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Cover Photograph

The White Pine County Courthouse in Ely, Nevada, was built during the turn-of-the-century mining boom. The community was careful to provide a park-like setting for the impressive structure. (Nevada Historical Society)

WILLIAM O. DOUGLAS AND HIS CLERKS

BY MELVIN I. UROFSKY

In the four decades of William O. Douglas's service as an active and then a retired member of the Supreme Court, fifty-four men and women served as his law clerk.¹ No two of them had exactly the same experience. For some it proved a time of anger and frustration, while others would remember it in a positive manner the rest of their lives. Douglas's relations with his clerks tell us a great deal about him, about how he worked, and about perceptions others had of those relations.

Without the clerks, it would probably be impossible for the court to maintain its workload and process several thousand petitions for certiorari each year. Over time, various justices have used their clerks in different ways, giving them a variety of tasks, from cite checking and basic research to drafting opinions for the court. In this regard, a justice's relationship to his or her clerks, and to those of others, is as much a part of the court's collegiality as are relationships among the justices.

In general the justices have tended to be secretive about how they do their work, and the most critical part of their delibera-

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Editor's note: A portion of this article will appear in a chapter titled "Getting the Job Done: William O. Douglas and Collegiality in the United States Supreme Court" in the book *"He Shall Not Pass This Way Again": The Legacy of Justice William O. Douglas*, edited by Stephen L. Wasby. *Western Legal History* appreciates the University of Pittsburgh Press's permission to publish this article prior to the book's publication in winter 1990-91.

¹ A list of the clerks is in William O. Douglas, *The Court Years, 1939-1975* (New York, 1980) 415-16. For this article I interviewed nineteen of Douglas's former clerks, over a dozen men and women who had clerked for other justices, four sitting members of the court and one former justice, and three of Douglas's wives.



Associate Justice William O. Douglas. [Oregon Historical Society]

tions—the conferences at which decisions are reached—are closed to everyone else, even clerks and secretaries. This attitude has tended to rub off on their clerks,² so that relatively little has been written about the clerking experience. Only one former clerk has attempted to explore it in any depth,³ while another has recounted some of his experiences in a longer work on the court.⁴ Usually, clerks recall their experience with a justice in a eulogistic

²In my research on this article and another work on the court, nearly all the former clerks I interviewed said they would not discuss confidential material; they differed considerably, however, in their interpretation of this term. There were also a few who would not speak at all, saying they still felt bound by an oath of silence.

³J. Harvie Wilkinson III, *Serving Justice: A Supreme Court Clerk's View* (New York, 1974) esp. ch. 2. There is some scholarly material; see, for example, the symposium in *Vanderbilt Law Review* 26 (1973) 1125.

⁴William H. Rehnquist, *The Supreme Court: The Way It Was, The Way It Is* (New York, 1987) ch. 1. Shortly after his year as a clerk with Justice Robert H. Jackson, Rehnquist charged that too many of the court's opinions were written by liberal-leaning clerks, see "Who Writes Decisions of the Supreme Court?," *U.S. News & World Report*, December 13, 1957, and February 21, 1958.

piece following the jurist's death, and, as in most obituary articles, tend to emphasize the good and the pleasant.⁵

Douglas is widely believed to have treated his clerks badly, a view fostered in part by reports of his bad temper in the best-selling book *The Brethren*.⁶ Clerks for other justices, as well as some of his colleagues on the bench, also claimed that he did not treat his clerks well.⁷ Yet the men and women whom I interviewed, while admitting that Douglas could be a hard master, remembered their year with him as a milestone in their lives. This article tells some of their stories.

GETTING THROUGH BOOT CAMP

During most of his tenure, Douglas, unlike the rest of the court, had only one clerk; two, he thought, would spend their time writing memos to each other.⁸ He made it a practice, with few exceptions, to take his clerks from law schools in the Ninth Circuit. For some years he accepted the nominees of the dean of the University of Washington Law School. Then, in 1946, he asked his friend Max Radin, of the law school at Berkeley, to take over the selection process and enlarge it to include all the schools in the Ninth Circuit. "This is the big league," he told Radin.⁹

I think you know exactly the kind of man I want.¹⁰ I need not only a bright chap, but also a hard-working

⁵ This does not mean that they all lack insight, but that for the most part their purpose is to praise, not to analyze.

⁶ Bob Woodward and Scott Armstrong, *The Brethren: Inside The Supreme Court* (New York, 1979) 284-89.

⁷ See below, "Perceptions and Misperceptions."

⁸ Interviews with Marshall Small (October Term 1951), August 26, 1988, and with Joan Martin Brown, March 2, 1989. In 1947 Douglas asked his clerk, Stanley Sparrowe, what he thought about having two clerks, since some of the other justices already had a second clerk, and Justice Hugo Black was about to hire one. Sparrowe said he would prefer to be in a one-clerk office where he would have a part in everything rather than in only some parts. Douglas agreed, and added, "Two clerks would just write memos to one another." Interview with Sparrowe (OT 1947), August 30, 1988. Charles Miller (OT 1958) also said that he preferred a one-clerk office, and, despite the heavy workload, believed that most of the other clerks from that time would also not have changed the arrangement. Interview on March 2, 1989.

⁹ Douglas to Max Radin, May 27, 1946, William O. Douglas Papers, Manuscript Division, Library of Congress.

¹⁰ Douglas hired the first woman clerk at the court, Lucille Loman, during the war, when he could not get a man because of the draft. But he did not consider women as good as men (see Douglas to Sparrowe, June 13, 1950, in Melvin I. and Philip E. Urofsky, eds., *The Douglas Letters* [Bethesda, 1987] 49), and he did not hire another woman clerk until 1972, when he hired two. It was not a happy experience (see Woodward and Armstrong, *supra* note 6 at 285-89).

fellow with a smell for facts as well as for law. I do not want a hide-bound, conservative fellow. What I want is a Max Radin—a fellow who can hold his own in these sophisticated circles and who is not going to end up as a stodgy hide-bound lawyer. I want the kind of fellow for whom this work would be an exhilaration, who will be going into teaching or into practice of law for the purpose of promoting the public good. I do not want to fill the big law offices of the country with my law clerks.¹¹

Radin chose Douglas's clerks for several years, until he became ill. Then Stanley Sparrowe, who had clerked for Douglas in the October 1947 Term and was practicing in Oakland, took over the task in 1950, and handled it until 1967, when Thomas Klitgard (OT 1961) assumed the responsibility. In 1970 a committee of three former clerks, Charles E. Ares (OT 1952), William Cohen (OT 1956), and Jerome Falk (OT 1965), took on the assignment.

None of the clerks met Douglas before showing up for work at the court, and some of them did not see him for a while even then. Douglas expected that the outgoing clerk(s) would show the incoming clerk(s) the ropes in the month or so before the court convened in October;¹² if he had any additional or special instructions at the time, he would send them to the clerk in writing.¹³ "My predecessor told me my responsibilities, not how to do them," one clerk recalled. "Douglas never told me anything about my job."¹⁴

When Douglas did arrive, he might—or might not—introduce himself, and then it was right to business. His first clerk, David Ginsburg (OT 1938), drew a picture of Douglas at work that all the other clerks I spoke to verified as accurate:

¹¹ Justice Louis Brandeis had a similar philosophy, as did Justice Felix Frankfurter, who, while a Harvard law professor, selected clerks for both Oliver Wendell Holmes and Brandeis. Of Douglas's clerks, at least a dozen went into academia, and a few others did some teaching in addition to practicing law.

¹² Douglas occasionally experimented with two clerks, and finally hired two in the 1970 term, and three starting in 1972. After his retirement, he reverted to one.

¹³ Interviews with Gary J. Torre (OT 1948), August 29, 1988; Small, *supra* note 8; Harvey Grossman (OT 1954), August 18, 1988; and Charles E. Ruckershauser, Jr. (OT 1957), August 18, 1988. It is not at all unusual for the justices to expect the outgoing clerk to break in the newcomer, and although most justices today interview applicants, in the past some of them relied on a third party to do the selecting. Aside from the fact that he did not want to be bothered with the chore, Douglas realized that it would be difficult and expensive for law students on the West Coast to make the trek to Washington for an interview.

¹⁴ Ruckershauser interview, *supra* note 13.

I see him as a man focused on his work, absolutely determined to get through and get through fast. The books would be brought down. . . . He would close the door [and work]. If you went in, you felt you were interrupting him. He would look up and seem to say, "Why did you come in?" It wasn't put that way, but that was the feeling that was conveyed. There he was, working with the yellow sheets of paper and with the books spread out in front of him, writing everything in longhand and then he would call in the secretary, Edith Waters, and he would dictate, piece by piece. But he was hard at work every moment of the time. This was not a man who took lightly the burden he had assumed getting on the court.¹⁵

The first month or so could be quite rough until a clerk picked up the rhythm of what the justice wanted. Within a few weeks there would often be a big blowup, and at least one clerk believed this was a set pattern; he could not believe it a mere coincidence that every clerk would botch an assignment within the third to eighth week, so that Douglas could raise questions about the clerk's fitness for the job and whether the chambers needed another clerk so that the work could get done properly.¹⁶ His clerk for the October 1956 Term, William Cohen, claims that the justice put all his clerks through a month of sheer hell, which Cohen compared to boot camp; if you got through it in reasonably good shape, the rest of the year was pretty pleasant.¹⁷ Another believed that if Douglas liked his clerk at the outset, things would go fine; if not, "You were probably finished."¹⁸

¹⁵Interview with C. David Ginsburg, June 16, 1988. Ginsburg had worked with Douglas when the latter had been chairman of the Securities and Exchange Commission. When Douglas went to the court in the middle of a term, he asked Ginsburg if he would come over and help out until he could hire clerks the following term.

¹⁶Ruckershauser interview, *supra* note 13; see also Douglas to Peter K. Westen, October 1, 1988, in Urofsky, *supra* note 10 at 52.

¹⁷Telephone interview with William Cohen, July 25, 1988; Jerome Falk compared it to "basic training," interview on August 26, 1988. Douglas's rages at his clerks were legendary. Robert O'Neill, now president of the University of California at Berkeley and former professor of law, believes that the interview committee would deliberately behave offensively to see how the applicants could handle themselves, and also to alert them to the type of experience they might have with Douglas. O'Neill had himself been a clerk, to Justice William Brennan in the October 1962 Term. Interview with O'Neill, August 13, 1988.

¹⁸Miller interview. For an example of Douglas's temper when he disliked a clerk, see his letter to Westen, October 1, 1968, in Urofsky, *supra* note 10 at 52. Another clerk reported that the letter was written when Douglas was still in the West, before he had even met Westen.

HARD WORK

The one thing on which all his clerks agreed was that, though Douglas worked them hard, he himself worked just as hard, if not harder. As one of them put it, "He worked the hell out of his clerks, but . . . he worked the hell out of himself, too, and if he could do it indefinitely, I could do it for a year."¹⁹ Another called him "a very demanding man. If he thought he had a right to make a demand on you, he made it."²⁰ Another recalled, "He was all work, and expected that of the clerks, and to that extent it was pretty rough. . . . He worked pretty hard. He was in court every day."²¹ Douglas believed that in a twenty-four hour period "you would get a certain amount of work done, whether it took ten or twelve or fourteen hours, you would do it." But "He was very intense, and he would work long hours himself."²²

Yet not a single one of the clerks I spoke to complained that Douglas worked them unfairly. Partly this was because of his own hard work. One clerk believed that "You worked hard, you worked very hard, but it was not at all unbearable or undoable. You're young, you're full of energy. It was a great job."²³ One clerk discerned that the heavy workload—especially when the other justices each had three clerks—was not an impossible task. "What he was doing," Falk explained,

was exacting very high standards. He worked himself pretty hard. That year I worked seven days a week, six nights often until 11:00, 12:00, 1:00. I really worked hard. I knew that the worst failure would be to have the certs not ready on the day they had to be ready, the day before the conference. That was a weekly deadline, nothing less than an excommunicable sin not to have them ready. I never missed a deadline, and that must mean, I later realized, that he was doling out the work with some idea of what I had on my plate—never making it easy, but never making it impossible, so that I would fail.²⁴

¹⁹Interview with Vern Countryman (OT 1942), August 29, 1988.

²⁰Torre interview, *supra* note 13.

²¹Interview with Walter B. Chaffee (OT 1941), August 19, 1988.

²²Grossman interview, *supra* note 13.

²³Interview with James Campbell (OT 1964), March 2, 1989. Miller expressed a similar sentiment: "I was single, I was young, I had worked hard in law school. I wasn't afraid to work hard. It was damned hard work, but it wasn't oppressive."

²⁴Falk interview, *supra* note 17.

Douglas's expectations of his colleagues, in terms of work, were similar. Those who could not keep up, or dissipated their energies in other directions, earned his scorn.²⁵ Vern Countryman (OT 1942) recalls once asking Douglas what he thought of Justice William H. Rehnquist, who stood at the opposite end of the jurisprudential spectrum. "He's an OK guy," Douglas replied. "He gets his work out on time."²⁶

Douglas often blew up at his clerks, sometimes allegedly firing them on the spot. When they staggered out of his office, his secretary would say, "Pay absolutely no attention to it. He'll never speak of it again."²⁷

In terms of the work itself, all the clerks worked on the certiorari petitions, and on any particular research the justice required for particular cases. In addition, Douglas was quite conscientious about *in forma pauperis* petitions (the right given to the poor to sue without liability for costs) and had them reviewed in his chambers, unlike some of the other justices, who agreed to let the chief justice's clerks review them.²⁸ Apart from that, the particulars appear to have varied from term to term, and from clerk to clerk. Perhaps this is most apparent when the clerks speak about Douglas:²⁹

C. David Ginsburg (OT 1938):

He did all his opinions himself, and he did it from the first. Sometimes he asked me what I thought, and it was easier for me to put it in writing, and sometimes he would use bits or pieces, but it was always what he wanted to say.

Walter B. Chaffee (OT 1941):

The year I was there he wrote all his own opinions. . . . He pretty much worked on his own. I never discussed his work until he had been through his first draft. . . . He would listen to any comments I had, but he was not interested in rehashing the merits of a case.

²⁵ For an example of Douglas's attitude toward those who could not get their work out, see his sarcastic story of writing an opinion for Justice Charles E. Whittaker, Douglas, *supra* note 1 at 74. The result was that Douglas wrote both the majority and minority opinions in the case.

²⁶ Countryman interview, *supra* note 19.

²⁷ Of the nineteen clerks I interviewed, not one had personally been fired, but all assured me that Douglas had fired, and then rehired, clerks who displeased him.

²⁸ Small interview, *supra* note 8.

²⁹ All quotes are taken from my interviews with the clerks.

Vern Countryman (OT 1942):

He made me think that it was part of my job to pick a hole in anything I could pick a hole in his opinions. We spent literally hours, just the two of us, going over his opinions, with me trying to point out things here and there that couldn't be squared. He frequently made changes as a consequence of that, sometimes he didn't. But I thought it was the most important part of the job.

He called me in one day and said he wanted a memo on every case the court had decided on the Full Faith and Credit Clause. It took me about a month to do. There was a statement in his opinion that says this court has never decided such-and-such under the Full Faith and Credit Clause.³⁰ That was my one-month memorandum. But aside from that, I didn't write anything, but I spent an awful lot of time haggling with him over what he wrote. That was the most enjoyable part of the job.

Stanley Sparrowe (OT 1947):

At the time I was there, I was supposed to check his drafts for citations, and make any suggestions I might have. At some point he would buzz and say, "Are you ready to go over the such-and-such opinion?" I'd sit across the desk from him, and say, "Nothing on the first paragraph." "You could use a comma here."

[*Question: Were there ever any discussions of substance?*]

Not after he'd written it. The only exception that comes to mind was C[ivil]A[eronautics]B[oard] against Waterman Steamship, where his first couple graphs were not too clearly presented, and the only degree where we would discuss substance would be where I said, "Do you mean so-and-so?"³¹ He would say "Yes," and then I said, "It would be clearer if you said it this way." But those are really editorial changes.

Gary Torre (OT 1948):

I did not write any of his opinions. I may have written a paragraph or a sentence. I may have blocked out for him a special concurring opinion or dissenting opinion, but I had no sense that any opinion of his was an opinion I wrote.

³⁰ *Williams v. North Carolina*, 317 U.S. 287, (1942).

³¹ *Civil Aeronautics Board v. Waterman S.S. Co.*, 333 U.S. 103, 114 (1948).

Marshall Small (OT 1951):

Generally, the judge liked to do his own writing. He was very bright, he was very fast. . . . He would occasionally have you prepare a portion of the research, or of the record, or something like that. You would prepare a portion of the opinion, more likely a factual portion. But I would say that was a rare occasion in my day.

Harvey Grossman (OT 1954):

He took the responsibility for everything that went out over his name; he did not suggest that a clerk such as myself decide a matter or come up with a matter from scratch. Basically, a clerk would assist him in coming to his conclusions; there would be memos prepared. . . . The more familiar he'd be with an area, the less questions he'd have.

There would be nuances of cases, twists and things, that he would be interested in, and it would be a matter of "This thing comes up and it doesn't look right. Check this out and how we deal with this." He would send you up avenues rather than give you a broad charge and tell you to go.

Everything had to be checked. He particularly looked to the clerk to come up with and analyze the fact part, the record part of the case. . . . He would be dependent on the clerk to make sure that the ultimate product dealt accurately with the factual matters of the case.

William Cohen (OT 1956):

He would write the opinions, and then give them to the clerk for comment. The clerk would offer his comments. There would be no discussion. Compare it to a computer. The clerk comment was input; Douglas listened, and then decided. . . . He wrote all his opinions. Even the most complicated case rarely took him more than three to four hours.

Charles Ruckershauser (OT 1957):

The first time the clerk would see the opinion would be after it came back from the printer.³² The responsibility of the clerk, passed on by his predecessor and not ever mentioned by the justice, was to check the legal citations and quotations, and also check the accuracy of the

³²Douglas maintained the old practice, long after other justices had discarded it, of using the court's basement print shop to set in type each iteration of a draft. One reason may have been that this had been Brandeis's practice as well.

statement of facts directly from the record. Nothing can be more embarrassing than a petition for rehearing that says you got the facts wrong. I found that very difficult, because the records are so voluminous . . . until I figured out—nobody told me—that he took the facts in large part from the brief of the loser, and because the briefs had transcript references it got to be pretty easy.

Charles Miller (OT 1958):

Whenever he wrote an opinion, he expected you would go over it and make any suggestions you thought appropriate. It was very focused; he would call you and say, "What do you have on page 1?" It was never, "Well, what do you think about that, Miller?" Nothing like that; he was all down to business. If you had any broad-gauged comments, you had to find a way to raise them in the context of page 1, page 2. And you could do it. I might say, "But Mr. Justice, have you adequately dealt with this point?" He would sometimes respond that maybe he could handle that in a footnote or by adding a phrase; you got a minimalist response. But you always knew when he had enough, because if you pressed the point . . . he would say, "That's the argument on the other side." That phrase meant the discussion was over.

James Campbell (OT 1964):

If he had an opinion for the court, he always did the first draft himself. The clerk never had anything to do with it. If the opinion was for a majority, or if dissents or troublesome concurrences started to appear, he expected me to supply the first draft of the counter-punching; one would often do paragraphs that would be inserted into the opinion. . . . In the case of dissenting opinions or concurrences, the practice varied, depending upon whether he was setting out his views on the subject for the first time or it was a relatively fresh subject, in which case he drafted it all himself, and expected relatively little input from the clerk. On the other hand, if it was an area in which his views were pretty well staked out, he would ask me to draft the whole thing.

Jerome Falk (OT 1965):

Every opinion that he wrote, I was the editor of it, and on a number of opinions that were separate opinions, dissents or concurring opinions, I was the initial author and he was the editor. He always wrote the first draft of every majority opinion; he sometimes wrote the first draft of dissents or concurring opinions, although more

often than not he would ask me to do it. In some instances I would volunteer. It wouldn't happen a lot, but I remember in one instance I went in and said, "I really think this is wrong, and I would love to see you dissent or concur," and I would volunteer to write it, and tell him what I would say. And he'd say OK. The early years were different, but mine was not the first year like this. I was told what to expect by my predecessor, and it was pretty much it.

Douglas obviously changed his work pattern over the years. There are several possible reasons for this. Most likely, as he settled in to the work of the court and mastered the law, he felt able to give up the tight control he had exercised in the first years. His extrajudicial activities and writings expanded after 1948, and in some terms his clerks would do as much research for his popular writing as they did on his opinions.³³ If he felt comfortable with the clerks, and if they were not afraid of him, he would allow them into a limited intellectual partnership. This was clearly the case with Countryman and Falk; other clerks had less pleasant experiences.

DIFFERING WITH THE BOSS

Sparrowe once thought a Douglas opinion technically wrong, and "got up the nerve" to ask if the justice would consider changing it. Douglas listened, but not too receptively, and then, according to Sparrowe, exclaimed, "I don't know what the hell you're talking about."³⁴ Ruckershauser recalled an incident involving an opinion in an antitrust case that Douglas had dashed off in a hurry. Douglas originally spoke for a 5-4 court, but Justice John Marshall Harlan prepared a lawyerly dissent. Ruckershauser thought Harlan's opinion so good that it had to be answered in more detail and with more analysis than Douglas had provided. He spent the entire weekend working on a draft, and left it on Douglas's desk with a note explaining why and what he had done. Soon after Douglas came into the office on Monday morning, Ruckershauser heard the clerk's buzzer. He went into Douglas's office, and watched as the justice held up his draft and then dropped it into the waste basket. It was all right, Douglas told

³³ The year Grossman clerked for him, he did a great deal of work on Douglas's Tagore Lectures, *We The Judges* (New York, 1956). Douglas evidently did not force this type of work on his clerks, but, if he found they were interested in the subject, he had no compunction in piling such assignments onto their regular work.

³⁴ Sparrowe interview, *supra* note 8.

him, but the issue was not that important. Douglas stuck to his original draft, and Justice Tom C. Clark, who rarely voted against the government, changed his mind and joined Harlan, giving him a majority.³⁵

Another story, ten years later, illustrates the difference. Falk admitted starting the year "scared to death" of Douglas, but found that if he took the time to compose his suggestions and put them in writing, Douglas would listen. Gradually the justice began to give Falk's ideas serious consideration. Falk then read a Douglas draft that did not work, because, as he discovered after some research, Douglas had relied on the winning brief for information, and the lawyer had misquoted the statute. Based on a misprint in the brief, Douglas had described the statute as vague, while Falk believed that it was not vague, at least not in the way Douglas had said. So Falk redrafted it as an overbreadth opinion, managing to retain much of what Douglas had written, but shifting the basis from one First Amendment doctrine to an entirely different one. After finishing the job on a Friday evening, he left it on Douglas's desk with a memorandum of what he had done, and then "shook all weekend long, wondering what was going to happen. Nothing happened. He agreed it was fine, and the opinion was recirculated."³⁶

Douglas, then, did take substantive suggestions from his clerks, providing the ideas had been thought out and the quality of the product met his standards. But "You did have to hold your breath with this. You never knew how he would take it."³⁷

Douglas would often impose the silent treatment on a clerk who failed to produce. Miller recalled a case concerning whether city health inspectors could enter premises without a search warrant.³⁸ Nearly everyone on the court thought of it as a simple case, since the Fourth Amendment had previously been held to apply only in criminal situations. Justice Felix Frankfurter, who considered the Fourth Amendment his private preserve, got the assignment. Douglas disagreed, and set Miller to work on a dissent:

I got a bunch of books down from the library, and I struggled for a week or so, and produced nothing of value. He got very frustrated, and in a pique of anger

³⁵ Ruckershauser interview, *supra* note 13; the case is *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). Douglas's statement for the four dissenters—originally the majority opinion—is at 383.

³⁶ Falk interview, *supra* note 17; the case was *Elfbrandt v. Russell*, 384 U.S. 11 (1966), which struck down a state loyalty oath.

³⁷ Falk also noted, "I have a sense my experience was not atypical of clerks immediately preceding me or following me."

³⁸ *Frank v. Maryland*, 359 U.S. 360 (1959).

said, "Bring all the books you got, and let me see what I can do." So I wheeled in the cart, and for two or three days he never said anything to me. At the end of that time he had produced an opinion, working off the stuff I had scratched around, a ten-page opinion that bowled me over. It was the most persuasive thing I had ever seen in my life. He circulated it to the court, and immediately three justices switched their votes. The minute he got a reaction like that, all ice melted away between us.³⁹

Such incidents may not have inspired love, but they often inspired awe.

INTERPERSONAL RELATIONSHIPS

Among the clerks I interviewed, there was not only much respect for Douglas, but, at least in a few instances, real liking as well. All agreed, though, that he was not a man to whom they got close, or who saw himself as their father-surrogate. The warm, personal stories that are told about his fellow justices Frankfurter, Hugo Black, and William Brennan are not told about Douglas. But all the clerks recalled instances when, if they could get Douglas out of the work relationship—an admittedly rare occurrence—he could be friendly, charming, and even cordial.

Small remembered an evening after work when Douglas sat his secretary, his clerk, and his messenger down and made martinis for them, "just the way he'd made them for FDR in the old days," and regaled them with stories from the New Deal years.⁴⁰ Ginsburg recalled a poker game; Sparrowe a Christmas dinner with the Douglasses and Blacks and all their children;⁴¹ Ruckershauser a hike along the Chesapeake and Ohio Canal; and Grossman a time when Douglas had a new camera, and the two of them ran around the court grounds taking pictures. Away from the court, especially at the clerks' five-year reunions, Douglas would unwind and unbend, and seemed genuinely happy to see them if they happened to be in Washington and came to the court.

³⁹ Miller interview, *supra* note 8. Justice Whittaker almost joined Douglas, and finally, after intense lobbying from Frankfurter, stayed with the majority but wrote a separate one-paragraph concurrence, 359 U.S. at 374. The Douglas dissent, joined by Warren, Black, and Brennan, is also at 374. Eight years later the court overruled the Frankfurter opinion and adopted Douglas's view in the companion cases of *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967).

⁴⁰ Small interview, *supra* note 8.

⁴¹ Though their predecessors told the clerks that Douglas would invite them to his house or apartment for Thanksgiving and Christmas, the invitation often came only a day or two beforehand.

(At one reunion, however, the arrangers decided that as part of the program they would parody a Douglas opinion. They naturally turned to Countryman, who had recently edited a volume of them. He evidently did an "outstanding" job, catching all the broad sweeping phrases, the dismissal of precedents that ran the other way, and so on. The clerks thought it hilarious, but Douglas, never cracking a smile, sat there stonily.⁴²)

In general, Douglas does not appear to have been a warm person, to whom social amenities or personal touches meant much. At a conference on Douglas in Seattle in April 1989, Stephen Duke (OT 1959) could not recall a single instance all year when the justice had said a word of praise about his work, a comment that other former Douglas clerks immediately seconded. Douglas evidently did not think it necessary to be pleasant to the people working for him. Lucas Powe (OT 1970) was married when he went to work for Douglas, and had an infant who was ill much of the year. Douglas showed not the least concern; Powe was there to work, and work he did, while his family and his marriage suffered. One night, Powe remembered, "I dreamt he buzzed for me. I woke up immediately, wide awake, ready to go in and find out what I had to do next."⁴³

One story in particular illustrates this aspect of Douglas's personality. A number of his clerks, as well as those of other justices, told me that there was a rumor—a legend, in fact—that Douglas had once told one of his clerks he could get married on Christmas Day, since the court would not be sitting then. I had almost decided that the story was apocryphal when I met Gary Torre, Douglas's clerk in the October 1948 Term, who confirmed the details. The story tells us so much about Douglas and his relations to his clerks that it is worth quoting at length in Torre's words.

I got married the year I was a law clerk and it was difficult. I was a 30-year-old man; I had flown in the Air Force out of Britain; I was grown up, I thought. Nonetheless, I was not grown up after I went to Washington to work for Douglas; he immediately reduced you to a subordinate. My then-fiancée had gone to Europe with her stepfather and mother; she was to be gone for three months. It was clear that I was going to have to be married in California; there were a lot of reasons why that was necessary.

So the question was, when? I assumed that I would not have a holiday of any kind. I also assumed that at Christmas there would be some kind of break at the

⁴²Interview with anonymous Douglas clerk.

⁴³Interview with Lucas A. Powe, Jr., April 16, 1989.

court, and if I could get three or four days off at that time, I could come out to California, get married, and go back to Washington. You have to remember that in 1948 it took eight hours or longer to fly across the country. There were no nonstop flights at that time. It would have been nice to have had four days, but it could be done in two days. You also have to remember that it was a couple of years after the war and everybody was used to living that way.

The problem was, when could I discuss it with him? The term began October 1st or 2nd, he came into the office, he introduced himself, and said, "We'll talk; we'll talk soon." And out he went. I never saw him again except whenever he'd buzz, I'd go in, and he'd ask me for something, I'd go and get it, and give it to him, and that was it.⁴⁴ And that had gone on through October. . . . I think the first time I spoke to him on my own initiative was the morning Truman was elected. The marshal came in to tell me to tell the judge that Dewey had conceded, and Truman had made it. . . . It was a shocking thing to do, that I went in without having been buzzed. I went and knocked on the door. That was the only time I initiated a conversation.

But I was getting letters from Europe asking me whether I had established our wedding date. In the third week in November my then-fiancée (my now-wife), had just returned from Europe, and she and her mother came down to Washington to see me and find out what we were going to do. They were sitting up in the Mayflower Hotel, so I had to do something. I couldn't go up to the Mayflower Hotel without raising the subject with him.

So about 6:30 at night, Edith [Waters], who was wonderful, kept saying, "Go in and talk to him." So finally I went in, knocked on the door. He looked up. I said I had a personal matter I wished to discuss with him. He turned back to the book he had been reading. I thought, "Oh God, this was absolutely the wrong moment to come in, I had interrupted something. Maybe I can just leave as if it hadn't happened. But I can't do that, I have to go up to the Mayflower, and it's very undignified to just skulk out of here." I was quivering.

He said, "Well, what is it?" And I said, "Well, I wish to discuss my marriage, I was planning on getting married." "Well, that's no problem, that's no concern of this office where you eat or sleep." And I said that I knew that, but I wanted to set a date for the marriage. Then I got a

⁴⁴This experience seems typical, and was confirmed by several other clerks.

lecture on work and the demands upon the office, and how this had to come first. This was all rather silly, because I had a pretty clear idea of the demands of the office in terms of work. But I got the lecture, and when he got through, he said, "What do you have in mind?" I told him I was hopeful of getting married on Christmas. A great sigh came out of him, almost, and he said, "We seldom work on Christmas, that shouldn't create any problem." "Well," I said, "I had hoped to have some time—I didn't think we would be working on Christmas."

Then I got another lecture. I had made a serious error. I had thought Christmas fell on a Friday, because I foolishly did not look at the calendar. Despite all the counting out of the ninety days to make sure that the certs had been filed on time, I had not looked at the calendar. Christmas fell on Saturday. I knew we didn't work on Sunday. I thought with Christmas on Friday, I could get Saturday off as well. So there would be three days. I could leave Christmas Eve, get there on Christmas, get married, and have two days to honeymoon and get back.

Well, after the second lecture he took the calendar down, looked at it and said, "You don't have any problem. Christmas is on Saturday. We seldom work on Christmas, and we don't work on Sunday." While this interview is going on Mitchell, his messenger and manservant, was coming in and taking his shoes off and taking them out to be shined at the barber shop. Edith was coming in with stacks of letters, which he was looking at and signing, and of course they both knew what I was doing. As far as he was concerned, there was no problem. Christmas fell on Saturday and we didn't work on Sunday, so I could do it. But that isn't what I wanted, I really wanted another day. But I knew I could do it in two days, so I started out of the office. He said, "Do I know the girl?" and I said, no, I didn't think so.

When I got out of the office Edith asked, "What did he do?" I told her, and said I would go out to California on Christmas Eve, get married on Christmas Day, and return on Sunday morning. She said, "Well, that's stupid. You can't get married that way." So she just went right in to the judge's office, and said what was he thinking of, this man was going out to California. And Douglas said, "Well, he never told me that. Tell him to take Monday off." She came back and said, "He told you to take Monday off." So that's how I got three days.

Christmas Eve I thought he would never leave the court. I think we were the last two people to leave that

night. I never left, I don't think any clerk ever left, before he did. I had done all the certs ahead so that if anything went wrong all the work would be done. Everything I had to do had been done. I kept waiting for him to go, and he never left. Finally, I *had* to go. This was the other daring thing I did. I had to leave him because I had to make the plane. I went in and told him everything was ready, and wished him a merry Christmas. He had put a bottle of scotch on my desk, and I thanked him for it, and left. There was no reference to the fact that I was going off to be married.

Well, I fortunately had Monday off, because it took us forever to get back. The plane was falling to pieces all the way across. We were supposed to arrive in Washington something like 10 o'clock in the morning and it was 4 o'clock in the afternoon. I barely got to work Tuesday. I was there, sitting at my desk working, when he came in. A few minutes after he came in he buzzed. I went in, and before he asked me to do anything he looked up with a big smile and said, "Have a good trip?"⁴⁵

PERCEPTIONS AND MISPERCEPTIONS

Charles Reich chose William O. Douglas as a hero, recognizing that he had a flawed personality. "Most of his flaws were personal and forgivable," Reich explained. "He had egregious personal flaws, but so what? He was a great man."⁴⁶ Great man or not, because of his treatment of his staff, his colleagues and their law clerks recognized his shortcomings. Justice Harry Blackmun declared that Douglas treated his clerks "in ways I couldn't accept. He went too far with them. One time he said to me, 'Law clerks are the lowest form of animal life.'"⁴⁷ Douglas could be nice—very nice—Justice Thurgood Marshall recalled, but most of the time "he was awful rough on his staff." Once the members of the court got a memorandum from Douglas that said, in effect, "I apologize for the mistake in not having done something on a motion. This was caused solely by the stupidity of my secretary." The memorandum had been typed by that same secretary, which seemed a terrible thing to Marshall. He went down the hall to Douglas's chambers to tell her how upset he was at this callous-

⁴⁵ Torre interview, *supra* note 13.

⁴⁶ Interview with Charles Reich (clerk to Justice Black, OT 1953), August 29, 1988.

⁴⁷ Interview with Justice Harry Blackmun, May 17, 1988. Douglas's third wife reported that she fought a great deal with Douglas over his treatment of his clerks; Brown interview, *supra* note 8.

ness on her boss's part. She responded, "It doesn't matter to me; I get worse than that. But I love the man. He is a great man."⁴⁸ Brennan confirmed that Douglas's secretaries tolerated a great deal of bad behavior from him, including frequent bawlings-out, firing them one minute and rehiring them the next.⁴⁹

Chief Justice William Rehnquist said that, as a clerk, he did not view Douglas as one of the friendlier justices to the anonymous law clerks walking through the hall. "I don't think he was stand-offish," he reflected, "I think he was just probably thinking about something else."⁵⁰ Others were less charitable. Several clerks described him as a "surly recluse." Frankfurter's clerk in the October 1952 Term, Donald Trautman, described Douglas as "surly, arrogant, and having no interest in his law clerks or anybody else's law clerks."⁵¹ Lewis Hankin, another of Frankfurter's clerks (OT 1946), considered him the most unpopular justice: "He was so unfriendly. He never talked to the other law clerks. He was sour and unfriendly."⁵² Daniel Meador, who clerked for Black in the 1954 term, recollected that no one saw much of Douglas: "He was something of a loner, he wasn't very social or gregarious." His view was echoed by Norman Dorsen, who clerked for Justice Harlan a few terms later.⁵³ Even Reich admits that his hero treated his law clerks "very badly," and kept them at arm's length.⁵⁴

Periodically the clerks held brown-bag lunches, to which the justices would be invited. Frankfurter loved these events and turned them into seminars, often keeping the clerks far beyond their allotted lunch breaks, much to the annoyance of some of his colleagues. Douglas, from what seems primarily to have been shyness, was not enthusiastic about the luncheons, and kept trying to get out of them. According to various recollections, he came and talked about his travels, or he did not come at all.⁵⁵

On the subject of their work, their treatment, and even the brown-bag lunches, Douglas's own clerks give a somewhat

⁴⁸Interview with Justice Thurgood Marshall, May 17, 1988.

⁴⁹Interview with Justice William J. Brennan, May 17, 1988.

⁵⁰Interview with Chief Justice William H. Rehnquist, May 17, 1988.

⁵¹Interview with Donald Trautman, June 29, 1988.

⁵²Interview with Lewis Hankin, June 27, 1988; Hankin added, however, "My own views may have been colored by Frankfurter."

⁵³Interview with Daniel Meador, July 13, 1988; interview with Norman Dorsen, July 7, 1988.

⁵⁴Reich interview, *supra* note 46.

