

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 5, NUMBER 1 WINTER/SPRING 1992

Western Legal History is published semi-annually, in spring and fall, by the Ninth Judicial Circuit Historical Society, 620 S.W. Main Street, Portland, Oregon 97205 (503) 326-3458. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts—particularly the federal courts—in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

Western Legal History is sent to members of the Society as well as members of affiliated legal historical societies in the Ninth Circuit. Membership is open to all. Membership dues (individuals and institutions): Patron, \$1,000 or more; Steward, \$750-\$999; Sponsor, \$500-\$749; Grantor, \$250-\$499; Sustaining, \$100-\$249; Advocate, \$50-\$99; Subscribing (non-members of the bench and bar, lawyers in practice fewer than five years, libraries, and academic institutions), \$25-\$49. Membership dues (law firms and corporations): Founder, \$3,000 or more; Patron, \$1,000-\$2,999; Steward, \$750-\$999; Sponsor, \$500-\$749; Grantor, \$250-\$499. For information regarding membership, back issues of *Western Legal History*, and other society publications and programs, please write or telephone the editor.

POSTMASTER:

Please send change of address to:

Editor

Western Legal History

620 S.W. Main Street

Portland, Oregon 97205

Western Legal History disclaims responsibility for statements made by authors and for accuracy of footnotes.

Copyright, © 1992, Ninth Judicial Circuit Historical Society.

ISSN 0896-2189.

The Editorial Board welcomes unsolicited manuscripts, books for review, reports on research in progress, and recommendations for the journal. Manuscripts (two copies) should be sent to the Editor, *Western Legal History*, 620 S.W. Main Street, Portland, Oregon 97205. Texts, including quotations and footnotes, must be double-spaced. Notes must be numbered consecutively and appear in a separate section at the end of the text. Authors are requested to follow the style for citations used in this journal. Manuscripts that are no more than thirty pages in length, not counting notes, charts and tables, and photographs, are preferred. Also preferred are manuscripts not concurrently under consideration by another journal.

Whether because of prejudice or custom, writers in earlier times often used language considered strange or offensive today. Because *Western Legal History* publishes articles that present the historical record as accurately as possible, it occasionally publishes quotations containing such language. The publication of such is not to be construed as representing the attitudes of either the authors or *Western Legal History*.

Communication with the editor is encouraged before submission of any manuscript. At that time, other guidelines for the preparation and publication of an article may be discussed. Consultation upon punctuation, grammar, style, and the like is made with the author, although the editor and the Editorial Board are the final arbiters of the article's acceptance and appearance.

Articles published in this journal are abstracted and indexed in LEGAL RESOURCES INDEX, HISTORICAL ABSTRACTS, and AMERICA: HISTORY AND LIFE.

NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

BOARD OF DIRECTORS

HON. JAMES R. BROWNING
Chairman
San Francisco

JEROME I. BRAUN, ESQ.
President
San Francisco

JOHN A. SUTRO, SR., ESQ.
Vice President
San Francisco

CHET ORLOFF
Secretary
Portland

GERSHAM GOLDSTEIN, ESQ.
Treasurer
Portland

J. DAVID ANDREWS, ESQ.
Seattle

LEROY J. BARKER, ESQ.
Anchorage

THOMAS D. BEATTY, ESQ.
Las Vegas

HON. JAMES M. BURNS
Portland

CHRISTINE SWENT BYRD, ESQ.
Los Angeles

DAVID A. CATHCART, ESQ.
Los Angeles

HON. BARBARA A. CAULFIELD
San Francisco

GEORGE W. COOMBE, JR., ESQ.
San Francisco

GEORGE C. DALTHORP, ESQ.
Billings

C. F. DAMON, JR., ESQ.
Honolulu

F. BRUCE DODGE, ESQ.
San Francisco

JEROME B. FALK, JR., ESQ.
San Francisco

MURRAY M. FIELDS, ESQ.
Los Angeles

HON. ALFRED T. GOODWIN
Pasadena

FULTON HAIGHT, ESQ.
Santa Monica

SHIRLEY M. HUFSTEDLER, ESQ.
Los Angeles

J. STERLING HUTCHESON, ESQ.
San Diego

SUSAN Y. ILLSTON, ESQ.
Burlingame

ELWOOD S. KENDRICK, ESQ.
Los Angeles

HON. SAMUEL P. KING
Honolulu

JAMES P. KLEINBERG, ESQ.
San Jose

FREDERICK K. KUNZEL, ESQ.
San Diego

THOMAS R. MALCOLM, ESQ.
Irvine

VILMA S. MARTINEZ, ESQ.
Los Angeles

EDWARD J. McANIFF, ESQ.
San Francisco

MICHAEL E. McNICHOLS, ESQ.
Lewiston

MOLLY MUNGER, ESQ.
Los Angeles

HON. ROBERT F. PECKHAM
San Francisco

FORREST A. PLANT, ESQ.
Sacramento

HON. MANUEL L. REAL, C.J.
Los Angeles

CHARLES B. RENFREW, ESQ.
San Francisco

HON. PAUL G. ROSENBLATT
Phoenix

HON. HAROLD L. RYAN
Boise

GARVIN F. SHALLENBERGER, ESQ.
Costa Mesa

DONALD C. SMALTZ, ESQ.
Los Angeles

GERALD K. SMITH, ESQ.
Phoenix

HON. JOSEPH T. SNEED
San Francisco

CHRISTINA A. SNYDER, ESQ.
Los Angeles

WILLIAM E. TRAUTMAN, ESQ.
San Francisco

WILLIAM W. VAUGHN, ESQ.
Los Angeles

CHARLES S. VOGEL, ESQ.
Los Angeles

ROBERT S. WARREN, ESQ.
Los Angeles

BOARD MEMBERS EMERITI

JOSEPH A. BALL, ESQ.
Long Beach

HON. RICHARD H. CHAMBERS
Tucson

ALLAN E. CHARLES, ESQ.
San Francisco

MORRIS M. DOYLE, ESQ.
San Francisco

JAMES C. GARLINGTON, ESQ.
Missoula

LEONARD S. JANOFSKY, ESQ.
Los Angeles

HON. JOHN F. KILKENNY
Portland

MARCUS MATTSO, ESQ.
Los Angeles

SHARP WHITMORE, ESQ.
San Diego

CHET ORLOFF
Director

WESTERN LEGAL HISTORY

CHET ORLOFF, Editor

PHILIPPA BRUNSMAN, Assistant Editor

EDITORIAL BOARD

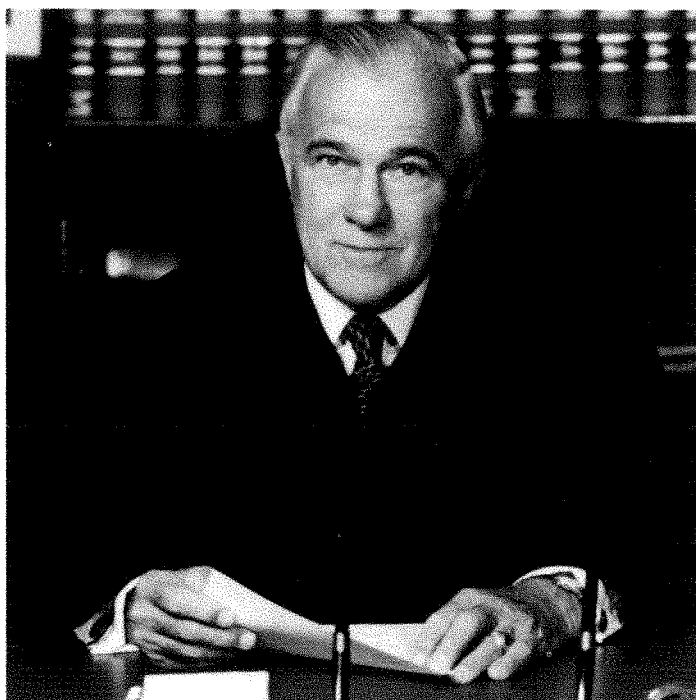
- | | |
|---|---|
| REX ARMSTRONG, Esq.
Portland | MARI J. MATSUDA
Richardson School of Law,
University of Hawaii |
| JUDITH AUSTIN
Idaho State Historical Society | R. JAMES MOONEY
University of Oregon Law
School |
| GORDON M. BAKKEN
California State University,
Fullerton | JAMES M. MURPHY, Esq.
Tucson |
| MICHAEL R. BELKNAP
California Western School of
Law | CLAUS-M. NASKE
University of Alaska, Fairbanks |
| HON. JAMES R. BROWNING
Circuit Judge, U.S. Court of
Appeals for the Ninth Circuit | PETER NYCUM
Northwestern School of Law,
Lewis and Clark College |
| ELIZABETH J. CABRASER, ESQ.
San Francisco | KENNETH O'REILLY
University of Alaska, Anchorage |
| ERIC A. CHIAPPINELLI
School of Law, University of
Puget Sound | PAULA PETRIK
University of Maine |
| LAWRENCE M. FRIEDMAN
Stanford Law School | JOHN PHILLIP REID
New York University
School of Law |
| CHRISTIAN G. FRITZ
University of New Mexico
School of Law | RAY REYNOLDS
Editor, <i>California Lawyer</i> |
| HON. ALFRED T. GOODWIN
Chief Judge, U.S. Court of
Appeals for the Ninth Circuit | HARRY N. SCHEIBER
Boalt Hall, University of
California |
| ROBERT W. GORDON
Stanford Law School | MOLLY SELVIN, Ph.D.
Santa Monica |
| MICHAEL GRIFFITH
Archivist, U.S. District Court,
Northern District of California | CHARLES H. SHELDON
Washington State University |
| JAMES W. HULSE
University of Nevada, Reno | CAROLINE P. STOEL
Portland State University |
| LOUISE LaMOTHE, Esq.
Los Angeles | STEPHEN L. WASBY
State University of New York,
Albany |
| DAVID J. LANGUM
Cumberland School of Law,
Samford University | JOHN R. WUNDER
University of Nebraska |

CONTENTS

<i>Lone Wolf v. Hitchcock</i> : Implications for Federal Indian Law at the Start of the Twentieth Century <i>By C. Blue Clark</i>	1
The Civil Law and Field's Civil Code in Common-Law California—A Note on What Might Have Been <i>By Bartholomew Lee</i>	13
Bearers of the Burden: Justices of the Peace, Their Courts and the Law, in Orange County, California, 1870-1907 <i>By John J. Stanley</i>	37
The White Man's Justice: Native Americans and the Judicial System of San Diego County, 1870-1890 <i>By Richard W. Crawford</i>	69
Phelps-Dodge and Organized Labor in Bisbee and Douglas <i>By Marshal A. Oldman</i>	83
The 1990 Northern Justice Conference Proceedings <i>By Stephen Haycox</i>	97
Book Reviews	101
Articles of Related Interest	105
Memberships and Contributions	107

Cover Photograph: San Diego Courthouse, 1887 (San Diego Historical Society)

WILLIAM P. GRAY 1912-1992



WHEN JUDGE WILLIAM P. GRAY died recently, his loss was felt by the entire legal community—lawyers, jurists, and legal historians alike—for he was admired and respected by us all. For good reason.

Judge Gray embodied the qualities that lawyers think judges should have. He was a person with principles, as well as patience; a person with convictions, as well as compassion; a person who believed in the law, as well as in fairness; a person who administered justice, but never lost his respect for human dignity. Just as his earlier years on the bench and in public service exemplified these qualities, so did his years as senior judge. For example, after he gained senior status, he gave up his courtroom to a junior judge, but he continued to take cases. He was a founding member of this Society and its first president, and his active support was critical to its early success. He became a counselor to high-school students in Pasadena. Even after he was diagnosed as having brain cancer, he began taking piano lessons. Throughout his life, he remained as interested, as interesting, and as thoughtful as ever. And he died as he as he had lived, with great dignity.

Christine Swent Byrd, *board member*
Ninth Judicial Circuit Historical Society

Lone Wolf v. Hitchcock: IMPLICATIONS FOR FEDERAL INDIAN LAW AT THE START OF THE TWENTIETH CENTURY

BY C. BLUE CLARK

January 5, 1903, has been called "one of the blackest days in the history of the American Indian."¹ The United States Supreme Court's decision announced on that day in *Lone Wolf v. Hitchcock* climaxed a century-long assault upon Native Americans that increasingly confined and restricted tribal members' rights to their cultural and legal separatism and to their lands.² The opinion had implications not only for the Kiowa Indians who had gone to court to halt allotment in severalty of their reservation lands, but also for federal-Indian legal relations, for native treaty rights and sovereignty, and for official policy toward the American Indians. One recent jurist has termed the case "the Indians' Dred Scott decision."³

The terms of the 1867 Treaty of Medicine Lodge had begun allotting lands to individual Kiowa, Comanche, and Plains Apache Indians, although only limitedly at first.⁴ Tribespeople continued to hold unallotted lands in common. To forestall demands for the cession of further lands, Article 12 of the treaty provided that three-quarters of the tribe's adult males had to consent to any more land transfers.⁵ Such consent was unlikely,

C. Blue Clark is executive vice-president, Oklahoma City University. A 1984-85 Fellowship at the McNickle Center of the Newberry Library supported the research leading to this article.

¹Justice Philip Nichols, Jr., concurring in *Sioux Nation v. United States*, 601 F.2d 1157, 1173 (1979) [hereafter cited as *Sioux Nation v. United States*].

²187 U.S. 553 (1903).

³*Ibid.*

⁴15 Stat. 581.

⁵*Ibid.* at 589.

however, since for most of the year the tribes were dispersed across the prairie. Relentless federal pressure confined the Indians to a reservation in western Indian Territory (or what later became Oklahoma), while frontier insistence on more land increasingly diminished the reservations themselves. The Kiowa leader Lone Wolf and his fellow tribal members viewed with growing alarm the steady erosion of neighboring Cheyenne and Arapaho lands following their opening in early 1892.

The Kiowa also saw clearly how federal policy was devastating the tribe in terms of malnutrition and disease and loss of its cultural heritage. Contemporary Christian missionary accounts describe many of the Kiowa as being in a state of panic over the opening of their lands. In September and October of 1892, a presidential commission negotiated with the Kiowa, Comanche, and Plains Apache Indians for an additional 2.5 million acres of land. Indian recalcitrance against any agreement that would cost them land led the commissioners to resort to deceit, fraud, and bribery. They arranged for Indian troops to sign the agreement under orders and for non-Indians to affix their signatures to the document in exchange for the promise of choice parcels of allotted land. The 1892 agreement surrendered the reservation land. The president submitted the fraudulent agreement (with many fewer than the stipulated Indian signatures) to the United States Senate.⁶ That body amended the agreement to conform to some Indian demands, but without Indian approval of the changes, and finally ratified the agreement in 1900 after eight years of preventive delaying tactics on the part of the Indians and their supporters.⁷ Ratification cleared the way for allotment to proceed and for the "surplus" to be opened to non-Indians. To block implementation of the act, Lone Wolf initiated a local suit early the next year.

Lone Wolf had consistently opposed the intrusion of Anglo-Americans into Kiowa affairs. After serving as one of the tribe's leading warriors on the southern plains, from 1879 he acted as the leading Indian opponent in western Oklahoma Territory of government assimilationist policy. He and his followers harassed

⁶Once back in the East, the commissioners switched versions of the agreement, substituting their version with the forged signatures. Even with the altered document, the 1892 agreement was still between 21 and 91 signatures short of the needed three-quarters, depending upon whether age 18 or age 21 was the criterion for adult status. *Kiowa, Comanche, and Apache Memorial*, 56th Cong., 1st sess., January 15, 1900, S. Doc. 76 [Serial 3850], vol. 8.

The commission was variously referred to as the Jerome and Cherokee Commission. "Proceedings of Council held with Comanche, Kiowa, and Apache Indians in September and October, 1892," 55th Cong., 3d sess., January 26, 1899, S. Doc. 77 [Serial 3731], vol. 7, and Office of Indian Affairs, Letters Received, Record Group 75, file 8094-1892, National Archives.

⁷Act of June 6, 1900, 31 Stat. 672.

missionaries on the reserve, threatened Indians who took up farming under government guidance, and challenged federal policy at every opportunity, enlisting the aid of missionaries and lawyers in writing petitions and letters of protest to government officials. Annual meetings with federal officials and visits to congressional hearings underscored Indian opposition to the 1892 agreement.

