states face grim prospects if their strategic planning fails to curb consumption, regulate pumping, and develop additional water supplies. While water researchers and policymakers have yet to describe Arizona and the American West in eschatological terms, there is sufficient evidence from multiple sources to

¹Stephanie L. Castle, Brian F. Thomas, John T. Reager, Matthew Rodell, Sean C. Ferguson, and James S. Famiglietti, "Groundwater Depletion during Drought Threatens Future Water Security of the Colorado River Basin," *Geophysical Research Letters* 41 (2014): 1.

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cast some urgency on the solutions that experts develop and advance in an effort to prevent outright shortages.²

A sense of urgency drove Betty Eakle Dobkins' work back in the 1950s as she conducted historical research for her manuscript on Texas water law. A severe drought had struck Texas in 1947 and continued to wreak havoc on farmers, irrigators, and ranchers for ten years, causing an estimated \$22 billion in losses and promoting migration from rural towns to cities.³ Acknowledging that historians had yet to embrace water research as legitimate inquiry, Dobkins found inspiration for her book in the "water problem, crucial to all Texas."⁴ She argued that the drought and water crisis afflicting the state "can be solved only when people of Texas become conscious of their imperative needs and only if they become informed and aroused enough to act."⁵ Dobkins sought to identify the origins of contemporary water law in Texas by assessing its European antecedents, specifically the laws, customs, and usages of Spain (and later an independent Mexico before Texas seceded in 1836) that remained in effect due to the obligations assumed by the United States in 1848 when it ratified the Treaty of Guadalupe Hidalgo. Of particular interest to Dobkins was the fact that, of the 170,000,000 acres of land encompassed by Texas,

²See, for example, the engaging conceptual essay by Donald Worster, "The American West in the Age of Vulnerability," *Western Historical Quarterly* 45 (2014): 5–16; critical works by Robert Glennon, *Unquenchable: America's Water Crisis and What to Do About It* (Washington, DC, 2009), and *Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters* (Washington, DC, 2002); and more specifically on Arizona, see the careful study by Douglas E. Kupel, *Fuel for Growth: Water and Arizona's Urban Environment* (Tucson, 2003). For recent commentary in the mainstream press, see Shaun McKinnon, "5 Reasons to Panic about Arizona's Water, and 5 Reasons Not to," <http://www.azcentral.com/story/news/local/arizona/2014/08/11/arizona-water-supply-drought/13883605/#>, and Michael Wines, "Arizona Cities Could Face Cutbacks in Water from Colorado River, Officials Say," *New York Times*, June 17, 2014.

³Farzad Mashhood, "Current Drought Pales in Comparison with 1950s 'Drought of Record,'" <http://statesman.com/news/news/local/current-drought-pales-in-comparison-with-1950s-d-1/nRdC5/>.

⁴Betty Eakle Dobkins, *The Spanish Element in Texas Water Law* (Austin, TX, 1959), x.

⁵*Ibid.*

26,280,000 acres had originated in property titles granted by Spain and Mexico.⁶

With nearly 16 percent of the Texas landmass parceled out under the Spanish civil law of property, Dobkins set out to determine the manner in which Spain allocated and managed water resources throughout arid Texas. In effect, the statutory and case law from the Spanish colonial enterprise in Mexico⁷ provided state lawmakers and the scholarly and general publics, not to mention the U.S. judiciary, with a substantial example of how the prior sovereigns defined and adjudicated property rights, including water rights, in the dry expanse of the far northern frontier. Such research, therefore, had broader implications beyond the academic exercise of bridging history and law as disciplines; the peace treaty that ended hostilities between the United States and Mexico had obliged the U.S. to protect the property rights of Mexicans who still owned property north of the newly established international border. For Dobkins, it seems, the Spanish element in Texas water law had something to teach us about the relationship between natural resources and human decision-making that had been fashioned by Spanish jurisprudence with deep roots in Roman, Visigothic, and Islamic law rather than in English common law.

As in Texas, water law in other parts of the West has its Spanish element that has surfaced time and again since the region became part of the United States under two treaties: the 1848 Treaty of Guadalupe Hidalgo and the 1854 Gadsden Purchase Treaty. Arizona invites evocative comparisons and telling contrasts. Unlike Texas, for example, of the 72,688,000 acres that encompass Arizona, a mere 309,705 acres, or .43 percent, were confirmed as having legitimate title under the

⁶*Ibid.*, ix, 131. Although Article X of the Treaty of Guadalupe Hidalgo had included Texas land grants, President James Knox Polk omitted the article in the final draft submitted to the Senate as a way to garner support for the treaty from the Texas delegation. From the official Texas perspective, the Spanish land grant question had already been addressed there between 1836 (separation from Mexico) and 1845 when the United States annexed Texas. At the very least, the adjudication of land grants was ongoing, and there was no reason to provide Mexican landowners with additional protections not afforded to more recent arrivals.

⁷Mexico under Spain was called New Spain, and Texas was one of several provinces that made up its far northern frontier. When the Bourbon dynasty assumed the Spanish throne after the last Habsburg king had died in 1700, the new monarchs reorganized the Spanish empire and created the *Provincias Internas* (Interior Provinces), of which Texas, Arizona, California, and New Mexico were part.

laws of Spain and Mexico.⁸ One unscrupulous land speculator even tried to push through claims that totaled approximately 12 million acres (about 16 percent of Arizona's total land mass), although the United States government stymied such efforts after an exhaustive investigation.⁹ Although the number of acres considered legitimately granted under Spanish and Mexican law differed in the two states, both Hispanic Arizona and Hispanic Texas allocated land and water according to a property rights tradition that had been born in medieval Spain, transferred to central Mexico in the sixteenth century, and made its way over time to the far northern frontier.

The early roots of Spanish jurisprudence and its relationship to property rights are found in Roman law, particularly after the first century A.D., when Roman law began to structure the political and social organization of what is today Spain.¹⁰ *Corpus Juris Civilis*, or Body of Civil Law, which was developed under the Roman emperor Justinian, formed the cornerstone of the civil law that would govern most of Europe and Latin America in the early modern and modern periods. The Spanish legal system that evolved from Roman law took shape in the fifth century A.D. after the fall of the Roman Empire. The Visigothic presence in Spain, not to mention that of Islam after 711 A.D., had created a multicultural society and disparate legal traditions. In 1265, Alfonso X, better known to historians as Alfonso the Wise, compiled into a single compendium all the major laws, customs, and practices that had governed Spain through the centuries. The *Siete partidas* took the better part of nine years to complete and illustrates the adaptation of Roman law to a medieval Spanish reality. Despite opposition from municipalities that saw their autonomy eroded, the *Siete*

⁸Henry P. Walker and Don Bufkin, *Historical Atlas of Arizona*, 2^d ed. (Norman, OK, 1986), 15. Of the fourteen land grants issued under the laws of Spain and Mexico in what is today Arizona and submitted to U.S. authorities for adjudication, only eight were confirmed by American tribunals and the U.S. Congress. See Richard Wells Bradfute, "The Court of Private Land Claims and the Adjudication of Spanish and Mexican Land Grants Titles, 1891–1904" (Ph.D. diss., University of Colorado, 1973), 254. For an earlier assessment of Spanish land grants and Spanish law in Arizona, see James M. Murphy, *The Spanish Legal Heritage in Arizona* (Tucson, 1966).

⁹Walker and Bufkin, *Historical Atlas*, 15. For the most notorious case in Arizona history of fraudulent use of Spanish land grant procedures, see Donald M. Powell, *The Peralta Grant: James Addison Reavis and the Barony of Arizona* (Norman, OK, 1960). A nicely conceived, interdisciplinary study of land speculation in southern Arizona and the loss of indigenous land granted under the laws of Spain is Thomas E. Sheridan, *Landscapes of Fraud: Mission Tumacácori, the Baca Float, and the Betrayal of the O'odham* (Tucson, 2006).

¹⁰Héctor González Román, *Derecho romano* (Mexico City, 2007), xvii; and Oscar Cruz Barney, *Historia del derecho en México* (Mexico City, 1999), 33.

partidas was accepted gradually throughout the various Spanish kingdoms. Under the terms of the *Ordenamiento de Alcalá* of 1348, the *Siete partidas* was sanctioned as a major source of Spanish law and later influenced much of the legal system that developed in Spanish America.¹¹

The general principles of Spanish jurisprudence followed conquistadors, explorers, and settlers as they made their way throughout the Western Hemisphere establishing Spain's presence. It became apparent by the middle of the seventeenth century that the 400,000 pieces of royal legislation directed to and affecting the New World required systematic rendering if Spanish jurisprudence was to serve the interests of the colonial enterprise. Historians refer generally to the corpus of Spanish law in the Americas as *derecho indiano*, or the law of the Indies. More specifically, the codification of laws related to the New World was given a distinctly American context in the *Recopilación de leyes de las Indias*, which was commissioned by the Royal Council of the Indies and published in 1681. The *Recopilación* became the foundation of the legal system throughout Spanish America.

The compilation is divided into nine books or *libros*, with each book having its own chapters (*títulos*) and subsections (*leyes*). It organizes more than six thousand laws in force at the time of its publication in 1681. As such, it is a snapshot, albeit a very important one, of Spanish jurisprudence up until the late seventeenth century. Since it was never updated, historians and legal scholars also need to identify any subsequent decrees, edicts, and royal acts such as *autos* and *bandos*. There was another attempt to compile the general laws of the mother country in the early nineteenth century. In 1805, the *Novísima recopilación de las leyes de España* was compiled and reflected all Spanish laws as they existed at the beginning of the nineteenth century. Unfortunately, historians have yet to establish with any documentary rigor the general application of the *Novísima* to Spanish America. In the case of New Spain, the wars of independence broke out a mere five years after the compilation was issued. Generally speaking, therefore, the *Recopilación* and subsequent legislation are cited more often by scholars when referencing the statutory context of property rights, including water rights.

Spanish law vested original ownership of all land and natural resources in the Crown. Christopher Columbus' so-called discovery of the New World invested the kingdom of Castile as

¹¹Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550–1850* (Tucson, 1984), 107.

RECOPILACION DE LEYES DE LOS REYNOS DE LAS INDIAS.

MANDADAS IMPRIMIR, Y PVBLICAR

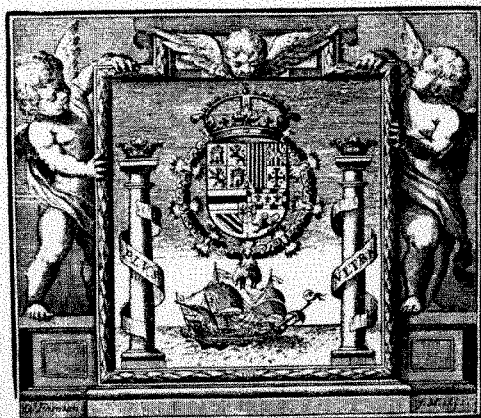
POR LA MAGESTAD CATOLICA DEL REY

DON CARLOS II.

NUESTRO SEÑOR.

VA DIVIDIDA EN QVATRO TOMOS,
con el Indice general, y al principio de cada Tomo el Indice
especial de los titulos, que contiene.

TOMO SEGVNDO.



En Madrid: POR IVLIAN DE PAREDES, Año de 1681.

En Madrid: POR EDICIONES CULTURA HISPÁNICA, Año de 1973.

Title page of the *Recopilación de leyes de las Indias* taken from a facsimile edition of the 1681 volume. (Photograph by Jannelle Weakly, Arizona State Museum)

the formal owner of the Americas. Libro 3, título 1, ley 1 of the *Recopilación* is clear on the issue of sovereignty: "By Donation of the Apostolic Holy See, and other just and legitimate titles, we are Lords of the West Indies, Islands and Mainland of the Ocean sea, discovered, and to be discovered, and these are incorporated into our Royal Crown of Castile."¹² All land was considered part of the royal patrimony and called *tierras realengas* or *tierras baldías*. From the international law perspective common to the early modern world, royal dominion over the land was considered absolute.¹³

Land and water in Spanish America could be alienated from Crown ownership and then given to a private party or public entity. In his classic study of Spanish law in the New World, which was published in 1647, thirty-four years before the *Recopilación*, Juan de Solórzano Pereira articulated the basis for the privatization of the royal dominion by distinguishing between Crown land and private property. The latter existed only by particular concession and grant; everything else was part of the Spanish Crown.¹⁴ Absent some kind of specific authorization on the part of the monarchy, neither private individuals nor public entities or corporations enjoyed an inherent or natural right to land, water, and natural resources in Spanish America, although the Crown recognized that Indians held land before the arrival of the Spanish, and that those newly arrived Spaniards would want land to settle and farm. The alienation of the royal dominion took place under a prescribed set of procedures

¹²The original Spanish reads, "Por Donación de la Santa Sede Apostólica, y otros justos y legitimos titulos, somos Señor de las Indias Occidentales, Islas y Tierra firme del mar Oceano, descubiertas, y por descubrir, y están incorporadas en nuestra Real Corona de Castilla." *Recopilación de leyes de los Reynos de las Indias* 4 vols. (Madrid, 1973), vol. II, fol. 1. Several papal bulls promulgated in 1493—known collectively as the Bulls of Donation—recognized and sanctioned Spanish and Portuguese overseas expansion into the non-Christian world. Each bull contained a sufficient number of rather vague provisions, however, prompting the two crowns to negotiate a separate treaty a year later in 1494, the Treaty of Tordesillas. The treaty divided the Americas between Spain and Portugal and delineated sovereignty and commercial rights within the broader context of geopolitical concerns.