⁵⁵Telephone interview with Murray L. Schwartz (clerk to Chief Justice Fred M. Vinson, October 1949 and 1950 terms), July 15, 1988. Interview with Gerald Gunther, August 26, 1988; interview with Harry Wellington (clerk to Frankfurter, OT 1955), June 28, 1988.

different side of the story. Small, Grossman, and Falk all remembered practically dragging Douglas to the dining room, while Miller and Campbell said they had no problem. But all agreed that, once there, Douglas enjoyed himself. Part of his reluctance may have stemmed from knowing that Frankfurter shone at the lunches, and from his belief, even after Frankfurter had left the court, that all those clerks from Harvard and Yale had imbibed his dogma. This seems to have been the case in Falk's term:

Douglas saw my colleagues as cookie-cutters from [Harvard and Yale], and didn't want to come. On the day of the thing he was late, and didn't want to do it. I finally dragged him out of the chambers and walked him down the hall, and he's grumbling at me all the way. I was very embarrassed. So he walks in, he sits down, he's looking kinda grumpy, and we start to talk to him and we have lunch. People asked him questions, and they were good questions. These are bright people. They came in sort of skeptical, too. Well, the long and short of it is he had a really good time. He became more and more expansive, more and more charming as he could be. . . . On the way back I teased him that he had had a good time, and he mumbled "Oh, well."⁵⁶

Some clerks from other chambers remember Douglas's showing up at various social occasions, and even hosting a party for them from time to time. But, again, perceptions vary. Two clerks from the 1954 term, Gerald Gunther (clerk to Warren) and Meador (clerk to Black), recalled a cocktail party Douglas gave for the other justices and their staffs. Meador remembered him as standing around somewhat stiffly, uncomfortable at his own party, not a very good conversationalist. Gunther, on the other hand, said that Douglas "looked like a different person, talking to people," and apparently having a good time.⁵⁷

It is true that Douglas's clerks had little to do with the others, because they worked so hard; they had no more time to spend socializing than did their boss. But none of those I spoke to regarded this as a terrible experience; they all had a sort of perverse pride in the fact that they could, and did, work that hard. As Torre said, Douglas wanted you to go all out, "which I was perfectly willing to do; I think I did, and I think every clerk did."⁵⁸

⁵⁶Falk interview, *supra* note 17; Campbell reported that Douglas charmed everyone, and that when they started asking him questions, he "hit 'em out of the park."

⁵⁷Interviews with Gunther, *supra* note 55, and Meador, *supra* note 53.

⁵⁸Torre interview, *supra* note 13.

The picture of overworked clerks "would be fairly reasonable" as seen from the other chambers, Falk confirmed, but it would not be accurate:

They would see only the worst of it. They could see that I could never have lunch with them when he was in town because he would work through the lunch hour. So I would get a sandwich sent in. . . . The law clerks did not like that. The other judges would let them go for lunch, and the law clerks were very loyal to each other. So their perception was that I was having some sort of a hard time. In fact, I felt pretty lucky to be there, and I was having a good time.⁵⁹

Grossman, the clerk for the October 1954 Term, seemed surprised that other clerks thought him ill used. The year he served at the court, Douglas was happy in his second marriage, and the addition of Earl Warren began to swing some decisions in the liberal direction. Grossman not only worked on Douglas's court cases, but willingly took on some of his extrajudicial writings. Douglas had an "intensity" about him that rubbed off on his clerks.⁶⁰

Despite his intensity, his coldness, his aloofness, and his inconsiderateness to his clerks during their tenure, some warmth, some affection developed.⁶¹ In a few cases, Douglas took an interest in their subsequent careers,⁶² and tried to help them from time to time, especially those who entered teaching. Whenever his former clerks returned to Washington and came by to visit him at the court, he seemed happy to see them. At the five-year reunions, "He would open up and have a hell of a time."⁶³ Although some of his clerks developed close, continuing relationships with him, however, the dominant sentiment remained one of respect rather than affection.

⁵⁹Falk interview, *supra* note 17. All the other clerks I spoke to also said they considered themselves lucky to be there, and that they expected to work hard.

⁶⁰Grossman interview, *supra* note 13.

⁶¹George Rutherglen, who clerked for Douglas during the few months of the October 1975 Term before he retired, reports that the justice was fairly kind to his clerks, chatting with them and telling stories about the Roosevelt days. This was after his stroke, when he could no longer sustain his former pace of work. Interview with Rutherglen, August 13, 1988.

⁶²James Campbell said that when he first started in practice, he believes it was Douglas who arranged for him to be named counsel in one of the *in forma pauperis* cases the court accepted; he thought Douglas had done this for other of his former clerks as well.

⁶³Chaffee interview, *supra* note 21. However, as another clerk pointed out, other justices' clerks had dinners every year; the Douglas clerks, by common consent, had dinners every five years.

SPANISH CRIME AND PUNISHMENT: THE NATIVE AMERICAN EXPERIENCE IN COLONIAL SAN DIEGO, 1769–1830

BY RICHARD L. CARRICO

Like other colonial Spanish institutions, the Spanish legal system in Alta California was a blending of Old World codifications and New World realities. Those realities included adaptations to an alien and often harsh environment, but not necessarily to an understanding of native culture. The Spaniards were operating on the international principle of *uti possidetis*, whereby belligerents had the rightful possession of conquered lands.

It apparently never occurred to Spaniards that native peoples possessed their own legal and moral systems. As Edward Spicer has written, "The Spanish view in respect to the process of civilizing was not that they were replacing existing functional institutions and culture traits, but that they were giving the Indians things which the latter did not have."¹

To understand the treatment of Indian peoples within the Hispanic legal system, one must grasp the concept of class in contemporary terms and the relationship of Indians in the class structure. As the California historian James Rawls has noted, the Indians "made up a lower class sharply and permanently different from that of their European masters."² Even in the most ideal situations—and that ideal was seldom realized—native peoples were fated to be either conquered minions or, at best, lower-class citizens. As such, the rights and liberties ascribed to their status were extremely limited. J. H. Parry wrote that liberty for Indians,

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¹Edward Spicer, *Cycles of Conquest* (Tucson, 1982) 282.

²James Rawls, *The Indians of California: A Changing Image* (Norman, 1984) 3.



Sketch of a Spanish soldier beating an Indian, from "Notebooks of Tonayuca," c. 1567. (San Diego Historical Society)

"in the sense in which Spanish legislators used the word, meant, *mutatis mutandis*, the kind of liberty within the context of the whole society to which he belonged, and subject to discharging the appropriate obligations towards that society as laid down by custom."³ To colonial Spaniards, those obligations, whether for Indian or for landed Spaniard, included obedience, allegiance to the Crown, and fidelity to God. Indians who refused to fulfill the obligations were legally at risk, as were Spanish citizens of all classes.

This structured society, with its uniquely European customs, prohibited native dancing and rituals, and made escape from Spanish domination (and thus from obligation) a crime. Yet influential historians such as Herbert Bolton have argued that the system of stewardship was a "force which made for the preservation of the Indians as opposed to their destruction."⁴ For better or for worse—and many would argue that it was for worse—the missionaries served in loco parentis in what they considered a childlike culture, possessing rights of judgment and punishment.⁵ Church historian Maynard Geiger has found that the relationship between the church and the Spanish government in California

³J.H. Parry, "Spanish Indian Policy in Colonial America: The Ordering of Society," in John J. TePaske, ed., *Three American Empires* (New York, 1967) 111.

⁴Herbert Bolton, "The Mission as a Frontier Institution in the Spanish American Colonies," *American Historical Review* 23 (1918) 42-61.

⁵Dianne Kirkby, "Colonial Policy and Native American Depopulation in California and New South Wales 1770-1840," *Ethnohistory* 31 (1984) 1-16.

was symbiotic, "intimate in theory and practice. The organization was tightly knit [allowing] little deviation from set rules."⁶

By the mid-eighteenth century, when the Franciscans and their military entourage marched into Alta California, they bore with them more than two hundred years of colonial experience. Since the betrayal of Montezuma, their mentality had been indelibly stamped with their domination of native peoples. The constant awareness that they were invaders in a foreign land surrounded by an unconquered people was made even more acute by resistance and sporadic uprisings. It was a long way from the proscriptions and lofty ideals of the *encomiendas* and *reglamentos* of Old Spain to the daily administration of Indian affairs on *La Frontera*.⁷ Fr. Fermín Francisco de Lasuén, one of the more enlightened and humane Franciscans who served in colonial California, revealed his own distaste for the frontier when he wrote, "As to punishments: it is obvious that a barbarous, fierce, and ignorant country needs punishments and penalties that are different from one that is cultured and enlightened, and where the way of doing things is restrained and mild. These punishments should not be less (and I suppose neither should they be greater) than what befits the crime, so that they may not be useless, or a source of further trouble."⁸

In their review of frontier colonial history, many analysts, especially the more recent revisionists, following the lead of Sherburne F. Cook, have portrayed the Spanish system in California as particularly rigid and inhumane.⁹ By contrast, mission apologists, many of whom are grounded in Bolton's work, have found little to criticize in the Spanish colonial system and the treatment of Indians. Rather than thoroughly examining specific examples, the tendency has been either to depict the colonial system in fairly generalized terms, or to focus on examples that support the claimant's view.

⁶Fr. Maynard Geiger, *The Life and Times of Fray Junípero Serra, O.F.M., 1713-1784: A Biography*, 3 vols. (Washington, 1959) 271.

⁷The *encomienda* was a system by which the Spanish Crown claimed to be the steward for native peoples and exploited them by assigning them to labor pools, in many cases essentially enslaving them. The *reglamentos* were Spanish regulations that, though still harsh, grew out of certain efforts to reform the *encomienda* system and more clearly defined the responsibilities and obligations of both Indians and Spaniards.

⁸Finbar Kenneally, *Writings of Fermín Francisco de Lasuén*, 2 vols. (Washington, 1965) i:220 [hereafter cited as Kenneally, *Writings of Lasuén*].

⁹Sherburne F. Cook offers a fine overview to the problems of administering native peoples in California in his "The Conflict Between the California Indian and White Civilization," *IberoAmerica* 21 (1943) 1-134 [hereafter cited as Cook, "Conflict"]. Rupert and Jeanette Henry Costo, *The Missions of California* (San Francisco, 1987); Edward Castillo, "The Impact of Euro-American Exploration and Settlement," in Robert F. Heizer, ed., *Handbook of North American Indians, California* (Washington, D.C., 1978) 99-127.

While an understanding of the overall view is important, an analysis of the interaction between Native Americans and Spanish colonials is perhaps best viewed from both a local and a regional perspective. A local approach is necessary because the diversity of Indian peoples in Alta California led to differing responses toward, and from, the European intruders. The twenty-one missions and four presidios that administered to more than fifty small tribes, stretched over 600 miles, cannot be presented as a single operating entity. In spite of uniform codes and regulations, the men, both religious and secular, who administered and governed the frontier, held differing attitudes toward justice and toward native peoples. While it may be instructive to point out atrocities committed by particular Spaniards or to dwell on the particularly benevolent deeds of some colonists, a better understanding can be provided by examining the data for a given settlement over a period of years.

By focusing on San Diego from 1769 to 1830, it is possible to document the actions of a group of religious and military colonial leaders and their handling of Indian criminal acts. In some cases there is ambiguity; we know the crime and the sentence as passed but we cannot document the actual punishment, which often varied from the sentence. It should also be remembered that a certain percentage (probably large) of the less dramatic crimes and their punishments were undocumented and, thus, are not the topic of this analysis. Moreover, because by edict of the May 1773 Council of War and Royal Treasury, "the management, control, punishment, and education of baptized Indians pertain exclusively to the missionary fathers," there may be a distinction between neophytes who came directly under the control of missionaries and unconverted Indians, who presumed were controlled by military rule.¹⁰ If the history of blacks and other minorities is any gauge, it may have been these poorly documented day-to-day crimes and the often violent response by the dominant culture that most affected the Indian population.

In his classic revisionist review of Spanish law as applied to the Indian people of colonial California, Cook proposed two major categories of crimes that can be recognized beyond inconsequential misdemeanors: the political and the criminal.¹¹ *Political* crimes included conspiracy against the Spanish crown; apostasy; refusal to follow orders; theft of, or damage to, government property; and failure to comply with certain restrictions, such as bans on ceremonial dancing and practicing sorcery. *Criminal* offenses included those actions that most communities would regard as adverse to themselves, such as murder, assault, rape,

¹⁰Kenneally, *Writings of Lasuén*, supra note 8 at 216.

¹¹Cook, "Conflict," supra note 9 at 55-56.

and those against private property, including theft, armed robbery, and arson.¹² Cook also suggested a third category, that of sexual delinquencies, which would include fornication, adultery, incest, and sodomy.

POLITICAL CRIMES

Then as now, political crimes formed a category of crime that was subjective and prone to abuse. While theft of government property and refusal to obey orders are relatively clear cut, bans on ceremonial dancing, apostasy, and practicing traditional curing methods are more difficult to view as true political crimes.

The best-known colonial example of a political crime and criminal conspiracy in San Diego occurred on November 5, 1775, six years after the founding of Mission San Diego de Alcalá, when native villagers from at least eighteen *rancherías* sacked the mission.¹³ As is clearly documented, destruction of the mission and the murder of Fr. Luis Jayme and two others struck a blow to the Spanish colonial effort.¹⁴ The insurrection tested the Spanish



Indian village of Temecula. Although sketched nearly 20 years after the end of the Spanish era, this Vischer drawing depicts a scene that differs little from those of earlier times. (Huntington Library)

¹² Cook, "Conflict," *supra* note 9 at 113-15.

¹³ For primary sources, see Ernest J. Burrus, S.J., ed., *Diario del Capitan de Rivera y Moncada con un Apendice Documental*, 2 vols. (Madrid, 1967) [hereafter cited as Burrus, *Diario*]. This work includes not only Moncada's notes but also the lengthy interrogations conducted by Lt. José Francisco Ortega. Ortega's notes are also available in the Provincial State Papers, Benicia, Military, at The Bancroft Library, "Revolt of the Indians, Burning of the Mission, Death of the Missionary, November 30, 1775," 1:1 [hereafter cited as Provincial State Papers].

¹⁴ Cook maintains that the San Diego revolt affected the Spaniards' "entire Indian policy in subsequent years." See his "Conflict," *supra* note 9 at 56-77.

legal and moral systems as they applied to native peoples. The investigation, trial, and sentencing that followed provide insights into the concept and application of justice as practiced by both the military and the clergy.

After several months of investigation, which included rounding up native ringleaders (*cabecillas*) and interrogating both Christianized and unconverted natives (neophytes and gentiles, respectively), the alleged offenders were tried for conspiracy and murder. By early fall 1776, Fernando Rivera y Moncada, commandant of the presidio, and Lt. José Francisco Ortega concluded their extensive investigation and determined that two neophytes, Francisco and his brother Carlos, from the main village at Nipaguay, as well as two other village leaders, Luis and Rafael, were the leaders of the insurrection.¹⁵ Rivera also decided that the four men bore the responsibility for Jayme's death, thus making a distinction among the insurrectionists.

At that point in the investigation, the four leaders had not been captured and were essentially tried in absentia. Whether Rivera suggested sentencing is not clear. Ultimately, the decision was made by the Spanish viceroy, Antonio de Bucareli, who granted a general amnesty to lesser Indian leaders, an act for which Fr. Junípero Serra expressed profound gratitude.¹⁶ On December 25, 1776, Bucareli wrote to Serra informing him that Governor Neve was instructed to show clemency for the petty chiefs and warriors held in captivity.

On February 2, 1777, Neve ordered the Indian leaders to be released. Some time after June 3, the majority of thirteen Indians and two gentiles were freed from the presidio prison.¹⁷ In the spring of 1778, Rafael and Luis, two of Jayme's alleged murderers, surrendered and were sentenced with Carlos to exile.¹⁸ They were imprisoned in the presidio at Loreto in Baja California Sur, and later worked as seamen.¹⁹

¹⁵Burrus, *Diario*, supra note 12 at 429-81. Carlos had surrendered in February 1776 and received sanctuary from Fray Vicente Fuster in the old presidio church. In an act of disregard for established tradition, Capt. Rivera y Moncada violated the sanctuary and drove Carlos to the nearby jail at sword point.

¹⁶See Junípero Serra to Antonio María de Bucareli y Ursua, June 1, 1777, in Antonine Tibesar, ed., *Writings of Junípero Serra*, 4 vols. (Washington, D.C., 1925) iii:140 [hereafter cited as Tibesar, *Writings of Serra*]. For Bucareli's instructions to Gov. Neve and Cmdr. Moncada, see Herbert Bolton, *Anza's California Expeditions*, 5 vols. (Berkeley, 1930) v:359.

¹⁷Hubert H. Bancroft, *History of California*, 7 vols. (San Francisco, 1885) i:302 [hereafter cited as Bancroft, *History*].

¹⁸Tibesar, *Writings of Serra*, Serra to Lasuén, April 6, 1778, supra note 16 at iii:177-87.

¹⁹See Kenneally, *Writings of Lasuén*, supra note 8 at i:93, for Lasuén's appeal.

Apparently concerned that Neve's orders for clemency would not be enforced, Serra wrote Viceroy Teodoro de Croix, requesting that the exiled men be shown Spanish mercy and allowed to recant their criminal acts without further incarceration or punishment.²⁰ Lasuén, who assumed the duties of Jayme following his martyrdom, agreed with his superior, Serra.²¹ That Serra was unsuccessful in his plea is shown by Lasuén's continued appeals to Gov. Pedro Fages in April 1785, asking him to release the men, who by that time had spent almost ten years in exile or prison.²²

A second case of alleged conspiracy occurred on March 16, 1778, when Benito, a coastal Indian leader friendly to the Spaniards, reported that the villagers at the inland mountain settlement of Pamo were planning a second insurrection.²³ Warned by Spanish officials that the villagers must remain peaceful and loyal, their leader, Aaron, replied that Spanish troops should come into the mountains and meet their deaths.²⁴ Rather than waiting for the insurrection to develop further, Sgt. Mariano Carrillo marched east to the mountains with eight soldiers, an interpreter, and two guides, to "castigate the insolent ones."²⁵

Carrillo was under orders only to capture the leaders and, if they admitted their guilt, to bring them back to the presidio to receive a flogging of thirty to forty *azotes* (lashes). He and his men entered the village at three o'clock in the morning on April 1, and captured the leaders as instructed. During a brief skirmish, however, at least two Indians were killed and several huts were torched. In spite of denying their guilt, five Indian leaders were flogged on the spot and four—Aaron, Achil, Aalcuirin, and Taguagui—were shackled and taken to the presidio for further interrogation.²⁶

Found guilty of disobedience and disloyalty, rather than conspiracy, the four were publicly flogged, and sentenced to death by

²⁰ See Tibesar, *Writings of Serra*; the punishment that Indians reportedly feared most was exile, see Provincial State Papers, *supra* note 13 at 40:8. Considering the culture shock, homesickness, hard labor, and sanitary conditions, exile may have actually been a death sentence.

²¹ Tibesar, *Writings of Serra*, Serra to Lasuén, April 29, 1782, *supra* note 16 at iv:137-39.

²² Kenneally, *Writings of Lasuén*, Lasuén to Pedro Fages, April 29, 1785, *supra* note 8 at i:30.

²³ Provincial State Papers, *supra* note 13 at 1:41.

²⁴ Aaron's taunting reply to Carrillo is cited in Bancroft, *History*, *supra* note 17 at i:315.

²⁵ See José Francisco Ortega, "Insurrección de Indios, Resultado Castigo de Cabecillas," April 6, 1778, in Provincial State Papers, *supra* note 13 at 1:41.

²⁶ *Ibid.*

Ortega. The military officer's execution order, which he was not authorized to impose, was not carried out, and the native leaders were released.²⁷ Three years later, as if to vindicate himself, and perhaps hoping to chastise the Pamo people, Ortega complained to Neve that the same Pamo leaders refused to attend Mass and that they were once again plotting "nefarious and insolent designs."²⁸ To Ortega's chagrin, no action was taken.

Although perhaps less threatening than armed resistance, the continuation of native religious practices was also perceived as conspiratorial. In 1829 three neophyte Indian shamans were found guilty of conducting pagan religious dances and sentenced to one year of imprisonment with hard labor and twenty-five lashes.²⁹

CRIMINAL OFFENSES

Crimes involving assault, theft, adultery, and simple disobedience were far more common than political crimes, at least in San Diego. From practically the first contact, Indians apparently saw the impoverished Spaniards as unequal trading partners, and regularly stole from the intruders. It should come as no surprise that the native people, or at least one element of the native population, regularly received punishment for crimes of property. Most commonly the Indians stole livestock, especially during drought years such as 1777, or assaulted a Spaniard, frequently in self-defense. The tables that accompany this text are adapted from Cook's work, and provide a concise chronological and topical tabulation of documented crimes and punishment in Spanish colonial San Diego.

MURDERS

Documentation of cases involving murder is relatively complete because of the seriousness of the crime. With the exception of an Indian cook accused of poisoning a priest, all the murder cases with Indian defendants involved the death of other Indians, both neophyte and gentile. (The murder of Jayme and two other

²⁷Ibid. at 1:44. Ortega's death sentence for the insurrectionists is in his letter to Neve, "Ejecucion de Reos," April 12, 1778. Also see Tibesar, *Writings of Serra*, supra note 16 at iii:189, a letter to Lasuén in which Serra doubts that the death sentence will be carried out, but, always cautious, provides instructions for conducting a baptism on the condemned men in their cells.

²⁸See Tomás W. Temple, ed., "Two Letters from Sergeant José Francisco Ortega to Governor Felipe de Neve, September 4th and 5th, 1781," *Historical Society of Southern California Quarterly* 22 (1940) 124-25.

²⁹Provincial State Papers, supra note 13 at 66:69; and Cook, "Conflict," supra note 8 at 121.

Spaniards during the 1775 revolt was included in the conspiracy charge against Indian leaders and not treated as a separate charge.)

The first documented account of Indians being tried for murder appears in 1800, when three neophytes were sentenced to twenty-five lashes for twenty-seven consecutive days for the murder of gentiles.³⁰ Apparently other murders occurred between 1800 and 1803, when twenty-seven Indians were held at the San Diego presidio jail, four for murder and most of the others for stealing horses; no other details are provided.³¹ In 1807 three neophytes were found guilty of murdering a fellow villager and received six to eight years in the presidio jail.³² Another murder case involving an Indian took place in 1810, but there are no details.³³

In November 1811 Nazario, a neophyte cook, was arrested and tried for the attempted murder of Fr. José Pedro Panto. According to the records, Nazario poisoned Panto's soup with powdered *cuchasquelaai*, a herb, in revenge for repeated severe beatings.³⁴ In his defense of Nazario, José Mario Pico urged that the Indian be acquitted because the poison was not fatal and the beatings—fifty, twenty-five, twenty-four, and twenty-five—lashes over a twenty-four-hour period just preceding the poisoning—were unjustified. The prosecutor, Domingo Carrillo, agreed, but stated that other Indians must be warned that such actions would not be tolerated, and successfully argued for eight months of labor at the presidio as the penalty. Pedro Panto died seven months later of what appeared to be the effects of the poisoning.³⁵

Two murder cases in the 1820s resulted in hard labor and imprisonment. In February 1821 an Indian was condemned to two years of public work for murdering his neophyte wife.³⁶ A neophyte tried for murdering a fellow convert in December 1826 received a sentence of one year of imprisonment with hard labor. The fiscal who requested the relatively light sentence justified it by the fact that the Indian was newly converted and should learn mercy from the Spanish system.³⁷ In May 1830 a neophyte received ten years of hard labor at San Diego for killing another neophyte during a gambling quarrel.³⁸

³⁰ Provincial State Papers, *supra* note 13 at 7:4.

³¹ *Ibid.* at 21:3,4.

³² *Ibid.* at 36:8.

³³ *Ibid.* at 44:6.

³⁴ *Ibid.* at 49:2-7.

³⁵ Bancroft, *History*, *supra* note 17 at ii:345.

³⁶ Provincial State Papers, *supra* note 13 at 1:81.

³⁷ *Ibid.* at 63:5

³⁸ *Ibid.* at 72:7.

ROBBERY

Stock theft was a problem in the 1780s, as Spaniards put cattle and livestock to graze on land that Indians considered theirs. In 1782 five Indians received twenty-five lashes each for stealing an unspecified number of cattle, and in 1786 ten Indians received a sentence of ten lashes each.

In 1811 three cases of robbery were tried. In one instance an Indian was given five years of imprisonment with hard labor and twenty lashes on four consecutive days. A second case involved six Indians who were sentenced to four years of hard labor and twenty lashes on four consecutive days. A third guilty verdict brought two Indians two months of hard labor and fifty lashes.

ASSAULTS

A neophyte who stoned a padre in 1805 was punished by what would appear to be severe flogging, to include twenty-five lashes on nine consecutive days and thirty-five to forty lashes on nine consecutive days. An assault committed in 1811 on a missionary brought the Indian assailant eight months of hard labor, while in the same year an assault culminating in homicide received only fifty lashes.

ADULTERY

An Indian man convicted of adultery in 1815 was sentenced to twenty-five lashes, a punishment consistent with the sentence meted out to Spanish colonists for the same offense.



Ruins of the San Diego Franciscan mission, with church walls and orchards. Sketched by Vischer in 1874. (Huntington Library)

CONCLUSION

In the case of military operations, Carrillo overstepped his bounds when he subverted the Spanish legal system by killing villagers and torching their huts without benefit of trial. In the context of a military operation, and on the principle of *uti possidetis*, he may have been operating beyond the civil code and against a perceived enemy rather than against assumedly innocent civilians. Ortega's execution order in the same incident is hardly defensible, given his lack of authority to impose such an order and the non-capital nature of the alleged crime.

Apart from these instances of direct military action, it is clear that crime and punishment as applied to Native American people in Spanish San Diego exhibited a great deal of latitude. Except for the public execution of an Indian for unspecified crimes, which occurred on October 30, 1824, after the Mexican revolution, capital punishment of Indians is undocumented.³⁹ Flogging was widely used, either as a sole means of punishment (for adultery and assault) or in conjunction with imprisonment (conducting native dances and robbery). Prison terms varied from two months for robbery to ten years for murder. Once sentenced, Indian prisoners served their sentences in the same cramped and dank cells under military guard at the presidio and toiled on work details beside Spanish convicts. In an era when exile was still widely practiced, native criminals were shipped into the interior of mainland Mexico or to southern Baja California. Exile was certainly a type of long-term imprisonment, since the convict was sent to a strange Spanish territory under military rule, apparently for life.

What may be more important than the sentencing, however, is that Spanish laws governing native peoples were cruel and inhumane. Civil laws that derived their roots from Catholicism and imperialism, e.g., outlawing fornication and tribal dances, were in direct conflict with the value systems of the Indians and made their common traditional actions criminal. Similarly, native attempts to escape the Spanish colonial system resulted in charges of fugitivism and apostasy, even when those attempts at escape were in response to severe beatings and food shortages.

Viewed in the context of the times, however, and given the possible gaps in the existing data, it appears that the Spanish authorities applied colonial laws (as detrimental as those laws may have been) to the San Diego Indians on more or less the same basis as they did to lower-class Spanish citizens. Apparently

³⁹ Mision Libros, MS. 95, The Bancroft Library; Bancroft, *History*, supra note 17 at ii:550.

largely undocumented is the daily conflict between Spanish and native laws, and the price that native people paid at the hands of the military and civil authorities beyond the protection of the legal system.

TOPICAL LIST OF CRIMINAL ACTIONS IN SAN DIEGO
INVOLVING INDIANS IN CALIFORNIA, 1775-1829

Year	Crime	Accused	Punishment
1815	Adultery	1	Flogging (25 lashes)
1815	Assault	1	Flogging (25 x 9)
1805	Assault (stoning a padre)	1	Flogging (25 x 9 and 35-40 x 9)
1811	Assault on a missionary	1	Imprisonment/Hard labor (8 mos.)
1811	Assault/Homicide	1	Flogging (50)
1829	Conducting medicine dances	3	Imprisonment/Hard labor (8 mos.) (1 yr.) + flogging (25)
1778	Conspiracy/Armed resistance	4(g)*	Death**
1775	Conspiracy/Murder	4	Exile/Hard labor
1782	Fugitivism	1	Imprisonment/Hard labor
1808	Fugitivism/Bad character Stock stealing	8	Imprisonment/Hard labor
1798	Homicide	1	Imprisonment/Hard labor
1810	Murder	1	Unknown
1800	Murder of gentiles	3	Flogging (25x 27)
1826	Murder of neophyte	1	Imprisonment/Hard labor (1 yr.)
1821	Murder of neophyte wife	1	Public work for 2 yrs.
1807	Murder of neophytes	3	Imprisonment (6-8 yrs.)
1811	Robbery	1	Imprisonment/Hard labor (5 yrs.) + flogging (20 x 4)
1811	Robbery	6	Imprisonment/Hard labor 4 yrs.) + flogging (20 x 4)
1811	Robbery	2	Imprisonment/Hard labor (2 mos.) + flogging (50)
1782	Stock stealing	5	Flogging (25)
1786	Stock stealing	10	Flogging (10)

*(g) denotes gentile; all others are neophyte or unspecified.

**The death sentence was commuted in favor of flogging.

**CHRONOLOGICAL LIST OF CRIMINAL ACTIONS IN SAN
DIEGO INVOLVING INDIANS IN CALIFORNIA, 1775-1829**

Year	Crime	Accused	Punishment
1775	Conspiracy/Murder	4	Exile/Hard labor
1778	Conspiracy/Armed resistance	4(g)*	Death**
1782	Fugitivism	1	Imprisonment/Hard labor
1782	Stock stealing	5	Flogging (25)
1786	Stock stealing	10	Flogging (10)
1798	Homicide	1	Imprisonment/Hard labor
1800	Murder of gentiles	3	Flogging (25 x 27)
1805	Assault (stoning a padre)	1	Flogging (25 x 9 and 35-40 x 9)
1807	Murder of neophytes	3	Imprisonment (6-8 yrs.)
1808	Fugitivism/Bad character	8	Imprisonment/Hard labor
	Stock stealing		
1810	Murder	1	Unknown
1811	Assault on a missionary	1	Imprisonment/Hard labor (8 mos.)
1811	Robbery	1	Imprisonment/Hard labor (5 yrs.) + flogging (20 x 4)
1811	Robbery	6	Imprisonment/Hard labor (4 yrs.) + flogging (20 x 4)
1811	Robbery	2	Imprisonment/Hard labor (2 mos.) + flogging (50)
1811	Assault/Homicide	1	Flogging (50)
1815	Assault	1	Flogging (25 x 9)
1815	Adultery	1	Flogging (25)
1821	Murder of neophyte wife	1	Public work for 2 yrs.
1826	Murder of neophyte	1	Imprisonment/Hard labor (1 yr.)
1829	Conducting medicine dances	3	Imprisonment/Hard labor (1 yr.) + flogging (25)

* (g) denotes gentile; all others are neophyte or unspecified.

** The death sentence was commuted in favor of flogging.



Western family scene, ca. 1890. (Oregon Historical Society)

THE SPREAD OF COMMUNITY-PROPERTY LAW TO THE FAR WEST

BY RAY AUGUST

The law of community property is one of the few laws peculiar to the western states that is recognized as originating from a source other than English common law. The unusual scholarly agreement on this point can be traced to the pride of the first such law's authors, the Creoles of Louisiana, in their French and Spanish legal heritage. The same pride in tradition led New Mexico to adopt the community-property system. However, the system's acceptance in six other states—Arizona, California, Idaho, Nevada, Texas, and Washington—was not similarly motivated, and was hampered rather than helped by its origins in civil law. What tipped the balance in favor of its adoption in California and Texas was the women's-rights movement—a social and political force just gaining strength as America expanded west of the Mississippi. Community-property law gave wives more rights—an attractive notion in frontier communities seeking to lure industrious and independent women from the East. In states with no French or Spanish roots, the law's adoption resulted from migration. For the most part, the migrants were California miners who regarded the system as a cultural link to their immediate past.

Apart from those states with a French and Spanish legal heritage, and those settled by California miners, the community-property system had little appeal. This was largely due to the reform movement in marital property that spread quickly across the nation between 1834 and 1850. Like the community-property law, it also gave wives greater property rights. The legal origins of the reform are traceable to Louisiana's community-property law, but the lineage was well concealed, so that the reform movement could be seen as the product of American genius and not the offspring of foreign jurisprudence. In the competition for adoption, the ostensibly pure American origins of the reform movement in

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marital property gave it a decided advantage over community property, with its roots in civil law.

As its name implies, community property is the property owned by the marital community. Unlike the common-law system of marital property, the community-property system permits the spouses to own separate property. In recent times community property has been managed jointly, while separate property remains under the control of each spouse.¹ When the system first appeared in the United States, however, the management of both kinds of property belonged to the husband, who could transfer complete ownership in the community, while his creditors could then extinguish his wife's interest by foreclosure and sale. Nevertheless, at the termination of a marriage, title to community property was vested jointly in both spouses, so that each was entitled to half the community property and all of his or her separate property.

By comparison, the English doctrine of coverture held that marriage merged the personality of the wife into the husband, who had sole title and control of all the property of both. As Blackstone put it, "The husband and wife are one person in law; that is, the very being of the wife is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose protection, wing and cover she performs everything."² Or, as the nineteenth-century French legal historian Jean Baptiste Brissaud once wrote of the English system, "Marriage is for the woman a sort of civil death."³

THE EUROPEAN SOURCES OF COMMUNITY-PROPERTY LAW

The community-property system exists today in one form or another in many of the countries that were once part of the Roman Empire. Early writers, as a consequence, thought that it had Roman origins.⁴ However, this is clearly not the case, since

¹This is true in most respects today, even though the husband is still the technical manager in most of the community-property states.

²William Blackstone, *Commentaries on the Laws of England*, 4 vols. (London, 1759-1765) i:1:442.

³Jean Baptiste Brissaud, *A History of French Private Law*, Rapelje Howell, ed. and trans. (Boston, 1912, reprint, 1968) [hereafter cited as Brissaud, *History of French Private Law*]. For an excellent, although dated, discussion of community-property law, see Chester G. Vernier, *American Family Laws*, 4 vols. (Palo Alto, 1935) iii:207-54.

⁴Tacitus, "The Early Germans," in Arthur C. Howland, *Translations and Reprints from the Original Sources of European History*, 2d ed. (Philadelphia, n.d.) vi:11-12. Tacitus (A.D. 55-117) observed that the Germanic "marriage code

there is nothing in ancient Roman law concerning a marital community of property.⁵ It was, rather, the Germanic tribes harrying the empire during its final centuries who devised the concept and introduced it to the western world.⁶

The system was introduced to Spain by the conquering Visigoths, whose seventh-century *Fuero Juzgo* (Code of Judgments) contains one of the earliest written records of a community-property law.⁷ In A.D. 711, however, when the Moors defeated the Visigoths, the system was displaced from most of the Iberian peninsula. During the long centuries of the *reconquista*, the enactment of new legal codes was not a major concern for the Spanish kings, and the *Fuero Juzgo* remained for centuries the

is strict" and that the tribesman's wife became "the partner of her husband's labors and dangers, destined to suffer and to dare with him alike." What the wife owned at the time of her marriage or was given by the groom as an inducement to marry him "she must hand down to her children worthy and untarnished."

⁵During the early years of the Roman Republic the wife was regarded as a daughter with no more rights in the community fund than a child. Gaius, *Institutions*, ii: 111, 118. Later, Roman law changed to treat the wife as legally independent of the husband, with completely separate property and freedom from the husband's power.

⁶"The best opinion appears to be that it [the community-property system] took its rise with the Germans, among whom, at a very early period of their history, the wife took by positive law, the one-third of all gains made during the coverture." *Cole v. Exr's*, 7 Mart. (La.) N.S. 41 (1828). "When it is found in northern France and in Visigothic Spain by at least the seventh century of our era, the inference as to its Teutonic origin is a strong one." William W. Howe, "The Community of Acquests and Gains," *Yale Law Journal* 12 (1903) 216. "The oldest traces of a community of goods between spouses, concentrated by custom, are found, according to our view, early among the south Germans, in three collections of Laws . . . : the law of the Visigoths (*Lex Wisigothorum*, dating, it is believed, from the end of the seventh century), the Ripuarian Law (*Lex Ripuariorum*, redacted in its present form, probably under the reign of King Dagobert, 630-637) and the law of the Saxons (*Lex Saxonum* of Charlemagne's time about 802)." Knut Olivecrona, "De l'Origine et du Développement de la Communauté des Biens Entre Epoch," *Revue Historique de droit Français*, 1st ser., 11 (1866) 254. See also Rudolf A. Huebner, *History of Germanic Private Law*, Francis S. Phillbrick, trans. (Boston, 1918) Topic 2, paras. 94-5; George McKay, *A Treatise on the Law of Community Property*, 2d ed. (Indianapolis, 1925) 5-6; and William de Funiak, *Principles of Community Property* (Chicago, 1943) i:23 [hereafter cited as de Funiak, *Principles of Community Property*]. Lobingier cites several other ancient law codes that have provisions comparable in some aspects to the community-property law, but concludes that the most likely origin is with the Germanic tribes. Charles S. Lobingier, "The Marital Community: Its Origin and Diffusion," *American Bar Association Journal* 14 (1928) 211-18.