Attorney William M. Springer assisted with a petition dated May 21, 1901, and a letter from Lone Wolf and other Kiowa and Comanche Indians on the reserve submitted to the acting secretary of the Interior directly protesting implementation of the 1900 act. Springer worked with local lawyers on behalf of the Lone Wolf suit. The Indians' attorneys argued successfully in June before a local probate judge in Canadian County that the 1900 act violated the terms of the 1867 Treaty of Medicine Lodge. The unilateral changes made to the 1892 agreement were illegal. Forged signatures and bribes paid during the negotiations made the agreement fraudulent. The attorneys sought a temporary restraining order halting U.S. Secretary of the Interior Ethan Allen Hitchcock and Commissioner of the General Land Office Binger Hermann from continuing with the allotment of Lone Wolf's tract and preventing the opening of the reservation to non-Indian settlement. The judge granted the injunction on June 6. On August 17, Judge Clinton F. Irwin of the Second Judicial District of Oklahoma Territory denied the temporary restraining order, overturned the temporary injunction, and allowed the federal government to proceed with opening the land.⁸

On June 6, 1901, Springer filed a suit for Lone Wolf in the Supreme Court of the District of Columbia. Eleven days later other Kiowa, Comanche, and Plains Apache Indians joined the suit, broadening Lone Wolf's support. On June 20, Justice A.C. Bradley turned down Lone Wolf's arguments.⁹ His opinion stressed Indian "dependence" on the United States and the unquestioning political nature of congressional enactments where Indians were concerned. Springer asked the district court of appeals for a special petition. Lone Wolf led eight others as part

⁸Civil Appearance Docket, vol. 8, Canadian County Court, Old Court Records microfilm, Case 2302, El Reno, Okla. In addition to the services of Springer, Lone Wolf used those of William C. Reeves and Charles Porter Johnson, as well as Hays McMehean.

⁹Springer to Indian Rights Association, June 23, 1901, May-December Correspondence, 1901 file, William McKendree Springer Collection, Chicago Historical Society [hereafter cited as Springer Collection]; and Van Devanter to Hitchcock, July 28, 1901, Hitchcock Private Papers, Record Group 316, Letters Received 1899-1906, box 3, National Archives [hereafter cited as Hitchcock Papers].

of the Indian delegation attending the appeals court hearing. Even their presence was controversial, since they were absent from the reservation without the agent's permission. (The Indian Rights Association of Philadelphia had to raise money to send them home once the arguments in the hearing had concluded.) Their appeal was turned down, clearing the way for the case to move to the Supreme Court for the October 1901 term.¹⁰

Because of Indian supporters' appeals and government counter-motions, as well as the sweeping nature of the lower-court opinions that left the Kiowa powerless in the face of federal actions, national advocates for Indian policy reform took up the legal struggle. The nation's largest Indian reform group referred to the court of appeals decision as "a momentous one for the Indians."¹¹ Indian reformers thought that the court opinion would hamper ultimate Indian assimilation by violating treaty rights and marring the Indians' confidence in reforms then under way. The Indian Rights Association agreed to pay William Springer's expenses in representing the Kiowa before the highest court.

Springer, who had represented Illinois in Congress for two decades, was a lobbyist and an active Democratic Party politician. He was familiar with Indian Territory issues, having served as a federal judge for the northern district of Indian Territory and as chief justice of the U.S. Court of Appeals for the Territory from 1895 to 1899. He had recently aided the Cherokee in their suit against Interior Secretary Hitchcock. Joining Springer in the case was Hampton L. Carson, founder of the Indian Rights Association and attorney general for Pennsylvania. Assistant U.S. Attorney for the Interior Department Willis Van Devanter defended federal officials in the appeal before the Supreme Court.¹²

The stage was set for what was to become the most famous American Indian court case at the turn of the century. Carson argued that the Kiowa and Comanche sought judicial relief from arbitrary congressional actions. He pointed out that Congress unilaterally altered the terms of the 1892 agreement through the 1900 act. He further underscored the fact that the 1892 signatures were forged and even then did not constitute the required three-

¹⁰23 S. Ct. 216 (1902); Decree of the Court of Appeals of the District of Columbia, No. 1109, March 4, 1902, Record Group 267, Records of Supreme Court Appellate Cases, file 18454, National Archives [hereafter cited as Court of Appeals Decree]; Opinion of Court on Motion for Re-Argument, No. 1109, Case 22338, Docket 50, March 14, 1902, reel 16, Indian Rights Association Papers (microfilm, Newberry Library, Chicago) [hereafter cited as IRA papers].

¹¹*Twentieth Annual Report of the Indian Rights Association*, 1902, IRA Papers, *supra* note 10 at reel 103.

¹²Sources include the Springer Collection, *supra* note 9; IRA Papers, *supra* note 10 at reels 16 and 99; Hitchcock Papers, *supra* note 9, and Court of Appeals Decree, *supra* note 10.

quarters of tribal males as required under the terms of the 1867 treaty. The 1900 act offered only a fraction of the land's value to be paid to the Indians, and the remaining land base could not support the Indians because it was too arid for agriculture. The government's actions, he maintained, clearly violated the 1867 treaty that the nation had made in good faith with the Kiowa, Comanche, and Plains Apache tribes.

Van Devanter, for the secretary of the Interior, argued in court chambers that the United States possessed unlimited plenary authority over its Indian wards. He drew upon a long series of federal court opinions (relying heavily upon the lower courts) to support his view that the federal government possessed paramount authority over its Indian wards. He dismissed the controversy over the 1892 agreement and its fraudulent signatures, noting that the Kiowa agent had certified that more than the necessary three-quarters of adult tribesmen were represented among the signatures on the 1892 agreement, making that document legal. He further argued that the 1900 act was modified to accord with the wishes of the Indians regarding grazing lands held in common. He stated that the Indians, including Lone Wolf and his family, had already accepted the government payment of \$50 per capita for the ceded surplus land and had taken their allotments.

Anticipation built among proponents on both sides of the case as the verdict neared. Technical adjustments by all parties, focusing on the government payment and Indian acceptance of the money for surplus land, delayed the suit to the October 1902 court term. Indian Rights Association champions fully expected to be vindicated because never before had the Supreme Court thrown open treaty-guaranteed Indian lands without some consent of the Indians involved. Throughout American history, when negotiators had pressured a hastily gathered group of Indians to sign a document, there had been at least a semblance of Indian consent. Indian Rights Association President Philip Garrett wrote that adverse government action would imperil all treaty-established reservation lands in the nation. Moreover, sanctity of property rights and treaties had consistently been legal cornerstones of the nation. Indian backers were equally confident that the court would not violate American due process of law where Indians were concerned.¹³

¹³IRA Papers, *supra* note 10: Springer to Matthew Sniffen, June 26, 1901, reel 16; Garrett to President William McKinley, June 6, 1900, reel 75; Samuel Brosius to Herbert Welsh, March 7, 1902, and Brosius to Welsh, March 15, 1902, reel 16.

THE COURT JUSTIFIES THE ABROGATION OF TREATIES

Supreme Court Justice Edward Douglas White read the court opinion on January 5, 1903. *Lone Wolf* is the court's strongest statement about the Indians' subject status in American law, proclaiming that Congress might abrogate an Indian treaty at will, that Indian reservation land could be seized while the Indian had little recourse to protest, and that Congress held plenary power over native peoples beyond the control of the judiciary. The justices tied together the major threads of thought from the nineteenth century regarding federal Indian law in their decision. The opinion stated:

The power exists to abrogate the provision of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so . . . it was never doubted that the power to abrogate existed in Congress . . . particularly if consistent with perfect good faith towards the Indians.

The justices ruled that Congress had made a "good faith effort" to give the Indians full value for their land, even though the federal government paid them 93 cents for land later deemed to be worth \$2 an acre at the time.¹⁴ Later opinions held that a "good faith effort" could be "purported" from the public record demonstrating that an adequate consideration had been provided, although not tied to a specific amount of money. A change in the form of investment of Indian tribal property from land to money was not protected under the Fifth Amendment of the Constitution guaranteeing "just compensation."¹⁵

The Indians' state of pupillage in the eyes of the justices necessitated the guardian's use of stern measures to lift the Indian charges out of barbarism. Under the political-question doctrine, the justices were reluctant to interfere:

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the

¹⁴*United States v. Kiowa, Comanche, and Apache Tribes*, 143 Ct. Cl. 534 (1958), 163 F. Supp. 603.

¹⁵Nichols concurring in *Sioux Nation v. United States*, *supra* note 2 at 1175.

Government. . . all these matters . . . were solely within the domain of the legislative authority, and its action is conclusive upon the courts.¹⁶

The justices faced a dilemma in their holding because of the obviously fraudulent nature of the signatures on the 1892 agreement. The justices also confronted an irony in the case. Would they turn down the majority-approved 1892 agreement, however it may have been achieved, in favor of the three-quarters' proviso, and thereby risk being undemocratic? They took shelter in the political-question doctrine. Justice White avoided the issue of fraud, bribery, and chicanery regarding the 1892 agreement with the reservation Indians and the alterations involved in the 1900 act when he stated that all such matters belonged to Congress: "as Congress possessed full power in the matter, the judiciary can not question or inquire into the motives which prompted the enactment of the legislation."¹⁷ In dealing with the Indians, "we must presume that Congress acted in perfect good faith." If the Indians felt injured by action of Congress, "relief must be sought by an appeal to that body for redress and not to the courts."¹⁸

Six years later the justices invoked the same doctrine when they applied federal jurisdiction to an allotted Indian citizen (as such persons became known) accused of murdering another allotted Indian citizen.¹⁹ At that time, Associate Justice David J. Brewer gave the court opinion and took the political-question doctrine even further. The justices held that when Congress enacted the Burke Act in 1906, Congress did not intend to relinquish all federal jurisdiction over Indians with the conferral of allotment and citizenship upon the nation's wards. Federal paternalism remained.²⁰

In his remarks on the *Lone Wolf* suit, Justice White cited a number of cases that dealt with congressional authority over Indian affairs. He invoked *Kagama* for congressional authority to abrogate provisions of an Indian treaty,²¹ as well as *Cherokee Tobacco*, which established that a previously enacted statute took precedence over a treaty.²² He also looked to *Ward v. Race Horse* for congressional authority to admit a state to the Union in

¹⁶ 187 U.S. 553, 567 (1903).

¹⁷ *Ibid.* at 568.

¹⁸ *Ibid.* at 553.

¹⁹ *United States v. Celestine*, 215 U.S. 278, 290 (1909).

²⁰ *Ibid.* at 291.

²¹ 118 U.S. 375, 383 (1885).

²² 11 Wall. 616 (1871).

violation of Indian hunting rights that were guaranteed by treaty.²³ White cited *Beecher v. Wetherby* to point to the temporary status of Indians as occupiers of lands historically theirs but held by the federal government and subject to the will of Congress,²⁴ and *Stephens v. Cherokee Nation* to endorse congressional power in determining tribal membership.²⁵ He recognized further congressional authority in *Cherokee Nation v. Hitchcock*, in which Congress delegated the responsibility for leasing Indian lands to the secretary of the Interior.²⁶

The opinion stunned advocates of the Indian cause, whose immediate reaction was one of alarm. Indian Rights Association field investigator and Capitol lobbyist Samuel M. Brosius wrote that the *Lone Wolf* decision announced a policy of wholesale confiscation of Indian lands. For him Congress now had no restraints upon it as far as the Kiowa were concerned.²⁷ One author blamed the ruling for pauperizing Indians and turning them "into hapless and dependent wards of the Nation."²⁸ The same writer wondered if, as a result of the decision, reservation Indians possessed "any vested rights" whatsoever.²⁹ A popular account at the time stated that the justices had "pronounced the death sentence" on tribes, since Indians were now firmly in the grasp of greedy and corrupt congressmen anxious for private gain derived from the exploitation of Indian lands.³⁰

Proponents of the government case hailed *Lone Wolf* as a much-needed vindication of a century of federal policy toward Indians. They believed that total assimilation of the Indians was inevitable, and that the justices merely acknowledged this in their opinion. Commissioner of Indian Affairs Francis E. Leupp called the opinion "epochal" because "in about a generation,

²³ 163 U.S. 504, 511 (1896).

²⁴ 95 U.S. 517, 525 (1877).

²⁵ 174 U.S. 445, 483 (1899).

²⁶ 187 U.S. 294, 306 (1902). Court opinions have ended absolute power: the "power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." Chief Justice Fred M. Vinson reading the opinion in *Alcea Band of Tillamooks v. United States*, 329 U.S. 40, 54 (1946), citing *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899); separation of powers and the plenary power of Congress "does not mean that all federal legislation concerning Indians . . . is immune from judicial scrutiny," *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977); and *Sioux Nation v. United States*, 448 U.S. 371, 413 (1980).

²⁷ Brosius to Welsh, July 30, 1902, IRA Papers, *supra* note 10 at reel 16.

²⁸ George Kennan, "Indian Lands and Fair Play," *Outlook* 76 (February 27, 1904) 501.

²⁹ George Kennan, "Have Reservation Indians Any Vested Rights?," *Outlook* 70 (March 29, 1902) 765.

³⁰ Seth Humphrey, *The Indian Dispossessed* (Boston, 1905) 274-75.

'Indian lands' and the 'Indian problem' will simultaneously disappear in the vortex of a general American citizenship."³¹ The Indian would soon be forced to assimilate into the body politic of national life.

The case came to dominate federal policy on Indian affairs. It proved useful to justices who sought a ruling that would aid their opinions in dealing with post-allotment issues of leasing, inheritance of petroleum rights, and the disappearance of tribal lands. One of the early influential cases relying on the Kiowa decision was *Heff*, which involved a full-blood Indian convicted of selling beer to another Indian in violation of liquor-control laws.³² In it, Supreme Court justices held that Indians were "under the care and control" of the United States, especially congressional plenary authority, but surprised nearly everyone when they stated that the United States "may at any time abandon its guardianship" of Indians and leave the Indian as an ordinary citizen.³³ The Indian in question had been allotted land in Kansas and was, therefore, a citizen. Many interpreted the opinion to imply that allotted Indians were no longer wards of the federal government and that they would soon fall prey to whiskey peddlers and other unscrupulous characters. *Tiger v. Western Investment Company*³⁴ is another major pronouncement that drew on *Lone Wolf*, building on the congressional authority over "dependent people" set out in that case to extend the federal power to restrict land *Choate v. Trapp*, in 1912, was another landmark.³⁶ Drawing on *Lone Wolf*, it was one of the few to declare a congressional enactment unconstitutional where the Indian was concerned. In *Choate*, the justices held that Congress could not authorize the taxation of Indian lands after previously pledging that they were tax exempt, protecting Indian property rights lawfully vested.³⁷ In 1912 *Heckman v. United States* also reaffirmed congressional plenary power over allotted American Indians, permitting the federal government to intervene in court on their behalf to prevent alienation of their lands.³⁸

³¹ "Indian Lands," *Annals of the American Academy of Political and Social Science* 33 (January-June 1909) 621, 626.

³² 197 U.S. 488, 498 (1905).

³³ *Ibid.* at 499.

³⁴ 221 U.S. 286 (1911).

³⁵ *Ibid.* at 316.

³⁶ 224 U.S. 665 (1912), esp. 671 and 678.

³⁷ See Felix Cohen, "Indian Rights and the Federal Courts," *Minnesota Law Review* 24 (January 1940) 199; Nell Jessup Newton, "Federal Power over Indians," *University of Pennsylvania Law Review* 132 (January 1984) 195.

³⁸ 224 U.S. 413, 832 (1912).