¹³M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin, TX, 2004), 11–18; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, UK, 2002), 12–15, 81; Colin M. MacLachlan, *Spain's Empire in the New World: The Role of Ideas in Institutional and Social Change* (Berkeley and Los Angeles, 1988), 1–19; Peggy K. Liss, *Mexico under Spain, 1521–1556: Society and the Origins of Nationality* (Chicago, 1975), 1–18; and Charles Gibson, ed., *The Spanish Tradition in America* (New York, 1968), 35–39.

¹⁴Juan de Solórzano Pereira, *Política Indiana* (Madrid, 1930), libro VI, capítulo 12, número 3.

that applied equally to the Spanish and indigenous populations. In New Spain, various royal decrees invested viceroys, governors, and district magistrates known as *alcaldes mayores* with the authority to alienate land and water from the royal dominion.¹⁵ Once granted, these resources were considered the property of the individual or entity that made the initial petition and no longer part of Crown property.

The alienation of land from the royal dominion conveyed neither surface water rights nor subsoil mineral rights. Surface water rights—the classic example of *propiedad imperfecta* in the civil law of property because it was a qualified property right¹⁶—were conveyed in a variety of ways: the issuance of a *merced de agua* (water grant); *repartimiento de aguas* (distribution of waters); *composición* (judicial process of authenticating water rights), or, more commonly, if the language of the land grant itself provided for the water rights (for example, if *tierras de labor* or *tierras de pan llevar* were used to describe the land in question). A property title without such wording or additional authorization, therefore, entitled the owner to the surface of the land and to the use of its perennially running water for domestic use only, as opposed to a specific right to use surface water to irrigate farmland such as that found inherent in *tierras de labor* or granted explicitly in a *merced de agua*. Much of the case law from New Spain, especially its far northern frontier, involved disputes over *propiedad imperfecta* or surface water.

On the other hand, groundwater and other waters that originated on a piece of property were identified as *propiedad perfecta*, and were treated differently from surface water under Spanish and Mexican law.¹⁷ Unlike water running on the surface of a river or stream, water that originated on a piece of property, ran solely within its confines, or lay under it was automatically alienated from the royal domain with the sale

¹⁵See, for example, Meyer, *Water in the Hispanic Southwest*, 133–39, 145–46.

¹⁶For a discussion of the distinctions between *propiedad imperfecta* and *propiedad perfecta*, see Mariano Galván Rivera, *Ordenanzas de tierras y aguas: O sea formulario geométrico-judicial* (Mexico City, 1849), 3–4. For these distinctions within a different juridical context, i.e., modern water law in Arizona, see James D. Leshy and James Belanger, “Arizona Law: Where Ground and Surface Water Meet,” *Arizona State Law Journal* 20 (1998): 657–748.

¹⁷Galván Rivera, *Ordenanzas*, 3–4. Under the laws of Spain and Mexico, groundwater has not received the same kind of treatment in the scholarly literature as surface water. Two essays that address the general parameters of groundwater in the Spanish civil law of property are Daniel Tyler, “Underground Water in New Mexico: A Brief Analysis of Laws, Customs, and Disputes,” *New Mexico Historical Review* 66 (July 1991): 287–301; and Michael C. Meyer, “The Living Legacy of Hispanic Groundwater Law in the Contemporary Southwest,” *Journal of the Southwest* 31 (Autumn 1989): 287–99.

or grant of land. Spring water and rainwater were considered part of the land.¹⁸ These waters were appurtenant to land ownership. No additional authorization or permission was required to use groundwater. Because it inhered in land ownership, the right to use groundwater was in no way dependent on regular use.

The medieval Spanish law code, *Siete partidas*, declared groundwater and other diffused water sources originating on a piece of land or running solely within its confines (including wells and springs) as belonging to the owner of the lands on which it rose.¹⁹ Rainwater and snowmelt that flowed in an intermittent stream could be impounded in reservoirs and tanks and put to beneficial use without additional permission or authorization, because the civil law of property considered it private water.²⁰ The principle of private ownership of groundwater in New Spain was stated clearly in 1761, when Fray Domingo Lasso de la Vega issued water regulations for the colony: "Springs and [underground] water sources belong to those who own the land on which they originate, and they are part and fruit of the land, and for this reason are granted together with the land."²¹ Owners of the surface of the land, therefore, were the owners of the water found beneath that land. They could use or not use the water, sell it, barter it, even divide it. Unless owners lost their land grants by reason of abandonment, the groundwater belonged to them.

Spanish colonial law was concerned with the principle of equity and the common good, but the relative lack of groundwater disputes on the far northern frontier of New Spain suggests that groundwater was not seen as a divisive issue of competing interests.²² Since groundwater was *propiedad perfecta*, only a few caveats limited its private use. It could not be used maliciously simply to deny access to a neighbor. It could not be denied to a neighbor who had previously been given a legal right to use it through title or prescription. Finally, groundwater could not be denied to the inhabitants of a recognized town

¹⁸ Alfredo Gallego Anabitarte, Angel Menéndez Rexach, and José Manuel Díaz Lema, *El derecho de aguas en España*, 2 vols. (Madrid, 1986), vol. 1, 415–16.

¹⁹ *Siete partidas*, partida 3, título 32, ley 19.

²⁰ *Siete partidas*, partida 2, título 20, ley 4.

²¹ The original Spanish reads, "Y á la verdad las fuentes y los manantiales son de aquel de quien son las tierras, en las cuales tienen su origen, y son como partes y como frutos, y así es que se conceden igualmente con las tierras." Fray Domingo Lasso de la Vega, "Reglamento general de las medidas de las aguas, publicado en el año de 1761," in Galván Rivera, *Ordenanzas*, 160–61.

²² Meyer, "Living Legacy of Hispanic Groundwater Law," 287–89, 298–99.

or municipality that had no other adequate source of water. If the common good dictated that the needs of the inhabitants of any given town had to take precedence over private use of groundwater, the water in question was still considered private property and the owner had to be compensated for use of his or her property.²³

The Spanish civil law of property remained intact despite the advent of Mexican independence from Spain in 1821. Formal separation from the mother country changed the political form of government in Mexico, to be sure, while the sovereignty that Spain had exercised over Mexico since the time of Hernán Cortés' conquest transferred to an independent Mexican nation. With few exceptions, requests for land and water, not to mention the adjudication of land and water rights, continued to reflect the principles of Spanish colonial jurisprudence.²⁴ The exceptions, however, reflected the political efforts in post-independence Mexico to codify the ideals of the Enlightenment that favored individual property rights over communal property rights as the principal pattern of land tenure. For example, Spanish reformers (and later Mexican liberals) wanted to promote economic liberalization and reassert government authority through the application of the scientific method.²⁵ As these policy makers and public intellectuals debated which political framework best nurtured the aspirations of the citizenry, particularly after independence from Spain, they also tackled the status of property held in common, revisiting the links between the obligations of citizenship and the exercise of individual rights, not to mention the utility of fostering democracy through private property rather than community-owned land and natural resources.

Common lands had been standard in Native pueblos under the laws of Spain, while in formal Hispanic towns and informal agrarian hamlets (*rancherías*, *plazas*, or *acequia* communities) these lands operated alongside individual ownership. The theory behind common land was that nobody had the right to

²³Gallego Anabitarte et al., *El derecho de aguas*, vol. 2, 135.

²⁴Michael M. Brescia, "Spanish Water Law," in *Encyclopedia of the Great Plains*, ed. David J. Wishart (Lincoln, NE, 2004), 863; Daniel Tyler, *The Mythical Pueblo Rights Doctrine: Water Administration in Hispanic New Mexico* (El Paso, 1990), 11–14, 44–45; Meyer, *Water in the Hispanic Southwest*, xii; and David J. Weber, *The Mexican Frontier, 1821–1846* (Albuquerque, 1982), 38.

²⁵Two well-researched studies that examine the impact of the Enlightenment on Spain's overseas empire are David J. Weber, *Bárbaros: Spaniards and Their Savages in the Age of Enlightenment* (New Haven, 2005); and David A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492–1867* (Cambridge, UK, 1991).

appropriate for themselves resources proffered by nature alone, i.e., resources produced without human intervention. Common lands attached to Spanish towns, agrarian hamlets, or Native pueblos could not be alienated in any way. Although they could not be bought or sold, these lands could be used without any tax burden by citizens of the community (or Natives residing in the pueblo) for certain purposes: for recreation, for pasture, for the watering of livestock, for the gathering of wild fruits and nuts, for hunting, fishing, and cutting wood.²⁶

Nineteenth-century liberalism, however, inspired as it was by the Enlightenment, began to question the economic feasibility of the common lands and found in these rather extensive tracts the ingredients for the ideal citizen-property owner who, motivated by self-interest, would work and irrigate the land in a manner that reflected the values of the nation-state instead of the *patria chica*, or little homeland.²⁷ In turn, regional elites in Mexico (such as those in the Sonora-Arizona frontier) viewed the common lands attached to Native pueblos as unproductive and available for partition and sale. In 1828, for example, the state legislature of Sonora passed a new law that opened the *baldíos* to private ownership. Baldíos were the empty lands in the immediate vicinity of the Native villages and held in common, although for the time being the same law restricted the division and sale to the Native inhabitants themselves. Native peoples who had reached the age of eighteen, whether they were married, single, or widowed, had the right to receive “una suerte” of land (nearly fifty-three acres) for cultivation, and another for raising livestock.²⁸ Interestingly enough, the law did not apply to those indigenous villages in what is today southern Arizona, because state officials were still gathering information about their political, economic, and social affairs.²⁹

Another exception to the continuity of Spanish colonial property law followed the desire on the part of the Mexican

²⁶Michael C. Meyer and Michael M. Brescia, “The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico,” *New Mexico Historical Review* 73 (1998): 323.

²⁷The general idea was to promote among the citizenry the interests of the nation-state and minimize parochial concerns. See, for example, Michael T. Ducey, *A Nation of Villages: Riot and Rebellion in the Mexican Huasteca, 1750–1850* (Tucson, 2004), and Margarita Menegus Bornemann, ed., *Problemas agrarios y propiedad en México, siglos XVIII y XIX* (Mexico City, 1995).

²⁸Congreso Constitucional del Estado Libre de Occidente, *Ley para el repartimiento de tierras de los pueblos de indígenas, reduciendolas a propiedad particular*, September 30, 1828, Archivo Histórico del Gobierno del Estado de Sonora, Hermosillo, Mexico.

²⁹*Ibid.*

government to attract foreign immigrants who would invest their time, talent, and resources into frontier regions (Arizona and Texas, for example) that were considered less attractive to Mexicans living in the interior of the country. An independent Mexico abandoned the Spanish colonial prohibition against foreigners so long as these newcomers converted to Catholicism, obeyed Mexican law, and put the land they were granted to beneficial use.³⁰ Moreover, the official most commonly authorized to make land grants—to either Mexican citizens or foreigners—on the northern frontier after independence from Spain was the general treasurer of each state. In 1836, however, under a new, highly centralized constitution (*Las Siete Leyes*),³¹ the federal government reserved for itself the right to make land and water grants, thus returning to the earlier colonial practice whereby the Spanish Crown (and its authorized representatives in New Spain) was the only competent authority to alienate land and water from its dominion. Nevertheless, regardless of which specific government official or agency held the granting authority—and who was eligible to receive a grant—the civil law of property remained essentially Spanish.

The U.S. invasion of Mexico in 1846 was a violent expression of Manifest Destiny, or the belief that Divine Providence sanctioned American expansion from the Atlantic to the Pacific coasts. Although scholars now have a more nuanced view of such limitless projection of American power across the continent, the fact remains that the United States sequestered half of Mexico's national territory by using its military to occupy large swaths of the country, including the capital, Mexico City.³² Later, in light of opposition to additional territorial conquest, the United States purchased from Mexico a sliver of land in southern Arizona and southwestern New Mexico in an effort to connect the southern corridors of the Southwest and California via rail and stimulate commerce and mining along the way.

The Treaty of Guadalupe Hidalgo, which ended hostilities between the two countries in 1848, contained several important protections for Mexicans who, through no fault of their

³⁰See the works by Armando Alonzo, *Tejano Legacy: Rancheros and Settlers in South Texas, 1737–1900* (Albuquerque, 1998), and Andrés Tijerina, *Tejanos in Texas under the Mexican Flag, 1821–1836* (College Station, TX, 1994).

³¹Michael C. Meyer, William L. Sherman, and Susan M. Deeds, *The Course of Mexican History*, 10th ed. (New York, 2014), 251–52.

³²Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (New York, 2009); Walter Nugent, *Habits of Empire: A History of American Expansion* (New York, 2008); and Cecil Robinson, ed., *The View from Chapultepec: Mexican Writers on the Mexican-American War* (Tucson, 1989).

own, suddenly found themselves residing in the United States. These protections—property guarantees in particular—could be passed on to their heirs and successors-in-interest. Article VIII of the treaty, in particular, stipulated unequivocally the property protections that the U.S. had assumed on February 2, 1848:

Mexicans now established in the territories previously belonging to Mexico . . . as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof. . . . [I]n the said territories . . . property of every kind, now belonging to Mexicans . . . shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may thereafter 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.³³

In addition to the broadly based protection of property rights found in Article VIII, international law and U.S. case law provided additional assurances. For example, the law of state succession rests on the fundamental legal principle that property and other vested rights acquired under a former sovereign must be respected by the successor state.³⁴ That acquired rights (*droits acquis*) survive territorial cession and the arrival of a new sovereign is part and parcel of international law.³⁵ The Treaty of Guadalupe Hidalgo is a classic example, therefore, of applying the law of state succession and prior sovereigns to citizens prejudiced by a change in territorial possession.