⁷Originally written in Latin, its formal title is *Liber Iudiciorum*, or Book of the Judges. It later became known as the *Fori Iudicium*, or *Forum Iudicium*, which in Castilian became *Fuero Juzgo*, or Code of Judgments. By order of Ferdinand III the entire text was translated into Castilian in the thirteenth century. De Funiak, *Principles of Community Property*, supra note 6 at 54. For the provision defining community property, see Appendix, n. 1.

centerpiece of Spanish law. Not until 1255 did the *Fuero Real* (Royal Code) expand and clarify the concept of community property. And not until 1567, in the *Nueva Recopilación* (New Restatement), was the system fully set out in modern terms. In 1805, the refinements and modifications of more than a millennium were collected and summarized in the *Novísima Recopilación* (Newest Restatement).⁸ The community-property system described in the two *recopilaciones* was followed in Spain's American colonies; both remained in effect long after those colonies became independent. Mexico, in particular, continued to apply the system until 1871.⁹

The evolution of community-property law in France had a similar history. An early seventh-century code, the *Lex Ripuariorum*, contained a rudimentary statement of shared spousal rights in marital property.¹⁰ For the next five centuries, however, few written references to it can be found. Not until 1128, in the charter of Laon in northern France, can one again find reference to a community of property between spouses. A thirteenth-century French legal commentator named Beaumanoir wrote, "Everyone knows that a community is formed by marriage; for, as soon as the marriage is performed the property of one and the other becomes common." Other than adding that the system was of ancient and immemorial custom, he gave few other details.¹¹

In the next several centuries, the community-property system was adopted as the customary law in much of northern France.

⁸De Funiak, *Principles of Community Property*, supra note 6 at 47-69; Lobingier, "The Marital Community," supra note 6 at 211, 214-15. For provisions in the *Nueva Recopilación*, see Appendix, n. 2.

⁹De Funiak, *Principles of Community Property*, supra note 6 at 40; John T. Vance, "Old Spanish Law of 'Las Siete Partidas' in Mexico," *American Bar Association Journal* 14 (1928) 219. "The principles established regarding this subject [community property] by the antique legislation are equal to those fixed by the legislation now in force." *Garcia v. Estate of Contreras* (D.Ct., Distrito Federal, 1904), *Diario de Jurisprudencia* 667 [Mayo-Agosto 1904].

¹⁰William Burge, *Burge's Commentaries on Colonial and Foreign Laws Generally, and in Their Conflict with Each Other, and with the Laws of England*, Alexander Renton and George G. Phillimore, eds., 4 vols. (London, 1907-12) iii:392 [hereafter cited as *Burge, Commentaries*]. Caesar described the law that existed in Gaul before the Germanic invasions: "Whatever sums of money the husbands have received in the name of dowry from their wives, making an estimate of it, they add the same amount out of their own estates. An account is kept of all this money conjointly, and the profits are laid by: whichever one of them shall survive, to that one the portion of both reverts together with the profits of the previous time." *De Bello Gallico*, vi.c. 19.

¹¹Quoted in Brissaud, *History of French Private Law*, supra note 3 at 817.

Most significantly, it became part of the *coutumne de Paris*.¹² This was important for later developments in the United States, because the *coutumne de Paris* was extended by royal edict to Louisiana in 1712,¹³ and also served as a source (although not the principal source) for the community-property provisions of the widely influential Napoleonic Code of 1806.¹⁴

COMMUNITY-PROPERTY LAW IN LOUISIANA

Louisiana was sold by France to the United States in 1803, but French law was not applicable in Louisiana at the time. France had transferred Louisiana to Spain in 1763, and only reacquired it by secret treaty in 1800. Not until four weeks before the colony was turned over to the Americans did the French retake possession. The law in effect in Louisiana at the time of annexation

¹²De Funiak, *Principles of Community Property*, supra note 6 at 38; Howe, "The Community of Acquests and Gains," supra note 6 at 217; William S. Holdsworth, *History of the English Law* (London, 1903) iii:522; Burge, *Commentaries*, supra note 10 at 332; Brissaud, *History of French Private Law*, supra note 3 at 807-11. In the territory governed by the *coutumne de Paris* or the *coutumne d'Orleans*, community property came about as the result of a formal contract between the parties, from the absence of a statement in the contract concerning ownership of property, or from the absence of a contract entirely. In Brittany and Anjou it came about from the silence of the parties when the marriage lasted more than a year and a day. In the *pays du droit écrit*, community property could exist only if expressly provided for in a written antenuptial agreement. In Normandy it could not exist even by written contract.

¹³"The whole of Louisiana, including Illinois, was in 1712, granted to Anthony Crozat, his charter providing that the royal edicts and the *coutumne de Paris* should be the law of the Colony. Crozat having surrendered his charter, in 1717, the same country was ceded to the West India Company and by the fifteenth article of the charter the Custom of Paris was established unchangeably as fundamental law of the territory." *Kaskaskia v. McClure*, 167 Ill. 23, 30, 46 N.E. 72 (Ill. Sp. Ct., 1897).

¹⁴Following the French Revolution, work began on a project to codify all French law. The first draft of the proposed code, written by Camba eres in 1793, gave the husband and wife equal right to the administration of all their possessions. By his third draft Camba eres had abandoned this egalitarian proposal. He believed that it was contrary to the societal norms of the time and too likely therefore to produce disputes. Brissaud, *History of French Private Law*, supra note 3 at 815. The final code, issued by Napoleon—and consequently known as the "Napoleonic Code"—reverted to the traditional concepts of community property. The husband was made the sole administrator of the community property and given power to alienate and encumber it regardless of the wife's interest. Civil Code, art. 1421. With the Napoleonic Code the French abandoned the marital-property rules of *droit  crit*, and gave community property full sway throughout the country. Lobingier, "The Marital Community," supra note 6 at 211-18.

—including that of community property—was, accordingly, Spanish.¹⁵

To oversee the transfer and take charge of the new territory as governor, President Thomas Jefferson picked William Claiborne,¹⁶ a Tennessean who was given extensive powers to administer the territory, including the naming of judges and the nomination of members of the legislative council. When he arrived in Louisiana, Claiborne found that the French had dismantled the existing Spanish administration without replacing it with one of their own. He was therefore forced to set up a government in haste. In consequence, the individuals he named as judges and legislators were chiefly chosen from the English-speaking community in New Orleans.¹⁷

Claiborne's authority as the governor of an American territory reflected the national government's own prejudices against a people lacking a common-law legal tradition. Jefferson, for

¹⁵De Funiak, *Principles of Community Property*, supra note 6 at 84. "When the country was first ceded to Spain, she wisely preserved many of the French regulations, but by almost imperceptible degrees, these have disappeared; and now the province is governed entirely by the laws of Spain, and ordinances formed expressly for the colony; it is believed that no correct code can possibly be procured; excepting only a few ordinances promulgated and printed by General O'Reilly, respecting principally the laws of inheritance and the rights of [civil law] dower." Answers to Queries showing the condition of Louisiana in 1803, in answer to Mr. Jefferson, Query No. 16, quoted in Joseph M. White, *A New Collection of Laws, Charters and Local Ordinances of Britain, France and Spain, Relating to the Concession of Land in their Respective Colonies, together with Laws of Mexico and Texas on the Same Subject*, 2 vols. (Philadelphia, 1839) ii:690-91.

¹⁶William Charles Cole Claiborne (1775-1817) was born in Virginia, began a law practice in Tennessee, and became a judge of that state's supreme court in 1796. From 1797 to 1801 he served as a congressman, and supported Jefferson in the presidential election. Jefferson appointed him governor of Mississippi Territory in 1801 and made him one of the commissioners to receive Louisiana from France. From 1804 to 1812, he served as governor of the Territory of Orleans. His government was not well received by the Creoles, and Claiborne frequently quarreled with legislators and others. When Orleans was admitted to the Union as the state of Louisiana in 1812, however, he was elected governor and served until 1816. In 1817 he was elected to the U.S. Senate but died before taking his seat. See William Charles Cole Claiborne, *Official Letter Books of W.C.C. Claiborne, 1801-1816*, Dunbar Rowland, ed., 6 vols. (Jackson, Miss., 1917) 1: introduction [hereafter cited as Claiborne, *Letter Books*].

¹⁷Henry P. Dart, "The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana," *Inter-American Law Review* 1 (1959) 304. The Creoles were apprehensive that Claiborne might use his authority to modify the existing law. He did not. His first official act on taking possession of Louisiana was to issue a declaration retaining the "laws heretofore in force" within the area. Proclamation issued on the surrender of Louisiana, December 20, 1803, Claiborne, *Letter Books*, supra note 16 at 308.

example, regarded the Creole settlers of Louisiana as aliens, more accustomed to despotism and tyranny than to freedom and democracy. He believed that the Creoles would shed their past only under the tutelage of their superiors; until they did so, their governor had to have extraordinary powers.¹⁸ When Claiborne arrived in Louisiana, he was imbued with the same notions.

The territory's first legislative council also reflected those values. Soon after it convened, the council acted to impose American law on the Louisiana Creoles. American-style rules of civil and criminal procedure were adopted for use in the newly created trial courts,¹⁹ and a bill to create codes defining the substantive civil and criminal law was proposed. The governor, however, vetoed the bill. Claiborne feared a violent reaction among the Creoles if their traditional laws were changed too dramatically.²⁰

His veto had long-term consequences. It preserved Louisiana's civil law, including its community-property system, until the Creole population could acquire a voice in the territorial government. Creole participation came quickly. Congress reorganized the territory in 1805, establishing a bicameral legislature that was elected (in part) by the local populace.²¹ The new legislature, dominated by the Creoles, acted promptly to draft a bill recognizing the Spanish law in force before annexation as the territory's basic law.²² Again Claiborne feared reprisals—this time from the American settlers in Louisiana, as well as the government in

¹⁸Dart, "Influence of the Ancient Laws of Spain," *supra* note 17 at 304.

¹⁹Act of April 10, 1805, ch. 26, 1805 Louisiana Acts 210-60. Act of May 4, 1805, 1805 Louisiana Acts 440-58. See also Dart, "Influence of the Ancient Laws of Spain," *supra* note 17 at 305.

²⁰Claiborne was sensitive to the dislike of the Creoles for any innovations in the legal system, and he feared that any changes introduced by a legislative council dominated by Americans could lead to trouble. On February 6, 1805, he wrote the secretary of state that "the Legislative Council do not proceed with all the dispatch which *several influential Americans* who are here desire; *They* are solicitacious that a code of Laws and principles of Practice *to which they* have been accustomed, should be introduced, and are so impatient of delay, that I fear former Municipal regulations will be too Suddenly innovated upon, and that the American System of Jurisprudence, will be more generally adopted than the present situation of the Territory will justify." Claiborne to James Madison, U.S. Department of State, *The Territorial Papers of the United States*, Clarence E. Carter, comp. and ed. (Washington, 1940) ix:390 [hereafter cited as *Territorial Papers*].

²¹An Act for the Government of Orleans Territory, March 2, 1805, *Statutes of the United States*, 322 (1805), *Territorial Papers*, *supra* note 20 at 405.

²²Mitchell Franklin, "The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana," *Tulane Law Review* 16 (1942) 319.

Washington.²³ Despite the vehement protests of the Creole legislators, he vetoed the bill.²⁴

At the end of 1806 a compromise of sorts was reached. Claiborne acceded to the legislature's appointment of lawyers from the two different legal communities in the territory—James Brown and Louis Moreau Lislet—to prepare a code, in both English and French, that would reflect “the civil law by which the Territory is now governed.”²⁵ Brown and Lislet took more than a year to prepare their draft, finally presenting it to the legislature early in 1808. They called it “A Digest of the Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments adapted to the Present System of Government,” but it was more adaptation than digest. Little of the draft came from Spanish colonial law, while most of it was freely taken from an advance copy of the Napoleonic Code printed in France in 1805. The legislature was nevertheless pleased with the draft, and adopted it in 1808, with a provision in the enabling act that “Whatever in the ancient law of this territory, or in the territorial statute, is contrary to the dispositions contained in said digest, or irreconcilable with them, is hereby abrogated.”²⁶

Unlike the legislative proposal of 1806, Claiborne did not veto the Civil Code of 1808. He explained his change of mind in a letter to Secretary of State James Madison:

It having been understood by our Courts of Justice that the *principles* of the Civil Law (except in criminal cases) were in force in this Territory, it became desirable to place *them* before the Public;—Heretofore, few Citizens had any knowledge of the existing laws; not even the Magistrates, whose duty it was to execute them.—Under these circumstances I could not do otherwise than to sanction the Code.²⁷

²³ Claiborne to Madison, May 26, 1805, Claiborne, *Letter Books*, supra note 16 at iii:309.

²⁴ The Creole reaction is described in Claiborne to Julien Poydras, May 26, 1806, *ibid.*; and in Jefferson to John Dickinson, January 13, 1807, *The Works of Thomas Jefferson*, Paul L. Ford, ed., 12 vols. [New York, 1904-05] x:340.

²⁵ *Acts passed at the First Session of the First Legislature of the Territory of Orleans*, 214 (1807).

²⁶ *Acts passed at the First Session of the Second Legislature of the Territory of Orleans*, 120 (1808). See also Francois Xavier Martin, *A General Digest of the Acts of the Legislature of the Late Territory of Orleans and of Louisiana and the Ordinances of the Governor Under the Territorial Government* (New Orleans, 1816), ii:92. A table of contents for the code is reproduced in Elizabeth Gaspar Brown, “Legal Systems in Conflict; Orleans Territory 1804-1812,” *American Journal of Legal History* 1 (1957) 54-55.

²⁷ Claiborne to Madison, October 7, 1808, *Territorial Papers*, supra note 20 at 405. See also Claiborne, *Letter Books*, supra note 16 at iv:168.

In 1812 the Territory of Orleans joined the Union as the State of Louisiana. An influx of people from other states followed, and the population soon ceased to be homogeneous. Both English and French came into common usage, and the continued use of Spanish law as a source of judicial authority led to a growing demand for reform. One approach was to underwrite the translation of old and rare Spanish legal texts, but the inapplicability of many of them only encouraged the legislature to make further changes.²⁸ In 1823, Moreau Lislet, Edward Livingston, and Pierre Derbigny were commissioned to "revise the civil code [of 1808] by amending the same . . . and by adding . . . to such of the laws as are still in force and included therein."²⁹

The revised code was adopted by the legislature in 1825. It retained much of the earlier code, and borrowed, paraphrased, and rearranged much of the Napoleonic Code.³⁰ With respect to community property, however, both the Code of 1808 and the Code of 1825 differ substantially from the French code. The community-property provisions of the two Louisiana codes were taken primarily from the *coutumne de Paris*, and the Spanish law as codified in the *Nueva Recopilación*. With a few exceptions, the 1825 Code adopted the Parisian provisions regarding the separate property rights of the spouses, but in virtually all other respects it is identical to the Spanish law.³¹

Both before and after the adoption of the 1825 Code, the state supreme court consistently held that the Spanish law of community property—except as modified by statute—was the law in Louisiana.³² In 1828 the legislature passed a provision that

²⁸Dart, "Influence of the Ancient Laws of Spain," *supra* note 17 at 307-08. *Laws of Las Siete Partidas which are Still in Force in the State of Louisiana*, Louis Moreau Lislet and Henry Carleton, trans. (New Orleans, 1820) preface. See also Vance, "Old Spanish Law," *supra* note 9 at 219-24.

²⁹Vance, "Old Spanish Law," *supra* note 9 at 219-24.

³⁰For a comparison of the various codes, see the concordance tables in *Civil Code of Louisiana: Revision of 1870 with Amendments to 1947*, Joseph Dainow, ed. (St. Paul, Minn., 1947) 655-724.

³¹This conclusion is from Richard A. Ballinger, *A Treatise on the Property Rights of Husband and Wife under the Community or Ganancial [sic] System* (San Francisco, 1895) 30-31. It is supported by a facsimile of the 1808 Code published in 1968, which contains manuscript notes interleaved throughout. Joseph W. McKnight has observed that on the interleaf opposite page 337, which contains the provisions on community-property law, "in contrast to many interleaves giving Spanish, French and Roman citations, this interleaf cites no non-Spanish source." He adds that "all evidence indicates that this annotated copy of the 1808 code belonged to Louis Moreau Lislet, one of the two draftsmen." Joseph McKnight, "Texas Community Property Law—Its Course of Development and Reform," *California Western Law Review* 8 (1971) 121 n. 30.

³²*Beard v. Poydras*, 4 La. 368 (1816); *Saul v. His Creditors*, 6 La. 569, 16 Am. Dec. 212 (1827); *Cole's Widow v. His Executors*, 7 La. 41, 18 Am. Dec. 241 (1828).

provided "that all civil laws which were in force before the promulgation of the civil code lately promulgated . . . are hereby abrogated."³³ This act, which received the belated blessing of the Louisiana Supreme Court in 1836,³⁴ ended the use of foreign laws in interpreting the rights and duties of the state's citizens. It also marked the formal date when the community-property system first took independent form in the United States.

MARITAL PROPERTY IN ARKANSAS, MISSISSIPPI, AND THE EAST

At the beginning of the nineteenth century, the common law granted the married woman little say with respect to property. It looked upon the wife's person as being merged with that of her husband. In consequence, she was deprived of two major rights: the power to sue in her own name and the right to control her own property. During coverture, the husband had complete title and management of the wife's property. If she survived her husband, the wife was entitled to a dower right—a one-third interest for the rest of her life in all property held by her husband at his death or that he had ever held during coverture. Because the dower was a life estate, it terminated on the wife's death and nothing—other than her personal estate—passed to her heirs.

The civil law, by comparison, granted the wife the power to sue or be sued in her own name. It also gave her control of any property she held before her marriage and that she acquired by gift or devise during marriage. Only the property acquired during the marriage by the labor of both spouses—the community property—was managed by the husband. The wife's estate—her separate property—was free of any title or proprietary right of her husband, or his creditors, and her control was as complete as if she were not married. She could manage or convey it without his consent or control.

Of the two systems—coverture and community property—the latter was better suited to the conditions of the frontier. "The conditions of pioneer life, the relatively high sentimental value placed upon women, the increasing degree of social and domestic freedom which American women enjoyed—all were incompatible with the strict theories of the common law which placed a married woman and her property under the absolute control of her husband," according to one student of the law.³⁵ At the same

³³ Louisiana Act No. 83 of 1828.

³⁴ Dart, "Influence of the Ancient Laws of Spain," *supra* note 17 at 312 n. 25.

³⁵ Elizabeth Gaspar Brown, "Husband and Wife—Memorandum on the Mississippi Woman's Law," *Michigan Law Review* 42 (1944) 1110.

time, the common law worked a hardship on married men who were on the frontier without their wives. To obtain full and complete title from a married man, one had to obtain a deed or release of dower rights from the wife. When the wife was left behind, sometimes to be brought west later, and sometimes simply abandoned, "the possibility of procuring the deed or release of a distant and perhaps unknown woman was remote."³⁶ The effect on men doing business in real property—such as a mining partnership—was potentially ruinous.³⁷

With these two pressures—to improve the wife's lot and to improve the separated husband's business opportunities—the need to protect the family from a ne'er-do-well husband was also a concern.³⁸ Which of these was primary depended on circumstance and place, although the latter seems to have been the foremost argument in legislative debates.

Despite a lack of rights, women rarely expressed dissatisfaction with their lot before the mid-1840s—at least not in public.³⁹ Although a few married women did file individual petitions with state legislatures to obtain special dispensation to hold property and contract in their own name,⁴⁰ the first generally applicable married-women's-property act was not passed until 1835.

Contrary to many of the general histories of the American feminist movement that have focused on developments in New

³⁶ Henry A. Dubbs, "The Unfolding of Law in the Mountain Region," *American Bar Association Journal* 12 (1926) 679, 685.

³⁷ An example of the problem, and its avoidance, is given by David J. Langum in "Expatriate Domestic Relations Law in Mexican California," *Pepperdine Law Review* 7 (1979) 41, 43-66. The example is repeated in Langum, *Law and Community on the Mexican California Frontier* (Norman, 1987) 265-67. Langum's materials on domestic-relations law examine the procedural aspects of entering into a marriage, of separating, and of obtaining a divorce in Mexican California. Since they are based on the study of a single American expatriate family, they are only indirectly concerned with marital-property law.

³⁸ Blanche Hersh, *The Slavery of Sex: Feminist-Abolitionists in America* (Chicago, 1978) 54 [hereafter cited as Hersh, *Slavery of Sex*]; Elizabeth Warbasse, "The Changing Legal Rights of Married Women" (Ph.D. diss., Radcliffe College, 1960); Keith Melder, *Beginnings of Sisterhood* (New York, 1977) 143 [hereafter cited as Melder, *Beginnings of Sisterhood*].

³⁹ In 1777 Abigail Adams wrote her husband: "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation." But her sentiment was not expressed publicly. Abigail Adams to John Adams, March 31, 1777, in *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution*, Charles F. Adams, ed. (New York, 1876) 149-50. Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill, 1980), 73-85 [hereafter cited as Kerber, *Women of the Republic*]. Not until Sarah and Angelina Grimke began to speak out in 1836 and 1837 were there vocal female voices advocating change in the laws. Melder, *Beginnings of Sisterhood*, supra note 38 at 72-93.

⁴⁰ Kerber, *Women of the Republic*, supra note 39 at 85-99.

York⁴¹—in particular the Seneca Falls Convention of 1848—the legislative reformation of marital-property law did not begin in New York, or the East in general, but in the three states and territories immediately adjacent to Louisiana—the nation's sole community-property jurisdiction from 1804 to 1845. The first modification came in Arkansas (itself carved out of the Louisiana Territory), in 1835.

The territorial legislature of Arkansas modified the common law to protect the wife's property from the premarital debts of the husband.⁴² Although it was a small step, it did protect a wife and family from a worthless husband.

In 1839 the Mississippi State Legislature went a step further. Property held by a wife before marriage or acquired by her after marriage from anyone other than her husband became "her own property." Additionally, any slaves that the wife owned before her marriage became her "separate property, exempt from any liability for the debts or contracts of her husband."⁴³ From Mississippi, this concept of separate property spread throughout the existing common-law states and territories.⁴⁴ (The laws enacted before 1850 are shown in Table 1; the spread of the marital-property system is shown in Map 1.) In 1842 Maryland adopted a one-sentence provision that protected a married woman's real property only from her husband's current debts, but a year later it adopted a provision almost identical to Mississippi's. Despite Maryland's change of heart, its first simple statute was copied with minimal modification by Connecticut, Iowa,

⁴¹ For histories of the women's movement see: Melder, *Beginnings of Sisterhood*, supra note 38; Kerber, *Women of the Republic*, supra note 39; Hersh, *Slavery of Sex*, supra note 38; Nancy McGlen and Karen O'Connor, *Women's Rights: The Struggle for Equality in the Nineteenth & Twentieth Centuries* (New York, 1983); Peggy Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport, Conn., 1980); Mary P. Ryan, *Womanhood in America: From Colonial Times to the Present*, 3d ed. (New York, 1983); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, New York, 1982); Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860* (New York, 1984); and Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, 1986). See also Carole Shammas, Marylynn Salmon and Michel Dahlin, *Inheritance in America from Colonial Times to the Present* (New Brunswick, N.J., 1987). For a history of the women's movement in New Mexico and Colorado, see Sarah Deutsch, *No Separate Refuge: Culture, Class, and Gender on an Anglo-Hispanic Frontier in the American Southwest, 1880-1940* (New York, 1987).

⁴² For the Arkansas statute, see Appendix, n. 3.

⁴³ For the Mississippi law, see Appendix, n. 4.

⁴⁴ Alabama adopted the Arkansas statute of 1835 in 1846, but two years later enacted the Mississippi statute as it had been modified by Maine. Richard H. Chused, "Married Women's Property Laws: 1800-1850," *Georgetown Law Journal* 71 (1983) 1399 n. 206.

COMMUNITY-PROPERTY LAW IN TEXAS

The current system of marital property in the states west of the Rockies is not directly related to Louisiana's community-property system. Rather, it is the product of substantial modification and development that occurred in Texas soon after that state's independence from Mexico in 1836.

Before independence Texas was a province within the Mexican state of Coahuila-and-Texas, and its community-property law was that of the *Nueva Recopilación*. The constitution of the new republic preserved the existing laws, but only until they could be modified by local legislation.⁴⁸ In 1840 the Texas legislature made a dramatic break with the republic's Spanish legal heritage, adopting the English common law as the country's fundamental jurisprudence—with one major exception. The exception was the retention of community-property law.⁴⁹

The Texas legislature, however, did not merely preserve the existing community-property law. As in Louisiana, few Spanish legal materials were available, especially in English translation; to overcome this shortcoming the Texas legislators—just like their counterparts in Louisiana—adopted their own community-property statute.

The precise origin of the statute is not clear from the evidence that remains today. Some parts are based on the Mississippi Married Women's Act of 1839⁵⁰ and others on the Louisiana codes of 1808 and 1825, but the basic definitions of community property "appear homemade and the product of legislative

(1848).¹⁹ New York, Act of Apr. 7, ch. 200, 1848 N.Y. Laws 307. ²⁰ Pennsylvania, Act of Apr. 11, no. 372, 1848 Pa. Laws 536. ²¹ North Carolina, Act of Jan. 29, ch. 41, 1848 N.C. Sess. Laws 12 (1849). ²² Missouri, Act of Mar. 5, 1848 Mo. Laws 67 (1849). ²³ Tennessee, Act of Jan. 10, ch. 36, 1849 Tenn. Pub. Acts 111 (1850). ²⁴ Connecticut, Act of June 22, ch. 20, 1849 Conn. Acts 16. ²⁵ Wisconsin, Act of Feb. 1, ch. 44, 1850 Wisc. Laws 29.

⁴⁸ Texas Constitution of 1836, *Sources and Documents of United States Constitutions*, William Swindler, ed. (Dobbs Ferry, N.Y., 1973-79) ix:250-59.

⁴⁹ Act of January 20, 1840, *The Laws of Texas 1822-1897*, 10 vols., H.P.N. Gammel, trans. (Austin, 1898) ii:177-80. In addition to retaining community property, the act also reserved from the wholesale reception of the common law the areas of civil procedure and land law. See William Orr Huie, *Cases and Materials on Texas Public Lands* (Austin, 1949) i:passim; Joseph McKnight, "The Spanish Watercourses of Texas," in *Essays in Legal History in Honor of Felix Frankfurter*, Morris D. Forkosch, ed. (Indianapolis, 1966) 373; McKnight, "The Spanish Influence on the Texas Law of Civil Procedure," *Texas Law Review* 24 (1959).

⁵⁰ See ch. 46, paras. 1-5, *Mississippi Acts* 72-73 (1839).

adjustment rather than careful deliberation."⁵¹ If what was enacted was intended as an expression of Texas's colonial legal tradition, it was only a "debased reminiscence."⁵² In essence it consisted of three elements: married women's capacity, married women's property, and common property. Regarding the married woman's capacity to act alone, the act appears to be derived from the Louisiana codes;⁵³ while the definition of the married woman's separate property seems to be inspired by the Mississippi statute of 1839.⁵⁴ The definition of community property, however, appears to be a synthesis of the Louisiana codes, the Mississippi act, and common-law concepts of property ownership.⁵⁵

The 1840 statute remained in effect only until Texas entered the Union in 1845. At that time an article was added to the new state constitution that both recognized and defined community-property law in the state. The article, which is still part of the Texas constitution, provides that

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband.

Laws shall also be passed providing for the registration of the wife's separate property.⁵⁶

The article's adoption was no easy matter for the delegates to Texas's first state constitutional convention. They agreed to it only after several alternate proposals had been rejected and substantial compromises made. The debates in the convention's records clearly reflect societal attitudes about women and marriage in mid-nineteenth-century America. This can be seen in the repetition of many of the arguments made in Texas—by proponents and opponents—in later debates in California and in other states that considered the system of community-property law.

⁵¹ McKnight, "Texas Community Property Law," *supra* note 31 at 119.

⁵² *Ibid.*

⁵³ See art. 2321, *Louisiana Civil Code* (1825); bk. 3, tit. 5, art. 30; *Louisiana Civil Code*, 328 (1808).

⁵⁴ See ch. 46, paras. 1-5, *Mississippi Acts*, 72-73 (1839).

⁵⁵ McKnight, "Texas Community Property Law," *supra* note 31 at 120.

⁵⁶ *Debates of the Texas Constitutional Convention*, William F. Weeks comp. (Austin, 1846) 602 [hereafter cited as *Weeks, Debates*]. The proposal was submitted on July 28, 1845.

The opponents' arguments were essentially two. The first was that the system being adopted was a bastardization of existing laws. One delegate characterized it as being different "from either the civil code of Louisiana, the civil laws of Spain, or the common law, or any rule which I know anything about."⁵⁷ The second argument was that community-property law was contrary to the legal tradition of the majority of the state's people. A delegate named Gustavus Everts said, "We are, as I conceive, emphatically a common law people. It is true the civil law was in force here in the earlier settlement of the country; but the present population was raised and educated under the common law. The laws relating to distribution and descents are generally alike throughout the Union, excepting Louisiana, where the civil law was retained on account of the first settlers being a foreign population of French and Spanish descent." In addition, he suggested, "Some little respect should be entertained by this Convention for the opinions of those who may come to this country hereafter from the U[nited] States."⁵⁸

The proponents also had two arguments. One was that the common-law system of marital property did not protect wives or children from ne'er-do-well husbands. Delegate John Hemphill, who would later serve as the state of Texas's first chief justice, and who clearly dominated the debate on marital property in the convention, argued that "The husband should not have [such] absolute control as to enable him to seriously injure or destroy the estate of the wife by wasteful expenditure or fraudulent mismanagement." In his mind, a return to the common law would mean that the wife's property would again be "the sole and absolute property of the husband." He could easily foresee the consequences—the wife's property, he said, "may be absorbed in the payment of [the husband's] debts before marriage; may be lost in speculations or at the gambling table, may be wasted and entirely destroyed, or may be given away in the presence of the deserted and beggared wife, to the most unworthy wretches, with the most complete impunity, without responsibility and without impediment interposed, or remedy afforded by law."⁵⁹

The second of the proponent's arguments was more radical. It was the recognition of limited rights for women. A delegate named James McHall Davis said that "The days have passed away when women were beasts of burthen, and as intelligence increases they will be placed upon the high and elevated ground which rightfully belongs to them." Referring to the womens'-

⁵⁷ *Ibid.* at 505.

⁵⁸ *Ibid.* at 599.

⁵⁹ *Ibid.* at 595-97.

rights movement in the eastern states, he said, "It is the opinion of the age, that women should be protected in their property."⁶⁰

One other viewpoint was raised at the Texas convention. It was the idea that women should not only be protected in their property rights but should also have the independent right to manage their separate property. Hemphill, who chaired the committee that produced the article adopted by the convention, viewed community property not as a system for giving the wife a share in the management of the marital estate, but only as a device for insuring her rights of succession at the termination of her marriage. When a formal proposal was made to give women the right to manage their separate property,⁶¹ Hemphill and the vast majority of delegates simply ignored it.

By looking upon community property as a way of insuring the wife's rights of succession, the Texas constitutional convention was acting within the mainstream of the nineteenth-century movement to reform marital property. The protection of the wife in Texas differed little from the rights granted her in the marital-property reform statutes enacted in the common-law states. Separate property was expansively defined to include all real and personal property brought into the marriage, as well as that acquired during marriage by gift, devise, or bequest. The proposal to let the wife manage her own property was, however, firmly rejected. Several years later this progressive—but not too progressive—definition of community property would give the Texas's constitutional provision great appeal in California, which also had a Spanish heritage and a large, mainly male, Anglo-American population that was anxious to attract women to the frontier, but that was also jealous of its common-law heritage.

COMMUNITY-PROPERTY LAW IN CALIFORNIA

Following the discovery of gold in 1848, the population of California increased dramatically. On January 1, 1849, it totaled 26,000, and a year later 107,069, while the number of Americans in the state grew from 8,000 to 76,069 during the same period.⁶²

⁶⁰Ibid.

⁶¹Weeks, *Debates*, supra note 56 at 52. See also William Orr Huie, "The Texas Constitutional Definition of the Wife's Separate Property," *Texas Law Review* 35 (1957) 1054.

⁶²Figures are from a "Memorial to Congress" submitted by the California congressional delegation elected and sent to Congress to seek the territory's admission to the Union. J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849* (New York, 1850) xxii-xxiii [hereafter cited as Ross Browne, *Report of the Debates*].

The increase made settlers—at least the American settlers—nervous for statehood. But in 1848, and again in 1849, Congress refused to act. The debate over classifying California as a free or a slave state could not be peaceably resolved, and nothing was done. In June 1849 Bennett H. Riley, the acting governor, decided it was time to force the issue. He sent out a call for a convention to write a constitution, hold elections, and apply for admission, in the hope that Congress would accept a *fait accompli*.⁶³ On September 1, forty-eight delegates gathered at Colton Hall in Monterey to begin the process.⁶⁴

Among the multitude of constitutional provisions considered by the convention was one involving the adoption of community property. The proposal submitted by the Committee on the Constitution was an exact copy of the community-property section of the Texas State Constitution. The only difference was the addition of one word to correct a grammatical error and the substitution of a comma for a semi-colon.⁶⁵

Nevertheless, the debate in the Committee of the Whole was heated, and highly reminiscent of the arguments made at the Texas convention four years earlier. It began when Francis Lippitt, a San Francisco lawyer, submitted a substitute for the committee's proposal. His substitute provided that

Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, devise or bequest, or otherwise than from her husband.⁶⁶

Lippitt presented his substitute, he said, because the committee's proposal changed "the present system." He argued: "I think that we tread upon dangerous ground when we make an invasion upon the system which has prevailed among ourselves and our

⁶³ From Governor Riley's "Proclamation" of June 3, 1849, calling for the Constitutional Convention, reproduced in Ross Browne, *Report of the Debates*, supra note 62 at 1-5, and in *Sources and Documents of United States Constitutions*, William Swindler, ed. (Dobbs Ferry, N.Y., 1973-79) i:441-45 [hereafter cited as *Sources and Documents*].

⁶⁴ *Sources and Documents*, supra note 63 at i:445-47.

⁶⁵ *California Constitution*, Art. XI, para. 14 (1849), states: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." One added comma and the word "to" (italicized here) are the only changes from the section in the Texas constitution.

⁶⁶ Ross Browne, *Report of the Debates*, supra note 62 at 257.

ancestors for hundreds and hundreds of years."⁶⁷ Henry A. Tefft of San Luis Obispo, a district with a high percentage of native Californians, objected to Lippitt's argument that the proposal would change the system. Tefft thought that the delegates should "take into consideration the feelings of the native Californians, who have always lived under this law."⁶⁸

Charles T. Botts of Monterey objected to both the proposal and the substitute. "In my opinion," he asserted, "there is no such provision so beautiful in the common law, so admirable and beneficial, as that which regulates the sacred contract between man and wife." He believed that the common law only reflected natural law. "Sir," he declared to the president of the convention, "the God of nature made woman frail, lovely, and dependent; and such the common law pronounces her."⁶⁹

He also disclosed the real issue of the debate: the question of women's rights. He was opposed to any such grant. "This doctrine of women's rights," he protested, "is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe." Accordingly, he concluded, "I entreat, sir, that no such clause be put in this constitution."⁷⁰

The women's-rights issue was precisely why Henry Halleck supported the proposal. "I shall advocate this section in the Constitution," he announced, "and I would call upon all the bachelors in the convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the best provision to get us wives that we can introduce into this Constitution."⁷¹

Botts chided Halleck for making a "light and trivial argument,"⁷² but Halleck's point was well taken. California's population was overwhelmingly male, and the desire to attract women to the West was a logical consequence of that state of affairs.⁷³ James McHall Jones came to Halleck's defense. Although a native of Kentucky, Jones had come to California from Louisiana, and

⁶⁷Ibid.

⁶⁸Ibid. at 258.

⁶⁹Ibid. at 259. Botts, like Lippitt, was a lawyer.

⁷⁰Ibid. at 260.

⁷¹Ibid. at 259.

⁷²Ibid.