In the *Lone Wolf* decision, congressional power over the American Indian was at its strongest. The decision equated in law the attempts of federal policies, educational programs, and missionary endeavors to obliterate Indian culture and to "civilize" and Christianize the American Indian. Federal tutelage replaced Indian independence. The court firmly established in law the wardship status of the Indian. Thus *Lone Wolf* marks the weakest recognition of American Indian sovereignty in United States history. Similarly, the decision is the Supreme Court's strongest statement of plenary power over Indian affairs. At the time, many members of the bar believed that national power over Indians had "no limit."³⁹ The plenary power dominated federal Indian law through the first half of the new century.⁴⁰ White drew upon his own remarks from an immediately previous Supreme Court decision regarding the Interior secretary's lease of Cherokee minerals for the court's use of plenary power. A month before the *Lone Wolf* decree, *Cherokee Nation v. Hitchcock*⁴¹ upheld the secretary's authority to lease Cherokee resources against tribal wishes, saying that Congress had delegated the power to do so and that Congress possessed "paramount authority" to do so. In *Lone Wolf* the high court decided "that full administrative power was possessed by Congress over Indian tribal property" and presumed that the legislative branch "exercised its best judgment" in such matters.⁴²

In *Lone Wolf* the high court directly addressed the issue of treaty-related Indian property rights for the first time. Following a lengthy series of nineteenth-century court opinions dealing with congressional enactment of laws affecting Indians,⁴³ grants of railroad rights-of-way across Indian reservations,⁴⁴ leasing of resources on Indian land,⁴⁵ and tribal membership rolls⁴⁶ (all without the consent of the Indians), the Supreme Court justices focused on Indian property specifically held under the terms of a treaty. Setting a precedent, the Court held that Indian consent

³⁹ Clinton Flynn, "Legal Status of the Indians in the United States," *Central Law Journal* 62 (May 25, 1906) 399.

⁴⁰ Ann Laquer Estin, "*Lone Wolf v. Hitchcock*: The Long Shadow," in Sandra Cadwalader and Vine Deloria, Jr., eds., *The Aggressions of Civilization* (Philadelphia, 1984) 236-37; Irene Harvey, "Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice," *American Indian Law Review* 10 (1982) 117-50; Mike Townsend, "Congressional Abrogation of Indian Treaties," *Yale Law Review* 98 (February 1989) 795, 806-8.

⁴¹ 187 U.S. 294, 306 (1902).

⁴² 187 U.S. 553, 568 (1903).

⁴³ *Cherokee Tobacco*, 11 Wall. 616 (1871).

⁴⁴ *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

⁴⁵ *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

⁴⁶ *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).

was no longer necessary and that Congress could unilaterally diminish Indian reservations. In effect, Congress was given a green light to force allotment in severalty upon reluctant Indian wards. Tribal property rights and tribal political authority became commodities that Congress controlled.

The justices also turned around the entire issue of Indian competency. Ironically, during the land negotiations in 1892 the commissioners had treated the tribes as competents while at the same time dictating terms to them. Immediately afterward, Lone Wolf and other Indians pleaded that they had been deceived and that they were not competent to take part in the negotiations as they had been held. In *Lone Wolf*, the Court presumed that native peoples were incompetent as a result of membership in their tribes, deeming that tribalism itself caused the childlike behavior that required guardianship. The Court held that the tribal holding of land in common was by its nature primitive and was directly opposed to the private ownership of property of superior civilizations. In 1903 the Court agreed that only Congress could certify the removal of restrictions over American Indians and their property. Congress then enacted a series of measures (such as the controversial Burke Act three years later) that hastened the loss of Indian land. American Indian landholders were increasingly declared competent in order to dispose of their previously restricted lands, while on other occasions the trust allotments were subject to state taxation statutes. For years, Indian lands were thrust open to non-Indian settlers and business interests. Government issuance of competency and land patents peaked between 1917 and 1920, when the Bureau of Indian Affairs gave out twenty thousand patents covering more than a million acres, most of which the Indians lost.⁴⁷

For the Kiowa, Lone Wolf's worst fears were realized. By mid-1901 the special allotting agent had made 2,759 allotments for the Kiowa, Comanche, and Apache reserve, a total that grew to 3,444 with final adjustments. The government filed 11,638 homestead entries during the two-month period of the land lottery that thrust open the reserve to non-Indian settlement. From the ninety million acres the Kiowa had claimed in 1865, only one-half million remained to them in 1904.⁴⁸

⁴⁷Russel Barsh and James Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley and Los Angeles, 1980) 93. The Burke Act is the Act of May 8, 1906, 34 Stat. 182. The Act of May 6, 1910, 36 Stat. 348, permitted the state of Nebraska to tax pre-1885 Omaha Indian trust allotments. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln, 1984) 164-65, 183-87, deals ably with the national aftermath.

⁴⁸*Report of W.A. Richards*, 57th Cong., 1st sess., May 5, 1902, S. Doc. 341 (Serial 4241) 22:14.

Lone Wolf came on the heels of the loss of a series of court battles over southern California Mission Indian land rights in which the Indian Rights Association had reluctantly become involved years before. Five years after *Lone Wolf*, the Indian Rights Association entered another suit before the U.S. Supreme Court on behalf of Indian rights to educational trust funds. That suit was also lost. The association lacked both the financial and the human resources to be able to sustain high court appeals.⁴⁹

As the century dawned, *Lone Wolf v. Hitchcock* summarized nineteenth-century American law regarding the place of native peoples in United States society. Federal courts tied together earlier decisions dealing with plenary power, Indian treaty rights, sovereignty, and administrative control that had evolved during the previous ninety years of American jurisprudence. The *Lone Wolf* decision firmly secured the Indians' place as second-class citizens in America. Exploitation of Indian resources and the ravages of the allotment system increased in the wake of the decision, resulting in more rapid reservation-land and resource losses. The opinion also came at the pivotal time of America's acquisition of an overseas colonial empire as a result of the conclusion of the Spanish-American War. The court applied the *Lone Wolf* ruling to dependent peoples in Puerto Rico, Cuba, and the Philippines, and to other Pacific island possessions of the United States.

⁴⁹ Another "Century of Dishonor!" pamphlet, IRA Papers, *supra* note 10 at reel 102, is an example. The Mission Indian case was *Barker v. Harvey*, 181 U.S. 481 (1901), discussed at length on reel 15 of IRA Papers, and in C.S. Goodrich, "Legal Status of the California Indian," *California Law Review* 14 (January 1926) 98-100. The later case was *Quick Bear v. Leupp*, 210 U.S. 50 (1908), discussed in Francis Paul Prucha, *The Churches and the Indian Schools* (Norman, 1979) 149-60. An example of the expense of litigation is the discussion in Minutes of Indian Rights Association meeting, January 7, 1903, IRA Papers, *supra* note 10 at reel 99.

THE CIVIL LAW AND FIELD'S CIVIL CODE IN COMMON-LAW CALIFORNIA—A NOTE ON WHAT MIGHT HAVE BEEN

BY BARTHOLOMEW LEE

A California lawyer who consults the civil code is consulting a statute whose structure dates back two millennia to the civil law of Rome. The code's modern architect, New York's David Dudley Field, envisioned a civil-law jurisprudence for his code. It was enacted in California in 1872 as a result of the nineteenth-century law-reform movement, with all of its civil-law ambitions. California's enactment also had considerable help from Stephen Field (later Justice Field of the United States Supreme Court, thanks to his brother's intervention with President Lincoln). Stephen probably took his brother Dudley's codes to California with him in his steamer trunk.

David Dudley Field financed many years of reform agitation with the fat fees he collected from the robber barons of the day. Perhaps no nineteenth-century lawyer in this country had a more challenging practice for higher stakes; certainly none applied its proceeds more nobly.

Despite the thrust of the law-reform movement, no civil-law jurisprudence evolved for the California Civil Code. The common law and its antithetical processes assimilated the code as enacted. The analyses of John Norton Pomeroy in the 1880s neutralized the civil-law import of the civil code in California, leaving it just another statute to be strictly construed.

This note is dedicated to the memory of the late Professor Grant Gilmore, in whose legal history seminar it first evolved at the University of Chicago Law School some twenty years ago.

Bartholomew Lee has been a member of the California Bar since 1973 and is a professorial lecturer at Golden Gate University, San Francisco.

Field's civil code stemmed directly from a sustained and nearly successful assault on the judicial process. The powers of the courts—in ascendancy since Lord Coke's conflicts with royal authority—had to best the challenges of the Jacksonian coalition and the related law-reform movement. These last were, ironically, the later standard-bearers of Coke's old client, the legislature. In many ways the most successful instrument of those challenges, the civil code, too, failed—of adoption in New York, and in application in the adopting states, especially California.

The adoption of Field's civil code in several western states, an almost accidental high-water mark, remains as the only statutory recognition of nearly a century of debate and controversy¹ about codification of the common law of civil obligation.² The enacting western states were the Dakota Territory, in 1865; California, in 1872; Idaho, in 1887; and Montana and Colorado, in 1895.

The nineteenth-century codification movement failed. The codes of this century differ widely in intent and effect.³ One

¹ The State of Georgia enacted a set of political, penal, practice, and civil codes, unrelated to Field's, in 1860. With respect to these codes, the Georgia Code commissioners wrote: "[We construed] the Legislative will . . . as requiring a Code, which should embody the great fundamental principles of our jurisprudence from whatever source derived, together with such Legislative enactments of the State, as the wants and circumstances of our people had from time to time, shown to be necessary and proper." *The Code of the State of Georgia*, prepared by R. H. Clark, T.R.R. Cobb, and D. Irwin (Atlanta, 1861) iii. But, as the legislative committee report accompanying these codes makes clear, they were essentially a set of revised local statutes, like the revised statutes of almost every other state, along with the statement of general rules. The principle of codification was "to attempt no change or alteration in any well-defined rule of law which had received Legislative sanction or judicial exposition, and to add no principle or policy which had received the condemnation of the former, or was antagonistic to the settled decisions of the latter." *Ibid.* at viii, Report of Senator Hines Hold et al.

Lawrence M. Friedman's magisterial *History of American Law* (New York, 1973) 353-54 [hereafter cited as Friedman, *American Law*] also presents the Georgia Code, and illumines the social and legal realities of the times. Friedman's earlier critique of the law-reform movement is necessary to any understanding of law's history in America: idem, "Law Reform in Historical Perspective," *St. Louis University Law Journal* 13 (1969) 351. His discussion of "The Civil Law Fringe" (*American Law*, ch. 2) makes clear how little the indigenous civil law affected legal development in the states south of Georgia and west of Mississippi.

More recent scholarship has shown that even California's community-property laws, commonly thought to derive from its civil-law heritage, had little to do with such abstractions, and much more to do with providing incentives to ladies of quality to get on the boats for the Golden Gate. Ray August, "The Spread of Community-Property Law to the Far West," *Western Legal History* 3 (1990) 1:34.

² See note 21 *infra*.

³ See generally Grant Gilmore, "On Statutory Obsolescence," *University of Colorado Law Review* 39 (1967) 461 [hereafter cited as Gilmore, "Statutory Obsolescence"].

reason the movement failed was simply that it could only argue in its early days: it had no written code to put forward, but only the proclaimed virtues of codification. By the time it had a code, Field's New York Draft of 1865,⁴ a raging opposition could articulate the persuasive virtues of case-by-case common-law jurisprudence.⁵ The legislatures, and in New York two vetoing governors, chose the known and rejected the code.⁶

Perhaps a draft code thirty years earlier might have given the codification movement the weapon needed to win its campaign. A set of nationally adopted codes, before the Civil War, could have made for a different legal world. But Field's code came too late. Its fitful adoption in five states gave it little effect. What effect it had, in encouraging corporations and confusing domestic relations, cut against its adoption elsewhere.⁷

In one effect Field sought for his code, the engendering of a new European-style civil-law jurisprudence for American law, the enacted codes failed totally. This note will examine this hope of Field's and the related thrust of the codification movement, and how they came to naught in California. California was a territory knowing only civil law from Spain and Mexico. Yet even in California, the civil law could hold no adherents despite calls from the earliest days for its positive enactment. In December 1849, California's governor had called upon its first legislature to enact the Civil Code of the State of Louisiana;⁸ in January 1850, leading lawyers of San Francisco petitioned the legislature to adopt the civil law. After a report to the contrary, the legislature

⁴See note 53 *infra*.

⁵See note 19 *infra*.

⁶See text at note 51 *infra*.

⁷For example, see the note by Mark DeWolf Howe, ed., *Readings in American Legal History* (Boston, 1949) 523 [hereafter cited as Howe, *Legal History*], to the effect that the California Civil Code had permitted an enormous growth in the power of corporations, resulting in an undesirable popular reaction. Howe also reprints a hilarious account from the *Los Angeles Weekly Express* (December 18, 1873) of some tangled marital relations caused by the civil code, as reflected in *The People v. Oades*. This was reprinted in the *American Law Review* 20 (1886) 764, as part of a campaign against codification. The newspaper account, and the story behind it, appear in Stuart B. Walzer, "A Strange Story," *Western Legal History* 4 (1991) 265.

⁸*Journal of the Senate of the State of California at their first Session begun and held at the pueblo de San Jose on the Fifteenth of December, 1849* (San Jose, California, 1850) 30, 33.

declined, and instead on April 13 enacted that the common law be the rule of decision in the courts.⁹

Shortly thereafter, Field's codes, as the fruit of the law-reform movement, fell on seemingly fertile western soil. Still, the civil-law principles of code and codifier never really saw the light of the juristic day. A vigorous thicket of common-law cases overgrew and overshadowed them. The twentieth century's civil and commercial codes cleared the thicket, area by area.¹⁰ Any hope for a civil-law statutory jurisprudence had, however, been dead for fifty to a hundred years. Speculation nonetheless has its uses in history, and the study of what might have been (particularly in California) can also illumine our present. As Grant Gilmore, a close student of the history of the law as well as the law itself, explained, "The historian who shows us that what in fact happened need not have happened at all enriches our understanding of the past and, consequently, puts us in a position where we can deal more rationally with the infinitely complex problems which confront us."¹¹

The forces that overruled the enacted codes still shape our law today.

THE GENESIS OF FIELD'S CIVIL CODE IN THE CODIFICATION MOVEMENT

"All that is the case,"¹² at least in its most general aspects, varies little over time. A century and a half ago, as now, there were two western legal systems. The common law, with its case-by-case system of precedents, and doctrines of stare decisis, along with its companion equity system to correct its excesses, prevailed in Anglo-American jurisdictions. The civil law, with its comprehensive, legislated codes of law and theorists of the caliber of Puffendorf and Pothier, prevailed on the Continent. Neither system was without historical lineage of some distinction—the

⁹*California Laws*, ch. 95. See generally Richard R. Powell's thorough history of law in California, *Compromise of Conflicting Claims* (Dobbs Ferry, 1977) 87ff. Powell reproduces the handwritten petition as Appendix D, with the Report, which appears at *California Reports* (San Francisco, 1850) 1:588-604. The Senate *Journal* of 1850 also prints the Report [of Mr. Crosby] on Civil and Common Law, at 459. Another interesting history of California law touching on these subjects is in the pamphlet by William J. Palmer and Paul P. Selvin, *The Development of Law in California* (St. Paul, 1983).

¹⁰See Gilmore, "Statutory Obsolescence," *supra* note 3 at 4, on the role of Article Nine of the Uniform Commercial Code: "to cut away the tangle of underbrush and reveal the unified structure of security law that had already grown up."

¹¹Grant Gilmore, "The Age of Antiquarius: On Legal History in a Time of Troubles," *University of Chicago Law Review* 39 (1972) 487.

¹²Cf. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London, 1963) 7.

common-law phrase ran "The memory of man runneth not to the contrary,"¹³ while the civil law was generally satisfied to trace itself to the Romans and the sixth-century *Corpus Iuris Civilis*, Justinian's *Institutes*.¹⁴

Both legal systems sufficed for the day-to-day purposes of resolving cases and controversies, providing normative principles, and generally running their civilizations despite occasional civil wars. As Gilmore once challenged, "Most cases—perhaps all cases—are sensibly, or even 'correctly,' decided as of their own time and place."¹⁵ Both legal systems gradually changed and adapted themselves to the conditions and complexities of the times. Such changes and adaptations, simplifications and conformities, could and did occur only through the work of thousands of lawyers, judges and scholars. The labors were labored, the cases decided and commented upon, the codes written and redacted. Both this process and its resulting law were sometimes painfully slow, as exemplified by *Jarndyce v. Jarndyce*, in Charles Dickens's *Bleak House*, published in London in 1852. The law on the Continent as well as in England still managed more or less to keep up with social and commercial realities.

Nevertheless, the dichotomy between common law and civil law is real and is reflected in intellectual history as well, as the opposition between the British empiricists (for instance, Berkeley and Hume) and their predecessors such as Aristotle, on the one hand, and the continental system builders (for instance, Plato, Descartes, Kant, and Hegel), on the other. A similar split appears between the English individualist free-market theorists such as

¹³ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1768) 1:67.