The principle that an area's change of sovereignty alters its public law but leaves intact its private law, including property law, has deep roots in the American historical experience. French citizens in Louisiana who found themselves part of the United States in 1803, after President Thomas Jefferson negotiated the Louisiana Purchase, continued to enjoy their property as before. The Adams-Onís Treaty of 1819 between Spain and the United States, which brought Florida into the American Union, likewise guaranteed acquired rights. In an early case that reached the U.S. Supreme Court and tested the American commitment to respect the private law developed

³³United States Senate, *The Treaty Between the United States and Mexico*, 30th Cong., 1st sess., Executive Document 52 (Washington, DC, 1848), 47.

³⁴Meyer and Brescia, "The Treaty of Guadalupe Hidalgo," 333.

³⁵*Ibid.*, 344 ns. 36–38.

under prior sovereigns, Chief Justice John Marshall declared in *United States v. Perchman* (1833) that the property guarantees afforded to individuals apply equally if the territory in question was acquired amicably or by force.³⁶ Scores of cases reached state and federal courts throughout the nineteenth century, and, although the judiciary did not always have good evidence from which to assess the nature and scope of acquired rights under the laws of prior sovereigns, it rarely debated the applicability of the laws themselves. For example, the courts recognized the possibility of altering acquired rights, but only to the extent that these rights were not specifically protected by U.S. treaty obligations. In *Delassus v. United States* (1835) the U.S. Supreme Court ruled that “the conqueror may deal with the inhabitants and give them what law he pleases, unless restrained by the capitulation, but until alteration be made the former laws continue.”³⁷

Peace between the United States and Mexico left the former with coast-to-coast dominion over a large part of North America, while the latter faced national humiliation and disunity. Five years after the Treaty of Guadalupe Hidalgo, the two countries entered negotiations for the Mesilla Valley, an area of about 30,000 square miles in southwestern New Mexico and southern Arizona. The U.S. viewed the strip of land as the best location for building a railroad from Texas to newly acquired California; Mexico, under the corrupt administration of Antonio López de Santa Anna, needed to replenish its coffers after having spent the \$15 million it received from the United States under the terms of the Treaty of Guadalupe Hidalgo in order to put down a secessionist movement in the Yucatan Peninsula. Encompassing the territory between the present U.S.-Mexico border in the south and the Gila River in the north, the Gadsden Purchase—or *La Venta de Mesilla*, as it is known in Mexico—was signed in late 1853 and ratified by both governments in 1854.³⁸

Mexican property owners prejudiced by the territorial cession received explicit guarantees in the treaty that the successor state would respect their private property. Article V of the Gadsden Purchase, for example, simply lifted the property protections stipulated in the Treaty of Guadalupe Hidalgo and

³⁶*United States v. Perchman*, 7 Pet. 51, at 86.

³⁷*Delassus v. United States*, 34 U.S. 117, 9 Pet. 117 (1835), quoted in Herbert A. Wilkinson, *The American Doctrine of State Succession* (Westport, CT, 1975), 39.

³⁸For more on the Mesilla Valley and its incorporation into the United States, see William S. Kiser, *Turmoil on the Rio Grande: History of the Mesilla Valley, 1846–1865* (College Station, TX, 2011).

applied them to land encompassed by the purchase: "All of the provisions of the eighth . . . article[s] . . . of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic . . . and to all the rights of persons and property . . . within the same, as fully and as effectually as if the said articles were herein again recited and set forth."³⁹ It is apparent that negotiators on both sides of the table were comfortable with the property guarantees enumerated in Article VIII of the Treaty of Guadalupe Hidalgo, and that these would apply to the newly acquired territory. Mexican property owners, therefore, would enjoy sufficient protection of their land and water rights under the 1854 Gadsden Purchase, since the 1848 treaty clearly protected "property of every kind."

Article VI of the Gadsden Treaty stated that the United States would consider as valid only those property titles that had been "located and duly recorded in the archives of Mexico."⁴⁰ It was Spanish colonial practice to deposit in the government archives official records of local, vice-regal, and royal origins; often the archives were maintained in the *casas reales* (government buildings) in the provincial capital.⁴¹ Scarcity of approved paper, the absence of trained scribes and notaries, and inadequate storage had posed certain challenges on Mexico's far northern frontier since the earliest days of colonial rule, however, making it difficult to comply fully and completely with the procedural elements of Spanish property law.⁴² In fact, the inability to follow the procedural steps in precise fashion was quite common in the more remote areas of the Spanish empire, although such lack of precision in no way invalidated property rights. Often frontier authorities reminded their counterparts in central Mexico and Spain of the absence of the procedural accoutrements of property law by employing in the documentation such language as "for lack of a public or royal notary, there being none in this province."⁴³

³⁹*The Gadsden Purchase Treaty in 1884, Compiled Laws of New Mexico in Accordance with an Act of the Legislature, Approved April 3, 1884* (Topeka, KS, 1885), 42. A useful reference that annotates the more salient materials on the Gadsden Purchase found in Mexico's foreign affairs archive is Rosalba Mayorga Caro, comp., *El Tratado de La Mesilla: Catálogo de documentos del Archivo Histórico de la Secretaría de Relaciones Exteriores, 1848–1856* (Mexico City, 1995).

⁴⁰*Gadsden Purchase Treaty*, 42.

⁴¹Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque, 1995), 80.

⁴²*Ibid.*, 36–37, 99–102.

⁴³Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* (Albuquerque, 1994), 132, 316 n. 23.

Article VI suggests that the Mexican and American negotiators agreed that both Spain and Mexico generally issued titles to property owners and maintained the originals in the local archives. Nevertheless, the treaty did not delineate just how the United States would obtain the property records from the archives. Neither mere copies of titles nor reliance on property owners to verify the originals in Mexican archives would suffice.⁴⁴ In the end, the United States sent a representative to scour the archives in Sonora and Mexico City in search of duly deposited property titles.

At first, Arizona was part of the territory of New Mexico when it was created in 1850 in the aftermath of the Treaty of Guadalupe Hidalgo. At the height of the Civil War in 1863, President Lincoln made Arizona a separate territory, although a surveyor-general would not be appointed until 1870. The appropriate act was approved on July 15 of that year, establishing the duties of the office, under instructions issued by the secretary of the interior, "to ascertain and report upon the origin, nature, character and extent of the claims to land in said Territory under the laws, usages and customs of Spain and Mexico."⁴⁵ In October 1872, the acting secretary of the interior appointed Rufus Hopkins, who had been in charge of the Spanish documents kept in the Office of the Surveyor General of California, to visit various archives throughout Mexico in order to identify and examine land grants and property titles that had been issued in places that had been part of Mexico (such as Arizona).⁴⁶ In Ures, the capital of Sonora at the time, Hopkins found, for example, land records that dated to 1661 and from which he wrote summaries of those property titles that had been issued in Arizona proper, as well as those made in northern Sonora near the present border.⁴⁷ Efforts to locate documents in Mexico City and Guadalajara failed to produce any relevant land records.

⁴⁴Ibid., 24. As Malcolm Ebright has rightly pointed out, although the United States would later reject certified copies of original titles when determining the validity of a land grant, there was no other method at the time for preserving these important documents. If the original was misfiled or lost in the local archives—or if the local archives burned down, as was the case in Santa Fe, New Mexico, after the Pueblo Revolt of 1680—property owners could still demonstrate just title by showing their copy (*testimonio*) to competent authority.

⁴⁵"Certain Private Land Grants in Arizona Territory," Report 192, in *Index to the Reports of the Committees of the House of Representatives for the First Session of the Forty-Ninth Congress, 1885–86* (Washington, DC, 1886), 175.

⁴⁶Henry Putney Beers, *Spanish and Mexican Records of the American Southwest* (Tucson, 1979), 330.

⁴⁷Ibid.

Hopkins returned to Sonora in 1879 after the commissioner of the General Land Office, J.A. Williamson, noted that the United States possessed few if any records related to Mexican property titles in the area encompassed by the Gadsden Purchase.⁴⁸ The development of the railroad and the potential to extract mineral resources had attracted speculators and those willing to create fraudulent land titles to increase their holdings. As a precautionary measure, Williamson wanted to determine what had been granted under the laws of the prior sovereigns.⁴⁹ Hopkins arrived in Ures with instructions to obtain transcripts and abstracts of land records. His hard work revealed that Sonoran land titles dated from 1661 and comprised about 1,500 files, totaling some 110,000 pages, from which he selected 1,200 to 1,500 pages relative to land grants made in Arizona. When Hopkins discovered that the archives there charged the equivalent of fifty cents for each sheet made of a certified copy, he decided to abstract the information required for determining the titles of grants (and their locations) instead of obtaining complete transcripts.⁵⁰

Hopkins compiled his report and sent it, in early 1880, to the General Land Office in Washington, D.C. He considered the land records and property titles that he had examined to be manifestly genuine, without forged signatures or rubrics, unauthorized revisions, interpolations, or other signs of bad faith.⁵¹ Such information was vital to the surveyor general of Arizona, who had to contend with numerous attempts to submit fraudulent claims based on the laws of Spain and Mexico. As referenced earlier, the infamous Peralta claim for approximately 12,000,000 acres of land in Arizona and New Mexico is but one example of efforts to deceive both the United States government and local property owners. Through the diligent work of men such as Hopkins, Will Tipton, and those employed in the New York law firm of Severo-Mallet-Prevost, U.S. courts from time to time had documentary evidence from which to assess the validity of Mexican property titles and halt fraudulent claims.⁵²

In his study of law and the legal profession in Arizona, James Murphy argued that the early Anglo settlers who arrived after the Gadsden Purchase selected the best parts from Arizona's Spanish, Mexican, and American legal traditions and synthe-

⁴⁸*Ibid.*, 331.

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹*Ibid.*

⁵²*Ibid.*, 336.

sized these in the Howell Code.⁵³ Appointed by the governor of the New Mexico Territory, territorial supreme court justice William Howell modified existing codes from California and New York and integrated many Hispanic laws and customs still in use at the time when he drafted his code in 1864. In particular, Murphy noted that the Howell Code's "water laws were Spanish as were its laws concerning community property. These property laws stood contrary to the common law of English-speaking countries of the world."⁵⁴

Murphy was alluding to the riparian rights doctrine that England bequeathed to its eastern seaboard colonies in North America. The riparian doctrine holds that property owners whose land borders a body of water have certain rights to use the water, including a right to have the water pass in its natural flow.⁵⁵ In principle, this is a right of usufruct rather than consumption or diversion away from the river, stream, or creek, although the riparian rights doctrine has in practice encompassed some moderate consumption.⁵⁶ Certainly by the end of the nineteenth century, when the United States had consolidated its Manifest Destiny through settlement, railroads, and military subjugation of indigenous communities, water was no longer the primary source of power for industry, and various courts throughout the eastern U.S. began to relax their earlier protections of the natural flow of water.⁵⁷ Property rights scholar Carol Rose summed it up best:

[M]ore or less simultaneously, in what is clearly one of the more dramatic transformations in all of water law, the miners and settlers on the dry western lands of the United States almost spontaneously created a very different water regime, one that harked back to the Blackstonian doctrine of occupancy. They simply took the water from the streams, informally recognizing a priority of rights according to the chronology of diversions. Their claims consisted of the amounts actually diverted and used, and once having made such a diversion—in sharp contrast to riparian law—the

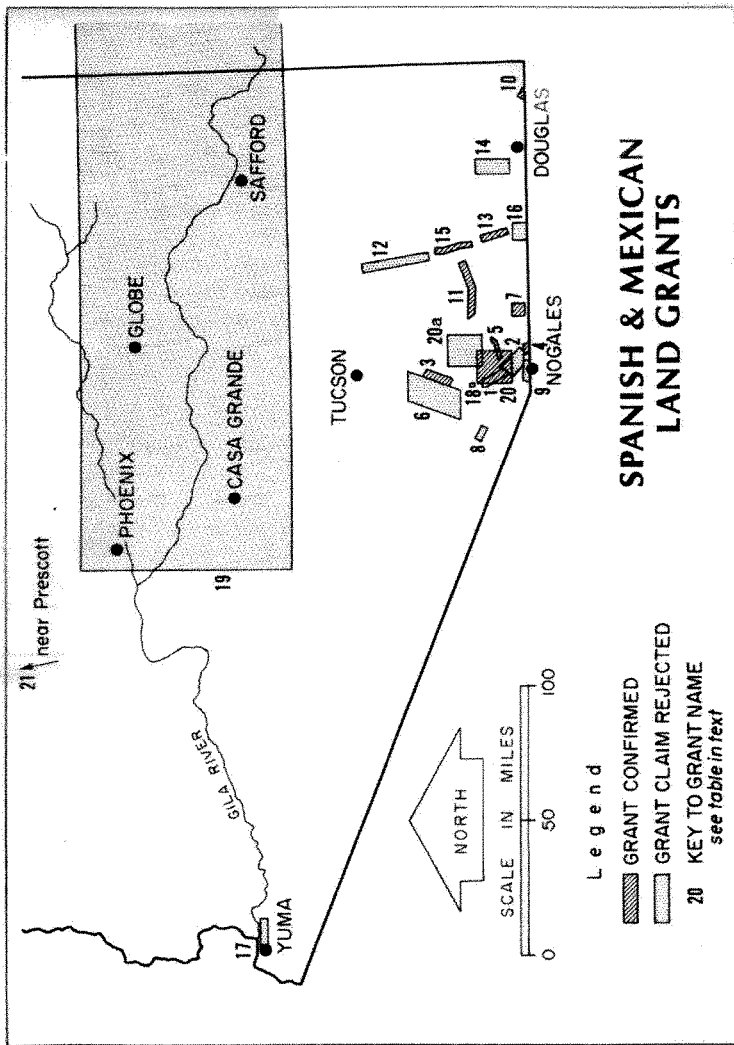
⁵³James M. Murphy, *Laws, Courts, and Lawyers through the Years in Arizona* (Tucson, 1970), 73.