⁷³The frontier American male's need for a wife had been a matter of concern in Mexican California as well. T.J. Farnham, in his book *California*, quoted in part in *California Reports* (San Francisco, 1886) i:580-82, observed that the Mexican males resented the Americans for taking away their women. "Another cause of the general feeling against the American and Britons in California," he wrote, "was the fact that the *Señoritas*, the dear ladies, in the plentitude of their taste and sympathy for foreigners, preferred them as husbands."

was consequently a champion of civil law.⁷⁴ "What is th[is] principle so much glorified [by the common law]," he wondered, "but that the husband shall be a despot, and the wife shall have no right but such as he chooses to give her. It had its origins in the barbarous age, when the wife was considered in the light of a menial, and had no rights." He then observed that "For forty or fifty years the States of the American Union have been trying to modify and simplify this principle of the common law," and concluded, "I want no such system; the inhabitants of this country want no such system; the Americans of this country want no such thing."⁷⁵

Because Botts had objected to Lippitt's substitute proposal for not going far enough in making an outright adoption of the common law, Lippitt took the floor in defense of his proposal. "I am wedded to the common law," he announced, and so, he said, were "nine-tenths of the people now in California." The will of the majority, he contended, had to prevail. "The general rights of property must be considered with reference to the great mass of the population, the Americans," he averred, and, "The smaller party, the Californians, must yield." While the lack of an effective government in California meant that "Americans have been living under the common law, [and] the Californians have been living under the civil," the establishment of a state government would require both to live under a single code. For Lippitt the choice of which system to adopt was unquestionable. "It would be unjust," he claimed, "to require the immense mass of Americans to yield their own system to that of the minority."⁷⁶

Myron Norton of San Francisco disagreed. "I regret that during this discussion," he stated, "gentlemen should have made this a question between the common law and the civil law. It is taken for granted that if we adopt this section proposed, or that of my colleague [Lippitt], we are going to adopt the civil law or the common law. I insist that the question has nothing to do with it." He returned to a discussion of the underlying issue. "The question before the Committee," he said, "is whether or not we shall adopt a certain section as introduced here, providing for the security of property, both real and personal, of the wife." He supported the committee's original proposal. "I will go heart and hand for the adoption of the principle," he declared, adding, "We should be satisfied that the principle embodied here is the correct one."⁷⁷

⁷⁴Josiah Royce, *California from the Conquest of 1846 to the Second Vigilance Committee in San Francisco* (Boston and New York, 1866) 262.

⁷⁵Ross Browne, *Report of the Debates*, supra note 62 at 264.

⁷⁶Ibid. at 260-62.

⁷⁷Ibid. at 265-67.

Botts, who had chided Halleck for his cavalier remarks, closed his own arguments with the following: "Sir, if she had a masculine arm and a strong beard, who would love her? She had just as well have them as a strong purse; she is rendered just as independent by the one as the other, and as little lovable."⁷⁸

Neither Botts's demeaning aspersion nor Lippitt's plea for the common law brought them enough supporters. Lippitt's substitute proposal went down to defeat, and the original community-property provision, an exact copy of the section in the Texas constitution, became the law of the land in the Golden State.⁷⁹ It was a remarkable development, because, as Lippitt observed, Americans in California had generally been living under common law and had no allegiance to the civil-law system.⁸⁰ Thus, unlike Louisiana, and, to some extent, Texas, community property came to California because, as Henry Halleck put it, "It is the best provision to get us wives that we can introduce into this Constitution."

THE SPREAD OF COMMUNITY-PROPERTY LAW FROM CALIFORNIA

The debate over the common law continued in the California legislature when it convened in 1850.⁸¹ Although the law was

⁷⁸Ibid. at 268.

⁷⁹Ibid. at 269. The vote is not shown in the minutes.

⁸⁰Langum points out that the 2,500 or so expatriate Americans living in Mexican California before 1848 also resorted to the common law to resolve disputes between themselves. Langum, "Expatriate Domestic Relations Law in Mexican California," *supra* note 37 at 41, 45-47, 66.

⁸¹"Certain members of the bar of San Francisco" sent a petition to the first Legislature "praying . . . that the Legislature will retain, in its substantial elements, the Civil Law." The petition was referred to the Committee on the Judiciary, which promptly noted that the 18 lawyers who signed the petition represented less than one-fifth of the practicing attorneys in San Francisco, and that the balance of the lawyers had adopted a resolution at a meeting of their bar "recommending the Common Law and requesting the Legislature to adopt it."

The Judiciary Committee agreed with the majority. The civil law, it concluded, was less suited to California. As to family law, it observed: "The Civil Law regards husband and wife, connected it is true by the nuptial tie, yet disunited in person, and with dis severed interests in property. It treats their union in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business. Whereas, the Common Law deems the bond which unites husband and wife, so close in its connection, and so indissoluble in its nature, that they become one in person, and for most purpose one in estate. At the same time, it puts the burden of maintenance and protection where it rightfully belongs, and makes the husband, in truth and reality, the head of the household. The concessions which it makes to the wife, in respect to property, by compelling the payment of her debts and

quickly adopted as the general rule of decision,⁸² only a few days later an act defining community and separate property was also passed.⁸³ This act of April 17, 1850, was in most respects a copy of the Texas Community Property Act of March 13, 1848,⁸⁴ and it even continued Texas's use of "common property" to describe the community.⁸⁵

The legislature's decision to adopt the common law as the general rule of decision in the state soon affected the Community Property Act of 1850. The ninth section of the act provided that "the Rents and profits of the separate property of either husband or wife shall be deemed common property."⁸⁶ It was copied from the Texas act, and stated the Spanish rule as it had been followed in both Texas and Louisiana. In 1860, in the case of *George v. Ransom*,⁸⁷ the California Supreme Court found Section Nine unconstitutional. Ignoring the legal history of California as well as that of Texas and Louisiana, the court stated that, because the 1849 constitution made all property owned by the wife before marriage her separate property, the allocation of rents and profits to the husband after the marriage ceremony would leave the wife with only a shadow of her real title. The court declared this a constitutionally impermissible taking of property.

This decision—that separate property includes profits and rents—is helpful in tracing the transfer of the community-property system to the five other western states that eventually adopted it—Arizona, Idaho, Nevada, New Mexico, and Washing-

vesting her with an estate and dower, are a full compensation for the sacrifices which it requires her to make, and an ample equivalent for the communion of goods allowed her by the Civil Law." "Report on Civil and Common Law," *California Reports* (San Francisco, 1886) 1:594.

⁸² *California Laws*, ch. 95 (1850).

⁸³ *California Laws*, ch. 103, p. 254 (1850).

⁸⁴ The similarity was observed by California Supreme Court Justice Burnett in *Selover v. American Russian Commercial Co.*, *California Reports* (1857) vii:260, 266. In adopting the Texas version of community property, California opted for rules that gave women much more extensive rights than did Spanish common law. See *Panaud v. Jones*, in *California Reports* (San Francisco, 1851) i:514-15.

⁸⁵ See *California Laws*, ch. 103, p. 254 (1850).

⁸⁶ *California Laws*, ch. 103, p. 254. The act of April 17, 1850, was amended in 1853 [*California Statutes*, 165 [1853]] to permit property that was bequeathed, devised or given to a wife to be governed by a provision in the conveyance that the rents and profits of that separate property would apply to the wife's sole and separate benefit.

⁸⁷ *California Reports* (San Francisco, 1860) xv:322, *American Decisions*, lxxvi:490 (1860). For a statement of the Spanish law, see Gustavus Schmidt, *Civil Law of Spain and Mexico* (New Orleans, 1851) art. 44; George McKay, *A Treatise on the Law of Community Property*, 2d ed. (Indianapolis, 1925) 206; and *Scott v. Ward*, 13 Cal. 458 (1858).



Map 2. Spread of community-property law, 1850-1907. (Map drawn by the author.)

ton—because each follows the California rule. Each, however, came to the system by a different route.

Because Nevada was acquired from Mexico under the Treaty of Guadalupe Hidalgo, the community-property system—at least in theory—was in existence all along. But no substantial Spanish or Mexican population ever settled in Nevada. When Congress organized the Mexican cession in 1850, Nevada was a part of the Utah Territory, and Utah did not enact a statutory provision governing marital property during the eleven years that Nevada remained within its boundaries.⁸⁸ Not until 1906 did the Utah Supreme Court decide that the common-law marital-property system had actually been in effect from 1850 to 1861.⁸⁹ When Nevada became a territory, its legislature adopted the common law as the rule of decision by its very first act.⁹⁰ But in 1864 the constitution that became effective with statehood contained a section establishing the wife's separate property, copied word for word from the California constitution.⁹¹ The debate in the convention over the adoption of the section was minimal; the

⁸⁸ M.R. Kirkwood, "Historical Background and Objectives of the Law of Community Property in the Pacific Coast States," *Washington Law Review* 11 (1936) 5.

⁸⁹ *Hilton v. Thatcher*, *Utah Reports*, xxxi:360 (1906).

⁹⁰ *Nevada Laws*, 1 (1862). See *Darrenberger v. Haupt*, 10 Nev. 43 (1875).

⁹¹ *Nevada Constitution*, Art. IV, 31 (1864).

⁹² Kirkwood, "Historical Background," *supra* note 88 at 10.

only objection was made by a delegate who feared that it might attract "he-women" to the state.⁹² Because most of Nevada's population came from California's mines and mining towns, it is not surprising that much of Nevada's constitution was copied from California's, or that the first state legislature adopted the California community-property act of 1850 as Nevada law.⁹³

New Mexico's community-property history is unique. When Gen. Stephen Kearny occupied New Mexico in 1846, at the outset of the Mexican War, he promptly promulgated the "Kearny Code." It declared:

All laws heretofore in force in this Territory, which are not repugnant to or inconsistent with the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory.⁹⁴

A similar provision was enacted by the New Mexico legislature after Congress formally established the territory in 1850.⁹⁵ In 1876, however, the legislature declared the common law "the rule of practice and decision."⁹⁶ This legislative assertion was subsequently ignored by the territorial supreme court, which held in 1908 that "in a number of cases" dealing with marital property it had always "recognized the civil law, in the absence of a specific statute, as controlling."⁹⁷ This, the court claimed, was true despite the fact that the legislature did not enact a community property statute until 1901.

The 1901 statute departed fundamentally from the usual system. It divided the management of the community between the spouses, giving each the power to control the property acquired by their individual efforts. Only in the encumbering or conveyancing of community property were they required to act jointly.⁹⁸ The law proved too radical, however, and in 1907 the statute was repealed and California's statute as it was then in force was adopted with only minor changes.⁹⁹

Arizona's history in adopting a community-property law was similar to that of Nevada. After Congress separated Arizona from New Mexico in 1863, the first session of the Arizona Territorial

⁹³ *Nevada Laws*, 239 (1864-65).

⁹⁴ *Kearny Code*, 82 (1846).

⁹⁵ *United States Statutes at Large*, vii (1850).

⁹⁶ *New Mexico Laws*, ch. 2, para. 2 (1876).

⁹⁷ *Reade v. de Lea*, *New Mexico Reports*, xiv:442, 448 (1908).

⁹⁸ *New Mexico Laws*, 112 (1901).

⁹⁹ *New Mexico Laws*, 46 (1907); Kirkwood, "Historical Background," *supra* note 88 at 5.

Legislature enacted the "Howell Code," thereby repealing all laws and customs of Spain, Mexico, and New Mexico then in force. The code also provided that the common law would be the rule of practice in Arizona, and that the English system of dower would apply to marital property.¹⁰⁰ However, the following year the dower provision was repealed, and a comprehensive community-property statute modeled closely on the California law was enacted.¹⁰¹

Because Washington and Idaho were not acquired as a consequence of the Mexican War, and were not originally settled by the Spanish, their community-property heritage is unrelated to a colonial civil-law system. Both states were carved from the Oregon Territory, but a larger percentage of their earliest settlers came from California than from Oregon.¹⁰² Thus, despite Oregon's common-law orientation (which was established before the Mexican War), both Washington and Idaho adopted the California community-property system.

Oregon's failure to adopt the community-property law is worth noting. The United States' claim to the Pacific Northwest was based on the Lewis and Clark expedition, and on the founding of a trading post by John Jacob Astor in 1811. Britain, too, actively claimed what was then called the Oregon Country. Trappers, settlers, and missionaries moved slowly into the country, with most American immigrants settling along the Willamette River. Government, as such, was provided by the Hudson's Bay Company and the Methodist mission. The local inhabitants were faced with the need for a more formal system when an American settler named Ewing Young died and his will had to be probated. They elected the Methodist missionary to be their "supreme judge," and agreed to draft a local code of laws.¹⁰³ Young's estate was disposed of peacefully, but it took two more years to enact a legal code.¹⁰⁴ In 1843, a public meeting of the Willamette Valley settlers established a provisional territorial government. The

¹⁰⁰ *Howell Code*, ch. 61, paras. 1 and 7, and chap. 27 (1864).

¹⁰¹ *Arizona Laws*, 60 (1865).

¹⁰² See Raymond S. August, "Law in the American West: A History of Its Origins and Its Dissemination" [Ph.D. diss., University of Idaho, 1987] 300.

¹⁰³ "Ewing Young and His Estate," *Oregon Historical Quarterly* 21 (1920) 183.

¹⁰⁴ For early histories of the Oregon provisional government, see Mirth Tufts Kaplan, "Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government," *Oregon Historical Quarterly* 62 (1961) 117-63; Lawrence T. Harris, "History of the Oregon Code," *Oregon Law Review* 1 (1922) 129; and Arthur S. Beardsley, "Code Making in Early Oregon," *Oregon Law Review* 23 (1943) 22-55.

settlers adopted as their code "the laws of Iowa Territory enacted at the first session of its territorial legislature in 1839."¹⁰⁵

Despite continued petitions to Congress, the United States did not act to organize the Oregon Territory until 1848. The first territorial legislature promptly adopted the Iowa statutes again,¹⁰⁶ but a controversy among the three justices of the Territorial Supreme Court as to whether the legislature acted properly in incorporating parts of Iowa's revised statutes of 1843 led the legislature to appoint a commission to draft a new code.¹⁰⁷ Copied almost verbatim from New York's statutes, it was belatedly adopted in 1854.¹⁰⁸ Both the Iowa statutes that served as the source of Oregon law before 1854, and the New York statutes that served as the model thereafter, recognized the common law as their rule of procedure, and included the common-law concept of dower. With the adoption of the New York statutes in 1854, however, New York's progressive Married Women's Property Act of 1848 became a part of Oregon's law,¹⁰⁹ and local interest in marital-property reform, if there was any, did not thereafter express itself publicly.

Congress separated the land north of the Columbia River from Oregon in 1853 and made it into the Territory of Washington. The organic act of the new territory provided that the laws of Oregon then in force would continue to operate until replaced or repealed.¹¹⁰ The timing of this development meant that Washington continued to observe the laws derived from Iowa and not New York, and the rights of married women to own or manage property were governed by the traditional common law, not New York's Married Women's Property Act.

When Washington's territorial legislature repealed the Oregon statutes in 1856, it made express provision for the common law's

¹⁰⁵ Oregon Archives 28-32, 1852 [Oregon Historical Society, Portland]; and *Real Property Statutes of Washington Territory from 1843 to 1889 Comprising the laws Affecting Real Property Enacted by the Legislative Committee and Legislative Assembly of Oregon Territory Previous to 1853 Including the Statutes of Iowa of 1839 and 1843, Together with the Organic Acts, Enabling Act, State Constitution and Treaties, Proclamations and Special Laws of Congress, such as the Donation Act, Railroad Grant and other Private Acts, Indian Treaties, Executive Orders, etc.*, Twyman Osmond Abbott, comp. [Olympia, Wash., 1892] no. 94, para. 13, p. 90 [hereafter cited as *Real Property Statutes*].

¹⁰⁶ Brown, "The Sources of the Alaska and Oregon Codes," *supra* note 47 at 26.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 27.

¹⁰⁹ *Ibid.*

¹¹⁰ *United States Statutes at Large*, x:172.

continuation.¹¹¹ Two years earlier it had recognized dower,¹¹² and four years later it recognized curtesy (the husband's estate equivalent to dower).¹¹³ In 1860 it enacted a provision expressly providing for both.¹¹⁴ Nine years later, however, Washington adopted a community-property statute based on California's 1850 act, and repealed the earlier dower and curtesy provisions.¹¹⁵ Why it did so is not clear from the records that have been preserved. The legislative debates were not recorded, and the newspapers of the time make no mention of the change.¹¹⁶ Possible explanations include an active women's-rights movement (but that is not revealed in the territorial newspapers), and a desire by legislators to align Washington's laws more closely with those of California, the dominant source of legal materials on the Pacific Coast. The latter seems the best explanation, as Washington relied heavily on California's legislation and its judicial decisions as a source of precedent in its territorial years.¹¹⁷

In 1863 Congress organized the Idaho Territory.¹¹⁸ The next year it reshaped Idaho's borders, creating Montana and transferring part of what is now Wyoming to the Dakota Territory.¹¹⁹ Idaho, and consequently Montana, inherited the common-law marital-property rules in effect in Washington up to 1863. In 1867 Idaho enacted a community-property statute based on the California act of 1850,¹²⁰ but Montana never did so. The explanation for Idaho's decision is not apparent in the existing records,¹²¹ but, like Washington, its territorial legislature may have preferred to align its laws with California's (the predominant industry in Idaho was mining, and most of its miners had come from California).¹²² Montana's decision to retain the common law may well be attributable to its economic and social connections with Denver, and its reliance on Colorado as its principal source of legislative and judicial precedent.¹²³

¹¹¹ *Real Property Statutes*, supra note 105 at 126.

¹¹² *Ibid.* no. 521, para. 1, p. 381.

¹¹³ *Ibid.* no. 522, para. 2, p. 385.

¹¹⁴ *Ibid.* no. 622, p. 468.

¹¹⁵ *Ibid.* no. 623, p. 471.

¹¹⁶ Kirkwood, "Historical Background," supra note 88 at 9.

¹¹⁷ See August, "Law in the American West," supra note 102 at 311-12.

¹¹⁸ *United States Statutes at Large*, xii:383, ch. 32, sec. 5.

¹¹⁹ *United States Statutes at Large*, xiii:85, ch. 95.

¹²⁰ *Idaho Laws*, ch. 9 (1866-1967).

¹²¹ Kirkwood, "Historical Background," supra note 88 at 9.

¹²² See August, "Law in the American West," supra note 102 at 309-11.

¹²³ *Ibid.* at 309-12.

CONCLUSION

At least initially, the community-property system found its way into the laws of the western states for two reasons. In Louisiana adoption of the civil law was a matter of local pride, its continuation being formal proof for the Creoles of their cultural heritage and legal tradition. To some extent in Texas and to a lesser degree in California, the civil-law tradition influenced the decision to adopt the community-property system. In Texas the early Anglo-American settlers had lived under the civil law practiced by Mexico. In California the Mexicans who became part of the state's population may have had some influence on the decision of the 1849 Constitutional Convention to adopt the community-property system, but it was clearly minimal.¹²⁴ Beyond Louisiana, Texas, and California, the civil-law origins of the system were important to its expansion only in New Mexico, where the territory's Hispanic population looked to the adoption of community property as an assertion and affirmation of their heritage. After years of living under a common-law marital-property system imposed by the Anglo-Saxon minority, they turned back to the laws of their forebears.

In Texas and California, where the civil law was less influential than in Louisiana or New Mexico, the principal reason for adopting the community-property system was probably related to the rise of the women's-rights movement in the United States. The national call for the protection of married women's property rights was answered by the states' adoption of provisions in community and marital property reform. In Texas, already familiar with community property, the choice between the two was obvious. In California, where men outnumbered women by at least ten to one, the choice was also equally obvious: the community-property system gave more rights to women and was

¹²⁴In its "Report on Civil and Common Law," prepared for the first legislature, the California State Senate's Judiciary Committee reflected on the needs of the Mexican Americans. "It is also urged," the committee noted, "that something is due to the rights of the people who became a part of the American Union by the acquisition of California." In particular, the committee considered whether the Mexican Americans would be at a disadvantage under the common law. "There is no just ground for supposing," it concluded, "that their rights will not be regarded under one system as much as under the other. In Texas and Florida, both formerly Civil Law countries, the Common Law was afterwards substituted, and we are not aware that life, liberty, and property of those who were citizens at the time of such change, have not since been quite as well protected under the latter as they had before been under the former." In sum, the victorious Americans had little concern for the interests of the vanquished Mexicans. "Reports on Civil and Common Law," *California Reports* (San Francisco, 1886) i:600.

more likely to attract the strong-minded and adventurous women needed on the West Coast.

Except for New Mexico, the spread of the system after its initial adoption in Louisiana, Texas, and California did not result from its civil-law heritage or the women's-rights movement, but, rather, because of migration from California. Nevada was settled by California miners who unhesitatingly adopted the Golden State's constitution and community-property laws as their own. In them, they recognized a cultural connection to their immediate past. The influence of transplanted Californians—especially miners—was also strong in Arizona, Idaho, and Washington, where the adoption of community property was an assertion of legal affinities and cultural heritage.

APPENDIX

1. From the *Fuero Juzgo*.

Book IV Title II

The Glorious Flavius Recesvintus, King

XVI. *Concerning such property as the husband and wife together have accumulated during their marriage.*

When persons of equal rank marry one another, and, while living together, either increase or waste their property, where one is more wealthy than the other, they shall share in common the gains and losses, in proportion to the amount which each holds. If the value of their possessions is the same, neither has the right to assume superiority over the other. . . . And if it should be evident that the possessions of one exceed those of the other in value, as above states, there shall be an apportionment of it made, showing what either shall have the right to claim after the death of the other, and what either shall have a right to dispose of to his or her children, or to heirs, or in any other way that may be desired. This provision shall apply to, and be observed in, all cases relating to the estates of both husbands and wives. The distribution and possession of other property concerning which an agreement in writing has been entered into by both parties, shall be held and enjoyed by them according to the terms of that written agreement. If the husband should acquire any property either from strangers, or during public expedition, or by the donation of the king, or of a patron, or of any of his friends, his children or his heirs shall have a right to claim it, and shall have absolute power to dispose of it as they wish. The same rule shall apply to women who have received gifts from any source.

Quoted in William de Funiak, *Principles of Community Property* (Chicago, 1943).

2. From the *Nueva Recopilación*.

Book V Title IX

Law 2. Everything which husband and wife gain or purchase during union, let them both have it equally; and if it be a donation from the king and he give it both, let husband and wife have it; and if he give it to one, let that one have it.

Law 3. If the husband should gain anything by inheritance from father or from mother, or from other near relative, or by donation from lord, relative, or friend or in the army of the king . . . let him have everything he may gain for himself; and if he be in the army without pay, at the expense of himself and his wife, whatever he may gain in this manner, be it all the husband's and wife's, for even as the cost is common to both, that which they may gain shall be common to both; what above is said of the gains of the husband, let the same be as regards those of the wife.

Law 4. Although the husband may own even more than the wife, or the wife more than the husband, either in immovables or movables, let the fruits be common to both equally; and the immovables and other property, whence come the fruits, shall be owned by the husband or the wife, who owned them before, or their heirs.

Quoted in Charles S. Lobingier, "The Marital Community: Its Origin and Diffusion," *American Bar Association Journal* 14 (1928).

3. From the *Arkansas Territorial Laws*

An Act to secure the property of Females

Sec. 1. Be it enacted by the General Assembly of the Territory of Arkansas, That from and after the passage of this act, the property, both real and personal, possessed by any woman, or to which she may in any manner be entitled at the time of her marriage, or which may be decreed or willed to or be given to her, before or after her marriage, shall not be subject to the payments of the debts or damages, contracted or incurred by the husband at any time before marriage.

John Wilson, Speaker of the House of Representatives

Charles Caldwell, President of the Legislative Council

Approved: November 2, 1835.

Wm. S. Fulton

Act of November 2, 1835, *Arkansas Territorial Laws* 34-35 (1835)

4. From the *Mississippi Laws*

An Act for the protection and preservation of the rights of Married Women

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That any married woman may become seized or

possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property: *Provided*, the same does not come from her husband after coverture.

SEC. 2. *And be it further enacted*, That hereafter when any woman possessed of a property in slaves, shall marry, her property in such slaves and their natural increase shall continue to be hers, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of her husband.

SEC. 3. *And be it further enacted*, That when any woman during coverture, shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall enure and belong to the wife, in like manner as it is above provided as to slaves which she may possess at the time of her marriage.

SEC. 4. *And be it further enacted*, That the control and management of all such slaves, the direction of their labor, and the receipt of the productions thereof, shall remain to the husband, agreeably to the laws heretofore in force. All suits to recover the property or possession of such slaves, shall be prosecuted or defended, as the case may be, in the joint names of the husband and wife. In case of the death of the wife, such slaves descend and go to the children of her and her said husband, jointly begotten, and in case there shall be no child born to the wife during her coverture, then such slaves shall descend and go to the husband and to his heirs.

SEC. 5. *And be it further enacted*, That the slaves owned by a feme covert under the provisions of this act, may be sold by the joint deed of husband and wife, executed, proved, and recorded agreeably to the laws now in force in regard to the conveyance of real estate of feme coverts, and not otherwise.

(see MS p. 34) Act of Feb. 15, 1839, ch. 46, *Mississippi Laws* 72 (1839)

5. From the *Maine Acts*

An Act to Secure to Married Women their Rights in Property

Section I. Any married woman may become seized or possessed of any property, real or personal, by direct bequest, gift, purchase or distribution, in her own name, and as of her own property; provided, it shall be made to appear by such married woman, in any issue touching the validity of her title, that the same does not in any way come from the husband after coverture.

Act of March 11, 1844, ch. 117, *Maine Acts* 104 (1844)

LEGAL HISTORY IN SOUTHERN CALIFORNIA

A Review Essay

BY DOYCE B. NUNIS, JR.

California Legal History Manuscripts in the Huntington Library: *A Guide*, by the Committee on History of Law in California of The State Bar of California. San Marino: Henry E. Huntington Library and Art Gallery, 1989, 233 pp., \$35.00, cloth.

The research and writing of legal history in southern California will be immeasurably enhanced by the publication of this *Guide* to the Huntington Library's manuscripts that relate to legal history. The State Bar of California is to be commended for sponsoring such a worthwhile project, and the financial contributors to the enterprise—individual lawyers, law firms, and foundations—are to be applauded. Most of all, Professor Gordon M. Bakken, of California State University in Fullerton, deserves high praise for the meticulous effort he put into preparing the *Guide* for publication, acting with the advice and assistance of the bar's Committee on Law in California and its several able chairpersons. Five years have been required to realize the finished product.

The *Guide* is superbly organized. Following established archival guidelines and Huntington's manuscript policy, the compiler has divided the book into two main sections: a subject-access guide and a description of the collections used. In both sections, several introductory short chapters detail usage and explain subject and subdivision headings, as well as descriptive headings. This may sound complicated, but the organization precludes any confusion on the part of the researcher. All the manuscripts are categorized under twenty-five major subject headings, well established in legal language. The headings are broken into 103 subdivisions, which in turn are supported by

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twenty-three subject headings. These, listed at the front, are followed by a careful description of each major subject heading.

Within this framework, the Subject Access Guide is the heart of the book, encompassing 142 printed pages. It is delineated in columns, with the subject and/or subdivision headings alphabetically arranged; the name of the collection; the box number in which the item in question can be found; the dated year of the document; and the name on the folder tab containing the item (in most instances, that of the person or concern writing or preparing the document). Within each major subject or subdivision heading, the collections are also alphabetically arranged.

The second section of the *Guide*, Collection Descriptions, presents, in alphabetical order, the Huntington Library collections used to compile the first section of the book. A précis of each collection's contents is given, with the inclusive dates and number of manuscript pieces, followed by subject headings appropriate to that collection. These headings indicate the subjects under which each item has been calendared in the Subject Access Guide. An added help to the researcher is the compiler's rating of the collection as to its usefulness, from "marginally significant" to "significant." Also helpful are the brief biographical and historical data provided.

It is obvious that the immediate purpose of the *Guide* is to stimulate research and writing in the field of southern California's legal history—a welcome impetus, for lacunae remain. Those attracted to legal history will find the book highly useful in exploring the rich holdings of the Huntington Library.

To aid the novice or junior researcher, a good beginning for an overview of legal history in California, including the southland, is a recent article by Christian G. Fritz and Gordon M. Bakken, "California Legal History: A Bibliographical Essay."¹ Several other basic reference works are also helpful. The second edition of *California Local History* and its supplement are both a bibliography and a union list, indicating the location of the items listed in various libraries. The two volumes are well indexed, making them most accessible.² For the southland there are two useful bibliographical tools, *Los Angeles and Its Environs in the Twentieth Century: A Bibliography of a Metropolis*,³ and *San Diego*,

¹ Christian G. Fritz and Gordon M. Bakken, "California Legal History: A Bibliographical Essay," *Southern California Quarterly* 70 (1988) 203-34 [hereafter cited as SCQ].

² Margaret M. Rocq, ed., *California Local History* (Stanford, 1970), and *Supplement* (Stanford, 1976). The two volumes carry the bibliography up to, and including, 1969.

³ Doyce B. Nunis, Jr., ed., *Los Angeles and Its Environs in the Twentieth Century: A Bibliography of a Metropolis* (Los Angeles, 1973). From 1900 to 1970, inclusive, with a good subject index.

*California: A Bicentennial Bibliography, 1769-1969.*⁴ Legal records for the latter city have been calendared in *A Guide to the San Diego Historical Society Public Records Collection*.⁵

One of the best aids, though dated, is a mimeographed manuscript by the late Professor Laurence A. Harper, the distinguished legal historian at the University of California, Berkeley, entitled "Guide to Materials for California Legal History." Unfortunately, the manuscript is no doubt scarce and few reference collections probably have it.⁶

In the main, the southland's legal history has been rather poorly served. Although the recollections of a handful of distinguished lawyers (notably those of Jackson A. Graves⁷) and composite histories of the bar and bar associations have been published,⁸ there are relatively few biographies of lawyers set in a socioeconomic and community context. For Los Angeles, Leconte Davis and Joseph A. Scott come quickly to mind. Of the major law firms in the city, other than that of O'Melveny and Myers, the histories remain largely unwritten.⁹

Nor is the judiciary well served. On that subject, attention tends to be restricted to state supreme court justices, with the exception of studies of controversial or pioneer judges, such as David S. Terry, the brothers Gardner and Walter Colton, Benjamin Hayes, and Oliver S. Witherby.¹⁰ As for the federal bench in southern California, a void exists in monographic literature, with only an occasional article surfacing here and there. In sum, the judicial system and the judiciary, both state and federal, have been badly neglected as a field for research in legal history.¹¹

⁴Ronald Louis Silveria de Braganza, ed., *San Diego, California: A Bicentennial Bibliography, 1769-1969* (San Diego, 1969). Lacks an index.

⁵Richard W. Crawford, comp., *A Guide to the San Diego Historical Society Public Records Collection* (San Diego, 1987). Has a good index.

⁶Professor Harper presented me with a copy of his manuscript, which has 171 pp.

⁷Jackson A. Graves, *My Seventy Years in California* (Los Angeles, 1929).

⁸W. W. Robinson, *Lawyers of Los Angeles* (Los Angeles, 1951), a history of the local bar association.

⁹William Clary, *History of the Law Firm of O'Melveny and Myers*, 2 vols. (Los Angeles, 1966).

¹⁰A. Russell Buchanan, *Davis S. Terry of California, Dueling Judge* (San Marino, 1956); Kenneth M. Johnson, "The Judges Colton," *SCQ* 57 (1975) 349-60; Marjorie Wolcott, ed., *Pioneer Notes: From the Diaries of Benjamin Hayes, 1849-1875* (Los Angeles, 1929), a subject surely deserving of a biography; and William Uberti, "Oliver S. Witherby: First District Court Judge of San Diego," *Journal of San Diego History* 23 (1987) 221-35.

¹¹The Ninth Judicial Circuit Historical Society has established several substantial programs during the past three years, notably founding a new journal, *Western Legal History*, and inaugurating oral history, research, and exhibits—all aimed at developing the legal history of southern California and the entire West.



Los Angeles lawyer Jackson A. Graves, photograph from the Pierce Collection (8565). (Huntington Library)

A subject that has great appeal is a study of famous legal cases. Dawson's Book Shop pointed the way to this fascinating field with its ten-volume series, *Famous California Trials*, published in Los Angeles from 1961 to 1975. Two cases from southern California were included: "*The People v. Lugo*" and "*Bombs and Bribery*" (the *Los Angeles Times* bombing case), by W. W. Robinson. Other notorious cases await the eager and interested researcher. They include the vigilante activity in relation to the murder of Sheriff James Barton; the Brenda Allen affair; Hollywood cases concerning parents, divorce, and foul play; and business scandals of the pre- and post-depression era.

If one recognizes and accepts the fact that southern California has been shaped by its physical environment, a host of matters involving legal history becomes apparent. Land remains a pervasive issue in the legal annals of the southland to this day. One has

Thomas S. Chapman, of the County of San Francisco,
 do hereby certify that the following is a true and correct
 copy of the original of the same as the same is on file in the
 office of the County Clerk of said County of San Francisco.
 To Bezeer Simmons, Atlas Hutchinson, John F. Hays, and Wm. H. Howell.
 This indenture made and concluded
 the first day of January in the year of our
 Lord one thousand eight hundred and forty nine between
 Thomas S. Chapman, and Thomas A. Warbass, of Sacramento City, of the
 first part and Bezer Simmons, Atlas Hutchinson, John F. Hays,
 and William H. Howell, all of San Francisco of the county
 of California of the second part Witnesseth that the said
 Thomas S. Chapman, and Thomas A. Warbass, for and in consid-
 eration of the sum of five thousand dollars (\$5,000), in hand paid
 by the said Simmons, Hutchinson, Hays and Howell, at a before
 the signing and delivery of these presents, the receipt whereof
 is hereby acknowledged has granted, bargained, sold, aliened, conveyed
 and confirmed unto the said Bezer Simmons, Atlas Hutchinson, John
 F. Hays and William H. Howell, the undivided one third
 part or part of land situate in Upper California and
 bounded as follows: to wit bounded on the North West by the
 old grant of Edward A. Everett, on the North East by land
 of James A. Murphy, on the South East by lands claimed by
 John Thomas, on the South West the Sacramento River making
 consisting of four square leagues, the said land is known by
 the name of Stone Lake (dry plain) Granted to Sebastian
 Keiser the original grantee of the Mexican Government which
 said that a parcel of land claimed by said Chapman, and
 Warbass, from John Bidwell, and also from said Bidwell as
 administrator of Henry A. Howell, by land bearing date the (25th)
 twenty fifth day of October A.D. One thousand eight hundred

Deed to portion of Rancho Llano Seco, Thomas S. Chapman and
 Thomas A. Warbass to Bezer Simmons and others, from the Halleck,
 Peachy & Billings Collection (HM 43004). (Huntington Library)

only to read the local newspapers to find discussion of real-estate developments, no-growth sentiment, polluted sites, management of hazardous waste and garbage, and zoning and planning regulations, to mention only the most obvious.¹² Land issues have dominated life in the southland since California's acquisition by the United States at the end of the Mexican War. The Treaty of Guadalupe Hidalgo was the starting point of land problems, inasmuch as the treaty required the federal government to respect the property rights of Mexican citizens—both those who chose to become U.S. citizens and those who did not. However, the wording was vague at best.¹³ Regrettably for those who held Mexican land grants in California, the U.S. Senate dealt them a serious blow by striking from the original draft treaty, as submitted for ratification, Article X, which "specifically validated legitimate Mexican grants of land." By that action, "the subject was now surrendered to controversy, and did indeed provide a fruitful source of future litigation."¹⁴

The result was the enactment of the U.S. Land Act of 1851, which in turn led to numerous lawsuits on the part of Mexican land-grant claimants. During the five-year existence of the land commission, 813 claims were presented. The commission confirmed 521, rejected 273, and discontinued 19. Since appeal was permitted for both the claimant and the federal government, 132 claimants appealed their verdicts and won 98 reversals. The federal government, on the other hand, appealed 417 decisions but won only 5 reversals. In the end, 92 cases went before the U.S. Supreme Court, which upheld the majority of the commission's initial decisions. The main problem was that each claimant had to defend the title six times—a costly affair, to say the least. On average, the legal process took sixteen or seventeen years for the claimant(s) to receive a patent. Eventually 602 claims for nine million acres were confirmed, while 209 claims for a total of four million acres were rejected. In the meantime, legal fees and the burden of taxation forced many claimants to mortgage, sell, or forfeit their holdings in part or in whole.¹⁵ Even a cursory glance

¹² For the legal-historical implications in a variety of land-related issues, see Richard Fitzgerald, "Land Use in Southern California: The Matter of Sears, Roebuck and Co. and the City of Riverside," *SCQ* 52 (1970) 383-422.

¹³ George P. Hammond, ed., *The Treaty of Guadalupe Hidalgo, February Second 1848* (Berkeley, 1949) 35-37.

¹⁴ *Ibid.* at 17.