¹⁴ The Roman jurist Gaius (A.D. ca. 110–ca. 180) and his *Institutes* preceded Justinian by several hundred years, but Justinian ordered destroyed all the predecessors of his code, according to a tradition correctly doubted by Gibbon. See Leo Deuel, *Testaments of Time* (Baltimore, 1965) 47.

¹⁵ In Grant Gilmore's discussion of the celebrated case of the Bezoar stone, *Chandelor v. Lopus*, 79 Eng. Rep. 3 (Ex. 1625), he concludes that "most cases—perhaps all cases—are sensibly, or even 'correctly,' decided as of their own time and place." Idem, "Products Liability: A Comment," *University of Chicago Law Review* 38 (1970) 107. A Bezoar stone was an animal's gut stone, thought to have restorative powers. Robert Burton, *The Anatomy of Melancholy* (London, 1621), Pt. 2, sec. 5, Memb. 1, Subs. 5.

On the Continent and in England, the practical business of the day has always required occasional adjudication. A body of law that came to pervade both the English and continental systems arose among traders and seafarers; it is known as the Law Merchant. From it, today's sales law, insurance law, Admiralty, and the law of negotiable instruments all derive. As a modern scholar concludes: "Spontaneity allowed the system to adapt to different commercial and political circumstances and facilitated legal changes in accordance with merchant practice. Deliberate planning was avoided because it would have interfered with the market's fluctuating supplies and changing prices." Leon F. Trackman, "Law Merchant," *Humane Studies Review* 2 (1984) 2:1, 3.

Adam Smith and Alfred Marshall and the continental socialists, especially Karl Marx. Isaiah Berlin noted the different ways of thinking in his essay on Tolstoy, *The Hedgehog and the Fox*, quoting Archilocus: "The fox knows many things, but the hedgehog knows one big thing."¹⁶

Berlin could have been commenting on the civil law and the common law when he wrote:

For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal, organizing principle in terms of which alone all that they are and say has significance—and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way . . . moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves, without . . . seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision.¹⁷

As part of the process of the law's change and adaptation, periodic and sometimes related law-reform movements agitated throughout the nineteenth and into the twentieth centuries. One such movement reached its culmination in England in the 1870s with the introduction of procedural reforms that would, it was hoped, make any repetition of a case like *Jarndyce v. Jarndyce* impossible. On the Continent, an earlier process had led to the adoption of the celebrated *Code Napoleon* of 1804, working a unification of the customary law of the North of France with the Roman law of the South.

A third such movement occupied the minds of many of America's best lawyers in the early part of the nineteenth century. It ultimately stemmed from Jeremy Bentham's 1776 criticism of Blackstone (the "Fragment on Government"). Bentham attacked "judge-made" law as opposed to legislation. The American law-reform movement's battle cry in many a rhetorical battle was "Codification." This movement, after Bentham, personified its archenemy as the common law, from its aspect of case-by-case ex-post-facto decision, case-by-case judge-made special legislation.

In what the reformers objected to, many saw the special virtue of the common-law process. At a later date, Oliver Wendell

¹⁶ Isaiah Berlin, *The Hedgehog and the Fox* (New York, 1965) 1.

¹⁷ *Ibid.* at 1-2.

Holmes would write (in 1881): "In substance the growth of the law is legislative. . . . It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the sacred root from which the law draws all the juices of life."¹⁸

Many of the later opponents of codification, notably James C. Carter of the New York Bar (a leading member of the prevailing historical school of jurisprudence), were of the opinion that *only* judges, through the common-law process, should make law.¹⁹ Such law would be made as factual situations, sure to re-arise, called it forth from a judiciary skilled in the process. Carter and others, in the debate with Field, occasionally went so far as to doubt the ability of legislatures to provide workable or just rules in advance.²⁰

On the right on the issue of codification were the conservatives—Chancellor Kent, Rufus Choate, Carter, and many of the most distinguished lawyers in America. In the early period, Jacksonian democracy had seemed everywhere—"King Andrew" had threatened their culture and the reformers were threatening their law. The reformers wanted a code, by which men could know the law, and by which they could be free of judges and their class. They wanted a code perhaps like Napoleon's celebrated code, but a code to do away with the mysteries of the common law, and the abuses of the common law.²¹

¹⁸Oliver Wendell Holmes, *The Common Law* (Boston, 1881) 35. For Justice Cardozo, both the legislator and the judge must legislate: "Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between the gaps. He fills the open spaces in the law." Benjamin H. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921) 113-14. In 1928 the dean of the legal realists, Karl N. Llewellyn, summarized thus the constraints of the judicial process, however legislative:

Four rules . . . form the basis of American case law procedure.

1. The court *must* decide *the* legal dispute that is before it.
2. The court *can* decide nothing but the legal dispute before it.
3. All cases must be decided on a *rule of law of general applicability* . . .
4. Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court.

Idem, *The Case Law System in America* (Chicago, 1989) 14.

¹⁹See Roscoe Pound's summary of Carter's views in Alison Reppy, ed., *David Dudley Field Centenary Essays* (New York, 1949) 7 [hereafter cited as Reppy, *Field Essays*]; see also James C. Carter, *Law: Its Origin, Growth and Function* (New York and London, 1907) 118, 204 [hereafter cited as Carter, *Law: Its Origin*], where he calls legislation, in its impact on private law, "a mere fringe."

²⁰Carter, *Law: Its Origin*, *supra* note 19 at 118 and 204.

²¹For the flavor of the debates of this and related legal issues of the early nineteenth century, see generally Perry Miller, ed., *The Legal Mind in America* (Ithaca, 1962) [hereafter cited as Miller, *Legal Mind*], and Howe, *Legal History*, *supra* note 7 at 433 ff.

In reaction to the reformers' hopes for codification on the European model²² (contrary to some comment,²³ the European model was pervasive), Choate would write:

Foreign examples, foreign counsel—well or ill meant—the advice of the first foreign understandings, the example of the wisest foreign nations, are worse than useless for us. Even the teachings of history are to be cautiously consulted, or the guide of human life will lead us astray. We need reform enough, Heaven knows; but it is the reformation of our individual selves, the bettering of our personal natures; it is a more intellectual industry; it is a more diffused and higher culture; it is a wider development of the love and discernment of the beautiful in form, in color, in speech, and in the soul of man—this is what we need—personal, moral mental reform—not civil—not political! No, no! Government, substantially as it is; jurisprudence, substantially as it is; the general arrangements of liberty, substantially as they are; the Constitution and the Union, exactly as they are—this is to be wise, according to the wisdom of America.²⁴

Of like-minded conservatives, who refused reform, and even of lawyers in general, the Jacksonian "mob" was said to have a simple view: "A successful lawyer is a sort of licensed knave, refined perhaps in his mode of cheating but really little better than a prime minister of Satan or at least a member of his Majesty's cabinet."²⁵

²² As this paper will show, Field himself structured his code on the Louisiana Code of 1825, which in turn had been based on the 1804 *Code Napoleon*. To this day, calls to implement some civil-law approach persist; see, e.g., Charles Maechling, Jr., "Truth in Prosecuting: Borrowing From Europe's Civil Law Tradition," *American Bar Association Journal* (January 1991) 59. Dudley Field's career itself has also been seen as a call for law reform by the lawyers of today: John Steele Gordon, "Reforming the Law," *American Heritage Magazine* (September 1991) 18. It should, however, be remembered that Field defended not only the robber barons but Boss Tweed himself; see Phillip J. Bergan, Owen M. Fiss, and Charles W. McCurdy, *The Fields and the Law* (San Francisco and New York, 1986).

²³ "Comment, *Swift v. Tyson Exhumed*," *Yale Law Journal* 79 (1971) 298 [hereafter cited as "Comment"].

²⁴ Rufus Choate, "The Position and Function of the American Bar" (1845), in Miller, *Legal Mind*, supra note 21 at 263; *Works of Rufus Choate* (Boston, 1862) 1:419.

²⁵ From James Jackson, "Law and Lawyers" (1846), in Miller, *Legal Mind*, supra note 21 at 275; cf. James MacCrate, "Populist and Elitist Conceptions of the Bar," *American Law Institute-American Bar Association Continuing Legal Education Review* 5 (March 1, 1974) 4 [hereafter cited as MacCrate, "Populist and Elitist Conceptions"].

Such feelings were seen partially as a reaction to the expense and delay of a lawsuit. But there was more to it than that. The common law was the law of England, and the revolution had subjected America to a profound anti-British reaction. Lawyers had nevertheless to practice this law; they bought their privileges at the price of the political implication. Their privileges, as exercised, brought them the distaste of the later Jacksonians, and while there were probably no more ministers of Satan at the bar than at present, there were no doubt as many licensed knaves.

David Dudley Field (1805-1894), born in Connecticut,²⁶ had read law in Albany in the 1830s. In the words of his brother Henry, he read the law "with a feeling of reverence amounting almost to awe."²⁷ But law reform was in the air. The period knew the agitations of the Benthamites in England²⁸ and the indigenous American movement, and had seen Livingston's codification in the civil-law jurisdiction of Louisiana.²⁹ Field returned from a European tour in 1837, influenced by both his observations of the workings of the continent's legal systems and Livingston's civil-law codes for Louisiana.³⁰ He began to systematize his views of the common law's failings, especially the division between law and equity jurisdictions. His entry into the law-reform jousting lists came with a public letter, in 1839, on judicial reform,³¹ and he rapidly became as effective an agitator as the American movement had.

Field was largely responsible³² for the clause in the 1846 Constitution of New York that provided the first official impetus to codification, requiring that the legislature "At its first session after the adoption of this constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practical and expedient. And the said commissioners shall

²⁶ See generally Henry M. Field, *The Life of David Dudley Field* (New York, 1898) [hereafter cited as Field, *David Dudley Field*].

²⁷ *Ibid.* at 42.

²⁸ Bentham appears to have written to President Madison in 1811, offering to codify the law of the United States. Madison appears to have written back four years later, declining the offer. "Comment," *supra* note 23 at 297 n. 61.

²⁹ Livingston was responsible for the widely known Louisiana Penal Code of 1825, and for the 1822 *Projet du Gouvernement*, formally the *Additions et Amendements au Code Civil de l'Etat Louisiane . . .* (New Orleans, 1823) [hereafter cited as *Projet*].

³⁰ Henry Field cites "Livingston's Report of a Code for Louisiana" as having a signal influence on his brother Dudley. Field, *David Dudley Field*, *supra* note 26 at 44.

³¹ *Ibid.* at 46.

³² Reppy, *Field Essays*, *supra* note 19 at 31; Field, *David Dudley Field*, *supra* note 26 at 47.

specify such alterations and amendments therein as they shall deem proper."³³ This commission accomplished nothing, and in 1850 the legislature repealed its mandate. Field, who by then had provided New York with partial codes of civil and criminal procedure through a similar commission, sought to revive the commission on substantive codification. He succeeded in 1857, becoming one of the commissioners.³⁴

Field made his case for reform whenever and wherever he could; his address to the 1855 graduating class of the Albany Law School³⁵ no doubt well represents his views. Given the rhetorical practice of the day, he delivered the same address to many another group. He first analyzes the sources of the law of New York. He finds an amalgamation of the Dutch law of the first settlements, the common law and statutes of England to 1776, the American Constitution, and the statutes and cases of the New York legislature and judiciary from the colonial period. To Field, "The present condition of our law is anomalous. For the main part it is derived from the common law of England, but so mixed with other rules and usages that it can hardly be called a system at all."³⁶

Like other reformers, Field saw the answer to the difficulties of American law in new and comprehensive statute law, quoting the phrase he put in the New York Constitution: "a written and systematic code of the whole body of the law of this state."³⁷ He admits to some significant reforms already; for example, legal and equitable relief could be administered in the same action, and parties could be made witnesses. Law was nevertheless the arcane practice of the lawyers. Yet "all instincts of republicanism were in favor of a written code by which any man could know the law," for "In monarchical or aristocratic governments it would not be so much to be wondered at that a class should arrogate to itself the knowledge and interpretation of laws; but that this should happen in a republic, where all the citizens both legislate and obey, is one of those anomalies which, however susceptible of explanation, seem at first sight incredible."³⁸

³³ Constitution of the State of New York (1846), Article 1, sec. 17; this constitution also, for the first time, provided for the popular election of judges: see MacCrate, "Popular and Elitist Conceptions," *supra* note 25.

³⁴ Reppy, *Field Essays*, *supra* note 19 at 39.

³⁵ David Dudley Field, "Address to the Graduating Class of the Albany Law School," March 23, 1855, in Miller, *Legal Mind*, *supra* note 21 at 287 [hereafter cited as Field, "Address"].

³⁶ *Ibid.*

³⁷ *Ibid.* at 287.

³⁸ *Ibid.* at 290.

To Field the question was not the practicality of a code, but merely its expediency. The European codes demonstrated the practicality of codification. Field thus asks: "Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians?"³⁹

Field had to meet the argument of his opponents that the common-law case-by-case method alone could provide the flexibility needed by a system of law for growth. To Field, however, a flexible common law meant judicial legislation. "Judges," said Field, "are not the wisest legislators." He held that legislators, elected and responsive, alone should legislate. If a judge merely declared an existing rule, a code would do that just as well; on the other hand, "legislation by a legislature is made known before it is executed, while legislation by a court occurs after the fact, and necessarily supposes a party to be the victim of a rule unknown until the transaction which calls it forth."⁴⁰

Field expressed his belief in the separation of powers, the doctrine first set forth by Locke in England at the end of the seventeenth century, followed by Montesquieu on the Continent in the eighteenth century. Field wrote: "The judiciary has no rightful concern with the policy of laws . . . the judiciary shall be independent of the executive, the executive of the judiciary, and the legislature of both."⁴¹

The next argument Field chose to meet, albeit with no great consistency, stemmed from the supposed inflexibility of a code, and the results of the workings of the judiciary on it:

Then it is said that, if a code were once enacted, it would soon be overloaded with glosses and comments upon the texts, as numerous and contradictory as the cases upon the common law, which now fill the books. This, if it were true, would only prove that the process of codification must be repeated at certain intervals—an objection of no great force, especially as it assumes that, until the accumulation of glosses and comments, the code would prove an advantage. But the fact is overstated. There would be glosses and comments, of course; but with a common tribunal to settle questions of doubtful construction, it should seem impossible that there should arise half the questions which now occur upon the Common Law, since the latter regards not merely the

³⁹Ibid. at 291.

⁴⁰Ibid. at 293.

⁴¹Ibid; compare, to this effect, Livingston et al. in Louisiana, in 1823 [see text at note 61 *infra*]. The doctrine of the separation of powers stems from Montesquieu's *L'Esprit des Lois* (1748) and Locke's *Second Treatise on Civil Government* (1690).

meaning but the existence of a rule, the extent of its design, its applicability to our situation, and also its policy. This objection, moreover, is inconsistent with the first objection which I answered; for, if there are to be so many commentaries and different interpretations, the text and the comments will soon come to have that flexible character which is thought by some to be so beneficial an element of the Common Law.⁴²

In this passage may be found the effect of Justice Joseph Story on Field's thinking, and a bow in his direction, as Gilmore first pointed out. Story, who had early favored codification of limited areas of the common law,⁴³ had come to oppose the generalized codification schemes of the later law-reform movement.⁴⁴ Uniformity in the law, especially the commercial law, was, of course, a virtue everyone recognized. Field's hope for "a code American"⁴⁵ shows that the "common tribunal to settle questions of doubtful construction" can be none other than Story's Supreme Court. In 1842 the Court, in *Swift v. Tyson*,⁴⁶ had undertaken to establish a federal general commercial law. As the success of the holder-in-due-course rule of *Swift v. Tyson* itself illustrates, often (if not always) the states came to follow the federal decisions on commercial matters. Story had provided the common tribunal that could settle doubts about a code's construction. Field would provide the code to control it.

These analyses and prophecies thus having disposed of all the alleged disadvantages of codification, Field goes on to enthuse: "How great are the advantages which we can see in its accomplishment! The numerous collections of law books upon the shelves of our libraries superseded by a single work . . . old abuses removed, excrescences cut away, new life infused—these will be the beneficent effects of this vast work."⁴⁷ To the perhaps jaundiced contemporary eye, Field appears transposed: "No undertaking which you could engage in would prove so grand or beneficent. Your canals, your railways, your ships cutting the foam of every sea, the enterprise of your merchants, the skill of your

⁴²Field, "Address," supra note 35 at 293; compare, on rounds of recodification, Gilmore, "Statutory Obsolescence," supra note 3 at 461, to the same effect.