⁵⁴*Ibid.*

⁵⁵John W. Johnson, *United States Water Law: An Introduction* (Boca Raton, FL, 2009), 36.

⁵⁶Carol M. Rose, "Riparian Rights," in *The New Palgrave Dictionary of Economics and the Law*, ed. Peter Newman (New York, 1998), 344.

⁵⁷*Ibid.*, 345.



In the 1890's, the Court of Private Land Claims considered the following claims:

NUMBER ON MAP	NAME OF GRANT CLAIM	ACREAGE CLAIMED	ACREAGE APPROVED OR REJECTED	SUCCESSFUL CLAIMANT
1.	Tumacácori	81,350	rejected	
2.	Calabasas			
3.	San Ignacio de la Canoa	46,696	17,304	Maish & Driscoll
4.	Buenavista (María)			
5.	Santísima del Carmén)	17,354	5,733	Maish & Driscoll
6.	San José de Sonotta	7,593	5,123	Santiago Ansa
7.	El Soporí	141,722	rejected	
8.	San Rafael de la Zanja	152,890	17,352	Colin Cameron
9.	Aribaca	8,677	rejected	
10.	Los Nogales de Elías	32,763	rejected	
11.	San Bernardino	13,746	2,983	John Slaughter
12.	San Ignacio del Babocomari	123,069	33,792	Robert Perrin
13.	Tres Alamos	43,385	rejected	
14.	San Rafael del Valle	20,034	17,475	Juan Pedro Camouli
15.	Agua Prieta	68,530	rejected	
16.	Ranchos de las Boquillas	30,728	17,354	William R. Hearst
17.	San Pedro	38,622	rejected	
18.	Algodones	21,692	rejected	
	Otero (Tubac claim)	1,199	claim not filed	
		850,050	116,416	
19.	Peralta-Reavis		rejected	fraudulent claim
20.	Baca Float Number 3	11,286,000	94,289	Lieu Land selection
21.	Baca Float Number 5		99,000	Lieu Land selection
		12,130,050	309,705	

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claimant could channel the water anywhere, including locations entirely outside the watershed.⁵⁸

The origins of the prior appropriation doctrine in the U.S. can be traced to the California Gold Rush and the case law that followed disputes and litigation. Miners needed and used water to conduct their activities, but often they did not own the land that they mined and, as a result, enjoyed no riparian rights to surface water.⁵⁹ The American government, in fact, owned much of the land, prompting early miners to appropriate water in much the same manner as they did the minerals they were seeking, i.e., they followed a "first in time, first in right" rule that gave the earliest user an almost exclusive right to use the water.⁶⁰ Over time, however, some western states limited the right to appropriate water in light of certain public interests (recreation, fish and wildlife protections, etc.), while all western states have some form of "non-injury" rule that protects the rights of so-called junior appropriators, or users who arrived later to appropriate a particular water source but are now prejudiced by a change in its diversion.⁶¹ Moreover, under the prior appropriation doctrine, potential appropriators must comply with all statutory requirements and put the water to use if they want to perfect their water rights. Simply put, the water right remains valid so long as the use lasts.⁶²

At first glance, Murphy's assertion that the Howell Code reflected a synthesis of Spanish, Mexican, and Anglo legal traditions is telling. Article 22 of the Howell Code, for example, stipulated that "all streams, lakes, and ponds of water capable of being used for purposes of navigation or irrigation, are hereby declared to be public property; and no individual or

⁵⁸Ibid.

⁵⁹Johnson, *United States Water Law*, 46.

⁶⁰Ibid., 46-47. The literature that bridges water law and public policy in the western United States is vast. Critical studies include Stephen Grace, *Dam Nation: How Water Shaped the West and Will Determine Its Future* (Guilford, CT, 2012); Norris Hundley, *Water and the West: The Colorado River Compact and the Politics of Water in the American West*, 2^d ed. (Berkeley and Los Angeles, 2009); Donald J. Pisani, *Water, Land, and Law in the West: The Limits of Public Policy* (Lawrence, KS, 1996); "Western Water Law," ed. Peter L. Reich, special issue, *Western Legal History* 9:1 (Winter/Spring 1996); Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902* (Albuquerque, 1992); the classic work by Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* (New York, 1986); and Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York, 1985).

⁶¹Johnson, *United States Water Law*, 47.

⁶²Ibid., 45.

corporation should have the right to appropriate them exclusively to their own private use, except under such equitable regulations or restrictions as the Legislature shall provide for that purpose."⁶³ Following Roman law, the Spanish civil law of property had long asserted the public character of water, and that no one person or entity could own or use the precious resource to the exclusion of others.⁶⁴ The idea of a water monopoly was antithetical to Spanish notions of equity and the common good, which had evolved over the centuries in the aridity of the Iberian Peninsula. On the other hand, according to the political theory that buttressed medieval and early modern understandings of sovereignty, the Spanish Crown exercised sovereignty over all land and natural resources;⁶⁵ only the sovereign (or his or her representative) could alienate land from the royal dominion in the form of explicit grants to individuals, municipalities, or informal communities or arrangements; or, as we have seen, if the grant implied water rights or if a judicial determination identified land ownership or water usage.

In another area of the Howell Code, the inhabitants of Arizona who owned or possessed arable land had "the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water."⁶⁶ That Howell maintained the Spanish word for ditch or canal throughout his code reflects how common it was for even Anglo settlers to use it. If the acequia that had been dug out ran through someone else's property who was not receiving any benefit from it, the owner was entitled to seek damages.⁶⁷ Spanish law likewise recognized that property owners whose land was traversed by an acequia but who did not use it to irrigate their own crops could expect compensation. For example, Spanish jurist Joaquín Escriche y Martín encapsulated the sentiment quite nicely in his early nineteenth-century assessment of the civil law of property: "Nobody can be forced to cede their property except for reasons of public utility, and even then the [property owner] has the right to

⁶³William T. Howell, *The Howell Code: Adopted by the First Legislative Assembly of the Territory of Arizona* (Prescott, AZ, 1865), 20.

⁶⁴*Siete partidas*, partida 2, título 8, ley 10; partida 2, título 24, ley 9; and Lasso de la Vega, "Reglamento general," 159.

⁶⁵Solórzano Pereira, *Política indiana*, libro VI, capítulo 12, número 3.

⁶⁶Howell, *Howell Code*, 423.

⁶⁷*Ibid.*

receive something equal in return or else the fair value of what he lost."⁶⁸

In general, the Howell Code mirrored the Spanish colonial sensibility regarding the primacy of agriculture and mining as essential activities that sustained daily life and filled government coffers with revenue. For example, nobody had the right to "impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others," while the person or persons who had "taken out [an acequia] for agricultural purposes . . . shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes. . . ."⁶⁹ If the water needed for agriculture, however, was taken for mining operations, the "person or persons owning said water shall be entitled to damages. . . ."⁷⁰ As noted earlier, Spanish jurisprudence classified the water running in rivers and creeks as *propiedad imperfecta*, which was a qualified right to use surface water based on the needs of others along the same water course. Under the laws of Spain and Mexico, therefore, no one had an exclusive right to water, particularly surface water that was used for irrigation, although mining enjoyed special consideration since it generated substantial revenue for the royal treasury.⁷¹ Howell's use of the word *exclusive*, therefore, was novel in the sense that neither Hispanic law nor custom described water usage in such restrictive language.⁷²

Prior appropriation, on the other hand, surfaced in the Howell Code in Article 55, section 17, which stipulated, "During years when scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors. The oldest titles shall have precedence always."⁷³ Thus, "first in time, first in right" was expressed for the first time in Arizona, and, while

⁶⁸The original Spanish reads, "Nadie puede ser forzado á ceder su propiedad; sino es por causa de utilidad pública, y aun entonces tiene derecho á que se le dé en cambio otra cosa igual ó bien el justo valor de la que pierde." Joaquín Escriche y Martín, *Diccionario razonado de legislación civil, penal, comercial y forense* (Mexico City, 1837), 546.

⁶⁹Howell, *Howell Code*, 423.

⁷⁰*Ibid.*

⁷¹Meyer, *Water in the Hispanic Southwest*, 154–55.

⁷²An incisive study that critically examines the use of prior appropriative language by American jurists to describe Spanish law is Peter L. Reich, "The Hispanic Roots of Prior Appropriation in Arizona," *Arizona State Law Journal* 27 (1995): 649–62.

⁷³Howell, *Howell Code*, 424.

its inclusion in the Howell Code reflected its emergence as the primary legal doctrine that would come to fashion water rights in the American West, prior appropriation was neither part and parcel of the Spanish civil law of property nor its Mexican successor, although it has been confused with the Hispanic legal principle of prior use.⁷⁴

The principle of prior use, or in Spanish *antelación* or *uso previo*, was only one of several factors considered by Spanish and Mexican authorities when they adjudicated water rights or petitions for land and water.⁷⁵ While Spanish jurisprudence recognized beneficial prior use as significant, it never privileged a "first in time, first in right" defense of water rights for several reasons: prior use was not synonymous with oldest use; it did not necessarily convey a better right; and it did not mean that whoever had used a water source first necessarily enjoyed a superior right or was entitled to continuing use without taking into account the needs of others. Spanish and Mexican officials may have given a property owner with prior use some deference in the judicial proceedings, but ultimately the water in question would be allocated on the basis of need, equity, and the common good. There is even an example in the case law of a newer use prevailing over a prior use of waters.⁷⁶

The Mexican period of northern New Mexican history (1821–48) also offers another example. Taos Pueblo laid claim to the waters of the Río Lucero based on both prior use and the fact that the pueblo had recently purchased land fronting the river, which provided for additional water rights. Newly arrived Hispanic settlers who established the village of Arroyo Seco, however, also needed water to maintain their fields. In the 1823 decision that followed, the authorities ruled that, although the Indian pueblo had a general right to the water in the Río Lucero, such a right did not preclude the Hispanic population from also taking water from the same source in order to irrigate their crops. The case demonstrates that prior use could

⁷⁴An example of a historian confusing prior appropriation with prior use is Sonya Lipsett-Rivera, *To Defend Our Water with the Blood of Our Veins: The Struggle for Resources in Colonial Puebla* (Albuquerque, 1999). For a critique of her work, see Malcolm Ebright, "Sharing the Shortages: Water Litigation and Regulation in Hispanic New Mexico, 1600–1850," *New Mexico Historical Review* 76 (2001): 5–6, 35; and Michael M. Brescia, review of *To Defend Our Water with the Blood of Our Veins*, in *Colonial Latin American Historical Review* 9 (2000): 143–45.

⁷⁵Meyer, *Water in the Hispanic Southwest*, 148–50.

⁷⁶Joseph Miguel Losano to Governor Miguel Vidal de Lorca, 1778, Archivo General de la Nación, Mexico City, Tierras, vol. 1018, exp. 3.

not sustain a claim to an exclusive right to use all the water, especially in arid regions or in times of scarcity.⁷⁷

In 1885, a dispute between primarily Anglo businessmen and Mexican farmers in Tucson over water in the Santa Cruz River demonstrated how quickly prior appropriation was overtaking Hispanic water practices. Unlike most rivers in the American Southwest, the Santa Cruz flowed from south to north. The defendants in the case came from the upper crust of Tucson society: Sam Hughes and W.C. Davis, both Anglos, and a Mexican, Leopoldo Carrillo. These men owned land south of a particular road, Sisters' Lane, while the plaintiffs, who were largely small-scale Mexican farmers, irrigated their lands that lay north of the road. The hydrological flow of the river, therefore, left the Mexicans at the mercy of their upstream neighbors. According to most Mexican farmers at the time, fields north of the road had always been entitled to as much water as the lands south of it.⁷⁸ Appointed by the landowners themselves, a water foreman (*zanjero*) had regulated the distribution of the water in the Santa Cruz according to Spanish customary practices. For example, whenever a scarcity of water had occurred, the water would be diverted to the field most in need, regardless of whose turn it was.⁷⁹ In the proceedings, one Mexican farmer explained the usage this way: "The custom was when there was a great scarcity of water there was a Commission established: this commission had to take a walk and look at all fields and determine where the greatest need was, and to that place the water was let go."⁸⁰

Custom, or *costumbre* in Spanish, was neither abstract nor theoretical for Mexican farmers and irrigators who worked their lands in the far northern frontier during the late eighteenth and early nineteenth centuries. While growing up they had seen their parents, grandparents, extended family members, and neighbors till the soil and cultivate various crops for

⁷⁷Spanish Archives of New Mexico, Santa Fe, New Mexico, I, 389 and I, 1292.