¹⁵ William H. Ellison, *A Self-Governing Dominion: California, 1849-1860* (Berkeley and Los Angeles, 1950) 102-136; W. W. Robinson, *Land in California* (Berkeley and Los Angeles, 1948) 91-109. Numerous articles by the noted authority on legal aspects of landholding in California, Paul W. Gates, Professor Emeritus at Cornell University, will be published in the near future in book form by the University of Washington Press.

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Stamp First by Dollars

Provisionally authorized by the maritime
Custom House of Monterey for the years 1839
and 1840

(Signed) Alvarado.

(Signed) Antonio Maria Ortiz

Good for the years 1841 and 1842.

(Signed) Alvarado. (Signed) Antonio Maria Ortiz



Manuel Jimeno Casarín, 1st
nave of the most excellent
Departmental Junta of the
Californias, charged ad interim with
the Government of the same.

Whereas Don Enrique Somoza Fitch,
born in the United States of America
and naturalized in the Republic of Mexico,
has, for his own personal benefit and
that of his family, asked for the land
known by the name of Sotoyome,
bounded on the East by Marcos West;
on the North by the Sierra to the end
of the cañada which is at the first
west; on the South South west by
the place where a water mill was
to be constructed by Don Juan Cooper,
and on the South by the Arroyo Seco;
the proper measures and examinations
having previously been taken as
directed by the laws and regulations,
using the faculties conferred by me

English translation of expediente for Rancho Sotoyome, for California
Land Claims Case 16 (N.D. 52), Josefa Carrillo de Fitch, claimant, from
the Halleck, Peachy & Billings Collection (HM 42995). (Huntington
Library)

at the *Guide* under review here will attest to the dominant role land titles have played in southern California's history.

The same must be said of water. Because southern California is semiarid, it has always been sustained by its access to water resources. Again, confirmation is easily found in the local press, with stories of the recent resolution of long-standing legal problems over Los Angeles' access to the water of Owens Valley in Inyo County via the Los Angeles Aqueduct, and the continuing legal difficulties over tapping the waters of Mono Lake.¹⁶

Some of the water problems of greater Los Angeles date back to 1781, when the city received its pueblo rights from the king of Spain, Charles III. Under Spanish law, each pueblo received four square leagues of land and all waters tributary thereto.¹⁷ This provision has led to a series of lawsuits by local cities against Los Angeles' claims based on its pueblo rights. In a series of trials in the 1950s and 1960s, the court found in favor of the defendant cities, much to the chagrin of Los Angeles.¹⁸ After such a resounding defeat, the city turned to the state for solutions to its growing demands for water, provoking a statewide political issue that is still very much alive.¹⁹

As regards its people, the Treaty of Guadalupe Hidalgo is again a starting point for legal controversy in this aspect of the south-land's life. The status of Indians in the Mexican Cession, which included California, was ambiguous at best.²⁰ The problem lay in the fact that the Mexican constitutions of 1824 and 1828, which forbade slavery, also provided citizenship for Indians who had become members of the "*gente de razón*"—people of reason, or civilized people. Rights guaranteed to Mexican citizens should thus have applied to that class of Indians, but from the outset the treaty provision was ignored. The Indian became the target of the first official discrimination at state and local levels. Later this was followed by comparable discrimination against the Chinese and

¹⁶ *Los Angeles Times*, September 21, 24, 1989; Alfred Clark, "The San Gabriel River: A Century of Dividing the Waters," *SCQ* 52 (1976) 155-69.

¹⁷ A square league equals some 6,935 square miles, or about 4,438 acres, Robert G. Cowan, *Ranchos of California* (Fresno, 1956) 148. The original Spanish pueblo grant to Los Angeles is missing from the City Archives.

¹⁸ *Glendale News-Press*, October 28, 1967, 1, 3; *Glendale Independent*, October 28, 1967, 1, October 29, 1967, 1; *San Fernando Valley Times*, October 30, 1967, 1. A similar case, rooted in the Treaty of Guadalupe Hidalgo and Spanish-Mexican land law, is the continuing fight over land use at Ballona Lagoon at Marina del Rey, between the city of Los Angeles and the Summa Corporation, *Los Angeles Times*, January 9, 1984, 1, 10. See also Alfred Clark, "The San Gabriel River: A Century of Dividing the Waters," *SCQ* 52 (1970) 155-69.

¹⁹ Harvey P. Grody, "From North to South: The Feather River Project and Other Legislative Water Struggles in the 1950s," *SCQ* 60 (1978) 287-326.

²⁰ Hammond, *Treaty of Guadalupe Hidalgo*, 35-39.

then the Japanese.²¹ Although considerable literature exists on the latter, there is less on the former from the point of view of legal history.²²

In recent decades, studies of discrimination in law against other minority groups—blacks, Latinos, and women, for example—have received more attention, although the legal dimension suffers in favor of cultural, economic, and social expositions.²³

THE EFFECTS OF TECHNOLOGY

The attempt to master nature's environmental limitations has contributed greatly to the development not only of Los Angeles, but of all of southern California. An obvious example of this was the construction of the Los Angeles Aqueduct, completed in 1913, which brought a ready supply of water to this semiarid land. That early effort was reinforced by the completion of the Colorado River Project, the Hoover Dam, and the resultant Southern California Metropolitan Water District. The area also benefited immensely from the California Canal. While these examples illustrate technology's role in the region's history, it must be recognized that technological achievements have legal dimensions as well as economic and social impacts. Those dimensions have been largely overlooked, including the legal implications of the age of the automobile, which have been either ignored or capsulated.²⁴

Yet the automobile is without question one of the most decisive influences on southern California. The combustion engine, vulcanized rubber, and assembly-line production made a rich man's toy available to all. This led to the construction of federal and state highway systems and unprecedented road building, especially in the southland.²⁵ It was Los Angeles that

²¹ Ferdinand E. Fernandez, "Except a California Indian: A Study in Legal Discrimination," *SCQ* 50 (1968) 161-76.

²² Donald T. Hata, Jr., and Nadine I. Hata, "California Asians," in Doyce B. Nunis, Jr., and Gloria R. Lothrop, eds., *A Guide to the History of California* (Westport, 1989) 99-110.

²³ Francisco E. Balderrama, "California Chicanos," Lawrence B. deGraff, "California Blacks," and Lothrop, "California Women," in *Guide to the History of California*, 75-98, 111-28.

²⁴ Two current studies are Scott L. Bottles, *Los Angeles and the Automobile, The Making of the Modern City* (Berkeley and Los Angeles, 1987) and Ashleigh Brilliant, *The Great Car Craze: How Southern California Collided with the Automobile in the 1920s* (Santa Barbara, 1989). For some of the legal ramifications of the automobile's use, see Marvin Bienes, "Smog Comes to Los Angeles," *SCQ* 58 (1976) 515-32.

²⁵ H. Marshall Goodwin, Jr., "Right-of-Way Controversies in Recent California Highway-Freeway Construction," *SCQ* 56 (1976) 61-105.

March 18, 1890.

Messrs. Jarboe, Harrison & Goodfellow,

Gentlemen:

Your favor of the 17th, (also abstract of title, by Express), received this morning. We have ordered a continuation of the abstract, and will prepare the papers immediately on receipt thereof. On March 8, 1888, the 80 acre tract included in the mortgage was sold to the State of California for taxes for the sum of \$238.84. No redemption has been made. Shall we redeem in the name of the Anglo Nevada Insurance Co., and include amount in the complaint? On this point, please wire reply. Mr. I.W. Hellman, of this City, who goes to San Francisco to-day to assume charge of the Nevada Bank (and to whose kind influence we are indebted for favorable mention to the Nevada Insurance Co.) differs with us as to the value of the mortgaged property. He does not think it is worth the mortgage debt, and his judgment is entitled to consideration, being one of the best posted men or values in our County. He strongly urges the appointment of a Receiver when the complaint is filed. He will probably consult with the plaintiff and your firm on the subject. As to the necessity of including the description of the mortgaged premises in the foreclosure summons, we refer you to People vs. Greene, 82 Cal. p. 507.

Letter from the law firm of Graves, O'Melveny & Shankland to Jarboe, Harrison & Goodfellow, from the Jackson A. Graves Collection (1890-91 Letterbook). (Huntington Library)

gave the nation a new concept when the Arroyo Seco Parkway (now the Pasadena Freeway) was completed in 1940.²⁶ Freeways became the grandparent of the present federal interstate system. Building California's roads and freeways has led to endless litigation, which has been only partially researched: much remains to be done.

As for a broader consideration of transportation as a whole, a larger legal frontier awaits exploration. Such topics as the struggle for rights-of-way, whether for electric railways, roads, or utilities, coupled with the political ramifications of the decisions that have been made, require greater study and refinement.²⁷

All these subjects await the researcher who is challenged by an interest in southern California's legal history. The *Guide* to the Huntington Library's collections that contain the materials of that history will prove a boon to all those so inclined.

²⁶H. Marshall Goodwin, Jr., "The Arroyo Seco: From Dry Gulch to Freeway," *SCQ* 47 (1965) 1-72.

²⁷Illustrative studies are Robert C. Post, "The Fair Fare Fight: An Episode in Los Angeles History," *SCQ* 52 (1970) 275-98; Loren E. Pennington, "Collis P. Huntington and Peter Studebaker: The Making of a Railroad Rebate," *SCQ* 53 (1971) 41-54; and Nelson van Valen, "A Neglected Aspect of the Owens River Aqueduct Story: The Inception of the Los Angeles Municipal Electric System," *SCQ* 59 (1977) 85-109.



Woodcut of Moses Lasky by Roy Ragle. (Moses Lasky)

MOSES LASKY: AN ORAL HISTORY

Editor's Note: Moses Lasky's oral history, of which a part appears here, was given to interviewer Thomas D. Kiley during sessions held between January 26, 1989, and February 6, 1990. Mr. Kiley, a lawyer in Hillsborough, California, is a volunteer in the Ninth Judicial Circuit Historical Society's oral-history program.

Moses Lasky has practiced law in San Francisco since 1929. From that year until 1979 he was with the law firm of Brobeck, Phleger & Harrison. In 1979 he established the firm of Lasky, Haas, Cohler & Munter. Mr. Lasky is a graduate of the University of Colorado (A.B.), the University of Colorado School of Law (J.D.), and Harvard Law School (LL.M.). Long active in professional, civic, educational, and cultural affairs, he was recently given the American Bar Foundation's 50-Year Award.

Kiley: Mr. Lasky, in an earlier interview you said that you ordinarily wouldn't take a tax case, and yet I believe it's true that in *Western Pacific Railroad Corporation*¹ you had one of the most interesting tax cases I have ever seen. Tell us about that, if you will.

Lasky: I also said, or should have said, that I'll take any case in any field of law if the client can afford to pay my tuition while I am learning what that field is about.

*Western Pacific v. Western Pacific*¹ was a case where the Western Pacific Company was the holding company and sole stockholder of the operating railroad. As a result of some reorganization ordered by the Interstate Commerce Commission, the parent company lost its ownership of the railroad, it went out of business, and its president was merely a former clerk doing a little windup. The tax attorneys for the railroad company got a very fancy idea that they could file a joint return for the railroad company and the former parent company, use the parent's loss in losing ownership of the railroad to offset the railroad's income, and thereby save \$26 million. Whereupon some attorney in New York (a railroad attorney) called upon Herman Phleger, and we took that case on a contingency basis.

It was turned over to me. I've always said it amounted to digging up the posthole and sawing it up into firewood.

¹ *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 85 F.Supp. 868 (N.D. Cal. 1949), *aff'd*, 197 F.2d 994 (9th Cir. 1951), *vacated*, 345 U.S. 247, *reh'g denied*, 206 F.2d 495 (9th Cir.), *cert. denied*, 346 U.S. 910 (1953), *reh'g denied*, 346 U.S. 940 (1954).

What I claimed was that our loss was an asset which was purloined by the railroad company, and as a matter of unjust enrichment they owed us the \$26 million that they profited from our loss. We tried that case before Louie Goodman, who was chief judge of the Northern District of California. He ended up throwing the case out on the basis that a fraud had been worked on the federal government. We argued that it wasn't our fraud, but, anyway, that was it, and we appealed.

The appeal came before a court consisting of one Ninth Circuit Court of Appeals judge and two district judges: one, Judge Byrne, from what was then the Southern District, Los Angeles, and the other before Alger Fee, who came down from the District of Oregon. We lost the case, two to one.

Later I got word from one of the judges of the Court of Appeals that the reason Judge Byrne had decided against us was, he said, that if the money went to the holding company it would end up in the hands of a lot of stock speculators in New York, but, if he kept it with the railroad company, it would go to the employees. (He had been formerly attorney for the railroad brotherhoods.) The other judge, Judge Healey, was the Court of Appeals judge, and he himself said to me, "Now look, Mose, you've just won the *Dollar Steamship* case, how many of these big cases do you want to win at the same time?" So I petitioned the United States Supreme Court for certiorari.

But first we petitioned the Court of Appeals not only for a rehearing, but for a rehearing *en banc*. It had never been done before out here that I know of, and the court not only denied it, but it struck our motion for a rehearing *en banc* on the grounds that it was presumptuous and we had no right to interfere with the way the court did business.

In my petition for certiorari . . . I preceded it by making inquiry of the clerks of all the courts of appeal to find out their practice. . . . One of my points was that courts must permit a method of seeking *en banc*. That case was argued in the United States Supreme Court. Herman Phleger argued it; I sat by his side with others. . . .

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Lasky: You asked me to comment on specialization . . . yes. Nowadays, with the growth of large firms, it appears that attorneys become more and more specialized. A man knows a whole lot about a small area. Perhaps my experience was unusual in that I had the good fortune to be thrown into an enormous variety of matters—one approached them without any hesitation. I've always gone on the assumption that you can tackle any problem and learn what the law is. From time to time people have referred to me as an antitrust specialist—it always annoys me and I deny that I am a specialist. If I'm a specialist in anything, it's in compli-

cated litigation. But I have been lucky to be on the cutting and growing edge of the law. I think that has been luck. What's come my way? Labor law: I got into that at the very beginning when the Wagner Act was first enacted; I never liked it. Antitrust law: I got into that along about 1939, one of the first. More recently, environmental law. I got into that in 1979, that's before it really became anything.

Kiley: You are a student of the common law and of the origin of legal principles. Would it be fair to say that your confidence, as you approach a complex new area of law, is in part based on the belief that you can pick up some sort of principle and cut quickly the Gordian knot and get down to the kernel of things?

Lasky: Every problem has in it a central notion of fairness and decency. You cannot approach that in the kind of superficial way that Earl Warren did; you have to see what that concept has created as a principle of law at the hands of outstanding men of previous centuries and generations. Then, as you get a new factual problem where no case is exactly in point, you have to sit back and isolate from the rules of law—to use the term that chemists would use—isolate what is the essential notion that underlies those particular principles. When a case comes to me I sit back, put my feet on the table and think for a couple of hours: "What is the essential question here?" Then from there on you aim at that question instead of rushing into court and taking depositions.

Kiley: Is it also your practice to attempt to immerse yourself in the factual setting of the industry in which your client operates?

Lasky: You have to. Unless you know . . . unless it was like that episode I mentioned of going into the carcasses.

Kiley: That's a case for Swift & Company involving the Office of Price Administration?

Lasky: Yes, but I haven't talked about that yet.

Kiley: Tell me about it.

Lasky: That was a suit brought by OPA against Swift & Company during World War II.² They'd issued a lot of regulations and required removal of heart fat (the mediastinal fat that surrounds the heart) before you sold it. They claimed Swift hadn't done it, and they were seeking penalties that ran up to about \$1 billion. I went out to Swift's South San Francisco plant, put on a rubber apron, took a knife in my hand, and got inside a couple of carcasses to find out what this was all about. You have to know . . . a

² *Swift & Co. v. Gray*, 101 F.2d 976 (9th Cir. 1939).

lawyer has to know more about the particular area of fact and industry that concerns that case than the experts in the field. You've got to learn it.

Kiley: Well, that case was during the war; we haven't started the war yet, we have to make you a partner first. That'll . . .

Lasky: Let me say one thing more . . .

Kiley: Yes, sir.

Lasky: I remember demanding discovery of the OPA, going out there and saying to the court, "The trouble with the government is, they know how to dish it out but they can't take it." I got my discovery.

Kiley: I hope when you were dishing it out you didn't approach adversarial counsel the way you approached those beef carcasses.

Lasky: No.

Kiley: Well, let's make you a partner. You became partner at Brobeck, Phleger & Harrison in 1940; that was 10 or 11 years after you joined the firm. Your name was Moses Lasky. Was it uncommon for people with names like "Moses" to become partners of San Francisco law firms at that time?

Lasky: I came to San Francisco for a number of reasons. One was the advice given by one of the professors at Harvard who had been in the O'Melveny firm (in Los Angeles) that there was less anti-Semitism and prejudice in San Francisco than anywhere else in the country. I believe that I was the first Jew that broke the ranks and ever got employed in a non-Jewish law office in San Francisco. I remember walking down the street two to three years after I started to practice law, some prominent Jewish personality dropped in step beside me and said, "You know you're admired here in the Jewish community because you still have the name 'Moses.'" Well, I didn't know anything about the Jewish community, and my remark was, "Why shouldn't I keep the name 'Moses'? It happens to be my name."

Kiley: Did partnership in the firm mean a significant increase in your compensation?

Lasky: Oh yes. I think I was getting about \$500 a month salary when I became a partner. I became a partner in the 10th or 11th year. Nowadays people become partners along about the sixth year. Yes, I think it amounted to about a double . . . I think it increased my income from about \$6,000 a year to about \$121000.

Kiley: How in the early forties were decisions taken within the firm regarding division of profits among the partners?

Lasky: I think Herman Phleger . . . what he said was the law. He decided whether a person should be a partner, and he decided what the percentage should be.

Kiley: So Herman was first among equals?

Lasky: Yes. And of course when you became a partner if you were "X" percent you had to buy your way into the firm by putting up "X" percent of the firm's worth. You had to pay for it. Nowadays people want to be members of the firm at no expense and they don't want to pay for it.

Kiley: Were you able to put that down as cash money or was it necessary to borrow?

Lasky: No. I had the cash, and I put it down. A little later the firm, when it took in new partners, allowed them to pay for it out of their current income.

Kiley: It's hard to see how the partners could resist making you a partner, given your experience, the business you were beginning to attract, your standing in the community.

Lasky: I don't know either. I do remember Mike Roche, who was chief judge of our Northern California federal district court, calling me into chambers one day and suggesting that it was time that I got out of that firm as an associate and go out on my own. I told him no, I thought a little patience was in order. I had an older brother who suggested a little patience, and it was sound. If I'd gotten out on my own at that time the opportunities and the important cases might not have come my way.

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Kiley: How do you regard the antitrust law as a body of concrete law? What is the social value of the Sherman Act as written?

Lasky: I've often been accused of being a philosopher, so let me philosophize. The concept of the Sherman Act is said to be the preservation of competition, although the act says nothing at all about it. Competition is very important. Without competition we don't really have progress, but the Sherman Act itself doesn't say that. The Sherman Act . . . I came to the conclusion years ago, and I said in some speech back in 1940, "It's an empty capsule into which each generation of judges stuffs its own predilections on what is economically wise." That's what happened during the days when Douglas, Black, and Warren were controlling the United States Supreme Court. Everything violated the antitrust laws. In the last few years, nothing violates the antitrust laws. It's a loose cannon, but it serves a very useful purpose. It's a device by which Congress has delegated to the courts the development of

policy. As a result, courts have had to perform in the guise of lawsuits what I would call "non-judicial functions." And then they turn them over to juries.

Kiley: As a general matter, have the courts done that job well or poorly?

Lasky: Not well. They built up an enormous body of law, and now they're building it down again, tearing it down brick by brick. It's all right, I suppose, if those questions get in the hands of the United States Supreme Court (not that they are any more equipped intellectually to handle them than anybody else, but they have a tremendous amount of assistance), less justifiable in the hands of the courts of appeals judges, and it works very badly in the hands of the district judges. But we live with it. You have to make sense of a lot of diverse statements. There is no consistency in the decisions.

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Kiley: [What] led to your involvement in *James v. Valtierra*?³

Lasky: [That] was a case in which a three-judge federal court had held to be unconstitutional a provision of the California constitution, which the California Association of Realtors had been responsible for successfully getting adopted as an initiative proposition, and it provided that no public-housing program could be engaged in by any community without first being put to the vote of the public. The City of San Jose had such a program, and the City of San Jose didn't want to put it to the public. I think there was a feigned case, suit was brought, and a three-judge federal court held that this provision of the California constitution violated the Equal Protection Clause of the federal constitution but somehow discriminated against the poverty-stricken.

The California Association of Realtors, which as I say had a fatherly interest in that California provision, got in touch with me and asked me if I would offer my services to the City of San Jose, which had lost that case. I called up the city attorney, he called me back the next day and said, "The city council wants to know whether you intend to win that case if you get into it." I said, "I sure do." Then he said, "They don't want you, then, because they want to lose, they want the United States Supreme Court to decide against them so that they can then float those bonds in New York City without following the California law." As I scratched my head, "How am I going to get into this case?" I had a telephone call from an attorney in San Jose whom I had beaten in an antitrust case a few years before.

³*James v. Valtierra*, 402 U.S. 137 (1971).

Kiley: What was his name?

Lasky: I forget it right now. He was an old-timer and he said he had a client who was a member of the San Jose City Council, and she wanted to get in on this side of it. I said, "But the suit was against the council." He said, "Oh, no, plaintiffs had sued each of the city council people as well as the council." So I took an appeal to the United States Supreme Court on behalf of this one council-woman. And when I got back to Washington, I took out to dinner before the argument the deputy city attorney and tried to get him loaded up to encourage him to try to win the case.

When we got out to court, since there were two appeals, each appeal was to be given one hour. The city attorney was to argue first. He got up, argued it, and it got bleaker and bleaker. He threw the case away. Archibald Cox had been brought in [on] the other side to defend the judgment, and he just made mincemeat of this guy. Then I got up. On my own case. I knew exactly what Cox was going to say because I'd heard him say it. I remember my opening sentence was, "This case involves two of the great bastions of democracy, the Equal Protection Clause and the people's right to vote. And believe it or not, the court used the one to destroy the other." Then I went on to say, "The difficulty that Mr. Cox is in is that he is not conversant with California history." Then I related the history of initiative and referendum in California and described the nature of California democracy. I won that case. Justice Black, writing the opinion, based it in part upon the nature of the republican and democratic form of government in California.

Kiley: Mr. Lasky, I've got in front of me a clipping from the June 28, 1971, edition of the *Washington Post*. The article is entitled "Impact of the Skillful Lawyer," and I think it's worth recording from that article this statement, quoting:

The oral argument on March 3 and 4 marked one of those rare occasions when a lawyer, in this case Lasky, seemed to work a change in the atmosphere of a case. The feat was especially remarkable because Lasky's formidable opponent was Archibald Cox. . . .⁴

The article goes on to note that for some unexplained reason Erwin Griswold's request to argue the case had been turned down. What was behind that?

Lasky: I can only speculate on that. Erwin Griswold was solicitor general of the United States at the time. At that time Nixon was developing some policy about housing. It may well be

⁴ *Washington Post*, June 28, 1971, A2.

that the Nixon administration wanted the solicitor general to take some position in the case. It must have, otherwise Griswold wouldn't have asked for leave to argue it; why he was turned down by the Court I don't know. He was present during the argument. I had known Griswold, of course, because we were seatmates in my graduate year at Harvard many years before. But he was present in the courtroom and he wrote me a letter after that argument.

Kiley: He called it "a considerable professional achievement" and was happy to send his congratulations.⁵ I see you've also got a letter here from another familiar name, William French Smith, who in 1971 congratulates you on the case.⁶ Of the article in the *Post*, it suggests it ought to be very satisfying because "kind words in that arena are hard to come by."

Lasky: I remember some paper, a few days after that decision came down, ran an article, some national papers, that this decision had strengthened the administration's housing policy. I don't remember much more about that.

Kiley: Mr. Lasky, *Valtierra* is one of your more recent cases before the Supreme Court. I'm reminded in looking at my notes that we neglected to talk about your first appearance before that court. That was in litigation involving the American Automobile Association.

Lasky: California Automobile.⁷

Kiley: I'm sorry, the California Automobile Association. What was the issue in that case?

Lasky: The issue in that case, which came up in the 1940s, was the constitutionality of legislation in California creating the assigned-risk plan, which provided that, if somebody was unable to get automobile insurance, the insurance commission would assign him to one of the insurers and make them insure him. The California Automobile Association, which is a cooperative of good drivers (that was the theory), to keep rates low contended that it was unconstitutional to make them accept these poor risks.

I had that case. I carried it up to the United States Supreme Court; I got up there by an appeal, not certiorari. I remember the California justice was astonished that it got up there without certiorari. I lost that case up there. I remember a few days later

⁵Erwin N. Griswold to Moses Lasky (April 27, 1971).

⁶William French Smith to Moses Lasky (July 8, 1971).

⁷*California State Automobile Ass'n v. Maloney*, 96 C.A.2d 876 (1950), *aff'd*, 341 U.S. 105 (1951).

one of the New York papers came out with an article saying that insurance companies had sustained a defeat on that one. I remember that case because I had cited a series of United States Supreme Court cases that seemed to be directly in point. Justice Douglas wrote the opinion. In the opinion he said, "The appellant has cited thus, thus, thus, and so. We put these cases to one side." And never discussed them. In some law-review article I wrote later, I said I never knew what he meant by "putting them to one side." Was it off side, outside, inside? But I speculated they were damn good cases which he would like to cite on some other occasion and rely on where they served his purpose. In this case, where he didn't like the outcome, he just put them to one side and didn't talk about them, which was a rather convenient way of disposing of inconvenient authority.

Kiley: Let me put to one side his treatment of the issues in that case and ask you whether on the occasion of your first argument before the Supreme Court you had butterflies, as lawyers are supposed to?

Lasky: Tom, even today, after 60 years of practice, I am likely to have butterflies before I stand up in any court of any rank to argue a case. But the moment I get up and utter the words, "If it please the Court . . ." those butterflies are gone and I am in perfect command of myself. At that time when I appeared there I wasn't bothered by the United States Supreme Court. I had argued a considerable number of cases in the Court of Appeals for the Ninth Circuit, California appellate courts, California Supreme Court, and this was one more court. Sure, there were nine judges, but they were all polite. I've always found the justices in the Supreme Court a polite and agreeable bunch, easy to argue before, with one exception.

I remember Abe Fortas, I thought, was a rude sort of fellow. I remember this first case also because I believe that that was the case where I was being pelted with questions up and down the rank of the judges. I had to stop at one point and say, "Your Honors, please, I'd be delighted to answer these questions, but I can only answer one at a time." The judges were interrupting each other, throwing questions at me while I was answering another justice's question. Which incidentally reminds me of one case I had up there where Chief Justice Vinson asked a question and Frankfurter butted in and said, "Oh, that's a nice question." And Vinson turned to him and snapped at him and said, "Maybe some of us like nice questions." I'll tell you, there's nothing more embarrassing for an attorney than to stand before a court when he sees two of the judges fighting with each other in front of his eyes.

Kiley: You can't choose sides, can you.

Lasky: No, you cannot choose sides!

Kiley: As a student of the Supreme Court and as one who has seen many arguments before it, have you any opinion as to the level of discourse currently, compared to the manner in which arguments were taken in years past?

Lasky: I can't comment on what it is today; it has been some years since I've been up there. My experience, what I've seen in that court, is that the quality of argumentation is generally very low. Very poor. This, I think, is attributable to the fact that it's a matter of accident what cases that court takes. It's likely to take cases that involve constitutional rights, attacks upon the constitutionality of some state law, or some city or county ordinance. In those instances the person who comes back to argue for the state, the county or the city is likely to be some junior deputy attorney general or city counsel . . .

Kiley: Chance of a lifetime . . .

Lasky: Yes. Much of it from the southern states, as you can well imagine, during all this drive for equality for the blacks. They, the attorneys, are not very good, they are not very good. I remember waiting around to get on an argument in that court at the time *Roe v. Wade* was being reargued the second time. An important case, and I thought it was argued in a very bad way.

Talking about the quality of argumentation in the Supreme Court, in one of the last, if not the last, case I had up there, *Gulf Oil v. Copp*,⁸ my opponent got up and at great length was telling the Supreme Court about *Gibbons v. Ogden*, which, as you know, is the foundation case on interstate commerce. The Court seemed so bored, because they knew all about *Gibbons v. Ogden*. When I got up to argue I simply said, "Really, the question before the court today is not whether Congress had the authority or power to enact the kind of law counsel thinks this is, the question is: Did Congress do so?" I remember Justice Powell saying, "Ah, Mr. Lasky, that's it, isn't it? It isn't a question of whether Congress had the power to do it, but did they do it?" He seemed so delighted that that had been picked out and *Gibbons v. Ogden* could be forgotten about for the moment. It was pathetic, it was like a schoolchild arguing something.

Kiley: That matter came out well for your client, didn't it?

Lasky: I won that case. The Supreme Court held that the Robinson-Patman Act did not reach that situation. I think the next year Congress amended the act so it did reach it.

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⁸*Gulf Oil Corp. v. Copp Paring Co.*, 1972 Trade Cas. [CCH] ¶ 74,013 [N.D. Cal. 1972], *rev'd*, 487 F.2d 202 (1973), *rev'd*, 419 U.S. 186 (1974).

Kiley: Others have said that your approach is more cerebral than passionate, more thoughtful than emotional.

Lasky: This is probably as erroneous as you can make it. I have also emphasized, and I have emphasized in the article I wrote years ago for C.E.B. [Continuing Education for the Bar] upon the essentials of trial advocacy, that you don't get results by convincing people. You have to persuade them. And I go back to the fundamental rules of salesmanship. You have to get your approach, you have to get your introduction, you have to then create interest, you then have to convince, obtain conviction, but if you stop with just convincing someone of a proposition, you haven't won your case. You have to persuade the trier, the judge, to want to decide your way. And you don't persuade them by just being coldly logical. You persuade them in other manners. After you've persuaded them, then you have to give them a logical structure with which to work, in order to make the law sensible instead of the aberrances of an eastern monarch, a Haroun al-Rashid. Now, how do you make a person want to decide your way? You don't have to do it by blatant emotionalism. You have to do it much more subtly. You have to appeal to the emotions while at the same time appearing to be appealing solely to logic. So when people say that I have no passion, more thoughtful than emotional, they have missed the whole essence of Moses Lasky and the art of litigation.

Kiley: Well, with that on the record I doubt they'll ever make that mistake again. So much for passion. What about compassion?

Lasky: Yes, there's room for compassion. And I have often thought that if I were a judge I would hate to have to try criminal cases when I would have to punish someone. Even sending them to jail. That's where compassion comes in. But the compassion is the job, again, for the legislature, and for those who carry out the judgments of the court. The legislature possesses the purse and the executive possesses the sword, and the judiciary, as Hamilton said, possesses judgment. That's its job, to apply judgment. To take the materials, the rules given to us and to apply them. You may have compassion, but you shouldn't allow compassion to interfere with what your judgment tells you the law requires. If the legislature wants some compassion, it can do it by its rules of who is liable, and to what extent he's liable, and to what extent there should be punishment.

Kiley: I suppose it's also hard when you are a trial attorney: you represent the interests of *one* party to a controversy, and I suppose you can bring very little compassion for the situation of your adversary to those matters.

Lasky: Yes, I have been accused of lacking compassion. I think

that's untrue. I think that, taken as a principle applied across the board, perhaps I don't have it; personally, I have a great deal of it; I have difficulty firing people.

A more general reaction to these criticisms, or—perhaps not criticisms—descriptions of me as come through the minds and mouths of others, is that they are superficial. Now, you had another one here.

Kiley: Well, I've heard it said that you believe in teaching by example and imagine that tuition is a byproduct of getting the job done. Any comment on that?

Lasky: You mean this business about hands-on teaching by example?

Kiley: Yes.

Lasky: Well, sure, I have some comment on that. One of the beauties of a small office, or smaller office such as mine, as compared to the large offices, is that we do teach by working together. I'm not going to turn over a case to some inexperienced person and let him do it if I look at it and find it's done wrong. I can't sacrifice the client's interests in order to educate. On the other hand, you don't educate just by lecturing to somebody. You have to—if something's wrong with someone else's work, if it doesn't carry the punch, it doesn't carry the persuasiveness—just tell them it doesn't, and tell them how we could correct it, doesn't work. I prefer to take the time out and sit down and say, "Why don't you say it this way?" Yes, I can recall way back, when I was at Brobeck, one of the partners' coming to me with a petition for certiorari to the United States Supreme Court. He said, "I want your comment," but he said, "I don't want you to rewrite any of it." And my answer was, "Well, if you don't want me to rewrite any of it I don't know what good I can do you." I can tell you that this, that or the other doesn't carry any persuasiveness to me but you're not going to understand what I have in mind, so that if I take the time out, as I do, to rewrite somebody's stuff for them and show it to them, he's learned. And I've always said, too, when people bring me a draft brief and I rewrite it, I've always said to them, "Now, if you want to sit down with me and ask me why I made these changes this way, let's take some time and discuss it."

Kiley: How long had you been an associate at Brobeck when you gave the partner instruction in these matters?

Lasky: No, I was a senior partner at that time.

Kiley: All right.

Lasky: [Chuckles.]

Kiley: Mr. Lasky, I have heard you say that the best lawyer brings to the practice of his profession the qualities of a salesman, a prizefighter, a philosopher, and priest. Now how can we approach this interesting concatenation of occupations? Would you like to take them one at a time? Or all together?

Lasky: No, I can respond to that. I've actually said this on a number of occasions when I've given addresses to law students or young lawyers. And I haven't quite phrased it this way. I have said this is a tremendous and great profession. I've said, "What other occupation gives a person the opportunity at one and the same time to be four different kinds of people—a scholar or philosopher, a salesman, a prizefighter, and a priest?" I said there is no other occupation that allows you to do that. And, now, most people understand at once what you mean by scholar. And it enables one to be an intellectual. Phi Beta Kappas are very frequent among great attorneys. I don't mean that you can't be a good attorney without being a scholar. There've been—maybe not a good attorney—a lot of successful attorneys; I say that if you love the work of the mind, this is an occupation that enables you to satisfy it and you're a better lawyer because of it.

What other occupation allows you to be a salesman while you are being an intellectual? I can't think of one. Everybody understands what being a salesman in the law is. If you're a trial or litigating attorney, you have to sell, because, as I said a few moments ago, it isn't enough to convince—you have to persuade. That's salesmanship.

Kiley: So philosophy has to do with convincing, salesmanship with persuading.

Lasky: Yes, but the philosophy also produces the materials to sell. You reach down by philosophy and think. What are the great needs of society? What would appeal to people?

Now you come to the next one, prizefighter. I don't think people have much difficulty with prizefighter—certainly for a trial lawyer. And it doesn't mean that you're just hard-boiled and tough, and playing hardball. It doesn't mean that at all. It means that you have to be fast on the balls of your feet. When you are trying a case you can never show any sign of having taken a blow that's hurtful. You have to be able to make a fast decision and respond immediately. You have to be able to move on the balls of your feet and never be out of position. You have to deliver hard blows, but they have to be fair blows. I can recall being introduced as a speaker at a Ninth Circuit judicial conference by Irving Hill, who was a judge of the federal court in Los Angeles, later chief judge, who introduced me as a tough but honorable adversary. It's one of these things that sticks in my mind because I felt flattered by it. Flattered by being called a tough adversary, but equally

flattered by being called an honorable one. You have to be a prizefighter, deliver hard blows, but fair blows.

That leaves the quality of a priest. And this is the one that often has baffled students and others that I've talked to. What on earth do I mean by priest? Perhaps I'm being fatuous when I say what it means is, one practices law not primarily to make money but because he believes that by practicing law he can do something useful for humanity. So that a moment before he dies he can say, "Because I have lived the world is better off"—maybe just a tiny little fraction, but at least some. Stating it otherwise, the law is a profession and not a business. And I've had young people say to me, "Oh, it's all right for you to say that, you've made it already. You can talk that way." But my answer to that has been, well, if you have the other qualifications of the lawyer and you apply this one too, you will find that making money will come in abundance, but it'll come as a byproduct. All I've said—I haven't said that you can't be a successful attorney from the standpoint of winning cases or making money without these four qualifications. I have said this is what makes the law a great and noble profession.

Kiley: Well, certainly members of that profession hold you in high regard. I understand the American Bar Association is about to honor you.

Lasky: The American Bar Foundation, which I think is one of the deluxe arms, if not the deluxe arm, of the American Bar Association, is giving me the so-called Fifty-Year Award, which is an award given to that attorney—it's an annual award—in the United States who had practiced law for at least 50 years and best exemplifies the highest traditions of the profession. That is being granted to me, and I suppose I can accept that as signifying that perhaps indeed I have lived up to these qualifications of scholar, salesman, prizefighter, and priest that I have been talking about. I hope so.