⁴³Reppy, *Field Essays*, supra note 19 at 9; see Joseph Story, "Codification of the Common Law: A Report . . . made to . . . the Governor [of Massachusetts]" (January 1837), in *Miscellaneous Writings of Joseph Story* (1852) 698; and "Report of the Commissioners" (December 1836) in David Field, ed., *Codification of the Common Law* (New York, 1882) 40, both cited in "Comment," supra note 23 at 302.

⁴⁴Reppy, *Field Essays*, supra note 19 at 9.

⁴⁵Field, "Address," supra note 35 at 294.

⁴⁶41 U.S. (16 Pet.) 1 (1842).

⁴⁷Field, in *Miller Legal Mind*, supra note 21 at 294.

artisans, the fame of your ancestors—all will not exceed in glory the establishment of a code of law containing the wisest rules of past ages, and the most matured reflections of our own . . . a *Code American*."⁴⁸

Field went on to close his address with another prophecy: "You stand, moreover, in the very portals of a new time. The world is soon to take its impulses from this side of the ocean. The language we speak, the institutions in which we participate, are to spread with our dominion—from the world's girdle to the frozen pole—and beyond our dominion to remote islands and continents. Whence shall come the lawgiver of the new time? From our own soil, I would fain hope and believe."⁴⁹

On April 6, 1857, after intense lobbying by Field and his colleagues, the New York Legislature passed an act establishing the commission on which Field (in effect, as "lawgiver") would serve "to reduce into a written and systematic Code the whole body of law of this State."⁵⁰ Years of work by Field, and no little work by the members of his commission and earlier commissioners, produced five proposed codes—a political code, a penal code, complete codes of criminal and civil procedure (enacted earlier in fragments), and the civil code, reported in 1865.

Nonetheless, as Field's brother and biographer, Henry, writes, "It is one thing to frame an ideal code on the strictest line of justice, and quite another to have it enacted into law by the law-making power."⁵¹ The codes of criminal and civil procedure were not enacted and passed into law until the period 1876-1882, the penal code in 1881. The political code saw only partial enactment. The civil code never became the law of New York. The legislature (understandably, in view of the codifiers' view of legislative dominance) did justify Field's faith in that institution, twice enacting the civil code. Two New York governors each vetoed it, in 1865 and 1882.

With the civil code's failure to become law in New York, the law-reform movement spent itself. The Civil War had intervened, the Jacksonian consensus had long been moribund, and the drive for codification died in the East.

In the West, however, rather than codifying old law, the substantive codes as enacted provided new law the states could grow into. There is also some evidence that the Jacksonian goals of the reformers were partially achieved, at least in the West. The common law was thought by some to have become, finally, the law for the common man accessible to the common man. In a

⁴⁸Ibid.

⁴⁹Ibid. at 295.

⁵⁰Field, *David Dudley Field*, *supra* note 26 at 74.

⁵¹Ibid. at 84.

letter to Field's brother dated Helena, Montana, January 24, 1896, a Colonel W. F. Sanders, Montana's first senator, wrote that with the adoption of the codes, published in one volume, "a citizen of Montana, who has but little money to spend on books, needs to have lying on his table but three: an English dictionary to teach the knowledge of his own mother tongue; this Book of Law, to show him his rights as a member of a civilized society; and the good old Family Bible to teach him his duties to God and to man."⁵² The same could presumably be said for the citizens of California, the Dakotas, Idaho, and Colorado.

FIELD'S PROPOSED CIVILIAN JURISPRUDENCE FOR THE CIVIL CODE

Field's 1865 draft of a proposed civil code for the State of New York⁵³ became substantially the civil codes of the adopting states. The code, however, required with its substance some procedure, some jurisprudential method, to permit its rational application. Codification, in the breadth of the civil code, had no precedent in the common law. The ancient maxim of the common law held that statutes in derogation thereof were to be strictly construed. Field's civil code was quite consciously in derogation of many common-law doctrines.

Moreover, Field's draft code indicated: "§6. In this state there is no common law in any case where the law is declared by the five codes." Further, the code explicitly abrogated the old maxim: "§2032. The rule that statutes in derogation of the common law are to be strictly construed has no application to this code." But the code stands silent as to how it is to be used.

While the common law had had no experience at all with broad codification, for the civil law codes were the law itself. Field turned to the civil law for his jurisprudential method, exactly as the codification movement had looked to the civil law for models for a code.

The civil law had never explicitly followed the common-law practice of stare decisis, foregoing distillation of principles from controversies. Rather, the legislature straightforwardly stated principles in comprehensive codes and the civil-law judiciary traditionally looked only to the code for decision. In those cases not covered by the code, the reasoning of the court was to follow

⁵²Ibid. at 92.

⁵³[David Dudley Field et al.,] *Civil Code of the State of New York*, Reported Complete by The Commissioners of the Code (Albany, 1865) [hereafter cited as Field, *Draft New York Code*]. Thomas G. Shearman and Austin Abbott did much of the actual drafting, under Field's direct supervision, according to Field, *David Dudley Field*, supra note 26 at 80.

analogy to code provisions, and, if worst came to worst, natural equity, perhaps including custom and usage, but not necessarily previous cases. As one modern writer puts it:

Basically, the civil law supposes a codification which incorporates fundamental principles and general rules rather than comprehensive details for specific fact situations. The courts look to the legislative source for solutions and for guidance . . . the attitude of the courts towards a civil code is one of liberal construction, including extension by analogy or by principle. . . . It follows that the common law doctrines of precedent and *stare decisis* cannot have the same significance for the civil law because for each case the courts must go back to the code for its starting point.⁵⁴

As an example of the civil-law policy, Article 5 of the *Code Napoleon* reads: "The judges are forbidden to pronounce, by way of general legislative determination, on the causes submitted to them."⁵⁵ There was, ostensibly, no judge-made law in France, although the decisions of French high courts were widely reported and reprinted as early as the 1840s.⁵⁶ The Louisiana Code⁵⁷ of 1825 sets out the manner of use in more detail:

⁵⁴Joseph Dainrow, "The Civil Code and the Common Law," *Northwestern Law Review* 51 (1957) 724; he adds, on the next page: "In the course of time, a civil law country accumulates a great many decisions which contribute substantially to the growth and development of the law. In a common law country, the legislative enactments constantly narrow down the original indefinite scope of the common law. In this way, the two systems come closer to each other in total resemblance, but the fundamental differences in their nature, and their techniques necessarily remain."

⁵⁵*Code Napoleon* (1804). All quotations are from the contemporary translation [George Spencer], *The Code Napoleon; or, the French Civil Code* (New York, 1841).

⁵⁶In an 1840 preface to the reprint of case reports (Sirey's) dating from 1791, the editors remark (in French, of course): "We hope, by this publication . . . to provide, for a new generation, a complete and structured collection of [our] jurisprudence, without which, today, it is impossible to proceed with the work of the Bar." *Recueil Général des Lois et Arrêts, avec Notes et Commentaires* (Paris, 1840). This series of reports, along with M. Dalloz's *Jurisprudence Générale du Royaume, Recueil Périodique et Critique de Jurisprudence, de Legislation et de Doctrine, en Matière Civil, Commerciale, Criminelle, Administrative et de Droit Public* (Paris, 1845), is the ancestor of the present French reports, the *Recueil Dalloz Sirey*.

⁵⁷All quotations are from the English edition of *The Civil Code of the State of Louisiana*, published by a Citizen of Louisiana (New Orleans, 1825). This is the contemporary English translation of the controlling official French text, which may be found in *Louisiana Legal Archives*, pts. 1 and 2, Compiled Edition of the Civil Codes of Louisiana, vol. 3 (Baton Rouge, 1940) [hereafter cited as *Louisiana Legal Archives*].

Article 13: When a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing spirit.

Article 18: The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, as the cause which induced the legislature to enact it.

While ostensibly there was no judge-made law in Louisiana, either, the possible imperfections of the code were recognized and provided for:

Article 23: In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.

Of course, where the code speaks, equity obtains by definition. In short, the code, and not the cases, were both the form and substance of the civil law, while the reverse was true of the common law, the cases giving form even to statutes.

Field's task in creating a code thus had to go to more than merely its substance. He would have had also to create for American lawyers a way to use the code consonant with both common-law traditions (to permit its acceptance by the bar), and the effectiveness of his codification concept. Even with his assumption that only legislators, and never judges, should make law, he had to propose a method blending the two disparate jurisprudential methods. Field, however, saw something very close to the civil-law process applicable to his codes; he proclaimed to the Albany Law School: "To have a code is to have . . . rules collected, arranged and classified; the contradictions reconciled; the doubts settled; the bad laws eliminated, and the result written in one book, for the instruction and guidance of citizen and magistrate, lawyer and client."⁵⁸ As noted above, he saw the possibility that rounds of recodification might be necessary to accommodate the seemingly inevitable results of judicial decision based on the code. With a supreme tribunal, he foresaw only minimal need for recodification. Even so, he explicitly recognized that for the code to be effective, the common-law process would have to be modified.

Field's view of the role of the judiciary under codification reflects, no doubt, study of the civil-law process. One item he

⁵⁸Field, "Address," *supra* note 35 at 292.

may well have seen, in view of his brother's remark about the influence of "Livingston's Report of a Code for Louisiana" on him,⁵⁹ is the discussion by the framers of that code of the role of the judge in civilian jurisprudence:

To determine what is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained is the proper office of the Judge—The exercise of his discretion is confined to these, which are called *Cases of Construction*: in all others he has none, he is but the organ for giving voice, and utterance, and effect, to that which the Legislative branch has decreed. In cases where there is no Law, according to strict principles he can neither pronounce nor expound, nor apply it. Governments under which more is required from, or permitted to, the Magistrate are vicious because they confound Legislative power with Judicial duties, and permit their exercise in the worst possible shape, by creating the rule, after the case has arisen to which it is applied. This is a vice inherent in the Jurisprudence of all nations governed wholly, or in part, as England is by unwritten Laws, or such as can only be collected from decisions.⁶⁰

Field held that of the five codes, only the civil code could fail to supply the rule for every case arising.⁶¹ The codes of procedure had provisions permitting earlier practice to be followed in any case not provided for in the rules, and Field thought even this provision unnecessary. By definition (and in contrast to the doctrine of common-law crimes), no new case could arise under the penal code for which there was no provision, since that code defined all crimes.⁶² But such a case might arise under the civil code. In discussing this possibility, Field explicates the civilian manner of use of the codes:

[What the civil code] professes is, to give the general rules upon the subjects to which it relates, which are

⁵⁹ See *supra* note 29.

⁶⁰ Edward Livingston, Louis Moreau Lislet, and P. Derbigny, "Report to the Louisiana Legislature" (1823) accompanying the *Projet*, *supra* note 29; reprinted in *Louisiana Legal Archives*, *supra* note 57 at 1:XCI [hereafter cited as Livingston, "Report"].

⁶¹ Field, *Draft New York Code*, *supra* note 53 at xvii.

⁶² The principle that only acts that violate a legislative command should be punished, in contrast to the doctrine of common-law crimes, also has civilian antecedents; see, for example, Livingston, "Report," *supra* note 60 at XCI: "In criminal jurisprudence there is no offence but where there is a breach of positive law, and the judge must acquit wherever the law is silent."

now known and recognized, so far as they ought to be retained, with such amendments as seem best to be made, and saving always such of the rules as may have been overlooked.

In cases where the law is not declared by the code, it is to be hoped that analogies may nevertheless be discovered which will enable the courts to decide. If in any such case an analogy cannot be found, nor any rule which has been overlooked or omitted, then the courts will have either to decide as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King v. Hay*, 1 W B1, 640 [K.B. 1767], trusting to future legislation for future cases.⁶³

While the suggestion that the court simply not decide a case might astound, Lord Mansfield is certainly a better authority for it than Field alone. *King v. Hay*, however, is ambiguous in the reports, and the names of both parties and counsel differ at 4 S.C. Bouv. 2295 (1767). Probably Mansfield would not issue the writ of mandamus sought, not simply because he would not decide the issue, but rather because he held that the ecclesiastical courts alone had competent jurisdiction over the legacy in question. Mansfield had first practiced the civil law of Scotland, as his celebrated dicta in the moral obligation (as contractual consideration) cases may attest.⁶⁴ The civil law would not accept Field's misreading of Mansfield into a maxim that "Hard Cases should make No Law"; see, for example, the *Code Napoleon*, Article 4: "The judge who shall refuse to determine under pretext of the silence, obscurity or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice."

In any event, Field thought the likelihood of an unresolvable case to be small, inasmuch as any judicial or statutory rule of law not inconsistent with the code was not to be negated by it. Where the law was not declared by the codes, a decision could presumably be had by old law.⁶⁵ Thus, cases foreseen will have been provided for, but cases unforeseen "may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted

⁶³Field, *Draft New York Code*, supra note 53 at xviii.

⁶⁴See *Atkins v. Hill*, 1 Cowp. 284, 98 Eng. Rep. 1088 [K.B. 1775], and *Hawkes v. Saunders*, 1 Cowp. 289, 98 Eng. Rep. 1091 [K.B. 1782], both also legacy cases.

⁶⁵Howe, *Legal History*, supra note 7 at 498, points out that while Field's 1865 *Draft New York Code*, supra note 53 at §3.3, says that "customary or common law" denominates judicial decisions, in the 1862 draft the same section made no reference to "common law."

from the Code and therefore still existing, or by the dictates of natural justice."⁶⁶ The judicial discretion existing in a rare case not to decide can be ascribed to Field's faith in the efficacy of the American legislative process, a process he thought quite able to remedy any judicial hiatus.

The manner in which Field envisioned his code as being used would thus closely follow the civil-law procedure.

THE CIVILIAN SOURCES AND STRUCTURE OF THE CIVIL CODE

That Field should turn to the civil law for a method of use for the civil code is not surprising, considering the powerful influence civilian sources had on the code itself. The extent of this influence, long noted by commentators,⁶⁷ has not yet been fully delineated—a consequence, in large measure, of the destruction of Field's personal papers in a 1911 library fire. But a close comparison of his code and the civilian sources it cites reveals not only the known contribution, but a remarkable structural identity.

The code cites to thousands of common-law cases as sources and examples, along with much of the statutory law of New York. In addition, Field frequently cites to the text writers, themselves heavily influenced by the civilians, notably Story on equity, bailments, and so on, and Kent and specialized writers in matters like admiralty and insurance. Of the civilians, Pothier on sales, for example, is several times cited. Although the civil-law component in the sources of the code can be partially traced to both civilian and Anglo-American text writers, Field's code was also influenced directly.

Specialized civil-law sources are often cited; for example, whole sections⁶⁸ on shipmasters were taken from the French *Code de Commerce* of 1807. Field also cites to both the Louisiana Code of 1825 and the *Code Napoleon* of 1804 for substantive phrases, clauses, and, in a few cases, whole sections.⁶⁹ In addition, many of Field's *Maxims of Jurisprudence* have civilian antecedents.

Of the more than two thousand sections of the New York code, however, all or part of only some forty to sixty sections can be traced directly to civil-law sources, or about 2 to 3 percent. The main influence of the civil law on the code appears in quite

⁶⁶Field, *Draft New York Code*, supra note 53 at xix.

⁶⁷See, e.g., Maurice E. Harrison, "The First Half-Century of the California Code," *California Law Review* 10 (1922) 193 [hereafter cited as Harrison, "First Half-Century"].

⁶⁸Field, *Draft New York Code*, supra note 53, §1050-60.

⁶⁹Ibid., for example, §443-48, from *Code Napoleon*, Art. 556-63.

another of its aspects, the architectonic. Field structured his code on six main levels: Divisions, Parts, Titles, occasionally Chapters and Articles, and numbered Sections.