⁷⁸Thomas E. Sheridan, *Los Tucsonenses* (Tucson, 1986), 64. My interpretation of the significance of the case follows the narrative established in Sheridan's well-researched book, which examined Tucson's transition from a traditional agrarian society rooted in Mexican and Native understandings of subsistence agriculture to frontier capitalism that often privileged quick profits and land speculation over stewardship of natural resources. Peter Reich also skillfully used the case to illustrate his argument that judicial decisions in Arizona often distorted the Hispanic civil law of property; my own assessment draws, in part, from Reich's analysis. See his "The Hispanic Roots of Prior Appropriation," especially 654–59.

⁷⁹Sheridan, *Los Tucsonenses*, 64–65.

⁸⁰Pedro Higuera as quoted in *ibid.*, 65.

household consumption and for sale. As Escriche y Martín defined it in his nineteenth-century legal treatise, custom was something practiced over and over again that had "acquired the force of law," or it also could be "unwritten law that has been introduced through use."⁸¹ Moreover, custom obtained legitimacy under three conditions: when it emerged through the consent of the people; in accordance with the general good; and when it had been observed for at least ten years.⁸² The Mexican farmer who testified in the dispute, therefore, had been socialized in agrarian practices with deep roots in the Spanish and Mexican historical experiences and nurtured via familial and community networks.

Hughes, Davis, and Carrillo began to undermine Hispanic custom to ensure themselves exclusive use of the Santa Cruz River in support of their economic activities. They prohibited the water foreman from releasing any water below the road unless there was a surplus, justifying their decision by arguing that, since their lands were located south of the road, their fields were the oldest cultivated fields in town and therefore were entitled to all the water they needed under the doctrine of prior appropriation.⁸³ Moreover, although the businessmen did not explicitly cite the Howell Code in their defense, it is obvious that its prior appropriative sensibility supported their efforts to monopolize the river based on "first in time, first in right." On the other hand, Hispanic custom had shaped the Mexican farmers' approach to irrigation and farming; they were used to sharing the water in good times and in times of scarcity regardless of who had first put the water to beneficial use. And without any explicit reference to the Howell Code of their own, the farmers' defense of their traditional water rights and practices echoed the letter and spirit of Article 55, section 25 of the code: "The regulations of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they made and used up to this day. . . ."⁸⁴

In yet another example of a poorly understood dimension of Spanish and Mexican water practices within the same dispute, Anglo water foreman, W.C. Dalton, testified in court on behalf of the Chinese farmers who rented Leopold Carrillo's

⁸¹Escriche y Martín, *Diccionario*, 165.

⁸²Ibid. The original Spanish reads, "Para que la costumbre sea legítima, se requiere que se haya introducido por el consentimiento del pueblo, que sea conforme á la utilidad general, y que se haya observado por espacio de diez años."

⁸³Sheridan, *Los Tucsonenses*, 65.

⁸⁴Howell, *Howell Code*, 425.

fields.⁸⁵ The Chinese had escalated cultivation on the lands that they had been renting from Carrillo, hoping to meet the town's growing demand for fresh produce. Although it is no surprise that Dalton's testimony favored Carrillo's Chinese tenants at the expense of the Mexicans—they were, after all, turning a profit with their intensified approach to farming that undoubtedly ensured timely rent payments—his testimony also reveals a lack of appreciation for the Hispanic regimen of laws, customs, and usages that had encouraged both traditional subsistence and production for sale on the open market. For example, the water foreman stated that the Mexican farmer did not cultivate his garden as often as his Chinese counterpart, who "raises cabbages, garlic, and in fact everything in the vegetable line from an artichoke to the biggest cabbage. . . . [T]he Chinaman makes it a matter of business and he produces all he possibly can."⁸⁶ Finally, the lawyer for the plaintiffs proceeded to ask Dalton if the Mexican garden was "merely an adjunct to his house or a matter of gain?" The foreman responded that it was the former and not a commercial enterprise.⁸⁷

It is possible, of course, that Dalton was unaware of the fundamental role that gardens and orchards (*huertas*) played in the household economies of New Spain and later an independent Mexico. As part of the property owner's *solar* or plot, *huertas* enjoyed automatic water rights and did not require additional authorization or permission.⁸⁸ In some areas of the far northern frontier such as Arizona, substantial tracts of common land were, in fact, uncommon, and Hispanic settlers came to rely on *huertas* to sustain themselves and their families, as well as generate just enough surplus to sell either to neighbors or at the local market. The Anglo water foreman's courtroom testimony, therefore, illustrated how much Tucson and southern Arizona had changed since the days when Spanish missions, presidios, and isolated adobe settlements dotted the landscape and competed for land and water with Native communities. Nascent commercial networks and exchanges from the East and Midwest had arrived, promoting a new social order at the intersection of prior appropriation and Anglo capital.

⁸⁵My description of the dispute comes from Sheridan, *Los Tucsonenses*, 65–67, and Reich, "The Hispanic Roots of Prior Appropriation," 654–55.

⁸⁶Dalton's testimony as quoted in Sheridan, *Los Tucsonenses*, 65–66.

⁸⁷*Ibid.*, 66.

⁸⁸Meyer, *Water in the Hispanic Southwest*, 130. William Dunmire examines the role of *huertas* in the local household economies of Spain and Mexico in *Gardens of New Spain: How Mediterranean Plants and Foods Changed America* (Austin, TX, 2004), especially 20–24, 171, 179, 264.

Informed by Spanish juridical understandings of what constituted equity and the common good, Mexican lifeways in southern Arizona now faced pressures from multiple fronts, including a new legal doctrine of water use and ownership that bore little resemblance to the regimen of laws, customs, and usages that had fashioned the agrarian rhythms of daily life for Hispanic settlers in Arizona since at least the eighteenth century. As legal scholar Peter Reich has correctly pointed out, however, the judicial decisions rendered locally by the trial court, which favored Anglo and wealthy Mexican landowners in Tucson at the expense of subsistence farmers primarily of Mexican origin, were overturned on appeal.⁸⁹ When provided with sufficient evidence, the appeals court found no historical precedent for prior appropriation in the Hispanic civil law of property. On the other hand, despite what seemed like the establishment of legal precedence, subsequent decisions by Arizona's high court ignored those earlier rulings, revealing a tendency to assign prior appropriative elements to Spanish law when no such elements ever existed. There was little doubt that prior appropriation had become the organizing principle around which water rights were adjudicated in Arizona. As Reich has argued elsewhere, lawmakers and judges seemed determined to create a longer and deeper history for the doctrine through a lens tinted by romantic notions of all things Spanish.⁹⁰

Displeasure with the Howell Code, particularly its lack of an index, coupled with the desire among some politicians to completely replicate the laws of California in Arizona, prompted the territorial legislature to replace it with *The Compiled Laws of 1877*.⁹¹ In this new code, John Hoyt integrated both the Howell Code's general structure and previous efforts undertaken by Coles Bashford to compile the laws of the Arizona territory; he also prepared an index. Not surprisingly, the first new law added to Hoyt's compilation—following the sixty-one laws found in the Howell Code—addressed land ownership. The territorial legislature had passed a law on November 7, 1864, mandating the registration of all land grants or property deeds in the office of each county recorder, including titles issued by the Mexican authorities prior to the territorial cessions. Failure to do so made ownership "null and void" and prohibited the person who claimed ownership from presenting in any court of

⁸⁹Reich, "The Hispanic Roots of Prior Appropriation," 656.

⁹⁰Ibid.

⁹¹Murphy, *Laws, Courts, and Lawyers*, 76.

law the document as evidence of title or possession.⁹² Hoyt's compilation lasted a bit longer than the Howell Code, although both ultimately reflected nineteenth-century efforts to synthesize disparate water customs and usages within a prior appropriative framework.

Given the flurry of legislative activity in light of the decision to seek statehood, Hoyt's code eventually fell out of favor with lawmakers and territorial governors for being "outdated and unclear."⁹³ Another effort took place in 1899 and 1900 to produce a new code—the *Revised Statutes of 1901*—which simultaneously updated and expanded the civil and criminal laws from previous editions and left Arizona's water regimen intact. Still, legislators determined that statehood in 1912 warranted yet another look at Arizona law. The *Revised Statutes of 1913* covered all the provisions of the 1901 code (except medicine and dentistry), and once again its water laws reflected turn-of-the-century contexts peculiar to Arizona and the West: a burgeoning population, substantial stretches of arid and austere landscapes, and limited water sources. The sheer number of laws (173) in Arizona that addressed water in the 1913 code reflected a political framework generously represented by Anglo commercial interests with their constituent parts: mining, agriculture, and ranching. When distilled in this way, each part sought to codify access to water sources via prior appropriation. Add to the mix the multiple layers of political governance (state, county, town, and irrigation district), each with its own stakeholders, some of whom had a "stake" in every level, and it is remarkable that the Spanish element in Arizona water law continued to endure in some fashion.

For example, although prior appropriation fashioned the overall approach to surface water in the 1913 code ("the person or persons . . . first appropriating water . . . shall always have the better right . . ."), the code stipulated that "all rights in acequias or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of the proprietors of such established rights."⁹⁴ In theory, at least, Arizona lawmakers had recognized the historical and multicultural dimensions of access to and use of water resources. In fact, in this 1913 code they still em-

⁹²John P. Hoyt, comp., *The Compiled Laws of the Territory of Arizona, Compiled and Arranged by Authority of an Act of the Legislative Assembly, Approved February 9, 1877* (Detroit, 1877), 573.

⁹³Murphy, *Laws, Courts, and Lawyers*, 78. Murphy's narrative has informed my own discussion here.

⁹⁴Samuel L. Pattee, comp., *The Revised Statutes of Arizona 1913: Civil Code* (Phoenix, 1913), 1727, 1730–31.

ployed the Spanish word *acequia* to identify irrigation canals. And just like the Spanish preference for agriculture and mining when allocating land and water, the 1913 code reiterated that "the right to irrigate fields and arable lands shall be preferable to all others . . . and if at any time the water so required [for agriculture] shall be taken for mining operations, the person or persons owning said water shall be entitled to damages to be recovered by civil action."⁹⁵

Another wrinkle with a synthetic hue in the 1913 code was statute 5358: "During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always."⁹⁶ Prior appropriative sensibilities are clear and apparent, of course, but now occupation of the land, even without just title, was added to the water doctrine. The wording of the statute also suggests that the date of occupation could extend back to the time when the grantor first arrived and then later opened up his or her lands for use, rent, or purchase by others. Decades earlier Spanish authorities had taken into account just title and prior use as important principles of water allocation—as we have seen—but much of arid Spain and New Spain prohibited the exclusive use of surface water by any individual or entity without considering the needs and circumstances of others in the vicinity. Mechanisms such as *composición* or *repartimiento de aguas* provided both rural folks and town dwellers with access to water for irrigation despite the lack of formal title or ownership.

In addition to its awareness of the needs of others and its recognition that not all settlers could produce legal title, the 1913 code also manifested in statute 5365—implicitly rather than explicitly—the Spanish legal concepts of *propiedad imperfecta* and non-injury to third party: "Any person owning lands . . . upon a river, may construct a private *acequia* for his own uses, subject to his own regulations, provided it does not interfere with the rights of others."⁹⁷ In the Spanish context, water rights were not articulated or extended in a social vacuum; surface water was a qualified right that was measured against the rights and needs of others, while the construction of ditches and canals—appropriate if one had to channel the water to his or her fields—was contingent upon how the ditch

⁹⁵Ibid., 1731–32.

⁹⁶Ibid., 1733.

⁹⁷Ibid., 1734.

affected nearby property owners and irrigators.⁹⁸ With a 66-percent increase in population between 1900 and 1910, Arizona lawmakers slightly tweaked the prior appropriation doctrine in recognition of the demographic truism that more people coming to Arizona meant more water competitors in the forty-eighth state, the only one where the four North American deserts could be found.⁹⁹

Deliberation and debate over the nature and scope of water rights in Arizona were nothing new, of course. They had marked the political process earlier, in 1910, when lawmakers had gathered to draft a state constitution. Some delegates at the convention tried to codify "due compensation" for water users who were deprived of their rights to use their proportionate amount of water, while others wanted to expand the list of economic activities with rights to water to include milling and ore reduction.¹⁰⁰ Still other delegates wanted to ensure that the common law doctrine of riparian rights would not enjoy the force of law in Arizona; compromise language that simply stated "all existing rights to the use of any of the water in this State for any useful or beneficial purpose are hereby recognized and confirmed" failed by a vote of twenty-six nays to twenty-one ayes.¹⁰¹ The original proposal to prohibit the riparian doctrine likewise failed to pass the first time around (nineteen votes in favor and twenty-nine opposed).¹⁰² Some declarations carried the day with little fanfare or opposition—for example, "[T]he waters of every river, creek or running stream in this State are hereby declared to be public property"¹⁰³—because these reflected the earliest synthetic understandings of water rights in Arizona dating back to the Howell Code.

Some delegates included the prior appropriation doctrine in a subsequent debate over water rights but added an order of preference in times of scarcity: domestic use, stock water, ag-

⁹⁸Meyer, *Water in the Hispanic Southwest*, 71–73.

⁹⁹*Minutes of the Constitutional Convention of the Territory of Arizona* (Phoenix, 1910), 61. Arizona's population in 1910 stood at 204,354, which was an increase of 81,243 over the last count, taken in 1900. Moreover, some of the state's primary surface waters, e.g., the Gila, Salt, Santa Cruz, and San Pedro Rivers, traversed counties with the largest populations: Cochise (34,591), Maricopa (34,489), Pima (28,180), and Graham (23,547). Quite tellingly, these same counties were home to substantial mining, ranching, and agricultural operations that required access to reliable water sources.

¹⁰⁰*Minutes*, 304–305.