Kiley: I'm disappointed that they didn't award it to you when you first qualified for it 10 years ago or more, but perhaps they saved the best wine till last.

Lasky: Well, let me say that, so as I don't politick for anything, I never paid any attention to it, never sought it. It came unexpectedly.

NEVADA'S TEMPLES OF JUSTICE

BY RONALD M. JAMES

A king without a kingdom, a general without an army, a county without a Court House—What are they?" wrote Myron Angel in his *History of Nevada* of 1881.¹ Typically monumental examples of architecture, courthouses symbolize civilization, stability, and justice, and tell us a great deal about ourselves and our attitudes. Because they are usually well constructed, they frequently survive other types of buildings and come to represent a part of our heritage.

Nineteenth-century settlers of Nevada's western Great Basin came a long way to a strange land, seeking to establish a new society and bringing with them a sense of law and of the fitness of things. With this cultural blueprint, they formed communities that strove to attain a level of sophistication to match those they had left. An integral part of the process was the erection of civic monuments. Few of the settlers wanted to live in a "county without a Court House," and, to attain a minimum level of respectability, most counties moved quickly to build their own such structures.

Besides wishing to establish a permanent community, the settlers no doubt considered an appearance of permanence also important. The builders of Nevada's county courthouses were inspired to some extent by their concept of civilization. Among the criteria for civilization, as defined by concepts prevalent in the western world, the anthropologist V. Gordon Childe has listed "monumental public works."² Though his criteria have been

Ronald M. James is state historic preservation officer in Nevada.

¹ Myron F. Angel, *History of Nevada with Illustrations and Biographical Sketches of its Prominent Men and Pioneers* (Oakland, 1881; reprint, Berkeley, 1958) 497.

² V. Gordon Childe, *The Dawn of European Civilization* (New York, 6th ed., 1957), and *New Light on the Most Ancient East* (London, 1952); Robert McCormick Adams, *The Evolution of Urban Society: Early Mesopotamia and Prehistoric Mexico* (Chicago, 1966) 10 [hereafter cited as Adams, *The Evolution of Urban Society*].

criticized, they are the ones by which we tend to assess ourselves.³ To Nevadans, the courthouse was a public monument that symbolized permanence and enshrined the ideals of justice, law, and democracy.

Childe also listed among his criteria for civilization "the substitution of a politically organized society based on territorial principles, the state, for one based on kin ties."⁴ The courthouse, embodying the state, declares that the land will not be lawless and furnishes the setting for formal government and courts.

For the past four years, the Nevada Division of Historic Preservation and Archeology has made great efforts to evaluate courthouse construction in the western Great Basin. Part of the state's celebration of the bicentennial of the Constitution, the project funded a comprehensive survey of courthouses as well as an exhibition, which opened at the Nevada Historical Society and which continues to travel to local museums and libraries.

The survey was made easy in part because Nevada has built only thirty-four county courthouses during its 125-year history. This made a comprehensive examination of the structures simple, at least compared with states that have many more. Texas, for example, has 254 counties, and a recent estimate suggests that it has had about a thousand courthouses.⁵

Nevada's county courthouses mirror the cycles of boom and bust that are a hallmark of the state's economic past. Their architectural designs preserve diverse styles, expressed in ways that reflect the cultural preferences and economic climate of the day. Analysis of the buildings is simplified by the fact that the dates of their construction conveniently fall into four distinct groups.

The first period coincides with the years of Nevada's territory and statehood, 1861–1865. This was immediately followed by two decades of extravagant courthouse construction during one of the most important mining eras in the region. There was then a hiatus from 1883 to 1903, during which no significant state or local courthouses were built. After the turn of the century,

³John J. Honigman, *The Development of Anthropological Ideas* (Homewood, Ill., 1976) 275ff.

⁴Adams, *The Evolution of Urban Society*, supra note 2 at 10ff.

⁵Willard B. Robinson, *The People's Architecture: Texas Courthouse, jails, and Municipal Buildings* (Austin, 1983) x. See also John J. Dreyfuss, ed., *A History of Arizona's Counties and Courthouses* (Tucson, 1972); June Rayfield Welch and J. Larry Nance, *The Texas Courthouse* (Dallas, 1971); Charles Brady, *County Courthouses of Oklahoma*, Tim Zwink and Gordon Moore, eds. (Oklahoma City, 1985); "County Courthouses of New Mexico," *Preservation New Mexico* 3 (Fall 1986); Bill Gurney, *Mississippi Courthouses* (Mississippi, 1987); Calvin Trillin, "Temples of Democracy: The County Courthouse," *American Heritage* 28 (1977).

another mining boom fueled the economy and supported the erection of many substantial neoclassical monuments to justice until 1922. The state then settled into a period of more than three decades when few courthouses were built. The modern period, which began in the late 1950s, is typified by contemporary architectural styles and modest building programs keyed to efficiency and necessity. A few examples of the courthouses from these four periods will suffice to illustrate the range and the transitions in architecture and symbolism that have occurred in Nevada.

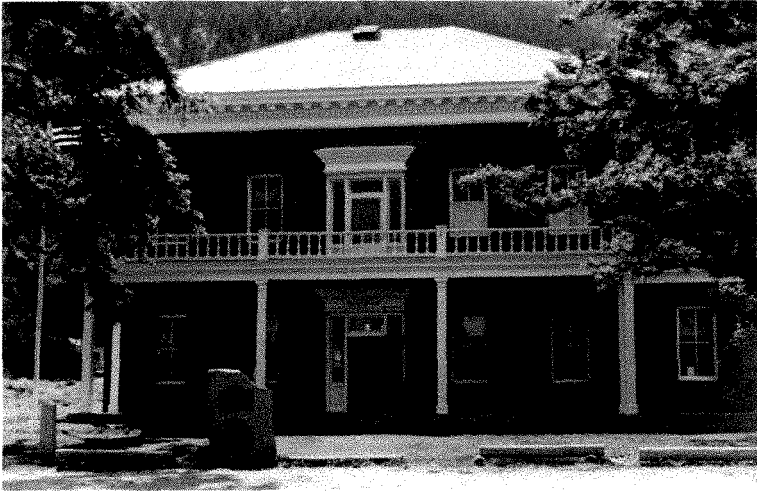
IMMEDIACY DICTATES SIMPLICITY

Between 1861 and 1865, the most urgent goal of the young counties was to provide shelter for local courts and government, and most of the earliest courthouses were rented or purchased. Douglas, Washoe, and Lyon counties bought or leased facilities that soon proved unsatisfactory. Other counties, including as Storey and Ormsby, continued to use purchased buildings as courthouses for several years, Ormsby (home of the state capitol) doing so for nearly sixty years.

Eventually four counties constructed new buildings, but they offered only essential accommodations. Nevada's first courthouse was erected by the Lander County commissioners, who evidently could not find a suitable structure in Jacobsville (Jacobs' Springs) that would serve the purpose. On April 29, 1863, they hired J. A. McDonald, for \$8,440, to build a simple wooden courthouse with a porch. The single story measured twenty by forty feet. It was clad in one-inch clapboard and rose to a plain box-cornice and a shingled roof. Windows on the side elevations provided natural light for the courtroom. Inside, a banister separated the proceedings from the audience, and the judge's bench was raised by an eighteen-inch platform from which to dispense justice.⁶ A few months after the building was finished, the seat of government was moved to Austin. Lander County commissioners paid McDonald to move the structure and to add a stone basement at its new location.

McDonald was almost certainly not a trained architect but a local builder, familiar with the techniques necessary to erect a stable structure. The commission's request for bids was specific about the dimensions and the nature of the courthouse, but McDonald gave it its final form, providing the details and tech-

⁶ *Territorial Enterprise*, April 3, 1863. This bid request provides the best extant description of the building. There is, however, the possibility that the structure took a different form in the course of construction. See also the *Eureka Daily Sentinel*, September 13, 1871.



The former Douglas County Courthouse in Genoa, Nevada, was built in 1865 and is the oldest courthouse still standing in Nevada. Now used as a museum, it has undergone considerable modifications, including a comprehensive rehabilitation after a fire in 1910. (Ronald M. James)

niques that translate written specifications into a three-dimensional building. He probably relied on intuition and experience to guide him; at most he may have had access to a pattern book. Common handbooks of the period, these texts illustrated several different building styles and provided various basic plans. In the same way the settlers in the area based their attempts at government and justice on a fundamental concept of those institutions, McDonald drew on a common cultural heritage rather than on academic training and publications. His vernacular courthouse was probably analogous to the squatters' governments of the 1850s: crude, simple, and undisciplined as to form, but still drawing on the strength of tradition.⁷

Lander was not the only county to build a courthouse in the early 1860s. The others drew on similar vernacular traditions for inspiration. The county courthouses of Washoe City (Washoe County), Dayton (Lyon County), and Genoa (Douglas County) were all relatively simple, but, unlike the one in Lander County, were all made of brick. Masonry promised greater durability and offered a more permanent symbol, and could not be easily moved to a new county seat. Only the Genoa Courthouse, however, survives from the period.

⁷On the history of architecture, see Martin S. Briggs, *The Architect in History* (Oxford, 1927) and Spiro Kostof, ed., *The Architect—Chapters in the History of the Profession* (New York, 1977).



The interior of the Eureka County Courthouse (completed in 1880) is one of the best preserved in the state. (Ronald M. James)

ELEGANCE REFLECTS A GROWING PROSPERITY

Between 1869 and 1883, many Nevada counties built courthouses that were elegant and more formal than their predecessors, in keeping with a period when Nevadans were trying to follow national trends. Providing shelter for local government was no longer the pressing problem. Nevada's counties were demonstrating their prosperity.

From the brick, Greek-revival structure in Austin to the more elaborate Italianate buildings in Eureka, Pioche, Reno, and Winnemucca, many of these courthouses survive as reminders of the state's judicial and governmental heritage. None of them, however, was built on a scale or at the cost of the Storey County Courthouse in Virginia City. This high-Victorian Italianate building became the measure for every other courthouse in Nevada. (When the Eureka County Courthouse was completed in 1880, the local newspaper boasted that "there is but one finer building of the kind in the State, that of Storey County."⁸)

The construction of the courthouse in Virginia City came surprisingly late for the state's premier nineteenth-century municipality. For more than a decade, booming Storey County

⁸ *Eureka Daily Sentinel*, May 29, 1880.



The Storey County Courthouse in Virginia City, Nevada, was completed in 1877. The elaborate Italianate building cost more than any other nineteenth-century courthouse in Nevada. This photograph dates from before the turn of the century. (Nevada Historical Society)

had housed its courts and offices in an adapted hall originally owned by the Odd Fellows, a fraternal organization. However, when a great fire on October 26, 1875, destroyed much of Virginia City, including the original courthouse, the county commission faced the necessity of new construction. The need was probably greater than may have been immediately apparent. Failure to replace the courthouse with a substantial structure might have suggested to investors that the Comstock bonanza was drawing



The statue of Justice on the Storey County Courthouse is the only one to stand on the exterior of a courthouse in Nevada. It is also distinctive for being one of the few in the nation without a blindfold. (Ronald M. James)

to a close. By building a sturdy courthouse of grand design, the county commissioners made a clear declaration to the contrary. The urgency of the situation is underscored by their swift action, for they secured plans and detailed specifications for the new building from Kenitzer and Raun of San Francisco in less than two months.

The plans included three designs upon which contractors based their bids. Although the "stone front" was cheapest, the commis-

sioners selected that of "brick and iron." The third choice, a "brick and iron Gothic front," would have cost about the same. Their selection featured the latest in iron decorations and promised to enhance the reputation of the Comstock as a place of tremendous wealth. The *Territorial Enterprise* of June 25, 1876, said that it would, "when completed, form one of the finest structures of the kind anywhere on the Pacific Coast."

The commissioners hired Peter Burke, a local contractor, for the construction. Caleb Nutting and Son of San Francisco supplied the safes and built the jail. Burke originally quoted a price of \$74,557.55, but cost overruns and contract disputes led the county into protracted negotiations with him when the courthouse was finished. The final cost, eventually settled in the local court, came to approximately \$117,000. (In 1897, twenty years after the building's completion, workmen discovered that its twenty-six-inch exterior wall was hollow. Burke had evidently swindled the county by not filling the brick, dual-wall system with rubble, as was customary. Locals recalled an incident involving William "Red Mike" Langan, who worked for Burke as a bricklayer on the courthouse. He was later arrested for murder and jailed in the facility he had helped build. Soon after his incarceration, he escaped by digging through the wall, which he had apparently known was hollow. The county subsequently went to great expense to line the cells with iron so that the incident would not be repeated.⁹)

The building opened on February 17, 1877, and is the oldest structure in Nevada in continuous use as a courthouse. The elaborate ironwork on the facade was painted in rich tones, while the date "1876" in large metal numbers, surrounded with ornate filigree and painted gold, capped the building.¹⁰

As the crowning touch, the commissioners purchased a statue of Justice to grace a niche above the entrance. Andrew Fraiser, Storey County Commission chairman, selected the gold-painted zinc figure from a catalogue of the Seelig Fine Arts Foundation of Williamsburg, New York. It cost \$236, including shipping. Its lack of a blindfold has attracted attention over the years, but perhaps more significant was the commissioners' willingness to pay for the ornamentation for their building: it is, after all, the only exterior statue of Justice on a Nevada courthouse.

(The fact that it lacks a blindfold was probably not, as is maintained in local lore, a commentary on frontier justice. Even-handed Justice has traditionally been depicted as a blindfold maiden, but use of the blindfold has not been universal. For the

⁹Wells Drury, *An Editor on the Comstock Lode* (Palo Alto, 1948) 161-62; *Territorial Enterprise*, July 1, 1897.

¹⁰*Territorial Enterprise*, December 5, 1875.



The 1903 Churchill County courthouse in Fallon is the only monumental courthouse in Nevada built of wood. This photograph was taken shortly after the building's completion. (Nevada Historical Society)

Greeks and Romans, Justice was a pure being with an unerring instinct for fairness and no need of a blindfold. German artists of the sixteenth century had a different point of view. Appalled by the corruption of the courts, they satirized Justice as blindfold (in what may be the earliest such manifestation) and staggering around the courtroom.¹¹ The figure eventually lost the negative connotations of the blindfold, which became a standard part of the image.

(Although it is rare to see the piercing eyes of Justice, more than twenty similar statues are scattered from Benton County, Oregon [1888-1889], to the Old Bailey in London [1907]. As recently as 1973, W.C. "Brother Rat" Stanton sculpted a statue of Justice

¹¹ Andres Simmonds, "The Blindfold of Justice," *American Bar Association Journal* (September, 1977) 1164; Antoine Pome, *The Pantheon: London 1694* (New York, 1976) 232-34; and Andrew Tooke, *The Pantheon: London 1713* (New York, 1976) 388.

with eyes unveiled for the Madison County Courthouse in North Carolina.¹²)

The large zinc figure may be taken as symbolizing the wish to project an image of opulence when the courthouse was built. Nor did the luxury stop at the exterior. Inside, walnut and marble exemplified the county's wealth. An article in the *Territorial Enterprise* described handsomely designed gas burners, and a large chandelier in the main entrance suspended from the eighteen-foot ceiling of the first floor. The newspaper added, "The courtroom is perhaps not excelled for beauty or finish or convenience of appointment by any similar room on the . . . coast, unless it be the one at San Jose."¹³ Storey County did not wish to be outdone.

From 1884 to 1903, no major county building projects were undertaken in Nevada, corresponding to a depression in the mining industry. Some counties were forced to contract for the construction of buildings, which were wooden and modest and which, with one exception, no longer survive.

BOOM TIMES AND DELONGCHAMPS'S CLASSICISM

After the turn of the century, the state enjoyed an era of prosperity, with renewed courthouse construction. Most of the resulting county buildings are substantial symbols of the classical roots of American democracy.

Within the first decade of the century, a mining boom encouraged the formation of Clark and Mineral counties in Nevada. The economic surge also resulted in the formation of three county seats and the construction of four courthouses. Tonopah, site of the first major strike, was also the first to capture a county seat. By 1905 its success, combined with the depression of the mining industry of Belmont, the county seat, prompted the state legislature to move the seat to the newer, more prosperous community. Deprived of county government, its last industry, Belmont continued to dwindle.

Nye County commissioners acted quickly to erect an imposing stone courthouse in Tonopah. As the *Tonopah Daily Sun* reported in April, 1905, "The courthouse and county jail are to be built in Tonopah as fast as material can be obtained and men perform the

¹² Correspondence with state historic preservation officers and additional sources has identified one statue of Justice without a blindfold in California, two in Colorado, one in Iowa, five in Kansas, one in Louisiana, four in Michigan, two in Oregon (one surviving), one in North Carolina, two in North Dakota, three in Pennsylvania (two surviving), and three in Texas; "The New Sessions House," *The Building News and Engineering Journal* 91 (October 6, 1906) 459.

¹³ *Territorial Enterprise*, February 18, 1877.

task."¹⁴ The commissioners awarded a contract for \$28,000 to the Continental Construction Company. "The building will be an ornament to the camp," proclaimed the *Daily Sun*. The *Tonopah Bonanza's* reaction was mixed: "The plans for the building, which will be a pretentious affair, were drawn by J.C. Robertson, one of the best architects on the Pacific coast."¹⁵

The two-story courthouse, of coursed ashlar stone and concrete, was completed within the year. Originally measuring fifty by sixty feet, it has a shallow-pitched, pyramidal roof with an onion dome. The eaves have classical, molded cornices dressed with dentils. Its round arches, supported by clustered columns, make it the only courthouse in Nevada with major Romanesque components.

In contrast with the mining-camp courthouses, several of Nevada's more stable county seats undertook building programs. Although these were initiated in part because of the general prosperity brought on by the mining boom, the architectural choices of the communities reveal their stability. These were classical, refined courthouses, in the mainstream of the architectural tastes of the time. The majority were designed by Frederick J. DeLongchamps, whose first courthouse plan won first prize in a Washoe County competition, for which he was awarded the architectural contract. The courthouse adapted a neoclassical design strongly influenced by the Beaux Arts style.

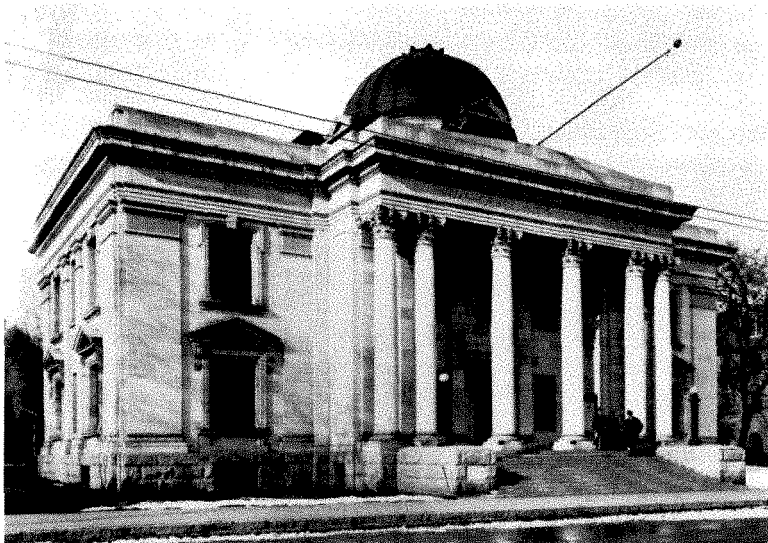
Work on the courthouse, which incorporated parts of the old Washoe County Courthouse, began in 1909. Dedicated on June 1, 1911, the new building was highly ornate, and included a massive copper dome and Corinthian columns supporting a two-story portico. Gray marble wainscoting with a black marble base, elaborate iron balustrades, and multicolor tiled floors decorated the halls of both stories. Windows in the dome illuminated a spectacular shallow dome of leaded glass, which was the ceiling for the second-floor hall.¹⁶

The Washoe County Courthouse represents the beginning of a distinguished career in architecture for DeLongchamps, who is credited with shaping the architectural character of early-twentieth-century Nevada. During his career, he and his associates designed more than five hundred public, commercial, and residential buildings. Among his works are plans for eight Nevada

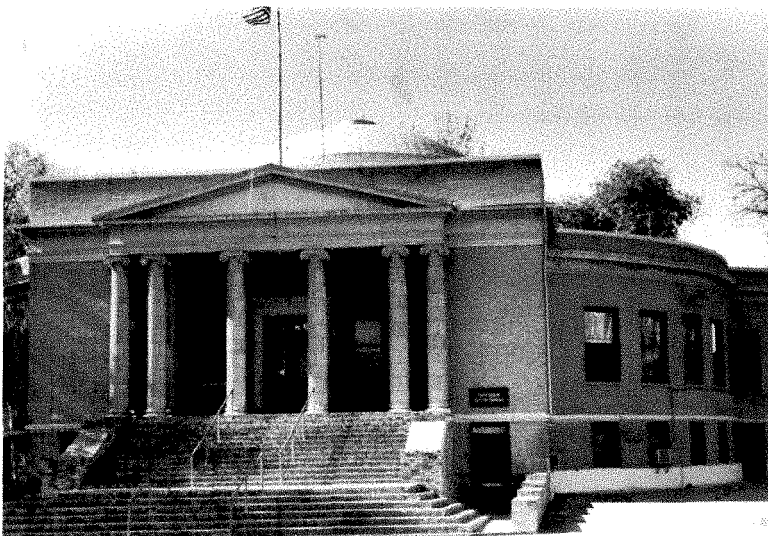
¹⁴ *Tonopah Daily Sun*, April 14, 1905.

¹⁵ *Tonopah Bonanza*, April 15, 1905.

¹⁶ *Reno Evening Gazette*, August 28, 1909, June 1 and 2, 1911; *Nevada State Journal*, December 20, 1909, June 1 and 14, 1910, November 21 and 23, 1910, January 29, May 1 and 23, June 1 and 7, 1911; DeLongchamps Collection, Library, Washoe County Courthouse, University of Nevada, Reno; John Davidson, "Washoe County Courthouse" *Nevada State Bar Journal* 3 (1937) 139-44.



The Washoe County Courthouse in Reno, Nevada, was the first designed by Frederick J. DeLongchamps. The Beaux Arts structure was completed in 1911. The original nineteenth-century jail stands to the rear at the left. This photograph dates from shortly after the completion of the courthouse. (Nevada Historical Society)



The Pershing County Courthouse in Lovelock, Nevada, was the last county courthouse by DeLongchamps to be built in the state, and was completed in 1921. It is thought to be the only round historic courthouse in the nation. (Ronald M. James)



DeLongchamps designed the Nevada State Supreme Court and Library building in 1935. It is the finest Art Deco courthouse in the state. (Ronald M. James)

courthouses, including a proposal in 1948 for Churchill County, which was never constructed.

Although each of his six surviving county courthouses is distinct and represents a new stage in his professional development, DeLongchamps's effort for Pershing County is particularly notable. Designed in the early 1920s, the building includes a round courtroom. A survey conducted by the Nevada Division of Historic Preservation and Archeology suggests that it is the only round historic courthouse in the nation. Its exterior is patterned after the Pantheon of Rome and Jefferson's Rotunda at the University of Virginia.

During the 1930s, DeLongchamps received his most prestigious courthouse assignment, for the Nevada Supreme Court building. Although not a county courthouse, it provides an epilogue to his courthouse designs.

For over sixty years, the highest judicial body in the state had met in the state capitol. A growing staff and library created the need for a separate building. DeLongchamps's design, a refined execution of Art Deco architecture, includes an exterior graced with stylized sunbursts and other details. Art Deco characteristically uses simple geometric forms and flat exterior walls enriched by stylized, vertical ornamentation. Typified by chevrons, zigzags, faceted surfaces, and geometric forms, it has its roots in

the 1925 Paris Exposition des Arts Decoratifs. DeLongchamps called for black marble and aluminum to decorate the interior. A sixteen-pointed star of "cathedral glass" served as the ceiling of the second-story courtroom. The library and supreme court first occupied the new building in 1937. It remains as the state's finest Art Deco courthouse.

THE EFFECTS OF EXPANSION

The few county courthouses built in Nevada after 1922 depart from classical architectural styles. County officials employed modern designs for these newer buildings, but more than architectural style sets them apart from their predecessors.

In the 1930s, the state stumbled upon the ingredients of a new boom, which eventually had far-reaching implications for state and local government. Liberal divorce and gambling laws created a new industry, which became a crucial part of Nevada's economic future. The gaming industry, in particular, has at times seemed almost limitless, and, as it grows, so do the state's major urban centers. In turn, the increased population has created a need for expanded county governments.¹⁷

The best example of this occurred in Clark County, which initiated the state's most recent phase of county-courthouse construction. In 1958 the local architects Walter Zick and Harris Sharp designed the new Clark County Courthouse, setting the tone for the era. The glass, concrete, and steel structure soars seven stories in the unadorned uniformity of the International style of architecture. It is an imposing building, its strength in stark contrast to the DeLongchamps courthouse, which stood to the rear.

A broad range of choices exists within any style. The International style, made popular in the 1940s and 1950s, can be used to create monumental buildings, or to create functional office buildings and houses. Above all, the Clark County Courthouse was designed to be functional. Its character may be traced to the county's expanding needs, when the growing staff required a larger facility. It belongs to a time when county governments were clothing themselves in practical garments.¹⁸

In many ways, the Clark County Courthouse is the ultimate expression of the era's public architecture in Nevada. Its design is a consequence of its use, not its symbolism. The size of Clark

¹⁷For a discussion of how this process has affected public architecture, see Henry-Russell Hitchcock and William Seale, *Temples of Democracy: The State Capitols of the USA* (New York, 1976) 265-302.

¹⁸Bid documents, plans, and specifications at the Clark County Courthouse. See also Robert Hughes, *The Shock of the New* (New York, 1982) 164-211.



This Clark County Courthouse is the third built in Las Vegas. It was originally a strict adaptation of the International style of architecture in the late 1950s, but the county built a Brutalist concrete two-story addition during the early 1980s. (Ronald M. James)

County and its government necessitated an impressive structure, making the courthouse the largest in the state. Despite its size, however, the building originally lacked monumentality. It was not intended as a community focal point, but was to provide efficient, practical shelter for expanded governmental services. It was not meant to make a symbolic statement about the role of government and the court in the community.

As if in an attempt to counter this, Clark County officials later initiated a plan to remodel the 1958 courthouse. In the 1980s, they funded the construction of a two-story concrete addition and colonnade around it. This addition has the massive, scored concrete blocks of Brutalism, a style of architecture whose name apparently is not intended as a value judgment. The term probably derives from its association with Peter Smithson, an architect who specialized in the style after the First World War and whose features reminded his friends of busts of Brutus, of ancient Rome. The selection of the style for the addition to the Clark County Courthouse contrasts with the plain, almost futuristic metal and glass lines of the core structure. Still, the remodeling gave an air of public architecture to the building, and takes the courthouse a step beyond its original practical design.

Like Clark County, other Nevada counties followed in the use of modern architectural forms to replace or augment their courthouses. All were influenced by the same shift in use and purpose that had affected the design of the Clark County Courthouse. Nevada's late-twentieth-century courthouses were moving away from the nineteenth-century emphasis on housing a county's judicial process in an elegant setting, and increasingly upon providing more space for county administration.

Local courthouses were once symbols of local prosperity and of commitment to law and order. Monumental proportions projected community pride and optimism. As Nevada's population tops one million, it is easy to lose sight of the central significance that local courthouses once had. Today's courthouses, particularly those in larger urban settings, do not function as community focal points, a fact that their architecture now reflects.

PRESERVATION, DESTRUCTION, AND LOSS

Of all Nevada's courthouses, approximately one-third no longer survive. Clearly, the choice to preserve is often as telling as the choices associated with construction. Extant courthouses provide us with a glimpse into the past, an opportunity to understand something of the mentality of the people who built them. The communities that choose to demolish public architecture also send a message: the decision to discard the old and erect the new reveals much about local culture and attitudes.

Nevada has lost eleven of the courthouses it has built. Three of them were destroyed by fire; eight were purposefully demolished, and, of these, only two were destroyed in response to a county seat's being moved. This means that approximately two-thirds of the courthouses erected in Nevada still stand. A quick overview of which counties were inclined to demolish courthouses provides a good indicator of local mentality.

Table 1 lists the average life span of courthouses for each of the current Nevada county seats. Because the government of Lander County recently moved to Battle Mountain, it makes more sense to use Austin, where the seat was for over one hundred years. The life span of the courthouses was determined by counting the years from the date of the first courthouse construction project to the present (or the county seat's move from Lander), and dividing by the number of courthouses constructed at the county seat. This approach skews the information in a number of ways. It does not consider county-seat moves that have resulted in a number of courthouses' being abandoned or demolished. Typically, a county seat was moved to accommodate economic and demographic factors, and had little to do with the county's seeking to preserve the old or to create a new image. Most controversies surrounding

such moves were settled within the first fifty years of the state's history, leaving the period to the present as a clear block of time in which to evaluate county actions.

In addition, only one of Nevada's former county seats built more than one courthouse. Stillwater, the former seat of Churchill County, erected two, but this was because the county failed to secure title for the first. Given the expense and embarrassment of building a courthouse on private property and then needing to replace it with one on public land, it is reasonable to conclude that the county would have preferred to have built only one. Since all the other former county seats of Nevada built at most only one courthouse, omitting them from Table 1 does not dramatically affect the impression it provides.

Table 1 does not clearly identify places that had developed a preservation ethic; a number of considerations come into play when a community makes a choice to preserve, demolish, or replace. The table nevertheless underscores a variety of local issues related to the economy and to a community's mentality. Many of the county seats on the lower end of the scale have mitigating circumstances that are not clearly portrayed by calculating the average life span of the structures. Lander, Lincoln, White Pine, and Churchill counties all found the need to replace their courthouses, but they reused the existing structure, thus demonstrating either a need for economy or a sense for, and a value of, history. Humboldt County's courthouse was the victim of fire, and attempts to rehabilitate its gutted shell were unsuccessful. The courthouse that replaced it has since acquired historical significance and has been well tended by the county.

Table 1 does reveal a great deal in the simple ranking of the communities, based on the average life span of the courthouses. The first four communities were mining-boom towns that have not faced subsequent attempts to shift the county seat. Lacking a vibrant economy during most of their existence, the counties involved lacked the financial resources to replace their courthouses. Although the mining's boom-bust economy has led to preservation in these communities, it would not be fair to suggest that this consistently resulted from a preservation ethic or a sense of history. It seems more likely that the courthouses exist today because of economic depression at times when the community might have been inclined to replace its public architecture.

The next four county seats—Yerington, Minden, Lovelock, and Carson City—are stable communities with an outlook distinct from that of a mining community. The first three are agricultural, the last is the state capital, and all have stable populations that appear to have developed a sense of, and appreciation for, history. Although Carson City was slow to build a courthouse, it, too, constructed only one and has since devoted itself to its preservation.

The remaining county seats have faced different questions when deciding whether to preserve or to demolish. The history of Austin is probably more reminiscent of the other four mining-boom towns at the top of the list. Its first courthouse was moved from Jacobsville and was probably never intended to be more than a temporary facility. When its replacement was built in 1872, the community acquired a courthouse that it still uses. The county seat was recently moved, but Austin's courthouse now serves as a space for regional county offices. Like Austin's, Ely's first courthouse was probably intended to serve only temporarily. When its more monumental successor was completed in 1909, however, the county decided to move and preserve the original modest building. Churchill County officials made a similar choice after erecting their new facility in 1973: the 1904 courthouse remains as an important ceremonial entry into the county complex. Similarly, the original 1872 Lincoln County Courthouse in Pioche is now a local museum. Mineral County's 1883 courthouse is currently not used or maintained, but it has not been demolished.

Elko, Reno, and Las Vegas fall into yet another category. Each actively demolished a substantial courthouse to make way for new construction. These communities apparently felt the need for an architectural renewal program and had the economic resources to accomplish it. Shortly after the completion of the 1911 Elko County Courthouse, a local newspaper called for its replacement in the near future by an even grander structure. Whether from economic considerations or from choice, this never occurred. After the Washoe County Courthouse was built in 1911, commissioners considered several plans for its demolition and replacement. Although they constructed a gargantuan annex, they did retain the historic core of the original.

Clark County is distinct. Although it is similar to Elko and Washoe counties in having demolished an earlier facility, its comparatively brief history means that it arrived at its decision more quickly than others. This gives its courthouses a short average life span. Clark County's first building was obviously temporary, and its replacement predictable. This occurred in 1914, with a substantial DeLongchamps design. When this was also replaced, Las Vegas became the only seat of government in Nevada to have erected three courthouses. This is made even more striking by the fact that its 1959 courthouse underwent major modifications before it was thirty years old. There can be no question that this pattern is partly a response to economic prosperity and the demographic explosion of the community. It perhaps also points to the distinct mentality of Las Vegas, grounded as it is in the gaming industry.

Although Nevada in general is famous for its legalized gambling, no other community in the state has been as clearly tied to

the industry as Las Vegas. One of the hallmarks of gaming is its need to renovate. Casinos undergo repeated rehabilitations, redecoration programs, and general facelifts. New is better, old is tacky. Las Vegas, more than any other, appears to have assumed and projected this outlook upon itself. Historic resources are rare in Las Vegas, partly because many people apparently perceive a building as a good candidate for demolition after it is only a few decades old. This has had a general effect on the architecture in the community, and appears to have had a direct effect on the public architecture. The history of courthouse construction in Las Vegas is as clear an example of the local character as is the history of preservation in some of the other county seats in Nevada.¹⁹

Although Nevada was founded by settlers bearing with them a cultural blueprint, the society they founded, the buildings they erected, and the patterns they followed were distinctly Nevadan. Many circumstances affected the four eras of courthouse construction in the state; together with the fashions of the day, they created Nevada's public architectural heritage.

The courthouses of the various periods reflect the changes in the state's socio-economic history. The simplicity of the first structures, for example, expressed both the urgent need to find shelter for judicial proceedings and the limited means and resources available, while the refined architecture of the later nineteenth century indicated that Nevadans felt sufficiently confident to put up permanent, substantial buildings. These courthouses countered those critics who saw Nevada as "a dread sahara, unfit for habitation of man or beast,"²⁰ and whose number included the influential Horace Greeley.

"Who would stay in such a region [as the Great Basin] one moment longer than he must?" he wrote. "I thought I had seen barrenness before . . . but I was green. . . . Here, on the Humboldt, famine sits enthroned, and waves his scepter over a dominion expressly made for him. . . . There can never be an considerable settlement here."²¹

The courthouses of this second period certainly confounded his claims.

The third period, which started with the turn-of-the-century mining booms in central Nevada, inspired rapid construction

¹⁹John M. Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas* (New York, 1986).

²⁰*Eureka Daily Sentinel*, September 13, 1871, in the *Reese River Reveille*, September 8, 1871.

²¹Horace Greeley, *An Overland Journey from New York to San Francisco in the Summer of 1859* (New York, 1964) 230-31.

employing quickly conceived, hybrid designs: the urgency of the first period appeared to have returned, and is perhaps a hallmark of mining-boom towns. Perhaps intrinsic to the evolution of a boom town is the rush by its citizens to construct public buildings in an attempt to convey an image of stability. This was true in the 1860s and 1870s, and was equally true at the turn of the century. Far removed from larger population centers, these communities often turned to local talent. The local builder, however, was typically a mining engineer who could erect a substantial structure but who lacked training in design. As a result, these courthouses were not part of the architectural vanguard and were frequently an assortment of details and features not normally combined elsewhere.

As the wealth of the mining boom flowed into established county seats, careful preparations led to new courthouses that reflected the opulence of the time in conventional contemporary architectural terms. This approach to public architecture corresponds to the projects undertaken in the 1870s and 1880s by established communities that no longer felt the need to rush into construction.

The changes that contributed to the architecture of the most recent era of courthouse construction are dramatic. These are the largest county courthouses in the state, yet their designs place less emphasis on monumental and ceremonial architecture than those of their predecessors. With classical details stylized or abandoned, much of what represented courthouse architecture in Nevada disappeared. Nationally, "The dominant concept has been that county offices have the same requirements as commercial offices."²² Combined with the need for office space, this has resulted in buildings that are distinct from their earlier counterparts but not necessarily from their modern commercial ones. In general, the Nevada courthouses of the first three eras are part of an evolution of form and detail. Most of them project a fairly standard "courthouse" image. Construction during the most recent phase is at variance with this pattern.

Economy, however, unites Nevada's county courthouses from all the periods, since county officials consistently tried to provide a substantial-looking courthouse while conserving funds. Although this is probably a national inclination, the fact that Nevada, with its extensive public holdings, has had such a limited tax base has reinforced the tendency for thriftiness. Predictably, this has often resulted in modest buildings designed on a smaller scale than elsewhere. Still, the state's courthouses are a testament to the ability of a few people to do a great deal with little. They have become symbols of the difficult task of

²²National Trust for Historic Preservation, *A Courthouse Preservation Handbook* (Washington, D.C., 1976) 10.