The Louisiana Code of 1825 is similarly structured, in Books, Titles, Chapters, occasionally Sections and Subsections, and numbered Articles. Schematically:

<i>Field's Code</i>	<i>Louisiana Code</i>
Divisions	Books
Parts	Titles
Titles	Chapters
Chapters	Sections
Articles	Subsections
2,034 numbered Sections	3,522 numbered Articles

The similarity, however, runs considerably deeper than this abstract structuring. With some transpositions, the Field code follows the Louisiana Code substantive area by substantive area, generally to the level of Field's Titles, but occasionally further, and at least once as far as the section and subsection structure of the Louisiana Code.

Field's use of a civil law structure to present common-law rules has hoary antecedents: Bracton's *De Legibus et Consuetudinibus Angliae* (A.D. 1250-60) uses Roman law for broad categories, filling them with English precedent (perhaps to the prejudice of both⁷⁰), as long ago noted by the English antiquary John Selden. Field's largest structure (Division one: Persons; Division two: Property; Division three: Obligations) dates at least to Justinian's and Gaius's *Institutes*. By comparison Blackstone's four Books are: Persons, Property, Private Wrongs, Public Wrongs, presented perhaps more from the perspective of a subject (or defendant) than a lawgiver.

Louisiana based its code of 1825 on the 1804 *Code Napoleon*, and a substantial structural identity also obtains between the two, in terms of both formal divisions and the sequence of substantive provisions. When adopting a substantive provision from the civil law, one to be found in both codes, Field often cites to both codes, but equally often to only one or the other. Some few of the civil-law provisions he adopts appear in only one or the other of the two codes, and he so cites. To structure his code, however, he used the more detailed Louisiana Code, and not the *Code Napoleon*.

⁷⁰ See the discussion in Colin Rhys Lovell, *English Constitutional and Legal History* (Oxford, 1962) 138-39. Roman law did have considerable influence on the law of Europe generally as well as England, as Selden first made clear in his 1685 essay on the ancient but post-Bracton English law text known as "*Fleta*." Idem, *Ad Fletam Dissertatio*, ed. David Ogg (Cambridge, 1925) xix.

THE CALIFORNIA JURISPRUDENCE OF THE CODE AS LAW;
AN EQUITY LAWYER REASSERTS THE COMMON-LAW
TRADITIONS

Field's use of civil-law sources, and his civilian style of code jurisprudence, is clear and unsurprising in view of the ultimate ambition of the law-reform movement: that legislatures alone would make law. All law was to come only from elected and responsive legislatures and not an insulated judiciary, forever proceeding in its post-hoc and ex-post-facto fashion, creating in every case a bit of special legislation.

But the civil codes of California and other enacting states seem to have been adopted without a great deal of thought as to what the judiciaries were to do with them. As illustrated by the fact that the contract sections 1550 (Structure), 1605 (Consideration), and 1606 (Moral Obligation) of the California Civil Code of 1872 first appear in the reports in 1883, 1891, and 1896, the judiciaries may have been none too sure themselves. In any event, the civil code pervaded the law of several states, but did not control it (as no doubt its author would have hoped). Forces unrelated to the enacted codes played a part in this outcome; for example, the exclusive common-law training of western lawyers. The chancellor's champion, John Norton Pomeroy (of *Pomeroy on Equity* fame), played at least as great a part in it.

In the 1880s Pomeroy edited the *West Coast Reporter*,⁷¹ a precursor to the National Reporter System, and he reported California's appellate decisions from 1887 to 1917. The publication covered most of the jurisdictions of the western United States. Pomeroy published in it occasional small notes for the amusement of the bar, as well as "Legal Essays" of substance. One of these bore the title "On the True Method of Interpreting the Civil Code."⁷² In it, he analyzed the defects and shortcomings of the code, and proposed the remedial manner of interpretation he thought appropriate. Even before publication of the essay the California Supreme Court had intimated the necessity of this method,⁷³ and the California courts eventually adopted it explicitly, citing Pomeroy, in 1912.⁷⁴ It has been said to be responsible for

⁷¹ *West Coast Reporter*, ed. J.N. Pomeroy (San Francisco, 1884) [hereafter cited as *West Coast Reporter*].

⁷² *Ibid.* at 3:585, 657, 691, 717; 4:1, 49, 109, 145. Particularly cogent points may be found at 3:585-86 and 717, and 4:51-52, 113-14, in addition to those quoted in the text.

⁷³ See *Rosenberg v. Frank*, 58 Cal. 387, 404 (1881).

⁷⁴ *Siminoff v. Jas. H. Goodman Bank*, 18 Cal. App. 5 at 11, 121 P. 933 (1912).

such constructions of broad code provisions as the California courts utilized.⁷⁵

His method required the courts to read the code as a simple statute in a common-law context: "Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines and rules contained in the code in complete conformity with the common law definitions, doctrines and rules, . . ."⁷⁶

The California legislature gave this suggestion statutory form in 1901: "*§5005 Provisions Similar to Existing Laws How Construed*. The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."⁷⁷

Of course, as early as Chapter 95 of the laws of 1850, the legislature had declared the common law to be the rule of decision in California; the lurking question was to what extent the subsequent enactment of the civil code had reopened the issue. Pomeroy's answer was "Not at all," and that was the end of that.

For Pomeroy, the ultimate defect of the language of the code lay in what one commentator⁷⁸ of this century, as well as Field, saw as one of its main virtues: the lack of denomination of legal doctrines versus equitable doctrines. But for Pomeroy the equity scholar, the civil code had sinned: "Its language is universal, and ignores the existence of any difference between law and equity."⁷⁹ He went on to note a number of doctrines of equitable derivation that were omitted from the code. He wrote:

The highest interests of the state require that these defects should be removed, and that the code should, as far as possible, be rendered clear, certain, and comprehensible, not only to judges and lawyers, but to all intelligent laymen. This result might be reached by a complete revision and reconstruction of the code itself

⁷⁵For an example, see the construction of §1606 (Moral Obligation) in *Estate of McDonnell*, 6 Cal. 2d 493, 58 P. 639 (1936). For the development of the doctrine of moral obligation in California, see Bernard E. Witkin, *Summary of California Law*, 9th ed. (San Francisco, 1987) 232; cf. 17A Am. Jur. 2d (rev. ed.), Contracts §168. As to the courts adopting Pomeroy's method, and the *Rosenberg* and *Siminoff* cases, *supra* notes 73 and 74, see the discussion in Harrison, "First Half-Century," *supra* note 67 at 190.

⁷⁶*West Coast Reporter*, *supra* note 71 at 4:110.

⁷⁷*California Civil Code* §5005 (1901).

⁷⁸Harrison, "First Half-Century," *supra* note 67 at 199.

⁷⁹*West Coast Reporter*, *supra* note 71 at 4:2.

through the labors of an able commission appointed for that purpose under the authority of the legislature. Such a reform is, at present, wholly impracticable. There is no reason to expect any interference by the legislature; and if it should interfere, there is no reason to anticipate any real improvement as the result. . . . The only practicable method, therefore, of removing ambiguity from the text of the code, of ascertaining the meaning of its provisions and determining their effect with certainty, is by the process of judicial interpretation.⁸⁰

But this process must be consistent and systematic, lest confusion reign. If (as Pomeroy fretted) some "hap-hazard" system were to evolve, with the courts construing some provisions as merely declarative of a common law rule, others as establishing new rules, and still others as merely modifying old rules, then "the utmost any lawyer could then do would be to guess, to speculate, to suggest possibilities, or perhaps probabilities."

This was the era of what Harvard Law School's first modern dean, C.C. Langdell, called "The one true rule of law." In his 1871 preface to the first law-school casebook, he had written:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility to the ever-tangled skein of human affairs, is what constitutes a true lawyer. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed. . . . If these doctrines could be so classified and arranged that each should be found in its proper place and nowhere else, they would cease to be formidable from their number.⁸¹

Although the idea was no doubt anathema to Langdell, this language reads like an argument for codification.

Pomeroy wished to avoid the evil of anything less than certainty in the law, however familiar such a probabilistic approach maybe to today's bar. It was the common-law judges, not any populist legislature, who should define the law, for he emphasized: "The paramount importance of construing the civil code so

⁸⁰Ibid. at 4:5.

⁸¹C.C. Langdell, *A Selection of Cases on the Law of Contracts* . . . , 2d. ed. (Boston, 1879) ix. Friedman, *American Law*, supra note 1 at 353, characterizes Langdell as one who "shared Carter's basic concept of law; yet his idea of a legal principle was much like that of Field, only implicit, evolutionary, more subtly dynamic."

that its sections shall preserve all the flexibility, comprehensiveness, and power of expansion and adaption which are the peculiar and distinguishing excellences of the 'law of judicial decision,' or so called 'unwritten' common law."⁸²

His argument informed the jurisprudence of the enacted civil codes, and later became a powerful weapon for the anticodification forces in the East, in the continuing debate in New York.⁸³ For Field's hope, and the hope of the law-reform movement, for a more civilian jurisprudence, it was the coup de grace.

CONCLUSION

The double failure of Field's civil code—of adoption in New York, and in its intended application in California and the other the adopting western states—has its ironies. Where it did become law, notably in California, the common-law processes of the courts alone gave it what effect it had. This result is ironic in view of both the populist-like dissatisfaction with those processes and one aspect of the law-reform remedy for that dissatisfaction: the civil-law processes envisioned as applicable to the code, as opposed to the common-law method. The result is especially curious upon recognition of the pervasive influence of civil-law doctrine and method inhering and implicit in Field's code.

This note has elucidated some of the influence of the civil law on Field and his civil code, especially in the contracts area. Yet even an examination of the California contracts cases involving promises supported by moral obligation,⁸⁴ where if anywhere this influence could be expected to appear, shows a common-law result, and common-law processes alone at work. The code in application delivered none of its great freight of civil-law intent, not even in the delicate area of the enforceability of promises.

The state courts, treating the enacted codes as common law, could and did use and ignore this huge and anomalous statute's doctrines in ways no different from any other. Let Field's civil code say what it would, however it chose, it spoke the common law.

⁸² *West Coast Reporter*, supra note 71 at 4:113.

⁸³ See the note by Howe, *Legal History*, supra note 7 at 523.

⁸⁴ See, e.g., William N. Keyes, "Cause and Consideration in California—A Reappraisal," *California Law Review* 47 (1959) 74, and note 75 supra.

BEARERS OF THE BURDEN: JUSTICES OF THE PEACE, THEIR COURTS AND THE LAW, IN ORANGE COUNTY, CALIFORNIA, 1870-1907

BY JOHN J. STANLEY

Recent legal scholarship has made it clear that nineteenth-century Americans were extremely knowledgeable about the law. John Phillip Reid has shown us that they carried this knowledge with them on the overland trail, and exercised that law even when circumstances were desperate and when no conventional legal institutions existed.¹ Gold miners first reaching California found themselves in a virtual legal vacuum; laws passed in distant San Francisco hardly seemed relevant up some tributary of the Feather River. The miners demanded law, and in the absence of traditional offices frequently resorted to popular justice—swiftly, often brutally. The introduction of the office of justice of the peace reimposed legal order.

By the 1870s California's legal institutions had survived most of their significant challenges. In some incidents regular legal methods failed (the massacre of the Chinese in Los Angeles in 1872 was one of them), but by and large an eastern model of American law had fully taken root, supplanting Mexican civil law and mining-camp justice. Californians routinely turned to their courts for justice and the resolution of disputes. Since most of these issues were settled in lower justice or municipal courts, the justice of the peace was an important figure in most communities. Seldom a lawyer, it was he who enforced local mores and reflected local attitudes.

John J. Stanley is a deputy sheriff in Los Angeles County. He recently completed graduate work in legal history at California State University, Fullerton.

¹ See John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, 1980).

The justice court was often the furthest extent of the legal system as far as the average citizen was concerned. To determine the level of legal expertise Californians could expect at the end of the nineteenth century, and to consider the men who disseminated the law, this study will concentrate on the justices in Orange County from 1870 to 1907, bearing in mind that the region remained a part of Los Angeles County until 1889.

Wherever drifting emigrants lighted to the east of the Rockies, the seeds of American legal culture took root. These forces were unopposed everywhere except in Louisiana, where a strange hybrid of common and civil law grew. When migrants crossed the Rocky Mountains and reached California, however, they encountered a Mexican culture that thwarted their drive to extend American common-law tradition to the Pacific. Before the Treaty of Guadalupe Hidalgo in 1848, according to David Langum, Americans living in California "drew on local law only to the extent absolutely necessary," preferring instead "to order their . . . circumstances in a manner harmonious with the remembered law of the eastern and midwestern states from which they had come."² Anglo-American expatriates' dislike for Mexican California's legal system quickly manifested itself when the Anglos assumed control of the region. They rejected many of the political and legal concessions established by the treaty and introduced more traditional American institutions.

The state constitution of 1849 further Americanized the region; remaining contentious matters were resolved in the courts.³ The Mexican *alcalde* system was repudiated and the familiar American justice system was adopted. Article 1232 of the *General Law of California, 1850-1864*, stated that "the following shall be the courts of justice of this state: first, the supreme court; second, the district courts; third, the county courts; fourth, the probate courts; fifth, the justice courts; sixth, the recorder's and other inferior municipal courts." Articles 1278-1284 pertained specifically to the justice courts. Justices were responsible for minor civil cases, with the exception of probate, and were granted the power to marry people. They also had authority over certain criminal matters: petit larceny; assault and battery, except on a peace officer or when the assault was likely to produce great bodily injury; breaches of the peace; riots; affrays; vandalism, and all misdemeanors punishable by fines of less than

²David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987) 267.

³For the transition of law in California between the Mexican and American period, see Gordon M. Bakken, *The Development of Law in Frontier California, 1850-1890* (Westport, Conn., 1985) 21, 42, 93. The settlement of Mexican land-grant claims was the state's most troublesome early issue.

\$500 or a maximum of six months in jail. This level of punishment was amended to \$1,000 and one year by the legislature on April 1, 1870. In the absence of the county coroner, justices conducted formal examinations of the dead. Additionally, the justice courts were given authority over "proceedings respecting vagrancy and disorderly persons."

As in eastern communities, the justice of the peace was called on to reassure local inhabitants that all was well. The slow population growth at the southern end of the state retarded the development of justice courts, but once Americans settled in pockets of the region in any numbers the courts were quickly established.

As part of their study of the criminal-justice system in Alameda County, Lawrence Friedman and Robert Percival considered the composition of the justice courts.⁴ The justices they studied held a wide range of occupations, from machinist to jack-of-all-trades. In 1880 the average age for a justice when he began his first tour on the bench was fifty-three. This age declined throughout the period, however, until in 1890 the average age was thirty-nine, and in 1900 Oakland city justices were, on average, twenty-eight when they heard their first case.⁵ Unlike township justices of the peace, who could be laymen, Oakland city justices had to be lawyers. "This made the job less inviting" for those who were established, according to Friedman and Percival, than for "a young, up-and-coming lawyer," and probably explained the justices' increasingly young age.⁶

In John Wunder's study of justice courts in Washington Territory from 1853 to 1889, he found that justices averaged 40.6 years of age during their first term of service.⁷ All of them were literate, at a time when 11.5% of the white population and 22.6% of the total population was not; most were men of more than average wealth and were politically active.⁸ Twenty-two of the 197 justices Wunder studied practiced law, and 107 of them had access to law books. They were thus educated and legally qualified for the office they held.⁹ Justices were highly respected in the Territory and, when called upon, were virtually always the court

⁴Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice, Crime and Punishment in Alameda County, California, 1870-1910* (Chapel Hill, 1981) [hereafter cited as Friedman and Percival, *Roots of Justice*].

⁵Ibid. at 45.

⁶Ibid. at 46.

⁷John R. Wunder, *Inferior Courts, Superior Justice* (Westport, Conn., 1979) [hereafter cited as Wunder, *Inferior Courts*]. See also Francis S. Philbrick, *The Rise of the West, 1754-1830* (New York, 1965), and Robert M. Ireland, *The County Courts of Ante-bellum Kentucky* (Lexington, 1972).

⁸Wunder, *Inferior Courts*, *supra* note 7 at 26-28.

⁹Ibid. at 117.

of last resort. Only six vigilance committees were formed throughout the history of Washington Territory, which Wunder attributed in part to the quality of justice in the courts and community. He concluded that "The justices of the peace of Washington Territory dispensed a quality of justice generally characterized by reason, accessibility, celerity, and community acceptance."¹⁰

As they did in Alameda County and Washington Territory, justices in the Santa Ana Valley played a vital role in the community.¹¹ Employing the same approach of collective biography to twenty-one justices who served in the region from 1871 to 1907, the author has found results that were both similar and dissimilar to Wunder's and Friedman and Percival's studies (see Table 1).