¹⁰¹*Ibid.*, 324.

¹⁰²*Ibid.*, 325.

¹⁰³*Ibid.*, 326.

ricultural, mining, and manufacturing purposes.¹⁰⁴ Although it passed with twenty-eight votes in favor, twenty delegates failed to support it. When Maricopa County delegate Albert Baker, the former chief justice of the Territorial Supreme Court of Arizona and a future justice of the state supreme court, moved to declare public water subject to beneficial use as defined by the legislature, the motion carried with only twenty-six votes, with twenty-one votes against the measure. It was becoming more difficult for the delegates to pass detailed water provisions with comfortable majorities. By the end of the convention the delegates decided to postpone indefinitely any effort to include in the state constitution a systematic enumeration of water rights for Arizonans.¹⁰⁵

Such reticence to tackle water rights within a constitutional framework, however, was more of a reflection of presidential influence than unwillingness among delegates to define and enshrine water rights in their governing document. President William Howard Taft had visited Arizona in October 1909 and, although in favor of statehood, warned residents to avoid adopting a constitution littered with restrictive statutes and unnecessary provisions that were best suited for state legislators. He pressed Arizona to draft a constitution modeled after the U.S. Constitution, an instrument with only "fundamental limitations upon your legislature and Executive."¹⁰⁶ With President Taft's warnings "ringing in their ears," delegates either attacked propositions by branding them "legislation" or scaled back on language so as to avoid the appearance of creating statutes rather than a constitution.¹⁰⁷ Such background noise explains why the state constitution contains but two brief mentions of water in a single article, Article 17.

Section 1 of Article 17 illustrated the persistence among those delegates who wanted no role for the riparian doctrine in Arizona water law. Despite the initial setback for supporters of the provision, it eventually passed and made its way into the state constitution. Albert Baker, the Democratic former chief justice of the territorial supreme court who had introduced the measure that failed the first time around, sparred with Samuel Kingan, a Republican attorney from Pima County. Kingan asserted rather boldly that the riparian doctrine had been the

¹⁰⁴Ibid.

¹⁰⁵Ibid., 326–27.

¹⁰⁶President Taft quoted in Paul F. Eckstein, Jerica L. Peters, and D. Andrew Gaona, "What Didn't Make It into the Arizona Constitution," *Arizona State Law Journal* 44 (2012): 513.

¹⁰⁷Ibid., 520.

"law of this territory" for nearly fifty years; Baker responded—surely with President Taft in mind—that "the answer is that it is purely fundamental. If a future legislature should undertake to establish a common law doctrine of water rights in this territory, they could do so. I want to fix it so that no legislature can ever do that thing."¹⁰⁸ In addition to his deference to presidential exhortation, Baker was most likely recalling a recent U.S. Supreme Court decision that had rejected the argument that a territorial statute adopting the English common law system included riparian rights.¹⁰⁹ Prior appropriation was the doctrine that had been governing, and would continue to govern, water rights in Arizona.

Section 2 of Article 17 recognized and protected "all existing rights to the use of any of the waters in the state for all useful or beneficial purposes. . . ."¹¹⁰ Although it lacks a specific reference to the Hispanic regimen of laws, customs, and usages in Arizona prior to the territorial cessions, the language employed by the drafters ("all existing rights") covered the Spanish element in light of the Treaty of Guadalupe Hidalgo and the Gadsden Purchase, not to mention the law of prior sovereigns. Of course, "all existing rights" had to have been obtained validly and confirmed by competent authority. In other words, a judicial or legislative determination that a claim to land and water under the laws of Spain and Mexico was illegitimate or illicit would not have fallen under the broad category of "all existing rights." The international treaties that brought Arizona into the American Union protected property rights, including water rights that had been granted according to the procedures and customs of the prior sovereigns. Fraudulent claims to natural resources granted under Spanish and Mexican law, or efforts to enlarge one's legitimate property rights through an expansive

¹⁰⁸Kingman and Baker quoted, respectively, in Eckstein, Peters, and Gaona, "What Didn't Make It into the Arizona Constitution," 522.

¹⁰⁹*Boquillas Land & Cattle v. Curtis* 213 U.S. 339 (1909), cited in John D. Leshy, *The Arizona State Constitution*, 2^d ed. (New York, 2013), 379–80.

¹¹⁰*Ibid.*, 380.

reading of the law, were set aside by the U.S. courts as contrary to those procedural elements and customs.¹¹¹

Since Arizona attained statehood in 1912, the Spanish element in western water law continues to surface in litigation that meanders its way through state courts, as well as through state government agencies in anticipation of adjudication. Two examples merit discussion. The Gila River Adjudication, initiated in 1974 by the Salt River Project (SRP) to clarify water rights in the Salt River above Granite Reef Dam, but excluding the Verde River, remains "the longest and largest judicial proceeding in the history of Arizona."¹¹² Two years later the SRP filed a similar petition for the Verde River and its tributaries. Soon thereafter, other nearby water users waded into the litigation. The Phelps Dodge Corporation filed petitions with the State Land Department in 1978 to determine the water rights of both the Gila River and Little Colorado River systems and sources. Meanwhile, ASARCO, Inc. lodged its own petition with the state in 1978, but for the adjudication of the San Pedro River and its tributaries.¹¹³ ASARCO's decision to ascertain water rights and usages prompted the Babocómari Ranch Company, a limited partnership that was (and remains) the successor-in-interest to the largest Mexican land grant issued within the confines of modern Arizona, to file a claim of its own with the Arizona State Land Department asserting its rights to water.¹¹⁴

Nestled in the grasslands of southeastern Arizona between Elgin and Fort Huachuca, the Babocómari Ranch may have seemed far removed from the fight over water rights in central Arizona's Verde Valley. With approximately 28,000 acres spread

¹¹¹As cited earlier in this article, the Peralta case is the most egregious example of a fraudulent claim submitted to the U.S. legislative and judicial systems for confirmation. An example of a legitimate property right with just title whose owner sought a generous reading of Spanish and Mexican law was Dr. Edward Perrin's attempts in the early twentieth century to enlarge his holdings under the San Ignacio del Babocómari land grant that had been issued in 1832. The Court of Private Land Claims, acting on the U.S. Supreme Court's remand, approved only the lands identified and granted within the boundaries stipulated in the original title, and not the surplus lands (*demasías* or *sobras*) that would have added nearly 90,000 acres to Perrin's ranch. See Ray H. Mattison, "Early Spanish and Mexican Settlements in Arizona," *New Mexico Historical Review* 21 (1946): 313–15.

¹¹²Joseph M. Feller, "The Adjudication That Ate Arizona Water Law," *Arizona Law Review* 49 (2007): 406.

¹¹³Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West* (Tucson, 2005), 130–31.

¹¹⁴Arizona State Land Department, *Statement of Claim of Right to Use Public Waters of the State, Babocomari Ranch Company*, registry no. 36-21891, Phoenix, June 27, 1979.

across rich savanna rangeland, desert, and riparian habitats, the ranch is the largest contiguous private land parcel in Arizona.¹¹⁵ However, it receives a portion of its water from the Babocómari Creek, a tributary of the San Pedro River, which, in turn, flows farther north to its confluence with the Gila River near Winckelman. The Gila River Adjudication, therefore, is supposed to determine the quantities and relative priorities of all legal rights to the use of water from the Gila River and its tributaries within Arizona, including the Salt, Verde, Agua Fria, Santa Cruz, and San Pedro Rivers.¹¹⁶ The ASARCO petition was, in the end, a response to, and an extension of, the larger Gila River litigation.

When Frank C. Brophy, Jr., filed the claim with the Arizona State Land Department on behalf of the Babocómari Ranch's general partners, he identified "irrigation, stockwatering, [and] domestic" as the purpose and extent of the ranch's use of the waters "upon, within or underneath the Babocómari Land Grant located in both Santa Cruz and Cochise Counties."¹¹⁷ In terms of surface water, Brophy specified "all the waters of Babocómari Creek and tributaries thereto located upon the said land grant . . . and all tributaries of Cienaga Creek and Pantano Wash located upon said Land grant."¹¹⁸ Other water sources included a mix of surface and groundwater, not to mention water stored in both manmade and natural settings: "Numerous stocktanks, windmills, water holes, the T-4 Springs, the Pacheco Spring, the Babacomari Creek and intermittent springs and seeps located upon the lands of Babacomari Land Grant . . . and the stockponds registered concurrent herewith."¹¹⁹

What makes Brophy's claim so germane to understanding the Spanish element in western water law is that the Babocómari Ranch was asserting its rights to water based not on the prior appropriation doctrine but rather "upon ownership of the land pursuant to the Grant of the Republic of Mexico," i.e., the law of prior sovereigns that had defined the nature and scope of

¹¹⁵"San Ignacio del Babacomari: A Family Owned and Operated Cattle Ranch since 1935," www.babacomariranch.com. According to historical documents, the correct spelling is Babocómari, but both forms are accepted.

¹¹⁶Feller, "The Adjudication That Ate Arizona Water Law," 407.

¹¹⁷*Statement of Claim of Right to Use Public Waters*. Brophy filed the claim with the state land department because the Gila River Adjudication was initially filed before the same department in 1974, according to the statutory procedures in place at the time. Five years later the applicable statutes were amended, requiring the superior court in each county to handle stream adjudications. See Feller, "The Adjudication That Ate Arizona Water Law," 407, n.8.

¹¹⁸*Statement of Claim of Right to Use Public Waters*.

¹¹⁹*Ibid.*

the water rights conveyed by Mexico to the original owners, Ignacio and Eulalia Elías, well before the area was part of the United States. Contextualizing the ranch's rich legal history in the statement of claim, Brophy invoked the original land grant issued in 1832, Article VIII of the Treaty of Guadalupe Hidalgo, the Gadsden Purchase of 1854, state and U.S. Supreme Court rulings, and the Court of Private Land Claims, and he did so in order to declare that "the rights to these waters were vested in the owner of the land under Mexican law and did not become subject to the ownership of the United States or the State of Arizona."¹²⁰ In effect, Brophy was stipulating that the ranch's water rights derived from a prior sovereign whose jurisprudence neither articulated beneficial use of water in the same manner as the prior appropriation doctrine nor fashioned agrarian customs unaware of the principles of equity and the common good.

Moreover, the owners of the Babocómari Ranch were reminding state officials that, under the law of prior sovereigns, land and water alienated from the royal (Spanish Crown) or national (Mexico) patrimonies by competent authority became private property and no longer enjoyed the fullness of its public character. Since water was considered property under Spanish and Mexican civil law, certain provisions of the international treaties cited in the statement of claim afforded the Brophy family explicit property guarantees. In fact, the owners of the ranch could have added that these property guarantees had (and continue to have) an explicit constitutional framework, i.e., Article VI, section 2 of the U.S. Constitution elevates treaties to the same level as the Constitution itself. Put another way, treaties that have been approved by the Senate become the supreme law of the land.¹²¹

While the owners of the Babocómari Ranch and their neighbors have yet to endure the adjudicatory morass that the Gila River litigation has become, they can muster a legal strategy fashioned by the law of prior sovereigns and the constitutional protections of the Gadsden Purchase should general stream adjudication resurface in the San Pedro River watershed beyond the issues specific to the Gila River Adjudication, or if the ongoing litigation for federal reserved water rights in the San

¹²⁰*Ibid.*

¹²¹Article VI, section 2 of the U.S. Constitution reads, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."



The Babocómari Ranch, shown above during a cattle roundup, receives a portion of its water from the Babocómari Creek, a tributary of the San Pedro River, which, in turn, flows farther north to its confluence with the Gila River. (Courtesy of Arizona Historical Society, neg. C6-7044)

Pedro Riparian National Conservation Area requires the ranch owners to assert and defend their own rights.¹²²

A second example of the continued presence of the Spanish element in western water law with an Arizona context is the ongoing adjudication to ascertain water rights in the Little Colorado River. On April 24, 2013, George Schade, Jr., the special master assigned to the Little Colorado case, filed a report with the clerk of the Apache County Superior Court in response to

¹²²After the state legislature amended Arizona's general adjudication procedures in 1979, the San Pedro River litigation was transferred to the Cochise County Superior Court. In 1981, however, the state supreme court consolidated several cases, including the San Pedro Adjudication, into one rather large proceeding that was handed to the Maricopa County Superior Court under the title *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, Nos. W-1, W-2, W-3, and W-4 (Consolidated). See Colby, Thorson, and Britton, *Negotiating Tribal Water Rights*, 131; and "Gila River and Little Colorado River General Stream Adjudications," www.azwater.gov/AzDWR/SurfaceWater/Adjudications/GilaRiverandLittleColoradoRiverGeneralStream-Adjudications.htm.

the Hopi Tribe's priority claims to all rights to use water in the river system and source.¹²³ As noted earlier, the case dated to 1978, when Phelps Dodge Corporation filed a claim with the state land department. Over time, however, the move by big copper mining interests to identify water users and their accompanying rights to the Little Colorado River created a bevy of experts and consultants, including historians, archaeologists, and hydrologists, which added layers of historical detail, cultural nuance, and shades of legal meaning to an already complex case. Ironically, then, what began as a routine general stream adjudication initiated by the private sector attracted mainstream and scholarly attention, as the case evolved into a dispute between two tribal sovereignties whose cultures often are seen as part and parcel of a broader Southwestern ethos: the Hopi Tribe and the Navajo Nation.¹²⁴

In his report, the special master addressed seven issues arising from the claims of both the Hopi Tribe and the United States to water rights for the Hopi Indian Reservation located in northern Arizona. Particularly relevant to an assessment of the Spanish element in western water law is the second issue raised in the report. Schade recommended that the court deny the Hopi Tribe's claims to water rights with a priority date of 1848 as a result of the Treaty of Guadalupe Hidalgo.¹²⁵ He established as a finding of fact that the 1848 treaty had declared "property of every kind . . . shall be inviolably respected," and as a matter of law, "water rights are property rights," citing the interlocutory review of procedures and due process found in *In the Matter of the Rights to the Use of the Gila River*.¹²⁶ As we have seen, the Spanish civil law of property prior to

¹²³"Report of the Special Master"; "Motion for Adoption of Report"; and "Notice for Filing Objections to the Report," *In Re The General Adjudication of All Rights to Use Water in the Little Colorado River and Source*, No. CV 6417-201 (*In Re Hopi Tribe Priority*), Superior Court of Apache County, April 24, 2013: 1-77. Much of the Little Colorado River documentation filed with the court is available online via the state government website listed in the previous note.