TABLE 1
AVERAGE LIFE SPAN OF COURTHOUSES
IN CURRENT COUNTY SEATS (LANDER EXCEPTED)

Community	Number Of Courthouses Constructed	Average Life Span As Of 1989 (In Years)
Virginia City	1	116
Eureka	1	109
Tonopah	1	84
Goldfield	1	81
Yerington	1	77
Minden	1	73
Lovelock	1	68
Carson City	1	67
Elko	2	60
Austin	2	59*
Pioche	2	59*
Reno	2	58
Winnemucca	2	58***
Hawthorne	2	53**
Ely	2	51*
Fallon	2	43*
Las Vegas	3	27
Statewide average		67

* Replaced courthouse used for other purposes, not demolished

** Original courthouse not demolished, but not reused

*** Original courthouse destroyed by fire

governing sparsely populated jurisdictions, which in most cases exceed the size of some states.

Nevada's county courthouses are also united by their function: they house that form of government and judicial process that is the most accessible to the average citizen. Taste in design has changed, county seats and political boundaries have shifted, but the county courthouse remains an example of local heritage and pride, standing as it does as the most important local symbol of government and law. In keeping with the nationwide practice, Nevadans have invested public resources for the construction of these dignified settings for the acting out of the ideals of law, democracy, and justice.

WESTERN LEGAL HISTORY: WHERE ARE WE AND WHERE DO WE GO FROM HERE?

Editor's note: *Western Legal History* sponsored a panel at the 1990 Annual Meeting of the American Society for Legal History, which was held in Atlanta, Georgia, on February 9. The aim was to bring together leading legal historians of the American West to discuss what distinguishes and characterizes western legal history and how they see the field evolving. The journal prints here the edited comments of the five participants, with their responses to questions from the audience. Members of the panel were Gordon M. Bakken, professor of history at California State University at Fullerton; Lawrence M. Friedman, Marion Rice Kirkwood professor of law at Stanford University; Christian G. Fritz, assistant professor of law at the University of New Mexico; David J. Langum, professor of law at Cumberland School of Law, Samford University; and Harry N. Scheiber, professor of law at Boalt Hall, University of California.

GORDON M. BAKKEN

Western legal history is distinctive because the law of the East had to come to grips with the facts of the trans-Mississippi West. Although John Reid would put it that the law of the East *was* the law of the West, I will take a different position. The most significant historical facts were physiographic: the sea of grass that became an arid plain as settlers moved west, the continuing presence of Native Americans and Hispanics and Mormons. Excepting aridity, Patricia Nelson Limerick terms these facts "the burdens of Western American history."¹ They are burdens at two levels. First, historians as well as present-day politicians have been ineffective in separating myth and reality. Second, on a historiographic level, professional historians have become mired in ideology, whether blinded advocacy for Indians, Hispanics or Mormons, or strident attack upon these groups. As a result, much of our literature has lost the supposed social-science neutrality that historians bring to their analysis and writing. When Critical

¹ Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987) 322, 349 [hereafter cited as Limerick, *Legacy*].

Legal Studies migrates beyond the Great Muddy, I am sure that it will do little to change this general condition.

More specific to law, Charles F. Wilkinson has argued for law in the West reflecting the ethic of place.² He observed that the West was not homogeneous. Rather, the assertion that every aspect of the American West is unique is important to preserve the essence of place—whether that be “an eagle . . . or a tribal judge trying to blend the old and the new, and many different cuts of conscience, when he or she rules on whether the Navajo child should remain with her white adoptive parents or be awarded to a Navajo family.” In this endeavor, Wilkinson advocates an aggressive assertion of western regionalism. He writes:

We are taught by sophisticated people that regionalism is passé. Let us not participate in that and let us not permit our children to participate in that. Let us take the emotional and intellectual chance of saying that is not the leftover sector of our nation; rather, this is the true soul of the country, the place that cries out loudest to the human spirit; that this place is exalted, that it is sacred—mark down that word, sacred. And whatever kind of ethic it is, use the word ethic, because the word properly connotes high things. And let us be sure to say these things are to all of the people, for the contentiousness really can wane when we realize, and act upon, our common melded past and future. For it is through cooperation, as Wallace Stegner has said, that we westerners can create a society to match our scenery.

Last, do not doubt that all of this comes back to law, for our society lodges its best dreams in laws. Too few of our laws call out the highest in us, too few call out the highest in the many sacred places that make up the American West, and we would do ourselves and our children proud by insisting with all of our worth that our laws be worthy of this wondrous place.³

Is this a sagebrush rebellion afoot in our western law schools? Are Chief Justice Rehnquist and Justice O'Connor enabling a return to a golden age of American law with state legal developments being laboratories for the nation? Will the independent state constitutional grounds doctrine create an interest in state constitutional law or constitutional history? These are all questions that are better answered by law professors and the bar

²Charles F. Wilkinson, “Law and the American West: The Search for an Ethic of Place,” *Colorado Law Review* 59 (1988) 401-25.

³*Ibid.* at 424.

than by me, but they do suggest some important considerations for serious western legal history scholarship.

For a quarter century I have been asking the question of the continuity of legal and constitutional history in the American West. My answers have been mixed. There has been continuity; there is some uniqueness. Western legislatures and jurists drew upon American legal experience when they made law for unique situations. The water law of the arid West is, of course, the best example, but it clearly was not the only area of law impacted. As I have argued elsewhere, many aspects of American legal and constitutional development were accelerated in an effort to create a society to match the scenery, using Wilkinson's terminology.

What is needed to advance legal history in the American West? More of the same, new questions, methodological experimentation are standard answers, but it strikes me that two books on American western legal history need to be accepted as models and other studies pursued. John Reid's *Law for the Elephant* convincingly demonstrated the role of legal culture in one part of the westering process.⁴ Lawrence Friedman and Robert Percival's *Roots of Justice* analyzed the workings of Alameda County's criminal-justice administration system.⁵ Both studies need to be duplicated in other places and times, and in the processes in the American West. As the history of the American Revolution's constitutional developments ends with the publication of his next volume, John returns to the American West, and we will probably see at least five to seven volumes coming out in five years. Book review-editors, be prepared! Well, perhaps when he completes his legal history of mining camps, we may learn how law was applied to property as well as persons in another type of western context. One hopes that studies of county legal systems and other demographic contexts will provide some comparative glimpse of criminal law in action in the American West. Perhaps we will discover more of the West's American legal heritage.

Some of the new questions about western history have been asked by Professor Limerick,⁶ but perhaps legal history can answer them. Why has the legal process or legal system failed to police development? What happened to the respect for law exhibited on the overland trail when men rushed upon Native American or Hispanic lands? Why did law fail to restrain Mormon polygamy? Why did it fail to deal effectively with Native American interests? Was our land law designed to assure a particular

⁴John Phillip Reid, *Law For the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, 1980) [hereafter cited as Reid, *Elephant*].

⁵Lawrence Friedman and Robert Percival, *Roots of Justice* (Chapel Hill, 1981).

⁶Limerick, *Legacy*, supra note 1 at 168.

kind of agribusiness? How did women fare in the American West? Was it different? How did they operate economically, politically? Or, at a much more superficial level, of course, why do Montana drivers refuse to obey the speed limit and Montana legislators refuse to enact meaningful speed laws? Well, the list goes on.

Another avenue worth exploring is that of methodological experimentation. The *Annales* school has already come to western historical studies. Perhaps such studies of legal communities, of lawyers and clients working out problems, of people without lawyers working with situations, would illuminate our understanding of the westering process. While methodological experimentation may be useful, we must remember that only with extensive reading of primary sources can we find law's reach in the real world of people in their places.

LAWRENCE M. FRIEDMAN

Obviously, "Western" is a term that has to be further broken down. After all, Los Angeles, Honolulu, Boise, Salt Lake City, and Tombstone, Arizona, hardly form a comfortable entity.

Is it possible that whatever distinctiveness there has been in western history is vanishing as sectional interests converge with national problems? (Compare southern legal history, which is perhaps in the same boat.)

One duty and chore of the legal historians who work on the West is simply to remind everybody else that the West exists, and exists as something other than an oddity. It is still probably the case that a professor at Harvard or Princeton might label a study of late-nineteenth-century Los Angeles or Denver as narrow and parochial, and a study of Wyoming as downright quaint, while a study of Salem, Massachusetts, between 1660 and 1661 is potentially earthshaking and in any event absolutely in the mainstream.

This is not an argument for the uniqueness of western legal history, but, in a sense, a denial that one ought to think in such categories. The scholar who has just completed a study of land transfer in Salem in 1660 doesn't think of himself or herself as a "New England legal historian," but as a legal historian, plain and simple.

Having said this, I am forced to return to some aspects of "western" legal history that are particularly salient. One of these is the issue of frontier behavior and violence. This has sometimes been treated for its story-telling value—Billy the Kid, Wyatt Earp, the vigilantes, and so on. But the serious literature raises issues that are of general relevance not only to American legal history, but to the study of law and society in general. A place like Dodge City was a small town, dominated by young males and inhabited

by people who were relatively rootless and who had known each other for a very short time. Some of these factors are by no means peculiar to Dodge City; there are ramifications that go far beyond the confines of this particular town (and western towns in general). This much seems plain.

There is an obvious relationship between the issues of "law and order" and the question of the translation to the West of general legal culture, which was the subject of John Reid's seminal book, *Law for the Elephant*. The western experience lends itself to an exploration of the way in which societies reproduce themselves as they spread into "frontiers," which need not be spatial ones. An extremely valuable "control group" for the study of some of the issues of law and community in the West is afforded by the experience of the Mormons in Utah.

There are also some substantive issues and themes that are bound to come up in any discussion of western legal history. Naturally, water law is one of them; the demonstration of how geographical conditions shape legal doctrine in water law has almost become a cliché. It was in the West that two important minority groups, Asians and Hispanics, first encountered the American legal system. These groups are rapidly growing in numbers today, and hence have attracted considerable scholarly interest. The Americanization of a Polynesian kingdom, now the state of Hawaii, provides us also with an indigenous story of legal colonization and its aftermath, which has no exact parallel elsewhere in our history.

CHRISTIAN G. FRITZ

I would have to agree with both Professor Bakken and Professor Friedman that there certainly are some distinctive aspects or dimensions to western legal history. But it strikes me that that is essentially true of the legal history of any region; yet studies set in the West may shed light on issues and experiences that ultimately transcend that particular region.

There may well be an analogy between the reasons why we study western legal history, and the history of the teaching and studying of southern history. In the past, to be a historian of the American South was *prima facie* evidence of parochial approach and subject matter. For some time, that may have been true in terms of southern historians' concerns and objectives, in large measure to vindicate the South and to reclaim the South's place in American history and culture. But over time, American historians clearly have come to recognize the centrality of both slavery and the South to the American experience, and to recognize the fact that regional studies are potentially important to a full understanding of American history.

In a similar way, western legal history shares the same twofold potential as southern history, the potential of its distinctive historical contribution as well as overcoming what Professor Friedman rightly describes as the continuing perception of parochialism. To some scholars, still, if you are studying the West, you must be an antiquarian or must not know how to travel eastward to other, richer archives. It seems to me that tapping the potential of western legal history consists of determining how far one can generalize from the data to claim insights and conclusions that are more broadly representative, or of relevance and interest beyond the confines of the West. As we have heard, the histories dealing with the West will need to be finely crafted to convince our colleagues that the West—however we define it—is worthy of study.

It seems to me that we judge the product of western legal history as we evaluate the integrity of any historical work. Initially we assess the depth of research and the care of use of sources, then the level and sophistication of the analysis, and finally the broader context within which the interpretation is placed. That is the way we judge legal history—indeed all history—and decide whether, using those factors, the study convinces us. At some visceral level, does it ring true to what we know about the sources?

Thus, implicit to this panel's task is the challenge of suggesting how western legal history might be able to contribute to our broader understanding of American legal history. There are three areas that strike me as being particularly worthy of further study.

The first is the treatment of minority groups, which Professor Friedman has already touched upon, but I was thinking primarily of the Chinese. The particular westernness of the Chinese as a subject of study obviously comes to mind because of the concentration of a Chinese population in the West, and especially in California. Some of the unique dimensions as well as the interconnections of that experience to mainstream American culture have been ably studied by Professor John Wunder.⁷ Yet, seen in a broader context, the experience of the Chinese is largely a question of judicial and bureaucratic action in a climate of prejudice that has some parallels to the black experience elsewhere in America. These parallels I see not merely in terms of the legal

⁷ See John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (1983) 191-211 [hereafter cited as Wunder, "Chinese and the Courts"]; idem, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17 (1986) 25-41; idem, "Law and the Chinese on the Southwest Frontier, 1850s-1902," *Western Legal History* 2 (1989) 140-58. See also Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870," *California Law Review* (1984) 529-68.

and institutional setting, but of the necessity of dealing with, and being the object of, judicial inquiry and official action, as well as of extralegal actions. There also seem to be some intriguing parallels between the Chinese-Must-Go movement in its organizational foundations, particularly Dennis Kearney's Workingman's Party, and the operation and instincts of the Ku Klux Klan.⁸

Perhaps more importantly, one source of comparison, or an important connection between the western and the American experience, broadly considered, is the durability of the rhetoric of equality—particularly legal equality—in the nineteenth century. Several scholars—Eric Foner, for instance, and most recently Professor William Nelson in his book on the Fourteenth Amendment—have discussed and explored a nineteenth-century experience and attitude toward legal equality as contradistinct from social and political equality.⁹ Generally, that discussion has taken place in terms of the antebellum and Reconstruction periods and in terms of what one might call general American history.¹⁰ But it strikes me that the Chinese experience before the federal courts in California, for instance, shows a remarkably similar sensitivity on the part of the judiciary to those same distinctions. I think there are further insights and the possibility of amplifying that general rhetoric of equality, by virtue of a study of the Chinese and the experience of other minority groups in the West.¹¹

A second area of fruitful study is what I would call the opportunity of federalism, namely, the examination of institutions such as federal courts, which shared similar functions but operated in dissimilar settings. To understand federalism and the American experience, we cannot ignore the West or any other region. Moreover, these institutional studies offer an excellent basis for interregional comparison. Not only federal judges, but federal court clerks, U.S. attorneys, revenue officers, collectors of port, surveyors general, and many others all had largely identical institutional mandates and tasks. There were, to be sure, regional variations, the push and pull of congressional politics, the percep-

⁸ See Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, 1971), and Elmer C. Sandmeyer, *The Anti-Chinese Movement in California* (Urbana, 1939).

⁹ See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York, 1970), and William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass., 1988).

¹⁰ See, for example, Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York, 1982).

¹¹ See, for example, Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32 (1988) 347-72.

tion of unique geographical conditions, but all those regional variations can be studied and identified, while at the same time affording a better understanding of a national experience with judicial and governmental institutions.

Perhaps most importantly, the third area of study would build upon John Reid's insight in his *Law For the Elephant*, that gold-rush immigrants to California shared a common legal culture.¹² To the extent that we pursue this question of a legal culture, we are inherently transcending the regional or local context. That is because Reid's essential insight is that those who went West, whether lawyers or laypersons, carried intellectual baggage with them that included assumptions and attitudes about the nature and role of law in their communities. This in turn illuminates the shared assumptions in the societies they came from, and provides a fascinating picture into an otherwise slippery aspect of intellectual history. Interestingly enough, this question of the transmission of legal concepts, which goes to the heart of the American experience with law, was largely illuminated because the legal historian in question was looking at a "western" setting. It is somewhat ironic that western legal history may prove especially revealing of legal attitudes and the understanding of law by nonwestern Americans of the nineteenth century.

Following from Reid's insight about legal culture, an equally rich area to be explored is that of a shared constitutional culture. Scholars have long been aware of the waves of state constitution-making in the nineteenth century, particularly in the 1830s, 1840s and 1850s.¹³ But to date there hasn't been a great deal of study of the general process of that state constitution making. The work has primarily had a regional emphasis.¹⁴ Scholars have observed that a fair amount of borrowing seems to have gone on in the conventions; that delegates freely selected provisions from one convention and inserted them into the constitutions being framed in another—not borrowing from the federal model, but from other state constitutions.¹⁵ The assumption has been that

¹² Reid, *Elephant*, supra note 4.

¹³ See Walter F. Dodd, *The Revision and Amendment of State Constitutions* (Baltimore, 1910); James Q. Dealey, *Growth of American State Constitutions: From 1776 to the End of the Year 1914* (Boston, 1915); Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitations* (Boston, 1917). See also Morton Keller, "The Politics of State Constitutional Revision, 1820-1930," in Kermit L. Hall, Harold M. Hyman, and Leon V. Sigal, eds., *The Constitutional Convention as an Amending Device* (Washington, D.C., 1981).

¹⁴ See, for example, Fletcher M. Greene, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* (Chapel Hill, 1930), and Gordon M. Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, Conn., 1987). See also note 34 infra.

¹⁵ See Leila Roberta Custard, "Bills of Rights in American History," (Ph.D. diss., University of Southern California, 1934), 375-442.

this borrowing was largely unoriginal, and therefore, by implication, unimportant.¹⁶ That may well be a premature and somewhat superficial judgment. We may find with further study that this constitutional borrowing might imply a wider knowledge, understanding, and awareness of what might have been the shared aspects of nineteenth-century American constitutionalism. This examination of the culture of constitutionalism will suggest—as this panel has—the dimensions of regional versus national experience.

DAVID J. LANGUM

The question of why “western” legal history has been considered in print twice recently. Kermit Hall wrote on the promise of western legal history in *The Western Historical Quarterly* for October 1987. He concluded that the study of western legal history would “contribute not only to the debate about the West’s exceptionalism, but provide a worthwhile comparative dimension to American legal history as a whole.”¹⁷ John Reid explored this question in the Winter 1988 inaugural issue of the Ninth Circuit Historical Society’s journal, *Western Legal History*. He explained that there were three kinds of western legal history, but clearly implied that the most interesting was the study of western law used comparatively, that is, to illustrate the legal culture of ordinary Americans. Some of this legal culture could be seen in eastern law, he conceded; nevertheless, historians could learn “different, deeper lessons about the nature and strengths of American law and institutions” from the study of law in the West. This was especially true of informal settings, such as along the overland trail or in the mining camps, or as expatriates fended for their needs in the alien legal culture of Mexican California. Because there had already been two centuries of American legal experience before the American pioneers moved onto the Pacific slopes, the extent to which the legal culture had become internalized can easily be considered.¹⁸

I would like to add still another dimension to the comparative process of such study. Patricia Nelson Limerick’s *The Legacy of Conquest* is a currently celebrated book, dealing to a considerable

¹⁶With respect to the implications attributed to constitutional borrowing in the California 1849 constitution, see Robert Cleland, ed., *Constitution of the State of California, 1849* (Sacramento, 1949) 7-8.

¹⁷Kermit L. Hall, “The ‘Magic Mirror’ and the Promise of Western Legal History at the Bicentennial of the Constitution,” *The Western Historical Quarterly* 18 (October 1987) 429-30.

¹⁸John Phillip Reid, “Some Lessons of Western Legal History,” *Western Legal History* 1 (1988) 6.

extent with the theory of western history. In it, she proposes a sharp definition of the ethnic distinctiveness of the western experience. She writes:

Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one's group the status of legitimate beneficiary of western resources. This intersection of ethnic diversity with property allocation unifies western history.¹⁹

The core idea is that the West offered more than simply a meeting place for diverse ethnic groups. In that regard alone, the great eastern cities offered even greater meeting places for even more ethnic diversity. Rather, in the West, diverse ethnic groups competed for significant property and economic interests in settings that were considerably more fluid than the urban centers of the East.

That same concept can be extended to diverse legal systems. Because of the isolation and vastness of the West, many ethnic groups had the luxury of their own legal systems. These separate mechanisms were sometimes elaborate, as with the Mexicans and the Mormons, who both preceded the American settlers, and sometimes more tentative, as with the Scandinavians in the Dakotas and the Chinese in California.

Ethnic diversity in the West produced far more alternative systems of law and dispute resolution than developed through immigration to the eastern cities. Studies of these alternative legal systems in the West are valuable for their own sakes, and offer insights into other cultures' critiques of the American legal system. Where Americans were forced to deal with these ethnically based legal systems, a study of their attitudes toward other legal norms would illuminate their perceptions of a proper legal system and their own legal culture. To do all this it will first be necessary for scholars to study these ethnic legal systems on their own terms, from within, and not merely to explain how various minority groups were treated by the American judicial system. Some of this work has been done, but much more remains untouched.

The Chinese immigrants in the West, for example, formed benevolent associations, dominated by Chinese merchants. These associations had a number of economic and social functions, but also served as mediators in disputes for members of that association. In San Francisco an umbrella council resolved disputes between different clans. The idea was to funnel disputes to these organizations and thus avoid the civil courts.

¹⁹Limerick, *Legacy*, supra note 1 at 27.

A detailed study of the operations of these Chinese mediations would reveal not only interesting information about an alternative legal system, but also an assessment by the Chinese participants of the then current American legal system. Although there have been some brief accounts of this substitute mechanism,²⁰ and more detailed recent studies of how the Chinese were treated within the American legal system,²¹ there is no systematic study of the Chinese dispute-resolution process in the West.

The Native Americans have fared somewhat better. The legal systems of the Cheyenne²² and particularly of the Cherokee²³ have been systematically studied. But many other western Native Americans await a legal historian to analyze their legal systems and their interrelationship with the conquering white Americans.²⁴

The legal interrelationships of the foreign residents of Hawaii and the local Hawaiian courts seem to offer more fertile soil for cross-cultural analysis. Ample materials exist, including the detailed records of the monarchy (now being translated into English), local newspapers, official reports, and extensive diaries of certain legally minded expatriate residents. The exploration of this vast area began two years ago, with a pioneering study of the impact of western legal ideas upon traditional Hawaiian legal consciousness, as reflected in the records of the Honolulu district court during the mid-1840s.²⁵

²⁰ Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1870* (Cambridge, 1964) 80-81, 84-86, 92-93, 167; Leigh-Wai Doo, "Dispute Settlement in Chinese-American Communities," *The American Journal of Comparative Law* 21 (1973) 629-33, 636; Stanford M. Lyman, "Conflict and the Web of Group Affiliation in San Francisco's Chinatown, 1850-1910," in Norris Hundley, Jr., ed., *The Asian-American: The Historical Experience* (Santa Barbara, 1976) 27-28, 48, 52; other sources cited in Jerold S. Auerbach, *Justice Without Law!* (New York, 1983) 158-59, ns. 9-12 [hereafter cited as Auerbach, *Justice*].

²¹ See, for example, John R. Wunder, "Law and the Chinese on the Southwest Frontier, 1850s-1902," *Western Legal History* 2 (1989) 139-62; idem, "Chinese and the Courts," *supra* note 7 at 191-211.

²² Karl N. Llewellyn and E. A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, 1941).

²³ John Phillip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York, 1970); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman, 1975).

²⁴ The Fund for Research on Dispute Resolution, however, has just awarded a grant to conduct an "historical and ethnographic study of the traditional and contemporary dispute processes of Puget Sound Native Americans." See "FRDR Research Awards Announced," *Law & Society Association Newsletter* (August 1989) 11.

²⁵ Mari J. Matsuda, "Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness," *The American Journal of Legal History* 32 (January 1988) 16-41.

The Scandinavians brought to the Dakotas and Minnesota their strong cultural predisposition for conciliation. During the 1920s this resulted in various attempts at mandatory conciliation procedures in North Dakota and Minnesota.²⁶ Scandinavian immigrant literature, novels, and short stories pictured American lawyers and the legal system as corrupt.²⁷ It seems inconceivable that this antipathy toward American jurisprudence and a predilection for conciliation would not have led to the creation of town or village institutions for dispute resolution. Norwegian and Swedish-language records generally have been well preserved, as have the thousands of Scandinavian-language newspapers and periodicals published in the United States.²⁸ This deserving topic only awaits the legal historian with appropriate linguistic talents.

The alternative legal systems of two minority groups have been studied in detail, together with the cultural interchange of Americans and those systems. The Mormons (though not ethnically diverse, still a distinctive minority) forced litigation between their members into a complex system of church courts. The procedures of those courts and their relationship to the civil courts have recently been studied.²⁹ In addition, the Mexican legal system in California has been analyzed, as have the attitudes toward it of the American expatriates who lived there.³⁰ These two studies might indicate to a researcher what could be accomplished for other minority groups of the West.

Highly significant in the American West were the encounters between numbers of ethnic groups, when circumstances were fluid and stakes were high. Attitudes toward law and dispute resolution differed greatly, and many of the minority groups had mechanisms for dispute resolution that they preferred to the ordinary civil courts. Detailed study of those mechanisms by scholars with the necessary skills to examine the primary documents will yield valuable information about the systems, and about the American civil courts beside which they often stood.

²⁶Auerbach, *Justice*, *supra* note 20 at 72-73.

²⁷Dorothy Burton Skardal, *The Divided Heart: Scandinavian Immigrant Experience through Literary Sources* (Lincoln, 1974) 191-92.

²⁸There were 800 newspapers and periodicals in Norwegian alone. *Ibid.* at 19n.

²⁹Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1820-1900* (Urbana, 1988).

³⁰David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987) [hereafter cited as Langum, *Law and Community*].

HARRY N. SCHEIBER

I started out in western history a long time ago. My first regional works were on George Bancroft and the Bank of Michigan, one of which was published in the *New England Quarterly* (1962), a very acceptable publication from the standpoint of those in the East, particularly one colleague of mine at Dartmouth who, asking about my graduate work at Cornell, said, "Why did you go out West for your Ph.D.?" I progressed from that to write a book on pre-Civil War Ohio—also a "western" subject—and to do some other studies that carried me into Wisconsin and Iowa and other states. Then, more recently, James Ely lured me back into some southern subjects on federalism and regional law. Now I have completed a number of California studies and have gone farther west: my wife and I are just now completing a study of the justice system in Hawaii during World War II.³¹ So I have gone the full route, which I guess qualifies me to say something about regional history from a somewhat unusual perspective.

The West is larger than the Ninth Circuit. The West has been many things, many places, over four centuries' time. And in some respects we have to deal with western history as it was dealt with routinely by American historians 50 and 60 years ago, that is, in terms of *successive regional frontiers*. To some degree, western history is the history of regional frontiers and regional development—of what I have termed "community building"—a process that occurred on successive frontiers.³² I think that is one mode of legal activity that offers wonderful data for comparative study over time and space. It makes Mississippi in the 1820s and California in the 1850s and Alaska in the later era comparable in ways that are much stronger for that particular aspect of study than, say, California and Oregon are in other respects.

³¹ The Hawaii study (with Jane L. Scheiber) will appear in *Western Legal History* 3 (1990).

³² Harry N. Scheiber, "The Frontier and Legal Culture: Market Values on the Overland Trail," *New York University Law Review* 57 (1982) 1209-1222, a review essay that includes data on the (very slight) attention to the West given by journals of law in the years 1970 to 1980—insofar as they published in the field of legal history at all. Fewer than 10 percent of historical articles in these journals were on the Ninth Circuit region. (ibid at 1211). See also Harry N. Scheiber, "Turner's Legacy and the Search for a Reorientation of Western History," *New Mexico Historical Review* 44 (1969) 23-48; idem, "On Concepts of 'Regionalism' and 'Frontier'" in idem, *The Old Northwest: Studies in Regional History, 1787-1910* (Lincoln, 1969) vii-xix; and the classic essays by Earl Pomeroy, "Toward a Reorientation of Western History: Continuity and Environment," *Mississippi Valley Historical Review* 41 (1955), and Arthur E. Bestor, Jr., "Patent-Office Models of the Good Society: Some Relationships Between Social Reform and Westward Expansion," *The American Historical Review* 58 (1953) 505-26.

I think that we should not forget, in other words, that there is a common experience of community building in North America from the seventeenth century to the twentieth. It included the expulsion and conquest of native peoples. In California it included the impact of the Chinese immigrants and then successive Asian and, later, Mexican immigrant groups. The Japanese have not been mentioned today. The Japanese were a very important additional element in Hawaii in the 1880s and in California at the turn of the century as well.

We can also link to community building the territorial aspect in successive "Wests." One thing that distinguishes Mississippi, Arizona, Oregon, and other states in this category from the original 13—or, more precisely, distinguishes them from 16 of the states—is the fact that they went through territorial periods. I think it's a great shame that probably 99 percent of the people who train in legal history or call themselves legal historians probably don't read Earl Pomeroy on the territories—or Howard Lamar or Paul Gates, or others who have written on the territorial and early statehood phases. Names like Philbrick are as little known, I'm sure, as the commentators on Hammurabi are to most American legal historians.³³

There are important insights to be gained with respect to the American legal process and the history of the West—or of successive Wests—by examining the frontier period and the constitution making that went on at the end of territorial periods, which in certain respects was quite different (despite what Chris Fritz has said about commonalities) from constitution revising later on. (Chris has written on the first [1849] constitutional convention in California; I've written on California's second one, the 1878-79 convention, which I think is basically different.³⁴)

In a sense, I appeal to the older tradition of western history, and I call upon those of us who are interested in western history to incorporate that older concern with community building in successive "Wests" and in the territorial phase and constitution making to reincorporate these themes. When we seek to make

³³ See Francis S. Philbrick, *The Rise of the West, 1754-1830* (New York, 1965); Paul W. Gates, *Fifty Million Acres: Conflicts Over Kansas Land Policy* (Ithaca, 1954); Earl Pomeroy, *The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah, and Nevada* (New York, 1965); and Gene M. Gressley, "West by East: The American West in the Gilded Age," *Charles Redd Monographs in Western History* No. 1 (1972). A study that is exemplary of the richness of the territorial era in the West is the recent article by Ralph James Mooney and Raymond H. Warns, Jr., "Governing a New State: Public Law Decisions by the Early Oregon Supreme Court," *Law and History Review* 6 (1988) 25-93.

³⁴ Christian G. Fritz's essay on the 1849 California constitutional convention and Harry N. Scheiber's on the 1878-79 convention will be published in the forthcoming issue of the *Hastings Constitutional Law Quarterly*.

comparisons, when we think about continuities and discontinuities, I think we should retain and recapture that old emphasis.

Thirty-five years ago, when I was an undergraduate at Columbia and later a doctoral student at Cornell—it certainly was true also at Harvard at the time, when Perry Miller's influence was so dominant—there was, I think, a sense of recapturing American history from Frederick Jackson Turner and the "frontier school." (And this was so despite Frederick Merk's presence at Harvard and Paul Gates's at Cornell.) There was a sense—certainly it was strikingly present at Columbia—that now, at last, after a long period of Turnerian dominance in American history, there had been a shift in the fulcrum, a shift in the center of focus, and that older "eastern" concerns were being recaptured. Certainly a revitalization of New England intellectual history took place at that time. And I think that some of the preoccupations of the last ten years in American legal history are, to a large degree, an extension of the reawakening of New England colonial intellectual history that occurred at that time and soon linked in with the wonderful new work in social history of New England.

Several years ago I gave a paper at some schools on the Atlantic coast. The paper was on California resource law from 1850 to 1950. When I proposed it at a major eastern institution, the person setting up the lecture—who had extended the invitation and made the mistake of leaving the topic up to me—asked, "That's a little parochial, isn't it?" I said, "We are talking about a hundred years, now, of law in a state whose economic product is the tenth-largest GNP in the world and has 20 million people. It's either that, or I could do something on Sudbury from 1640 to 1650." He yielded. It was a friendly exchange, but it really did bespeak the struggle that one has in dealing with the problem of regional parochialism that can capture us on both coasts, or other distinctive regions of the country.

I've appealed for kind of a resurrection of some of the Turnerian-school concerns, not certainly for the frontier school's substantive interpretations, but a recapturing and an inclusion once again of community building, of territorial-period governance and federal-territory relations, and of constitution building in our conception of the history of western law and of western legal history.

The second area that I am going to touch on—briefly, because it has been explored by the others who have spoken here—has to do with environment and resources. This is a centrally interesting subject in western legal history. In my own studies of eminent-domain law and of public rights and regulation, initially I didn't really attempt to deal with them regionally at all. I tried to cover the whole country, and I did an intensive sampling of states in each region in an effort to get a picture of how police power, takings law, and, more generally, the regulatory tradition have developed. I quickly realized that the periodization associated

with eastern states had no real applicability in states that were in a different era of resource development, a different era of economic development, and a different phase of legal development farther West. If we are to understand changes in ideological emphasis and in substantive content of the law, we have to understand the complexity of problems to which legal ideology is addressed in different periods of our history and must recognize that these are different at different times and different places—with often vastly varied resources bases and patterns of economic activity.³⁵

I don't mean to give the impression that the western economy should be interpreted as a primitive one. As a matter of fact, that is one of the paradoxes and one of the really interesting things about the Pacific frontier and the Rocky Mountain frontier. At almost every phase from 1854 on—it's not so true at first of Oregon, but pertains in California, the mining states, and later on in the Pacific states—the problem for western law was to accommodate large-scale capitalism and the latest, state-of-the-art technologies as applied to resource extraction. In some respects, the western states confronted some of the most difficult and intractable problems of modern capitalism even earlier than other parts of the country.

I'm sure that very few American legal historians today read it, but I find indispensable a book like Rodman Paul's *Mining Frontiers of the Far West*, which stresses the modernity of the extractive sector in the western states. It shows how western law had to respond to the most modern technology, in many ways with unknown potentiality and unknown effects at the initial time of application. For students of resource history, that's why something like the famous California mining-debris cases of the 1880s—which I'm sure are never read in legal-history courses at 90 percent of the universities—or the Colorado and California water cases, which are seldom mentioned, can vividly represent a confrontation for the first time of large-scale technologies.³⁶ This is why the terrible labor conflicts soon after the turn of the

³⁵ See, for example, Donald Pisani, *From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West, 1850-1931* (Berkeley, 1984); and Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study in Judicial Resource Allocation in Nineteenth-Century America," *Law and Society Review* 10 (1976) 217ff. On regional differences in phases of development and comparability of legal ideologies (or "judicial style") according to stage or phase, see Harry N. Scheiber, "Instrumentalism and Property Rights," *Wisconsin Law Review* (1975) 1-18; and idem, "The Jurisprudence—and Mythology—of Eminent Domain in American Legal History," in Ellen Paul and H. Dickman, eds., *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* (Albany, 1989), 217-38.

³⁶ See Rodman W. Paul, *Mining Frontiers of the Far West* (New York, 1964); Robert W. Kelley, *Gold vs. Grain: The Hydraulic Mining Controversy in*

century in the Colorado mining frontier, and by 1912 in Arizona, are so important. They represent, in many respects, an unprecedented kind of confrontation and conflict and, ultimately, an accommodation—although a very cruel one for labor—of modern large-scale mining technology and corporate organization.

I'm not arguing at all for our viewing the West as an "under-developed" or "undeveloped" region. On the contrary, in many respects western legal history, so far as it pertains to resources and the environment, is the history of modern technology applied to a new area. To take another example, in regard to scientific study and systematic management of marine fishery resources, the Pacific Coast states, for a variety of reasons, were far in advance of other regions and the national government from the 1880s to the 1940s.³⁷

Moreover, as Lawrence Friedman has said, the variety, the differences within the West, have to be recognized. The lines of commonality can extend back east for certain problems as far as the colonial period in time, and as far as the Appalachians and even east of them in space. For other issues we do have areas of uniqueness, such as Chris Fritz and David Langum have stressed. It's a mixed picture: regionalism is a slippery concept.

Regional consciousness, however, is not so evasive, and that's the last thing I shall discuss. You are hearing some of this sort of consciousness today. It reflects regional consciousness in the actual application of law and in juridical debate and consideration. Recently I've been doing research on the history of international law as a focus of regional issues, and there are some really strong western positions on questions of international law from the 1930s to the 1950s. Edward William Allen, one of the spokesmen for this view and an international lawyer in Seattle, wrote a letter to Philip Jessup in which he said, in effect: "The problem with you people back there in New York is you don't understand that the Atlantic is 'just a puddle' compared to the Pacific. And we are very close to Japan. It's not some remote, exotic, removed country. We see Japanese fishing fleets off our shores in Alaska every

California's Sacramento Valley; A Chapter in the Decline of the Concept of Laissez Faire (Glendale, 1959); and Mary Catherine Miller, "Riparian Rights and the Control of Water in California, 1879-1928: The Relationship between an Agricultural Enterprises and Legal Change," *Agricultural History* 59 (1985).

³⁷ See Harry N. Scheiber, "Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-1970," *Ecology Law Quarterly* 13 (1986) 381-534; Arthur F. McEvoy, III, and Harry N. Scheiber, "Scientists, Entrepreneurs, and the Policy Process: The Post-1945 California Sardine Depletion," *Journal of Economic History* 44 (1986) 393-406; and the full-scale study by McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980* (New York, 1986).

day." There was a difference among regions in the approach taken by lawyers to issues of international coastal fisheries law and other questions that came to the fore in these debates.³⁸ Certainly such differences were reflected also in debates of domestic legal issues, particularly in the resource area—irrigation and reclamation, for example—which were peculiarly regional. So that palpable thing, regional consciousness, has to be considered.