Justices in the Santa Ana Valley averaged 45.8 years of age at the beginning of their first term. This average dropped during the decade of the 1890s, though it never reached as low a figure as in Alameda County. With one exception, justices of the peace in Orange County remained laymen throughout the period. Their reasons for becoming justices appear to have varied and are addressed below.

FLEDGLING JUSTICE TAKES WING

The lore and legend of Orange County states that Richard Egan of San Juan Capistrano was the area's first justice of the peace. He had migrated from Ireland to America in 1852, at the age of ten, fought for the Confederacy during the Civil War as both a soldier and sailor, and left for California in 1866. After trying his hand at farming he went to work for a prominent landowner, Don Marco Forster, first as a surveyor and afterward as Forster's adviser and estate executor. When Egan arrived in San Juan he believed that only he and two other men in the area spoke English. The local community took to him immediately, however, and he became first the traditional *alcalde* and then justice of the peace for the newly formed San Juan/Silverado township. At the time he was in his late twenties. In 1880 he was elected to the Los Angeles Board of Supervisors; he was also an enumerator for the census that year. In 1889 his reputation and experience made him a natural

¹⁰Ibid. at 167.

¹¹Orange County's division from its parent county of Los Angeles was not approved until March 1889 and did not take effect until August. Before that the area was more commonly known as the Santa Ana Valley. The terms "Orange County" and "Santa Ana Valley" are used interchangeably throughout this study.

choice to arbitrate the disputes between the infant Orange County and its former parent, Los Angeles County.¹²

Even to this day, Egan's reputation is prodigious. It seems unlikely, however, that he was the first justice of the peace in southern Los Angeles County. By 1870 San Juan was the lesser of the two townships in the area. The other township, Santa Ana, included on its rolls the 881 citizens of the town of Anaheim. Santa Ana's total population of 1,445 numbered a thousand more than that of the combined San Juan/Silverado township. Virtually all of San Juan's population were Mexicans and Indians who spoke no English. Their demands for a justice court would not have been as pressing as those of the Anglos at Santa Ana. The presence of this Anglo population in Santa Ana Township, especially since it contained Anaheim within its borders, almost certainly meant that at least one justice of the peace was in the community before Egan's arrival in San Juan.

Unfortunately, none of Egan's docket books has survived, thus making an assessment of his performance in office impossible. The first extant docket books from the region come from the court of Justice J.J. Johnson of San Joaquin (later Santa Ana) Township. Little biographical information survives about Johnson. A forty-four-year-old farmer from North Carolina named John J. Johnson is listed on the rolls of the Index to the Great Register of Los Angeles County for 1876, and since justices were all voters, that was probably the justice, but his common name and the lack of any cross-references make verification impossible.¹³ From scrutinizing his dockets it is clear that he was an educated man and a competent writer. His dockets were detailed and cited legal sources. His first docket book begins on February 13, 1871, and the first criminal case was recorded on April 4.¹⁴ Between February 1871 and June 1875 he heard 140 actions. Of this total only nineteen were criminal cases: five felonies, twelve misdemeanors, and two crimes of unknown type.¹⁵ Justice courts

¹² Accounts of Egan's life were compiled from the *Santa Ana Register*, December 6, 1920, and February 9, 1923; Terry S. Stephensen's *Camino Viejos* (Santa Ana, 1930) 92-95; Leo J. Friis's *The Village of Garden Grove, 1870-1905* (Santa Ana, 1959) 100, and 107; and Ellen K. Lee's "The Irish Alcalde," in *Orange Countiana, A Journal of Local History* 1 (n.p., 1973) 30-37.

¹³ Index to the Great Register of Los Angeles County, 1876, 70.

¹⁴ A mayor's court was also operating at Anaheim during the same year. Mayor's courts, recorder's courts, and police courts were all inferior courts that constituted the sixth tier of the state judicial system as described in the *General Law of California, 1850-1864*, vol. 1, Article 1232.

¹⁵ Of the 121 civil actions, fifty were cases of estray involving horses, mules, cattle, pigs and hogs. In seven cases in which the state was the plaintiff, six were for failure to pay assessed school taxes. Amounts owed in school taxes ranged from fifty cents to \$62.50. The willingness of the state to pursue someone in November 1872 for failing to pay half a dollar in school tax indicates how serious the state was about supporting its schools.

could not try felony cases but they did conduct preliminary hearings (see Table 2). Of the five felony matters Johnson heard (three grand larceny, one assault with a deadly weapon, and one burglary), two were remanded to Los Angeles for trial, two were dismissed, and the fifth was never heard because the accused, a horse thief, escaped custody three days after his arraignment.¹⁶

By 1874 justice courts also existed at Anaheim and Orange, as we know from the cases Johnson both received and sent to these jurisdictions on change-of-venue motions. The presence of a justice court in Orange is particularly significant. Unlike Anaheim, which became a township at the beginning of the decade, Orange remained divided between Santa Ana and Silverado townships until 1889. Apparently, wherever citizens formed a distinct community, they insisted on a justice court of their own, even without the traditional sanction of an official judicial township.

There appears to be a direct correlation between the arrival of the railroad in the Santa Ana Valley and an increase in court activity that begins about the same time. The Southern Pacific's first line into the region reached Anaheim in 1875 and was extended to Santa Ana in 1877. Records for the San Joaquin Justice Court are missing for 1876, but when they resume again at the beginning of the next year, the new justice, Charles W. Humphreys, found himself far busier than his predecessor.

In the period beginning in January 1877 and ending in December 1880, Humphreys heard 69 criminal and 261 civil cases (see Table 2). Humphreys was a Kentucky native, the son of a sheriff in Mason County, and had arrived in the area with his wife and three children in 1874. He was employed as a real-estate broker, was quickly elected justice in 1875, and began service the following January. He served continuously until 1883, when he inexplicably left the bench, only to return at the beginning of 1885. A case entered in his docket book at the end of 1882 was completed by Justice Freeman, apparently because of Humphreys's sudden illness. After his return, Humphreys remained on the bench until the end of 1886. Three years later he was part of a syndicate that purchased the *Santa Ana Blade*. He was again elected justice in 1892 and served from January 1893 until January 1895. Before his return to the bench he became a lawyer. On his death in January 1896 he was lauded by members of the Orange County bar, whose obituary in the *Santa Ana Standard* remembered him as "a trusted counselor, [and] friend to the needy."¹⁷ Like Egan, Humphreys had been new to the area and had used the bench to

¹⁶Docket Book of the San Joaquin Justice Court, J.J. Johnson, Justice, November 11, 1872.

¹⁷This brief biography of Humphreys was compiled from *An Illustrated History of Southern California* (Chicago, 1890) 857-58 [hereafter cited as *Illustrated*

forward his business career. His scholarly approach is reflected in the detail of his docket and his eventual membership of the bar.

The arrival of the railroad made the region much more accessible. Settlement in the Santa Ana Valley became easier and more attractive and local crops could be sent to distant markets. Between 1870 and 1880 the population of Los Angeles County more than doubled.¹⁸ During the same period, the two townships in the Santa Ana Valley were divided into five and the population grew three and a half times. The increase in Humphreys's court reflected the region's expanded pool of potential litigants, although why so many citizens took their disputes to court is unclear.

The increase in criminal activity did not keep pace with the increase in civil actions, and what increases there were were not considered particularly alarming at the time. With the exception of 1877, felonies do not increase at all, and of the six felony cases that year one was dismissed, a second saw no action taken after the filing of the complaint, and a third was reduced from assault with a deadly weapon to disturbing the peace. Only three of the cases were remanded to higher court in Los Angeles for trial. The majority of criminal cases were for battery and disturbing the peace.

Lawyers also made their presence felt in criminal matters by the end of the decade. Only five of the nineteen defendants who stood before Justice Johnson (1871-75) did so with counsel, whereas between 1877 and 1880 nearly 54% of defendants were represented. Chinese defendants were almost always represented by counsel; Hispanic defendants rarely were.

If activity in Justice Humphreys's court is indicative of court activity throughout the region, the few lawyers who lived in the area did not want for employment at the end of the 1870s (see Table 2).¹⁹ Matters appeared to change noticeably, however, in the early 1880s. A review of Santa Ana Justice Court records indicates a steady drop in civil litigation between 1879 and 1882. A similar

History], the Index to the Great Register of Los Angeles County, 1880; the *Santa Ana Standard*, January 25, 1896; and Jim Sleeper's *Turn the Rascals Out!* (Trabuco Canyon, Calif., 1973) 122 [hereafter cited as *Sleeper, Turn the Rascals Out!*].

¹⁸ The redivision of the townships was made in 1875.

¹⁹ A possible explanation for the sudden flurry of participation by lawyers in the justice courts may have been the general business depression throughout California in the 1870s. Short on work, lawyers were eager to represent any clients who were willing to pay for their services. See Gordon M. Bakken's *Practicing Law in Frontier California* (Lincoln, 1991) for more on this hypothesis. Friedman and Percival noted that in some quarters lawyers who practiced in justice courts were not well thought of. Quoting from an 1892 *Yale Law Review* article, they noted that justice court lawyers were considered a "legal shark, a kind of tolerated legal vermin, devoid alike of honesty, learning and industry." Idem, *Roots of Justice*, supra note 4 at 64.

decrease may be observed in the justice courts at Westminster. (The large, though declining, number of civil cases at the end of the 1870s evidently reflects local circumstances rather than a community that was suddenly more litigious. The railroad's arrival brought new inhabitants to the area, and their presence may have encouraged disputes of title and of minor debts.) An explanation for the apparent wane in civil litigation might be that, if the amount contested in individual suits exceeded the limit imposed on justice courts by law, all actions were contested in Los Angeles Superior Court. However, travelling the more than thirty miles to Los Angeles was difficult by horse and buggy and costly by train. Moreover, the lack of any noticeable increase in the dollar amount of civil suits suggests that cases were unlikely to exceed the justice court limit, and a review of the Los Angeles County Superior Court plaintiff index from 1880 to 1889 reveals no unusually high number of actions from the Santa Ana Valley.²⁰

The drop in civil litigation appears to have affected criminal actions in an interesting way. Beginning in 1881, fewer and fewer criminal defendants were represented by counsel. In only five of the twenty criminal cases that year was there counsel for the defense. Except in 1883, when only two criminal cases were tried before Justice Jacob Ross, attorneys represented criminal defendants only half, or less than half, the time.²¹ By the end of the decade such representation had declined even further. In 1888 only two of fifteen defendants were represented, and in Justice Sam Craddick's court at Orange in 1889, defense counsel was present in only one criminal case of forty-three. Contributing to the situation in Craddick's court was the large number of vagrancy cases (see Table 3). In only one of the 212 vagrancy cases studied from all courts was a defendant represented by an attorney.²² Criminal representation by counsel was no better in

²⁰The Los Angeles Superior Court system as it exists today was organized in 1880, before which the court was administered as a circuit court and its records were maintained quite differently. Los Angeles County Archives' plaintiff and defendant indexes date from 1880. Before that date it is virtually impossible to ascertain official court records.

²¹Little is known about Ross, a farmer of limited judicial ability. He handled only eleven cases in his two-year tenure on the bench. All three of his actions in 1883 came to him from another venue. His docket entries were brief and tentative. Lawyers may have shifted litigation away from his court until Humphreys's return in 1885.

²²The docket book of the Anaheim Justice Court of James Howard for 1903 records that on February 19, 1903, Anaheim lawyer Will S. Tipton represented accused vagrant George Ellis in a bench trial. Tipton demanded a jury trial for his client but District Attorney Horace Head ordered that the matter continue without one. Despite the presence of Tipton at his side, Ellis was found guilty and sentenced to pay a fine of \$60.00 or serve thirty days in county jail. Since Ellis was accused of soliciting alms on the street, it was unlikely that he could produce the fine, and he was remanded to the custody of the sheriff to serve his sentence.

Westminster, where defense attorneys were present in only five of the twenty-six criminal cases between 1879 and 1889.

The justice courts of Westminster Township were ably manned when their first surviving docket books begin in 1879 and 1880 (see Table 4). Jonathan Wesley Aldridge was a fifty-one-year-old farmer from Indiana who, unlike Egan and Humphreys, had been in the region several years before becoming justice in 1880.²³ David Webster, who had been born in England and who lived in Garden Grove, began service as justice of the peace at Westminster Township's other justice court in 1879, two years after he had arrived from Ohio. In addition to his duties as justice, he served as postmaster, and was affectionately referred to as "Deacon" Webster because of his church activities. When he relinquished his office in 1893 at the age of 78 to the 26-year-old Luke Smith, he carefully listed in his docket the books he was transferring to the young man. They included "1 volume *Statutes of California, 1877-1888*, 1 volume *Amendments to the Codes, 1877-1878*, 1 volume *Statutes of California, 1880*, 1 volume *Amendments to the Codes, 1880*, 1 volume *Statutes & Amendments to the Codes, 1881*, 1 volume *Statutes & Amendments to the Codes, 1883*."²⁴ His list indicated that, despite lacking formal legal training, justices had access to legal sources. The degree to which they scrutinized those sources depended on the justice.²⁵

Practicing law in the southern precincts of Los Angeles County was a precarious business during the 1880s. Work in the justice courts was not sufficient to keep lawyers within the region when a superior court and a larger potential client pool was only thirty miles north in Los Angeles. Between the recording of the 1879 and 1886 Indexes to the Great Register of Los Angeles County, there was no change in the number of lawyers living in the Santa

²³ Aldridge served as justice until 1884. There are no further entries in the docket book from this court until 1888. When it resumed Thomas C. Hull, a forty-one-year-old merchant from Ohio, was the justice. Aldridge had moved to Westminster Colony in April, 1874, from Watsonville with his wife, Elizabeth. Thomas Hull and his wife, Emma, had arrived in the colony two months earlier. Hull was elected manager of the village store in November 1875 and in February 1878 purchased the store in partnership with F.A. Lund. Biographical information on Aldridge and Hull is from the Index to the Great Register of Los Angeles County, 1880, 1886 and 1888, and Ivana F. Bollman's *Westminster Colony, California: 1869-1879* (Santa Ana, 1983) 62, 90, 120, 124.

²⁴ Docket Book of the Westminster Justice Court, David Webster, Justice, 1893.

²⁵ Index to the Great Register of Los Angeles County, 1880; *History of Los Angeles County, 1880* (1880; reprint, Berkeley, 1959) 191 [hereafter cited as *History of Los Angeles County*]; Leo J. Doig, *The Village of Garden Grove, 1870-1905* (Santa Ana, 1959) 34, 63, 107-9. Doig makes no mention of Webster's tenure on the bench before 1893 and erroneously states that he was justice from 1901 to 1902. Webster died in 1896, however. The *Orange News* published his obituary on May 4 of that year.

Ana Valley. The index lists seven in 1879 and seven in 1886. Of the seven in 1886, however, only two were among the group from 1879.²⁶

With two justice courts in each township, lawyers could exercise some choice as to which justices heard their civil cases. As we have seen, Humphreys was well regarded, and during his absence from the bench in 1883 and 1884 there was far less court activity during farmer Jacob Ross's tenure. Records from Santa Ana's other justice court have not survived, but it is likely that Justice George Freeman, who was seated there, was much busier than Ross during those years.

Freeman was a prominent fixture on Santa Ana's justice bench. He assumed the office in 1882 and remained in it until January 1903. Born in Hallowell, Maine, in 1829, he went to California by steamer in 1851, landing in San Francisco. He was occupied in mining and lumbering until he moved to Alameda County in 1869, where he changed occupations and became a carpenter and contractor. He continued to work as a contractor after arriving in the Santa Ana Valley in 1877. In April 1889, seven years after becoming a justice of the peace, he was elected recorder of the city of Santa Ana.²⁷

During 1882, when Freeman completed some of Humphreys's cases, his entries in his colleague's docket were extensive and reflected an equal grasp of the law.²⁸ Throughout the eighties, Freeman enjoyed the full confidence of the community. This was clear in the election of 1890, when, despite not gaining the endorsement of any party ticket, he was reelected justice.²⁹ However, this confidence was somewhat shaken early in the next decade when Freeman, together with his colleague Isaiah Marks on the Santa Ana justice bench, and James Landell of Anaheim, were indicted by a grand jury for alleged irregularities over the collection of their fees.³⁰

²⁶Southern Township Attorneys, 1879 and 1886, compiled from the Index to the Great Register of Los Angeles County, 1880 and 1886. The name, place of birth, city of residence, and age at the time of the index are included.