¹²⁴See, for example, Trudy Griffin-Pierce, *The Columbia Guide to American Indians of the Southwest* (New York, 2010); and Thomas E. Sheridan and Nancy J. Parezo, eds., *Paths of Life: American Indians of the Southwest and Northern Mexico* (Tucson, 1996).

¹²⁵"Report of the Special Master," 27. In addition to claiming water rights with a priority date of 1848 under the Treaty of Guadalupe Hidalgo, the Hopi Tribe also claims water rights with a priority date of (1) time immemorial; (2) 1882 as a result of the establishment of the Hopi Reservation under President Chester Alan Arthur; and (3) other priority dates such as 1900, 1934, etc., as a result of congressional acts and judicial decisions.

¹²⁶*Ibid.* The complete citation of the interlocutory review is *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992).

the territorial cessions also defined water rights as property rights, although the special master did not explicitly reference in his report the Hispanic regimen of laws, customs, and usages. Moreover, in his discussion of the broader international context of the treaty's property guarantees, Schade cited three cases, including *Boquillas*, to stipulate that the 1848 treaty neither created nor defined the existing property rights of those prejudiced by the territorial cession, and that their existence was not contingent upon American law; rather, if the rights could be shown to have existed under Mexican law, the treaty obliged the United States to protect them.¹²⁷

Noting the Hopi Tribe's response to a motion for partial summary judgment, Schade also stated that the Hopi Tribe had accepted that the treaty "is not an independent source of water rights, nor does it serve as an independent priority date for water rights that pre-date the creation of the [Hopi] reservation."¹²⁸ In addition to the tribe's concession, the United States stipulated that it "does not claim water rights on behalf of the Hopi Tribe based on the Treaty itself, but asserts instead that the Treaty simply protected the aboriginal water rights that were in existence at that time."¹²⁹ The special master concluded that the treaty "neither created nor established new water rights by virtue of its provisions"; it merely "protected property rights, including water rights held by Mexican citizens who lived in the lands acquired by the United States as a result of the treaty."¹³⁰ Without further discussion or additional commentary, Schade recommended that the court deny the Hopi Tribe's motion for summary judgment on its water rights under the treaty "to the extent the motion requests the adjudication of discrete water rights with a priority date of 1848."¹³¹ In sum, based on his reading of the law and the evidence presented to him in the case, the special master determined that "the Hopi Tribe does not hold water rights with a priority of 1848 as a result of the Treaty of Guadalupe Hidalgo."¹³²

¹²⁷*Ibid.*, 27–28. Schade cited the following cases to support his Conclusion of Law No. 10: *Phillips v. Mound City Land & Water Ass'n*, 124 U.S. 605, 610 (1888); *Accord, Townsend v. Greeley*, 72 U.S. 326, 334 (1866); and *Boquillas Land & Cattle Co. v. St. David Coop. Com. & Dev. Ass'n*, 11 Ariz. 128, 138, 89 P. 504, 507 (Terr. 1907), *aff'd*, 213 U.S. 339 (1909).

¹²⁸*Ibid.*, 28.

¹²⁹*Ibid.*, 28–29. Schade cited "U.S. Resp. to Hopi Tribe's Mot. For Summ. J. on Hopi Water Rights Under Treaty of Guadalupe Hidalgo at 3–4 (June 20, 2012).

¹³⁰*Ibid.*, 28.

¹³¹*Ibid.*, 28–29.

¹³²*Ibid.*

Whether the court accepts Schade's recommendation is an entirely different matter, of course. What is clear, however, is that the Spanish element continues to offer certain water competitors another legal pillar around which they can tie their rights to scarce water sources in Arizona. As the current drought enters its second decade, a judicious reading of the historical record raises awareness of the difficulties of adjudicating water rights in a judiciary that operates in one legal tradition but is obliged to resolve disputes according to the laws of another. Many years ago, another crippling drought pushed Betty Eakle Dobkins to consider the manner in which Spanish law and custom structured the relationship between policy and natural resource management. While we should avoid romanticizing Spanish notions of equity and the common good, especially since the Spanish colonial enterprise in North America thrived and endured for three hundred years at the expense of the Native population, the Hispanic civil law of property points us to a regimen of water practices and usages that constantly sought to balance individual rights with the needs of the larger community, and often within ecological contexts shaped by aridity and scarcity. That archives in Mexico, Spain, and the United States are replete with case law capturing the tensions between jurisprudence and daily practice in Spanish North America demonstrates just how difficult and contested the efforts were to achieve judicial balance and social equilibrium.

BOOK REVIEWS

In the Smaller Scope of Conscience: The Struggle for National Repatriation Legislation, 1986–1990, by C. Timothy McKeown. Tucson: University of Arizona Press, 2013; 288 pp.; illustrations, notes, index; \$55.00 cloth.

The Native American Graves Protection and Repatriation Act (NAGPRA) has been lauded by many as one of the most important and effective pieces of human rights legislation affecting Native Americans today. While Congress voted unanimously to enact NAGPRA, as C. Timothy McKeown illustrates in *In the Smaller Scope of Conscience*, the path to national repatriation legislation was nebulous and highly disputed, and involved intense negotiations between multiple parties in consideration of sixteen disparate bills before finally arriving at the National Museum of the American Indian Act (NMAI) and NAGPRA in 1989 and 1990, respectively. In application of these laws today, anthropologists, museum professionals, and tribal representatives frequently, and causally, reference the variance between the “letter of the law” and the “spirit of the law,” and make broad statements about Congress’ intent. But can we singularly define the spirit or intent of these complex laws? McKeown meticulously details the origins of repatriation legislation from 1986 onward in the hope that “questions that may arise can be answered in a way that is consistent with both the intent and meaning of the law” (p. 211). In doing so, McKeown successfully provides the necessary background information and legislative framework to better understand the multiple and often conflicting interests and intents of individual members of Congress, federal agencies, Native American representatives, museums, and archaeologists, while weaving together a compelling narrative.

McKeown begins by chronicling the Northern Cheyenne tribal member William Tallbull’s discovery of a Dog Soldier Society pipe and thousands of human remains stored in the “green boxes” at the Smithsonian Institution. This narrative provides a tangible and humanizing example illuminating the need for a repatriation process. Conversations between Tallbull, the Northern Cheyenne delegation, and Montana senator John Melcher follows suit. One senator’s interest, coupled with the opportunity to acquire the National Museum of the American

Indian, Heye Foundation, collections, quickly broadens the conversation and provides the necessary momentum for the precursors to the NMAI Act. From here, McKeown provides a systematic and exhaustive description of the evolution of the NMAI legislation. This journey is informed not only by examining congressional records, but also by in-depth interviews, as well as detailed archival research. This story includes not only congressional opinions, but also the viewpoints of representatives from the Smithsonian Institution, Native American Rights Fund, National Congress of American Indians, and the Association for American Indian Affairs, providing a comprehensive view of the complexity of negotiations.

The ink on the NMAI Act was barely dry when Senator Inouye, Senator McCain, and Representative Udall joined efforts in an attempt to expand repatriation legislation outside of the Smithsonian. McKeown details the close connection between the NMAI act and the resulting NAGPRA. As repatriation was expanded to include all museums and institutions accepting federal funds, negotiations became even more complex with many stakeholders expanding their direct involvement, including the Society for American Archaeology, the American Association of Museums, the National Park Service, art dealers, and various academic institutions. Again, McKeown masterfully details the marathon negotiations and after-hours meetings in vivid detail, explaining who was there, what was said, what was agreed upon, and what could not be agreed upon.

McKeown dedicates the last chapter of the book to analyzing the subsequent interpretation of the law. He compares and contrasts NMAI and NAGPRA to elucidate when the differences are the result of an intentional negotiation process. He carefully discerns and explains definitions and required actions and acknowledges important ambiguities in the law. As a NAGPRA practitioner, I find McKeown's careful analysis of the language, both the final language and the language omitted from the act, critically important to any interpretation of NAGPRA. As we have seen with *Bonnichsen v. U.S.*, the nuances of language, including verb tense, can have a critical, and perhaps unexpected, impact on the application of repatriation legislation.

On the twenty-fifth anniversary of NAGPRA, it is particularly interesting to consider McKeown's work and the history of legislation in light of the recently introduced Bring the Ancient One Home Act of 2015, proposed by Washington State senator Patty Murray (Senate Bill 1979). This bill would direct the U.S. Army Corps of Engineers to transfer the "archaeological collection" (aka the human remains otherwise known as the Ancient One or Kennewick Man) to the Washington State

Department of Archaeology and Historic Preservation in order to repatriate the remains to the claimant tribes.

In the Smaller Scope of Conscience is an impressively well researched, fairly presented, and valued contribution to the field. This work should be required reading for anyone entrusted directly or indirectly with repatriation work.

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Son of a Gambling Man: My Journey from a Casino Family to the Governor's Mansion, by Governor Bob Miller. Foreword by President Bill Clinton. New York: Thomas Dunne Books/St. Martin's Press, 2013; 272 pp.; illustrations; \$26.99 cloth.

After Nevada legalized casino gambling in 1931, it needed experts to develop its new industry. But with gambling outlawed in every other state, the experts would have to come from the wrong side of the law. Recognizing this, Nevada political leaders displayed an unusual tolerance concerning the rap sheets of the early casino operators. Illegal gamblers from Los Angeles, Cleveland, and elsewhere flocked to Nevada, where they could put their skills to use without fear of a police crackdown.

As Nevada's gambling industry gained momentum, it attracted the interest of criminal syndicates, which saw a financial opportunity more lucrative than any they'd seen since Prohibition. In 1945, Meyer Lansky, Benjamin "Bugsy" Siegel, and Moe Sedway purchased the El Cortez hotel-casino, marking the mob's first significant investment in Las Vegas.

Ten years later, the Chicago Outfit opened the Riviera Hotel—at nine stories, the first high-rise on the Las Vegas Strip. The nation's most sophisticated organized crime group soon sent an illegal bookmaker named Ross Miller to help run the place. By all outward appearances, Miller was a buttoned-down manager of a growing business enterprise. He was respected in the community and regarded as a civic leader. But try as he might, he was never able to free himself fully from his origins as a key associate of the Chicago mob.

This association haunted his son Bob as he embarked on a career in politics. For decades, Bob Miller's political opponents could not resist raising the suggestion that his father's past organized crime ties had corrupted his son. Despite this pesky obstacle, Bob Miller enjoyed considerable success in the political realm, culminating in ten years as Nevada's governor.

"Throughout my political career, my adversaries would take every opportunity to use my father's career in gaming and his business associations against me," Miller writes. "To this day I feel these were cheap shots, especially given the fact that my father had already passed away by the time these accusations were made. I never shied away from my father or who he was—and I never will."

Miller's memoir is most compelling in his recollections of growing up in Las Vegas during the 1960s. He is at once honest about the depth of his father's activities and associations—he remembers Jimmy Hoffa visiting the house to talk business—and nostalgic about his teenage adventures on and off the fabled Strip. As a lifeguard at the Riviera's hotel pool, he had a humorous run-in with a haughty young singer named Barbra Streisand. He also witnessed some historic lounge shows, including the Rat Pack's legendary Summit at the Sands, despite being underage.

Miller also excels in describing his early career after law school (at Loyola in Los Angeles), including serving as attorney for the Clark County Sheriff's Department, as an appointed Las Vegas justice of the peace, and his first elected office as Clark County district attorney. It was during his 1978 election campaign that an opponent's sleazy campaign tactics first threatened to derail his promising career. A minor candidate in the primary, defense attorney Bucky Buchanan, ran campaign advertisements questioning whether Miller could be an impartial prosecutor considering his parents' links to organized crime. Miller nonetheless won the primary and election.

"I walked away from the entire experience hurt but wiser, and emotionally prepared for future attacks along the same lines as Bucky's," Miller writes. "I digested the bitter truth that for me, a person who'd grown up in a Las Vegas casino family in the 1950s and '60s, character assassinations founded on innuendo about my parents just came with the territory in running for public office."

As district attorney, Miller became involved with the National District Attorneys Association and ultimately served as the organization's president. It was in this role that he met John Walsh, the father of a six-year-old boy who was kidnapped and murdered in Florida. Miller and Walsh, among many others, teamed up to push for passage of landmark victims' rights legislation, the Missing Children Act, in 1982, as well as the Victim and Witness Protection Act. "My greatest accomplishment in my years as Clark County DA was improving the treatment of crime victims," Miller writes.