The first question I posed and the last one I'll leave you with is this: could we write a book on western law like that great book of Wilbur Cash, *The Mind of the South*?³⁹ Is it possible to write a comparable book called *The Legal Mind of the West*? Is there a definable regional consciousness and a unity in the subject that would warrant that kind of enterprise?

THE AUDIENCE JOINS THE CONVERSATION

Orloff: I would now like to open the panel for further comments and for questions from the floor.

Friedman: I'd like to say a word. I think that there was a common theme in what everybody said; everybody talked about samenesses and differences.

The samenesses flow from a number of things. First, there is a sameness that comes from the recapitulation of experiences that other parts of the country went through at an earlier stage. Sameness also comes from the fact that certain legal processes are common to the whole country—that is, people get divorced, they buy and sell land, they make wills. The first kind of sameness is important because it provides a way of testing general hypotheses about American legal history. The second kind is important for a mundane reason: lots of people now live in the West. California is by far the most populous state. It has 29 million people in it, and a lot of universities. (The reason so much work was done on Massachusetts, on Wisconsin, has to do with the location of university centers. If you study legal process, it's easiest to examine records right in your own backyard.) Because there is a large western population, there are going to be a lot of people working on matters of common interest. Thus the West should not be considered quaint or peripheral, but as centrally important, on issues of resource allocation, or any other national theme.

Panelists have also stressed differences: case studies that differ in striking ways from the general American experience. They

³⁸ See Harry N. Scheiber, "Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-52," *Ecology Law Quarterly* 16 (1989) 23-99.

³⁹ Wilbur Cash, *The Mind of the South* (New York, 1960).

may or may not be more common in the West than elsewhere; they certainly do exist. The Mormon experience has been mentioned. Utah—territory and state—was uniquely constituted, more theocratic than any of the states or colonies, perhaps since Cotton Mather. Both Hawaii and New Mexico were exceptions to the domination of English-speaking Anglos. One can multiply examples of exceptional communities, within the general American legal framework—communities that test common notions about American legal culture and American legal tradition.

From the floor: Everybody agrees on the importance of western history, and there have been a number of comparisons here made of Colorado and Sudbury. Let me make the argument for Sudbury, and then I'd like you to respond to it, and that might increase our understanding of western history.

The small number of people in Sudbury are important because ultimately Sudbury becomes a nation. I mean, this is Perry Miller's idea, that somehow the Puritan mentality, the Puritan experience ultimately has a long-term influence in American culture. And that's why reading those sermons by a limited number of people is important.

Now, one facet that has not been mentioned is the notion that not only is frontier history—and let's focus on the West—important not only in itself, but it had some influence in overall American culture and mentality. What do you think about that—I mean, western history not only important in its own right, but western history as, not in the way Turner described it, but somehow important in all of American history?

Scheiber: Let me respond to that, since I raised the Sudbury issue, and start with the explanation that the first reading used in my legal history course is Sumner Powell's book on Sudbury, *Puritan Village*.⁴⁰ I use this book because it is very Turnerian: it introduces the issue of individualism and conflict with efforts in social ordering in a frontier community and it treats not only legal institutions, but the transmission of received ideas and received legal culture.

I didn't mean to indicate that I thought Sudbury was unimportant. I would include its history in regard to the problems of continuity that I talked about earlier in a process that exceeds the boundaries of the Ninth Circuit in the definition of western legal history. I think the major themes are all spoken to in that wonderful book. It's a remarkably useful text for awakening students and sensitizing them to the themes of social ordering and conflict resolution, economic individualism, and putting pressure on

⁴⁰Sumner C. Powell, *Puritan Village* (Middletown, Conn., 1963).

established structures and received ideas in later periods of American history, in other places.

Friedman: I'm going to disagree totally. Not with what Harry said. I think Sudbury is fine. The book he mentioned is fine, and, of course, you can learn a great deal from it. But I think the thesis you have mentioned—

Scheiber: No, I don't agree with that thesis regarding a linear development.

Friedman:—is simply wrong. The thesis that those few people in Sudbury, with their sermons, somehow had a massive, lasting influence; that somehow the tens of millions of us who are not genetic descendants of the Puritans in some way absorbed their ethos by osmosis; that it had this lasting effect; that those happy few—I mean, those unhappy few, those sour few—somehow persisted through the colonial period, the Industrial Revolution, the Civil War, and FDR and Ronald Reagan; that somehow that core of Puritan sermons remains: I think that's just baloney.

From the floor: I would differ with you substantively, but that wasn't so much my concern. My concern is more of fitting the West into this longer-term American history. And that leads me to a second thing that nobody commented on, this whole republicanism, this whole new history that goes back to the sixties. Do you think that this is some sort of linkage; that this notion of republicanism creates some languages and continuity between colonial and eastern and western history, if anyone would want to respond?

Fritz: I view republicanism as a linkage, although probably not as direct a one as you might have suggested. With growing popular participation in politics, one sees the states facing the institutional challenge of the working-out of the implications of republicanism. With the rise of Jacksonian notions of governance, there is a further rethinking of the mechanism by which the people may change their state constitutions. I think this discourse harkens back to an earlier eighteenth-century concern about the meaning of republicanism. Virtually everyone agreed that American republicanism implied a popular basis for government, but the question, as John Adams put it in 1776, was, what exactly did that mean?⁴¹ Drew McCoy's work illustrates the shifting direction of thought about the nature of republicanism of the early

⁴¹ On May 26, 1776, John Adams wrote to James Sullivan: "It is certain, in theory, that the only moral foundation of government is the consent of the people. But to what an extent shall we carry this principle?" Charles Francis Adams, ed., *The Works of John Adams*, vol. 9 (Boston, 1850-56) 375.

years of the country.⁴² Ultimately, working out the inherent implications of popular sovereignty was a task that carried over well into the nineteenth century. Yet some nineteenth-century debates about republicanism have been largely ignored, perhaps because they happened with the westward migration, as, for example, the constitution making in the states carved out of the Northwest Ordinance.

From the floor: I think the biggest problem that I perceive here is a problem simply of definition. Your moderator referred to the Ninth Judicial Circuit as encompassing the nine western states. Not nine of the western states, but *the* nine western states. Dr. Scheiber referred to western international interests because people living in Seattle saw the Japanese fishing fleets on a daily basis. People in Idaho didn't see the Japanese fishing fleet on a daily basis off their shores, I'm sure. A mirage perhaps, but not in reality. Again, Dr. Scheiber talked about whether we could do "*The Legal Mind of the West*" as Cash did *The Mind of the South*. Cash could define the South very simply as the slave-holding South, the old Confederacy, that place where blacks and whites lived in an unusual situation for a long period of time.

The biggest problem is, what is the West? I grew up in New York City. I teach in South Carolina. But for me for years the West was going to visit my Uncle Morris who had a farm in Trenton. My colleague to my left here taught a course I remember arguing about. He defined the West as anything west of the Appalachian Mountains. What is the West? What are you talking about? You are talking about so many different kinds of things, Southern California, Seattle, Texas. You are talking about an area that you define as the West, but I'm not sure anyone else does.

Bakken: Let me just offer that western historians have debated that and will continue to debate that, so I'm not sure that we are going to arrive at any geographic definition at this session. Perhaps the simplistic one that would be used by Walter Prescott Webb, taking a look at aridity and crossing a certain meridian or more easily crossing the Mississippi River, would define a West different from what Turner is talking about primarily, which is defining a frontier. One of the books John Reid has agreed to write some day for New Mexico is a history of law on the frontier, but he would not venture doing a law on the West because it is far too difficult, because the frontier at some point (again, we are not too sure when) ends, but unfortunately the West, that half of the geographic nation, continues, and over the twentieth century has, of course, expanded very rapidly.

⁴² See Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill, 1980); idem, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge, 1989).

I think that generally many of us see the West as something that takes place when people get across the Mississippi and see a dramatic change in how they have to deal with the same problems they had on the other side because of physiographic change. In addition, as I pointed out and Patricia Nelson Limerick points out, is the fact that we have problems with Mormons, we have problems with Indians, but we have those problems with Indians on the other side of the Mississippi. And suddenly we have a large Hispanic population, and, as mentioned, a Chinese population, and later a Japanese population, which the law has to deal with in some way.

Not very helpful, but at least some of the ideas people have used in the literature.

Friedman: Wrong river.

Bakken: Which one do you want?

Friedman: Missouri.

Bakken: See! Debate continues.

Scheiber: I think the appeal is to recognize the relevance of that portion of the western states—which in the 1820s would include Ohio, which in the 1890s would be a different set of states, and which in the 1930s would be more distinctly a region defined more acceptably as the modern Ninth Circuit—that is relevant to the problem at hand.

If you want to write on “instrumentalism” in the middle and late nineteenth century, you can’t do that without looking at resource law in the West. If you try, you have missed the target, because that is where the law was trying to deal with prioritizing and allocation and so on in the process that we discerned so vividly for the eastern states. Looking at the eastern seaboard won’t do. For other subjects, it’s not relevant.

If you want to write on eminent domain, you had better look at Idaho, whether or not they see Japanese ships, because that is where eminent domain was vastly extended to include enterprises in almost the whole range of available primary resource extraction.

In race relations, the appropriate geographic area is different. I think the common plea is for an inclusion of the relevant areas—to extend your sense of what is relevant. For certain subjects in cultural history, I’m sure a perfectly adequate definition of the West is a place where you feel comfortable wearing a bolo tie in the town’s best restaurant. For most subjects in legal history, that is not a very good approach, but in some areas of cultural history it might be fine. Obviously, it depends on what subject you are pursuing.

Langum: There is a part of the first gentleman's question that we never got around to. I think he was asking us what we thought was the contribution, if any, of the West to general law. I don't think we ever got around to answering that question. Certainly there have been tremendous contributions in resource-allocation law.

From the floor: I want to return briefly to the Sudbury question. I, too, do not feel that I descended from the people in Sudbury. There are too many cultures and generations between us, but I think that there is something about Sudbury as an example that does live on in a special way, and that is that Puritan culture, that the Puritan movement has endured in the dominant ideology; that school children still do study the Puritans. They think of the Pilgrims as the first Americans, and there is a special respect for them because of that. It's lived on in a way in our dominant ideology.

What I'm wondering is whether this vision of the West, and particularly western legal history, fits into the dominant ideology, or if it's some kind of alternative voice or some kind of contradicting voice. On the one hand, I think that this western imagery and Turnerian ideology and western legal history suggest certain things about, say, the space program, which I don't take to be an alternative program. I think it could be a dominant program. On the other hand, what I heard from almost all of the panelists in one way or another is some sense of alternative vision, alternative ideology, alternative history that you think the West represents. Are you going to put your western legal history in the dominant way, Anglo-Saxon protestant ideology, or are you going to hold this out as an alternative second voice of American ideology?

Friedman: First of all, that ideology has been more and more challenged. In other words, it's not necessarily accepted as the exclusive narrative of American history. When I went to school, a long time ago, we learned a few catch phrases and clichés about the Pilgrims. These were contemporary reinterpretations and distortions at a grammar-school level of something about those people who wore funny clothes and fled from England to form democracies. Perry Miller would have been disgusted by it. In short, I don't think the ideology of the Puritans really survives. I don't think—and this is an empirical question—that there has been the kind of apostolic succession from the Puritans that people who work on colonial history, and deal with those ideologies, sometimes would have us believe.

A study of the colonial period is enormously important, it is true; and for the same reason that the study of any other community is important, in that it is, if you will, a case study of the influence of particular forms of social structure, ideology, culture,

and so forth on forms of law. And general understanding of our legal history, perhaps even a general theory of the place of law in society, has to be built up from such case studies. But I reject the kind of claims made for the persistence of a Puritan ideology or Puritan mentality. I just don't see any case for that.

In the late nineteenth century, and early twentieth century, there was a resurgence of rules and regulations controlling sexuality. This is often described as an outburst of the Puritan strain in American life or as a return to Puritanism. But to say that explains nothing. It is indeed, I think, historically false. When you study the movement, you see the *contemporary* reasons for these events; none of the people who were campaigning for repression were doing it because they were somehow in the line of succession from Cotton and Increase Mather. That is simply a distortion of the dynamics of American history. That's what I believe. Others may disagree.

Scheiber: Let me just make a comment addressed to general American jurisprudence. First, however, I think it's wonderful that Sudbury has become the focus of more discussion and time today than anything else in the subject of "western" American legal history. In American constitutional jurisprudence, if you look at one of the few works on a person who had significant experience in a western state, although he was from the East originally, Stephen Field, there is an interesting question: to what extent is his jurisprudence—which you certainly would say is part of the mainstream American jurisprudence (can we all agree on that?)—to what extent is it shaped by his experience in learning from, and perception of, the California scene in the 1850s?⁴³

I don't think you have to go too far in certain functional areas of law with respect to certain individuals—if you want to confine the issue to national jurisprudence—to see that the influence of western *regions* (including the midwestern regions), as with the influence of other regions, is very powerful. And I think it really is a profound misreading of that or any other aspect of American political and legal ideology to draw that straight line, follow-the-dot game, back from Cotton Mather down to Stephen J. Field. There are a lot of intervening variables, including the regional experience, and by the 1880s they are really profound, and by the 1980s they are even more profound.

So I understand the degree to which what you say has been widely subscribed to. It's hardly an off-the-wall comment. It's certainly representative thinking of a lot of very respectable scholars. I just think it's dead wrong.

⁴³ See note 35 *supra* [McCurdy].

From the floor: If I could follow up on my own question, I don't think this ideology I'm pointing to stands the test of Puritan New Jersey. That isn't the issue. The issue, though, is that this ideological understanding is real. It exists. Maybe there is an ongoing struggle to produce the data that undercuts it, but it's mistaken, I think, to understand this ideology as sort of nonexistent. There is a dominant ideology in this society, and the reason I raise this question in the first place . . .

Scheiber: You were talking about genesis. You were talking about that ideology's pedigree, about the origin.

From the floor: What I'm wondering is, if the western historians have got hold of something that could be useful in the development of an alternative jurisprudence, whether there is something special, something particularly valuable, in what you fellows are studying as a resource for toppling the sort of right-of-center dominant jurisprudence.

Friedman: I'd like to say something about this so-called dominant ideology. There is, at any given time, a dominant ideology. I'm not denying that such a thing exists. There was a dominant ideology in 1880. It owed nothing, or almost nothing, to the Puritans. Think of the dominant ideology insofar as it exalted big business, the free market, its opposition to labor and labor movements, or whatever else you say about it, and the belief that government should have nothing to do with prices. Imagine what a Puritan divine would have thought of that!

Yes, there is always a dominant ideology. The question is, where does it come from, what shapes it and influences it? The idea of tracing it back rests on the assumption that law, including its ideological basis, is an autonomous entity which, like language, persists over time. But law is not like language.

The Puritans spoke English. We would have understood their English. It would have sounded a little funny, but we would have understood. We speak English today. The descendants of immigrants have been assimilated into that persistent, tough linguistic tradition which, though it changes, changes very slowly and is very much insulated from most social events. The question is, is law more like language, or is it more like, say, the economy or other parts of the polity, society, or culture that are malleable and open to outside influence? To me, the answer is clear: law is the opposite of language; it's incredibly nonautonomous and changeable, and that includes its ideological basis as well.

Once you abandon the idea of autonomy, you are dealing with a socially determined legal culture. Each region, each county, each town, has, as it were, an equal claim to be a source of insights, if studied properly and carefully. Some western communities have a special claim. A state nobody has mentioned is Nevada. The

legal history of Nevada is full of lessons as important as anything poor Sudbury has to show. Nevada is a sparsely populated state that has created a unique legal system out of the opportunities of federalism. It has created an economy by legalizing certain vices that are against the law in California. This is, in essence, the legal history of Nevada. It's an amazing case study of the limits of federalism or the limits of sovereignty. Gambling, divorce, and so on—those items from which Nevada created an economy—depend on the position of Nevada within a federal system. I can't think of a better way to understand federalism and state sovereignty, and their limits, than to study Nevada.

Langum: I'd like to make another comment on this theme of the persistence of ideology that you were developing. There is sometimes a fallacy of reasoning that, because over a long period various disparate groups have a persistence of attitude, the intellectual underpinnings for the attitudes that are similar are necessarily the same. For example, someone mentioned that repressive attitudes toward sexuality are resurgent Puritanism. If you look, of course the Puritans had a somewhat harsh attitude toward sex, and the progressives in the nineties and so forth also did. But that's really all you can say about those two in common for that topic, that they both had a harsh or strict, nonlibertarian attitude toward sex. The intellectual underpinnings of the role of sex in society for the Puritans were far different from those for the progressives. There just isn't a connection there, even though on an attitudinal level superficially it seems the same.

From the floor: A common theme that runs throughout what you said is that in the West you have contact between the American legal system and minority groups, Asians, Chinese, Native American, Hispanics. Is the story there the story of just dealing with a group of alien people, or do you have in any sense a clash of legal culture? Do the alien groups have legal cultures that have to come into contact?

Langum: Definitely there was a clash of legal cultures. In fact, that is a theme upon which I organized my whole book on the legal system of California.

From the floor: Does it have any influence on the way the American law plays out?

Langum: No, it doesn't. After the gold rush and after the Americans rushed into California, that influence just disappeared except for a few traces of the substantive Hispanic law. But during the period in which the Mexican legal system and the American expatriates coexisted in California, the clash over what law was about, its role in society, certainly played an important role in American assessment of Mexican law and legal institutions.

Bakken: One thing that strikes me, which picks up on several comments about eastern legal history and western legal history, is also something you could find in the present developing field of American women's history. It struck me, looking at Sarah Evans's recent book, *Born for Liberty*, that western women virtually don't exist.⁴⁴ One fruitful area for investigation is to look at how in the West women's property rights, the rights to suffrage, the issue of divorce, going back to Nevada and other situations, the issues of community property, develop and blossom in some places at really different rates. From the perspective of how men use law to control women and how that changes in the American West, if you look at the periodical literature that exists not so much in legal history as in what we typically call women's history, you'll find a great deal that is of interest and that should be pursued.

Scheiber: On that line, I would disagree with Professor Langum and say there are some clear lines of continuity. There is an impact, unlike the general picture he has suggested, which can be noted, for example, in the areas of property law and water law. Consider the public-trust doctrine, imported out of Spanish law. It had English origins as well, but it was Spanish in the western states. It came out of the civil-law tradition, and it's still a part of western law and an important doctrine affecting vital economic interests, shorelands, and common waters and municipal pueblo rights, which are the rights of cities like Los Angeles to tap into the water supply of the hinterland. There are unique aspects to law in the former Mexican states and the former Mexican territories that can be traced. So the answer is that it does feed back.

In terms of legal culture, which is a much broader area and a more difficult and amorphous subject, there are aspects of the accommodation, for example, the Chinese accommodation of American law and the American-law accommodation of the Chinese. John Wunder has written on this, as has Professor Fritz. One of my graduate students, Lucy Salyer, has done work on this for the later period. You get some interesting developments within, for example, the Chinese community. Even today a large number of Chinese families in California have what they call paper names and real names. They adopt a name for the purposes of immigration that will get them in the door, when they buy papers in China that affiliate them with America, and a hundred years later they maintain that as their legal name, all the while knowing and maintaining a family name and family connection. This kind of "in-the-shadow-of-the-law" phenomenon exists in the social life of families, and carries over into the business

⁴⁴Sarah Evans, *Born for Liberty: A History of Women in America* (New York, 1989).

community, and clearly it is an element of "legal behavior," hence of the social history of western law.

Thus there are a lot of interesting social effects in terms of groups accommodating one another. There was a lot of interesting interplay, for, example, between the American legal profession and communities that were challenging the dominant law. One of those areas of interplay was the activity of American lawyers who served as immigration lawyers for an unpopular, despised minority. And so on.

I think the answer is a little more difficult to get at in this amorphous area than in something like public trust law, but there are some interesting dimensions that we have only begun to explore.

Langum: There are obviously some substantive carryovers from Spanish law to American law. I wasn't suggesting that there weren't. But what I mean is the philosophy about what the dispute-resolution process was about, its emphasis on conciliation, and what it was designed to accomplish. In that sense, I don't think much was ultimately imported from the Spanish tradition into American law.

From the floor: That's the follow-up point to all of this: the degree to which this dominant consensus recognizes and accepts the existence of native law or Chinese law or any of these other communities is, I assume, nonresistant.

Fritz: With respect to the experience of New Mexico, the topic of diverse legal traditions is quite interesting. David Langum's book deals with the interaction of the Anglo expatriates in the pre-statehood period with the indigenous population of Hispanic Californios.⁴⁵ It's interesting to note that in New Mexico a legacy of cultural conflict was not only more complex in that it entailed the combination of an indigenous Indian population, a Hispanic population, and the arriving Anglos, but that that legacy is still present. There is a different conception, even within the subculture of northern New Mexico, of what we mean by property and property rights that have roots previous to this century and that have legal impact today.⁴⁶ At least one western state—New Mexico—remains in some measure a living laboratory of rather different cultural assumptions about the nature of law.

Scheiber: Also, Indian claims have been recognized in treaties, and as late as the famous *Boalt* decision they have been given status in federal law.

⁴⁵ Langum, *Law and Community*, *supra* note 30.

⁴⁶ G. Emlen Hall, "Land Litigation and the Idea of New Mexico Progress," *Journal of the West* 27 (1988) 48-59.

From the floor: That's recognition *now*. We are talking about recognition *then*.

Scheiber: Over the years there have been varying degrees of recognition.

Fritz: In terms of the California private land-grant claims, from the beginning, in the 1850s, when federal District Judge Ogden Hoffman and the land commissioners were considering those claims, they mangled the Mexican law. But they clearly were struggling with it, incorporating what they understood Mexican legal concepts to be, what a pueblo title meant and a whole variety of other ideas. As Hans Baade has argued, a large part of American legal history consists of the legacy of multiple sovereignties that left a legal culture that may have been subsumed but still percolates beneath the surface.⁴⁷

Scheiber: This is one of these phenomena peculiar to this place. There are other kinds of phenomena peculiar to the configuration of forces and events in the East or in the South or other regions. Some of them, in effect, progress across the country and are replicated over time in different situations, bouncing from New England and the eastern states, the middle Atlantic states in the 1820s and 1830s, to California in the 1860s, back into the Rocky Mountain area, and also coming out of the Midwest. They have different impacts at different times on national law, legal culture, and national jurisprudence, so it is complex.

I come back to my original point. For certain purposes, we had better understand the West as not being confined solely to the jurisdictional area of the Ninth Circuit. For other purposes, it's entirely logical to talk about it in these terms.

⁴⁷Hans W. Baade, "Proving Foreign and International Law in Domestic Tribunals," *Virginia Journal of International Law* 18 (1978) 619-25; idem, "The Form of Marriage in Spanish North America," *Cornell Law Review* 61 (1975) 1-89.

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

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———, "Technology in Appellate Courts: the Ninth Circuit's Experience with Electronic Mail," *Judicature* 73:2 (1989) 90-97.

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LAW, THE BILL OF RIGHTS, AND THE GREAT PLAINS

15th Annual Interdisciplinary Symposium

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The bicentennial of the Bill of Rights provides the backdrop for a first ever conference on law and the Great Plains. The degree to which the Great Plains has provided a setting for the expansion or definition of the Bill of Rights will be addressed at this conference. A second overarching theme of the conference will be to determine the extent, if any, of a regional legal culture. Other regions of the United States have claimed a unique legal culture; the Great Plains, united by environment, geography, and a retained cultural diversity, may also have such a legal dimension.

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BOOK REVIEWS

The Bench and the Bar, a Centennial View of Orange County's Legal History, by Pamela Hallan-Gibson. Chatsworth, Calif.: Windsor Publications, 1989, 144 pp., bibliography, index, \$27.95, cloth.

This large and attractive book defines its purpose in its title and fulfills its mission admirably. With a swift, deft touch, Pamela Hallan-Gibson (a former journalist) sketches Orange County's history and the growth in its legal services. These services are woven into the burgeoning land and business development, and into the state's growth by the county's participation in the formation of the State Bar Association and contributions to state law. Eschewing critical interpretation, the first two-thirds of the book chronicle the development of the legal system in approximately ten-year increments and by means of considerable anecdotal description. Pictures—sometimes two or three—appear on every page, and near the end of this historical section are eight pages of excellent color photographs of the area.

The remainder of the book is written by Cynthia Simone, a corporate historian, and profiles lawyers and law firms under the chapter heading "Spotlight on Legal Sponsors." The section reveals that the Orange County law establishment consists of legal counsels, partnerships, law firms, and firms comprising family members. The writer has interviewed extensively, condensed the material well, and made a fine present-day complement to the book. Minor quibbles are the lack of alphabetization of patrons' names, and the fact that this contributing writer was not so indicated on the title page.

For readers with a historical or romantic bent, the Spanish and Mexican years give the state a special appeal; though outside the scope of the centennial years, the author has sagaciously included them. A possible factual confusion arises, however, in reference to the "two year war" (page 18) with Mexico, 1846–48. While the war did last for eighteen months elsewhere, and congressional ratification of the treaty took another four, the skirmishes involved in taking California lasted only seven months, ending in early January 1847. Since the focus of the book is entirely on California, the reader might be led to think that the state was involved in the war for two years.

The relation of the county's legal requirements to its growth from the land boom of the late 1880s through the post-World War II expansion and its developing corporate stature is enlivened by many tales from early sources as well as from recent and current participants. Several pages are devoted to the years of struggle by

lawyers to secure badly needed new and enlarged facilities, culminating in the multi-storied Orange County Courthouse erected in 1969.

The author capably relates the period of the courts' critical overload in the 1970s and the major administrative and legal revisions of the 1980s that kept the system from breaking down. The most effective of these was the advent of judicial arbitration, an addition later adopted by the state. Hallan-Gibson ends with praise for many, both in the profession and working for it, who reach out to the wider community.

The Bench and the Bar is a pleasantly readable and informative centennial publication.

Marian Parks
Corona Del Mar, California

A Century of Judging: A Political History of the Washington Supreme Court, by Charles H. Sheldon. Seattle: University of Washington Press, 1988, 379 pp., illustrations, index, \$35.00, cloth.

Travelers in the West often wonder at the billboards lining the highways advertising this or that candidate for election to the state supreme court. Their first reaction is, "Who are those people, anyway?" and their second, "Isn't an individual's political candidacy for the court of last resort a contradiction in terms?" In a more scholarly way, these are precisely the questions the author sets out to answer. How are judges elected to the states' high courts able to strike a balance between judicial independence (the ability of "judges to render decisions free from the distractions of public opinion, the pressures of special interests, and the temptations of personal preferences") and public accountability (a process "synonymous with democracy . . . that keeps the judges in check")?

Using Washington as a case study, Washington State University political scientist Charles Sheldon explores the development of the state's supreme court from statehood in 1889 until 1986. Of first importance is "recruitment," or the process of choosing judges for the high bench. In this, the longest section of the book, he discerns five periods characterized by different recruitment patterns. At one time political parties, gubernatorial appointment, bar influence, electoral approval, or a combination of two of these held sway. But in the long run, according to Sheldon, judicial recruitment in Washington evolved from a simple system dominated by the Republican party, with an emphasis upon public

accountability, through the ad hoc and uninstructed years of experimentation to an institutionalized system. Accompanying this movement was "a gradual balancing between the demands of judicial independence or rule of law and public accountability or majoritarian democracy."

Because recruitment to some extent shaped the characteristics of the bench in each of the five periods, it also influenced the court's behavior in a number of ways. Using representative two-year periods from each of the five courts and a composite biography of the justices, Sheldon proposes generalizations about that particular court's ability to solve the "independence vs. accountability" dilemma. Given the judges' close association with partisan politics, the 1903-1904 court unsurprisingly avoided conflicts with legislators and bowed to the demands of accountability. The 1920s court, or Court 2, although certainly no hotbed of judicial activism, reversed the earlier court's predilection for strict accountability. Court 3 (1939-1940) nominally redressed the balance between judicial activism and restraint, and Court 4 (1952-1953) did likewise. The creation of the Court of Appeals influenced Court 5 (1978-1980) by allowing the judges control of their docket and ensuring selection of the most important or contentious cases. In consequence, the modern court became more active in affirming or making public policy.

Writing on what appeals to readers, Lawrence Friedman has noted that "The drama of the trial has fascinated people for centuries. Crime and punishment are frontpage news and are the subjects of hundreds of plays, movies, and books. There is a great novel called *The Trial* and another called *Crime and Punishment*. No novel worth reading is called *Antitrust Suit* or *The Broken Lease*." His assessment might well apply to *A Century of Judging*, and that is unfortunate, because in many ways it is a fine book. In what might have been a mare's nest, Sheldon deftly provides a methodical explanation of the various forces that influenced the court's development and elucidates the combination of politics and supreme courts. He is at his best when he is analyzing the various courts and how their composition affected their rulings. In organization and breadth of research, his book is a model of its kind. That it is pleasant to read attests to its clear prose, despite the passive voice, the list-like paragraphs of uncelebrated people, and the sometimes obscure tables, which tend to make points unnecessarily complex. But elimination of the passive voice and bizarre tables are something I would like to see in all the social sciences.

Paula Petrik
University of Maine

Native American Estate: The Struggle over Indian and Hawaiian Lands, by Linda S. Parker. Honolulu: University of Hawaii Press, 1989, 261 pp., index, \$24.00, cloth.

The word "struggle" is appropriate to the subject of Linda Parker's book. In relating how the indigenous peoples lost their lands to whites, she takes a strong moral and political stand. White-controlled governments are "imperialistic." Native land was invariably taken by force. When payment was made, it was a token payment. No hedged judgments here.

Her polemical stance has important consequences for her narrative, the most interesting of which tends to flatten white leaders into moral equals. Andrew Jackson and Isaac Stevens were simply two more imperialists. Those often perceived as villains, like Jackson, gain relative stature as impersonal parts of the juggernaut. Parker even recites the standard claim of Jackson apologists that the president-general "did not have the legal authority or the means to enforce [*Worcester v. Georgia*]."

Where she relates general principles or events, great selectivity is required, and her choices carry on the struggle. However, when she is specific and detailed, the conflict recedes and contrasts appear. About half the book is on Hawaii, the other about Native Americans in the rest of the United States. The latter is necessarily generalized. Parker's ideological position dominates, and many would differ with her judgments and with the versions of events she accepts. But where she tells the story of Hawaii, shadows and nuances appear. Some whites and some natives behaved better than others. This part of her narrative will have wider appeal.

The book does not attempt technical accuracy. Footnotes follow paragraphs only—an accepted method, but readers must guess among several sources at the specific support for many statements, while some quotations and legal assertions are not supported at all. However, there is no reason to think that Parker intended her book to be a reference work.

The legal side of her thesis stresses different concepts of land tenure between Anglo- and Native Americans: individual and communal, alienable and inalienable, permanent and revocable. Like many other writers, she expounds these differences from the perspectives of history, law, and politics.

Something might have been gained from an economic analysis. Most native societies in North America were too sparsely populated to value land intensely, in the sense of value per acre. Land was almost a free good, except for places of special use such as fishing sites and salt sources, and sites having religious significance. The admirable native reverence for nature was for nature as a whole, not for God's Little Acre. No society develops the institutions of land ownership until land is scarce enough to justify the costly governmental machinery needed to protect

ownership. Even then, most societies go through long periods of centralized control and use of force before land becomes a market commodity. Europe had had centuries of that before its system was suddenly applied to sparsely settled America.

Crucial to the shift from land held by the powerful to land as a market commodity is social stability. Before any contact with whites occurred, many native societies were reasonably stable but lacked the economic conditions for an ownership system. Economic conditions changed after such contact, but native societies were continually destabilized by whites, as Parker forcibly reminds us. These points are well illustrated by her account of Hawaiian land tenure. Native settlements in the islands were much denser than in America north of Mexico, making land relatively scarce. At the time of contact, Hawaiian control was centralized under princely heads and aristocratic sustainers. Acquiring guns enabled King Kamehameha I to unify this system for all the islands. But tenure was revocable at the will of the king, and below him at the will of each local lord. Because white immigrants opposed revocability, there were two sources of instability of tenure: that inherent in revocability, and that arising from subversion by whites. As a result, the system slowly crumbled until the United States took over in 1898. By that time, the natives had largely been dispossessed.

The case of Hawaii is of especial interest because it lacked the sudden cessions of large territories so common on the mainland. We are thus able to see other elements of its history more clearly.

Economists' favorite theme about land tenure is the tragedy of the commons, and is often asserted to denigrate communal systems such as Native Americans'. But this assumes unstable arrangements for the uses of common land. There have been stable and successful commons, such as the common-field systems of medieval England and of the pueblo tribes of the American Southwest. On the other hand, unstable systems, regardless of their theoretical design, are always inefficient. The whites' most fundamental weapon against native societies was incessant destabilization. Parker's depiction of Hawaii shows this force at work in a particularly revealing setting.

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In Pursuit of Justice: Reflections of a State Supreme Court Justice, by Joseph R. Grodin. Berkeley and Los Angeles: University of California Press, 1989, 208 pp., \$20.00, cloth.

When it comes to being appointed, the author is summoned on a pretext, or taken aside at an unrelated gathering, or tracked

down with considerable effort at some remote location. The actual moment is brief, sometimes marked by (mock) irony, and the words spoken are usually trivial in themselves. Thus Joseph Grodin:

Janet and I were on an eight-day raft trip down the Colorado River when the governor finally decided on my appointment. As we were checking into a motel at the Grand Canyon after our trip, the desk clerk said that I had a message from "a Jerry Brown" in Sacramento. . . . I placed a call to the governor and reached him in Los Angeles. Though I had heard rumors of my pending appointment, it was still a thrill when the governor made the offer. I thanked him and accepted with enthusiasm. Then I went downstairs and bought a small bottle of scotch, drank it with my wife in celebration, and went to bed.

And so Grodin became a judge. With refreshing candor, he departs from the usual custom in describing the circumstances leading up to the event. Generally, judges claim that they never considered going on the bench, or, if perhaps the thought had crossed their mind, that they never lobbied for the appointment. Occasionally, they will admit that some kind friend may have spoken on their behalf. Grodin, by contrast, is quite direct about how he obtained his appointments: he was a protege of Matthew Tobriner, the California Supreme Court justice for whom Gov. Jerry Brown clerked after graduating from law school.

While in many cases the beginning of a judicial career may not seem of great moment, it is the end of such a career that prevents even the attempt at autobiography. Death or incapacity concludes a large percentage of careers on the bench. Retirement allows for writing, but retired judges may simply prefer leisure. Impeachment, resignation (voluntary or under duress), and election defeat may leave a judge disinclined for public retrospection. On the other hand, these causes may spur a former judge to reminisce to a wider audience. Grodin was a member of the California Supreme Court from 1982 until he was defeated in his bid for retention in November 1986. That defeat was the impetus behind *In Pursuit of Justice*.

In the chapter on the retention fight, the former judge describes how the opposition to him, and to Justice Reynoso and Chief Justice Bird (both of whom also lost their retention bids), resulted in his waging a full-fledged election campaign, complete with paid fund-raisers, political consultants, and television commercials. In the end, he raised \$900,000 in his effort to keep his seat. His campaign, he tells us, was no match for the opposition, which raised over \$7 million to defeat the three candidates and focused

on Grodin's links to Bird and his voting record in death-penalty cases.

His experience in this election led Grodin to the theory he now espouses about judicial-retention elections, namely, that voters cast their ballots based on their view of the decisions (or results) the judge reaches. This is bad, he says, not because competent judges will be removed, although they will. Those judges may well be replaced by equally competent judges whose decisions may be more in accord with popular sentiment. Rather, he argues, the threat from result-oriented voting is that judges may compromise their performance to achieve popular rulings.

Grodin certainly recognizes that much of the law is sufficiently plastic to comprise differing interpretations based on the same facts, each having been reached in principled fashion. Much of his book is devoted to demonstrating that plasticity, and to justifying judges' roles in choosing from among possible interpretations based on their personal convictions.

The author argues that the practical solution to this threat is what he calls a consensus of constraint. That is, voters would agree that the appropriate criterion for casting a judicial-election ballot was whether the judge's qualifications were deficient in some crucial way. Voters would constrain themselves from voting based upon the judge's decisions.

This argument is neither new nor rigorously sustained in Grodin's book, but such was not his intention. He wanted to present to the laity his views on the process and problems of judicial-retention elections, and he has done so with frankness. Along the way, to flesh out his material, he describes the life of a judge and the workings of appellate courts. He also writes about the nature of the judicial function in a style highly accessible to nonlawyers.

Interspersed in all three sections are details of Grodin's career on the bench. These are a valuable contribution to the literature on judges, while much of the rest of the book makes interesting reading for the general public.

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