Miller's extensive tenure as Nevada's governor is, surprisingly, less detailed in the book than one might expect. But he

does provide an ample description of one important legislative battle. In 1995, the Las Vegas Hilton sought a bill that would cap jury awards to hotel guests for negligence because of inadequate security. The hotel had been the site of a military convention where more than eighty female officers had been sexually harassed and assaulted. An ensuing lawsuit accused the Hilton of providing inadequate security, and the jury agreed. The Hilton appealed.

During the appeal, the Nevada state senate passed a bill that not only would prevent hotels from being liable for damages to guests as a result of inadequate security, but it would apply retroactively to lawsuits pending final judgment. Outraged by the retroactive part of the bill, Miller went to work lobbying for its demise. The state assembly removed the retroactive clause from the bill.

Son of a Gambling Man tells a political story that, as Miller notes, "could not have happened in any other state or in any other city."

Geoff Schumacher
Las Vegas, Nevada

Quite Contrary: The Litigious Life of Mary Bennett Love, by David Langum, Sr. Lubbock: Texas Tech University Press, 2014; 256 pp.; illustrations, bibliography, index; \$34.95 cloth.

David Langum, Sr., has illuminated the life of an unusual woman, Mary Bennett Love, based largely on legal sources. With careful research, he has teased out the story of a plain woman of humble beginnings who succeeded in later life on her own terms. She accompanied her first husband and their children to Oregon in 1842, but shortly thereafter the family moved to California for better farmland. As other Americans moved westward and California transformed from a Mexican province to an American state, Bennett Love's passion for land ownership created a host of documents that Langum taps to construct the major framework of this book. Langum also includes a section on her eldest daughter, Catherine Bennett Graham McCusker, whose common-law marriage, divorce, and fight for child custody engendered other litigation in which Bennett Love was concerned. The book's title, *Quite Contrary*, clearly is well chosen.

Langum's efforts to document this working-class life stretched far beyond the legal documents of two nations. He utilizes personal reminiscences, since Bennett Love was

frequently remembered, based on her huge size (six feet tall and, eventually, over 300 pounds) and flamboyant personality. Langum also examined notices in the contemporary press and contacted descendents, who shared with him family records, oral histories, and photographs. In short, the research behind this biography is impressive.

While the research is very strong, the contextualization and analysis are weak. Langum initially relies on the outdated "separate spheres" concept of antebellum womanhood, where women lived private lives at home and men alone operated in the public sphere, although he clearly states that Bennett Love did not conform to these mores. In the "Foreword," Gordon Morris Bakken, editor of the American Liberty and Justice series, adds material from his well-recognized *Encyclopedia of Women in the American West*, co-edited with Brenda Farrington. While Bakken's list of individual women from a wide variety of times and places lends color, it does not adequately meet the need for a more nuanced historical context. The final two pages of this biography do provide a hint of analysis, contextualizing Mary's skill in utilizing the law in a commonly shared legal culture predominant in pioneer America. This concept of a wide understanding of the common law, so amply demonstrated throughout this work, could have been amplified considerably and would have enriched this study.

The book also contains some minor, but nagging, internal contradictions. Langum repeatedly notes that Bennett Love maneuvered well in a "man's world," but notes an unusual legal vulnerability in her second divorce proceedings. She did not finalize the divorce, and Langum offers the supposition that, under Mexican law, the now well-off Bennett Love would have had to support her impoverished husband had the divorce become final. Langum also emphasizes her illiteracy but gives her credit (or blame) for forging the signature of her son Winston as Narciso Bennett on a land claim, and for signing her own name on later documents. Additionally, although Bennett Love unquestionably turned to the law to address her problems, the author's assertion that she did so single-handedly may be overstated. Lawyers are mentioned, some by name, as involved in her second divorce and in seeking payment from her estate.

Despite these minor irritations, this book is a fascinating read. Langum's clear prose makes the book accessible not just to those educated in the law, but to general readers. The author, who clearly understands all the minute ramifications of Mexican and early American legal codes, successfully explains Bennett Love's various legal dodges in language accessible to the layperson. Those not enamored of land law may find her late-life land claims heavy going; however, her interaction with

several characters of her day, including her marriage to Harry Love, who claimed to have killed Mexican "bandit" Joaquin Murrieta, and her eldest daughter's marriage to trapper/tavern keeper Isaac Graham, helps leaven the story. Langum presents all his carefully marshaled and organized material in an engaging, readable manner.

Despite the lack of a strong context and wider historical analysis, the impeccable research encapsulated in this work offers a new, atypical view of womanhood in antebellum California. This book is guaranteed to enlarge the history of the West and the women who lived there. I recommend it highly.

Nancy J. Taniguchi
California State University, Emerita

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.

Ablavsky, Gregory. "Beyond the Indian Commerce Clause," *Yale Law Journal* 124 (Dec. 2014): 1012–90.

Bergmann, Mathias D. "Agents for Change: Robert Huston Milroy and Federal Indian Policy," *Journal of the West* 53 (Winter 2014): 21–31.

Britten, Thomas A. "The State of Nevada v. Eugene Austin: A Tragic Story of Homicide and Incarceration in the American Southwest," *American Indian Culture and Research Journal* 38:2 (2014): 111–34.

Brown, Kate Elizabeth. "Rethinking *People v. Croswell*: Alexander Hamilton and the Nature and Scope of Common Law in the Early Republic," *Law and History Review* 32 (Aug. 2014): 611–45.

Cantrell, Gregg. "Lyndon's Granddaddy: Samuel Ealy Johnson, Sr., Texas Populism, and the Improbable Roots of American Liberalism," *Southwestern Historical Quarterly* 118 (Oct. 2014): 133–56.

Cantrell, Gregg. "'Our Very Pronounced Theory of Equal Rights to All': Race, Citizenship, and Populism in the South Texas Borderlands," *Journal of American History* 100 (December 2013): 663–90.

Cooke, Jason. "Property as a Pillar of Oil-Based Capitalism: The Case of the Southern Pacific Company in Southern California, 1865–1926," *Journal of Historical Geography* (London) 46 (Oct. 2014): 1–12.

Dalstrom, Harl A. "Homicide on the Canada-U.S. Border," *Manitoba History* 73 (Fall 2013): 9–18.

Dillon, Brian Dervin, Richard H. Dillon, and John Dervin Yi An Dillon. "Gum Shan vs. Tan Heung Shan: 19th Century Chinese in California and Hawaii," *California Territorial Quarterly* 100 (Winter 2014): 6–47.

Filindra, Alexandra. "The Emergence of the 'Temporary Mexican': American Agriculture, the U.S. Congress, and the 1920 Hearings on the Temporary Admission of Illiterate Mexican Laborers," *Latin American Research Review* 49:3 (2014): 85–102.

Glasrud, Bruce A. "Anti-Black Violence in 20th Century East Texas," *East Texas Historical Journal* 52 (Spring 2014): 53–81.

Goings, Aaron. "Women, Wobblies, and the 'War of Grays Harbor': Finnish-American Women and the 1912 Grays Harbor Lumber Strike," *Montana: The Magazine of Western History* 64 (Winter 2014): 3–21.

Greetham, Stephen H. "Tribes in 'Unexpected Places': The NLRA, Tribal Economic Actors, and Common Law Expectations of Tribal Authenticity," *American Indian Quarterly* 38 (Fall 2014): 427–58.

Hansen, Karen V., and Grey Osterud. "Landowning, Dispossession and the Significance of Land among Dakota and Scandinavian Women at Spirit Lake, 1900–29," *Gender and History* 26 (April 2014): 105–27.

Harvey, Anna. "The Economic Origins of Entrenched Judicial Review," *Studies in American Political Development* 29 (April 2015): 1–22.

Kenny, James, and Bill Parenteau. "'Each year the Indians flexed their muscles a little more': The Maliseet Defence of Aboriginal Fishing Rights on the St. John River, 1945–1990," *Canadian Historical Review* 95 (June 2014): 187–216.

Koenig, Sarah. "Maternalism and the Mayor: Dottie Do-Good's War on Sin in Postwar Portland," *Journal of Women's History* 26 (Winter 2014): 108–31.

Labode, Modupe. "The 'Stern, Fearless Settlers of the West': Lynching, Region, and Capital Punishment in Early Twentieth-

Century Colorado," *Western Historical Quarterly* 45 (Winter 2014): 389–409.

Lew-Williams, Beth. "Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control," *Pacific Historical Review* 83 (February 2014): 24–56.

Lewis, Caitlain Devereaux. "Policies of Inequity—A World Apart: A Comparison of the Policies Toward Indigenous Peoples of a Post-Colonial Developing Nation to Those of a Post-Industrial Developed Nation," *American Indian Law Review* 37:2 (2012/2013): 423–65.

Maier, Chris. "The Farmers' Fight for Representation: Third-Party Politics in South Dakota, 1889–1918," *Great Plains Quarterly* 34 (Spring 2014): 143–62.

McPherson, Robert S., Kevin Conti, and Gary Weicks. "Murder and Mapping in 'The Land of Death,' Part II: The Military Cantonment in Monticello," *Utah Historical Quarterly* 81 (Fall 2013): 368–85.

Medina Bustos, José Marcos. "Ethnic Militias and Insurgency in the Arizpe Intendancy," *Journal of the Southwest* 56 (Spring 2014): 53–81.

Miller, Char. "Streetscape Environmentalism: Floods, Social Justice, and Political Power in San Antonio, 1921–1974," *Southwestern Historical Quarterly* 118 (October 2014): 159–77.

Miller, Larisa K. "The Secret Treaties with California's Indians," *Prologue* 45 (Fall/Winter 2013): 36–43.

Molina, Natalia. "The Long Arc of Dispossession: Racial Capitalism and Contested Notions of Citizenship in the U.S.-Mexico Borderlands in the Early Twentieth Century," *Western Historical Quarterly* 45 (Winter 2014): 431–47.

Morgan, Michelle. "Americanizing the Teachers: Identity, Citizenship, and the Teaching Corps in Hawai'i, 1900–1941," *Western Historical Quarterly* 45 (Summer 2014): 147–67.

Murphy, Mary. "When Jeannette Said 'No': Montana Women's Response to World War I," *Montana: The Magazine of Western History* 65 (Spring 2015): 3–23.

Niete, Warren. "Enforcing Oregon's State Alcohol Monopoly: Recollections from the 1950s," *Oregon Historical Quarterly* 115 (Spring 2014): 90–105.

Obert, Jonathan. "The Six-Shooter Marketplace: Nineteenth-Century Gunfighting as Violence Expertise," *Studies in American Political Development*, 28 (April 2014): 49–79.

O'Donnell, Connell. "The 1855 Murder of Isaac Whitehouse in Parowan, Utah," *Journal of Mormon History* 40 (Fall 2014): 130–57.

Petty, Ross D. "F. Beverley Robertson: The Tragic Life of Poundmaker's Defence Counsel," *Manitoba History* 73 (Fall 2013): 19–28.

Pillai, Alvina, and Jeffrey Velez. "Avenues of Criminal Justice: The Blackfoot Confederacy from 1877 to 1889," *Great Plains Quarterly* 34 (Spring 2014): 123–41.

Pulsipher, J. David. "'Prepared to Abide the Penalty': Latter-day Saints and Civil Disobedience," *Journal of Mormon History* 39 (Summer 2013): 131–62.

Randolph, Sherie M. "Not to Rely Completely on the Courts: Florynce 'Flo' Kennedy and Black Feminist Leadership in the Reproductive Rights Battle, 1969–1971," *Journal of Women's History* 27 (Spring 2015): 136–60.

Robertson, Dwanna L. "A Necessary Evil: Framing an American Indian Legal Identity," *American Indian Culture and Research Journal* 37:4 (2014): 773–93.

Smith, Miles. "'Rode Out of the Democratic Party as Heretic': The Political Transformation of Sam Houston and the Southern Whig Legacy, 1848–1861," *East Texas Historical Journal* (Spring 2014): 64–83.

Smith, Stacey L. "Oregon's Civil War: The Troubled Legacy of Emancipation in the Pacific Northwest," *Oregon Historical Quarterly* 115 (Summer 2014): 154–73.

Squires, David. "Outlawry: Ida B. Wells and Lynch Law," *American Quarterly* 67 (March 2015): 141–63.

Stanger-Ross, Jordan. "Telling a Difficult Past: Kishizo Kimura's Memoir of Entanglement in Racist Policy," *BC Studies* 181 (Spring 2014): 39–62.

Tennant, Brad. "Becoming Dakota Territory: The 1861 Organic Act and the Struggle for Territorial Status," *South Dakota History* 43 (Summer 2013): 118–46.

Walker, Ronald W., and Matthew J. Grow. "The People Are 'Hogaffed or Humbugged': The 1851–52 National Reaction to Utah 'Runaway' Officers, Part 2," *Journal of Mormon History* 40 (Winter 2014): 1–52.

Wallis, Eileen V. "'The Verdict Created No Great Surprise Upon the Street': Abortion, Medicine, and the Regulatory State in Progressive-Era Los Angeles," *Frontiers* 34:3 (2013): 48–72.

Wilson, Bernard J., and Zaellotius A. Wilson. "From Maiden Lane to Gay Alley: Prostitutes and Prostitution in Tucson, 1880–1912," *Journal of Arizona History* 55 (Summer 2014): 167–86.

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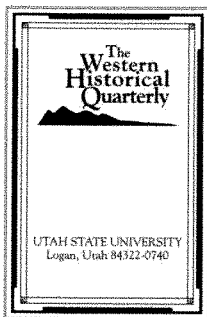
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