²⁷*Illustrated History*, supra note 17 at 886; Index to the Great Register of Los Angeles County, 1880.

²⁸Docket Book of the Santa Ana Justice Court, Charles W. Humphreys, Justice, July 6, 1882.

²⁹*Santa Ana Standard*, November 8, 1890.

³⁰Freeman also bears the dubious distinction of conducting the 1892 preliminary hearing for accused murderer Francisco Torres before his lynching. To his credit, Freeman ordered that Torres be held to answer for the charge, and was considering a change-of-venue motion by Torres's attorneys. Torres's executioner noted this by leaving a sign around the hanged man's neck that read "Change of Venue."



George E. Freeman served on the Santa Ana justice bench between 1882 and 1903. (Santa Ana Public Library)

FEES, FINES, CRIMES, AND VAGRANTS

The office of justice of the peace was unsalaried. Justices received compensation from fees collected in civil and criminal matters. The front of Webster's docket book clearly lists the amounts set by the state legislature of 1870 that were to be assessed for each of the justice's functions. Los Angeles County officials convinced the state to attach a special provision to the law affecting justices within their boundaries.³¹ By consequence,

³¹ California, *Revised Statutes* (1870) 677. The most pertinent section of this law for this study was the one applying to justice fees for criminal actions in Los Angeles County, which stated: "For all services before a J.P. in a criminal action or proceeding, whether on examination or trial, \$3.00. Provided in the county of Los Angeles the fees in a criminal action shall be collected from a defendant if convicted, but shall in no case become a county charge." State lawmakers had addressed the issue of justice fees as early as 1851, during the second session of the legislature [see the *Compiled Laws of California* [1851] 726, 733]. It should be noted that the \$3.00 fee for criminal matters was not increased between its imposition in 1870 and the end of this study in 1907.

justices' fees there were tightly regulated and protected against judicial abuse. The same law that specified justice fees also stipulated fees for constables, the justice's right arm. Constables acted as jailer, bailiff, and lawman and were also unsalaried.³²

This system worked well through the 1870s and 1880s. Justices carefully sentenced convicted defendants to pay fines that covered court, constable, and any miscellaneous fees, such as those for witnesses and juries. Fines often exactly matched costs (Humphreys was well known for his precise match of fines to expenses.) The idea of using court fines to pay for other government services was obviously not a strong one at the end of the nineteenth century. The only reason the system worked as well as it did was because of the cooperation of convicted defendants, enough of whom paid fines and refused incarceration to maintain the system.³³ When things went well, justices and constables garnered the majority of their compensation from the civil side of the docket rather than the criminal. Problems began to arise at the end of the 1880s with an increase in criminal activity generally, the arrival of tramps specifically, and the creation of Orange County, which eliminated Los Angeles County's protection against unpaid criminal-justice fees' becoming a county charge.

The court of Anaheim justice A. V. Fox was the first to record a noticeable increase in criminal activity (see Table 5). Fox, a sixty-two-year-old hotel keeper from New Hampshire when he began his docket in November 1886, dealt with crimes that ranged from violating county licensing ordinances to robbery. In 1887 twenty of the fifty-nine crimes he handled concerned property—either theft, fraud, burglary, or robbery, an unusually high number. In 1888 only twelve crimes of the seventy handled involved property; in 1889, ten of forty-six; in 1890, eight of fifty-six. These figures are of interest since vagrants who flocked to the area in the 1890s were accused of being thieves and increasing the crime rate, yet property crimes peaked in Anaheim before tramps began to flood the local courts.

Fox handled eleven cases to do with vagrants in 1889, but in Orange thirty-nine of Craddick's forty-three criminal cases were

³²Either one or two part-time constables maintained the peace throughout each township in addition to their duties in court. They were assisted in their law-enforcement duties by a number of other sources. Marshals (paid by the city) were responsible for law enforcement within Santa Ana, Anaheim, and Orange, although their primary duty was to collect city taxes. The sheriff and his deputies (paid by the county) also had jurisdiction over the unincorporated area of the county, but sheriff's personnel rarely dealt with non-felons. Other law enforcers were nightwatchmen, private citizens, and railroad employees, all of whom initiated complaints about criminal activity, especially vagrancy.

³³Defendants who failed to pay their fines were generally ordered to serve one day in jail for each dollar of their fine. This decreased in the 1890s and 1900s to one day for each two dollars of a fine.

for vagrancy. Craddick, who was born in Iowa, had moved to the Santa Ana valley for the sake of his wife's health after living in the Middle West. He pursued an occupation in real estate and quickly immersed himself in local politics. When he became an Orange justice in 1889, he counted the establishment of Orange County College as his greatest achievement.³⁴

Of less distinction was Craddick's alleged proclivity for bringing vagrants before him. When he was bidding to return to the bench in the election of 1894, the *Orange News* was quick to remind its readers that, of Craddick's forty-three criminal cases between August 1889 and the end of his first term of service in January 1891, thirty-four were tramp or vagrancy cases. To the *News* this meant that "he also was then engaged in a practice of running his office largely for revenue only."³⁵ Surviving records of his first term in office end in July 1890, therefore the paper's statistics for the remainder of the year cannot be confirmed. If we assume that they were accurate, however, and couple them with Craddick's docket entries before August 1890, we learn that during his first term as justice he actually heard sixty-seven vagrancy cases out of a total of seventy-eight criminal cases. Thus 86% of his time on criminal matters was spent with vagrants.³⁶ However, there is a problem with the *News's* assertion about Craddick's motivation for hearing vagrancy cases. Before the division, his ability to garner fees for criminal cases was dictated by the special Los Angeles County provision concerning the collection of those fees. It is true that he listed his fees at three dollars per defendant, but it is doubtful that he was able to collect any of that money. In August 1890 the *Orange Post* printed with pride that "Tramps give Orange a wide berth."³⁷ This was largely attributed to the city's aggressive detention of suspicious persons, in which activity Craddick had few rivals.

Despite Craddick's combative policy of prosecution, he was somewhat more lenient when it came to sentencing. Of the sixty-six accused vagrants whose names are recorded in his surviving docket, only twenty ever saw jail time. No story was too implausible to win the dismissal of a case. In February 1889 five vagrants, found "penniless and . . . sleeping in a box car," asserted that they were former employees of the Santa Fe and hoped to work for the railroad again. This assertion created enough "reasonable doubt" in the mind of the court "sufficient to earn their release."³⁸

³⁴*Illustrated History*, supra note 17 at 871.

³⁵*Orange News*, October 24, 1894.

³⁶*Ibid.*

³⁷*Orange Post*, August 9, 1890.

³⁸Docket Book of the Orange Justice Court, Sam M. Craddick, Justice, February 13, 1889. Their release did not prevent Craddick from charging a fee of \$15.00 for his time.

Those who were sentenced faced progressively longer stints in custody. On pleading guilty to a charge of vagrancy, William Brown was sentenced to fifteen days in jail on January 17, 1889.³⁹ Frank Eniges's guilty sentence at the end of the year, on the other hand, earned him thirty days' hard labor.⁴⁰ By 1890, however, even a guilty verdict did not necessarily mean jail time. Craddick routinely offered sentenced vagrants the option of leaving the county within several hours of their conviction in order to avoid the imposition of their jail sentences. This invitation, commonly referred to as a "floater," was always accepted, and no vagrant went to jail from Craddick's court between January and July of 1890. However, this did not deter the justice from filing his fees against the county coffers.

The questions that arise were whether justices of the peace in the county were attempting to take advantage of the homeless for their own monetary gain, and whether they were responding to the demands of the community. In the early 1890s the financial condition of the county was tenuous. A virtual flood of homeless people threatened the county's already stretched resources, and in 1895 the formation of a vigilance committee to address the problem was discussed at a meeting in Neill's Hall in Santa Ana. The gathering included some of that city's more prominent citizens, including the former district attorney, J.G. Scarborough.⁴¹ The committee never came about, but one may ask whether the justices did not feel it incumbent upon themselves to maintain law and order by controlling the community's most visible reminder of its fear of economic failure. At the same time the justices had to balance their civic responsibilities as keepers of the law with their fiduciary responsibilities of not burdening the county treasury. With these opposing functions before them, conflict was inevitable.

When Orange County officially came into existence on August 5, 1889, it did so with justice courts already established within its five judicial townships, at Anaheim, Orange, San Juan, Santa Ana, and Westminster.⁴² In fact, the region's justices of the peace played an integral part in the creation of the other layers of county government.⁴³ Justices of the peace and constables were the only elected officials to remain after the new county broke away from Los Angeles County.

³⁹ *Ibid.*, January 17, 1889.

⁴⁰ *Ibid.*, December 14, 1889.

⁴¹ *Santa Ana Standard*, January 12, 1895.

⁴² *Supra* note 26.

⁴³ Names of justices of the peace, past and present, lace the "Proceedings of the Board of Orange County Commissioners," the committee created on March 11, 1889, to organize the various offices of the new county and conduct a special election to confirm the new county's existence and elect its new officers. Justices of the peace were instrumental in calling the election on June 4 and establishing

While controversy did not characterize the office of justice of the peace in earlier years, the issue of fees and tramps was to change things. One of the justices affected was James Landell, of Anaheim, who was elected in November 1890 to succeed Fox. A longtime resident of the community, Landell appeared an excellent choice for justice. Like so many others, he had migrated to southern California (in 1874) for health reasons. He became a farmer and vineyardist, and also served as precinct clerk during the special election that chose the county's first officers in 1889.⁴⁴ Like Craddick, Landell spent a significant percentage of his court time on vagrancy cases between 1891 and 1893 (see Table 5). In 1894 controversy over the handling of his office arose, and it is regrettable that his docket is missing from October 1893 through December 1895.

Part of the problem between justices of the peace and county officials was the administration of the justice courts. While the region was part of Los Angeles County, justices worked without strict supervision from Los Angeles and were virtually autonomous. Local lawyers took turns being prosecution and defense counsel because assistant district attorneys did not travel south to prosecute cases. Justices' dockets were supposed to be reviewed annually by the Los Angeles grand jury, but one is hard-pressed to find many signatures from members of the grand jury who reviewed the records before the division.

With the advent of county offices in Orange County, the district attorney's office prosecuted significant cases and the grand jury scrutinized each justice's docket thoroughly. While the Santa Ana Valley was part of Los Angeles County, justices in the region routinely conducted their business without informing the distant district attorney's office. Orange County D.A.s wanted to review matters before justices adjudicated them. A justice's failure to consult the district attorney put a cloud on the fees he was claiming. Addressing the issue in 1894, the *Orange News* concluded that "The result of this practice was that many complaints were filed through spite, many improper cases and many wrong offenses and all tended to largely increase the expense to the county for criminal prosecution."⁴⁵ This was especially true when it came to vagrancy cases. The *News* continued that "in September 1893, it was also discovered that one or two justices and constables were making a business of

the voting place within each precinct. This information comes from *Orange County: From Birth to Metropolitan Status, 1889-1964* (Santa Ana, 1964), a photocopied, unpaginated compilation of original county documents assembled for Orange County's diamond jubilee by the county itself.

⁴⁴For biographical information on Landell, see his obituary in the *Anaheim Gazette*, July 3, 1902, and the *History of Los Angeles County*, supra note 25 at 185.

⁴⁵*Orange News*, October 24, 1894.

arresting tramps during the night in gangs of from 10 to 30, and prosecuting them without the knowledge of the district attorney, so that each tramp cost the county, in illegal fees to the officers, of from \$5 to \$6.50."⁴⁶

The grand jury of 1893 responded to these alleged abuses in December, when it reviewed justices of the peace and constables for the previous year:

The attention of this Grand Jury has been directed to the abuses of authority by Justices of the Peace and Constables, in their manner of handling the tramp and vagrant questions, by which their fees have been greatly increased beyond any contemplation of law, and thereby the taxpayers burdened with unnecessary expenses therein.

It has been shown to the Grand Jury that these abuses have become extensive and flagrant, and that some restraint was absolutely necessary to be imposed, and we have accordingly taken such action and directed the attention of our efficient District Attorney to the same, and with a request to take such further steps as are necessary in the premises.⁴⁷

The casualties from the grand jury's investigation were justices Freeman and Marks of Santa Ana, against whom indictments were returned.⁴⁸ Both indictments were dismissed at the beginning of 1894, but they served notice that the county would not tolerate any further excesses.⁴⁹ Because the dockets from both justices' courts are unavailable, it is not possible to know how many tramps were brought before them, but it may safely be assumed that it was Freeman and Marks to whom the *News* was referring. The only clue to the volume of vagrancy cases in their courts comes from Supervisor Samuel Armor's long article in the

⁴⁶Ibid.

⁴⁷Grand Jury Report, County of Orange, 1893, p. 7.

⁴⁸This was not the first time that Freeman had found himself in court over the charges involved in the administration of a public office. In 1889 he had brought suit against the City of Santa Ana when it attempted to lower his salary as city recorder while he was in office. Freeman won his \$20.00 suit, and the city was forced to pay another \$80.00 to his attorney, Victor Montgomery. See Sleeper, *Turn the Rascals Out!*, supra note 17 at 131-32.

⁴⁹Another county justice who had run afoul of the law was Luke E. Smith, of Westminster, who on February 22, 1893, faced charges of selling tobacco to a minor in the Westminster Justice Court of Josiah McCoy (see the Docket Book of the Westminster Justice Court, Josiah McCoy, Justice, February 23, 1893). A jury found Smith not guilty on March 1, but the scandal of the trial was apparently so great that he left the bench and was not replaced until 1895. There was so little court activity in Westminster that the absence of one court was no hardship, either to the community or to the other justice court.

Anaheim Gazette in February 1892.⁵⁰ Armor reported that fifty-three vagrants were brought before Freeman and one before Marks during January 1892 alone, which projects to a staggering number of vagrancy cases for the year—far more than in Landell's court, or in Craddick's during 1889 and 1890. Even if the "floater" was liberally applied in Santa Ana, the county was burdened with a huge population of tramps in its jails. Marks undoubtedly dealt with more such cases in other months to merit his indictment in 1893.

In addition to handing out indictments against Freeman and Marks, the county attacked the fee problem by refusing to honor the claims for fees made for vagrancy cases by constables. Constable C.F. Preble took his claim for fees owed to Superior Court Judge James Towner in March 1894. Preble asserted that he had filed a claim for \$59.75 for bringing in tramps, but that the county had paid him only \$25.75. Towner quickly dismissed the matter on the grounds that Preble had not followed the proper appeal process with the Board of Supervisors. Preble not only failed to collect his \$34.00, but owed his attorney for bringing the unsuccessful action to court.⁵¹

By the end of 1894 the relationship between the district attorney and the county's justices of the peace had greatly improved. The district attorney now reviewed all cases that came before the justices, from whose courts fee claims went down as a consequence.⁵² Not all accusations of abuse against justices were eliminated by improved relations with the district attorney's office, however. The *Anaheim Gazette* reported that the grand jury of 1894 narrowly failed to return indictments against "an officer and a Justice of the Peace of this township." The names of the justice and officer involved were not listed, but the two were under suspicion of "taking money from arrested parties and pocketing the same without bringing the accused to trial."⁵³ The grand jury expressed other concerns about practices in justice courts in 1894. Among them was the strange fact that the county treasurer received more money from justices than the justices claimed credit for.⁵⁴ The grand jurors also took exception to the practice of some justices of imposing fines "sufficient only to cover costs of the action, without any apparent regard to the gravity of the offense."⁵⁵

⁵⁰*Anaheim Gazette*, February 11, 1892.

⁵¹*Ibid.*, March 22, 1894.

⁵²The only justice courts whose docket books survived for 1894 and 1895 were in Westminster, but the volume of cases there was so small that it is impossible to notice any drop in caseload.

⁵³*Anaheim Gazette*, December 13, 1894.

⁵⁴*Los Angeles Times*, December 7, 1894.

⁵⁵*Anaheim Gazette*, December 13, 1894.



Anaheim, ca. 1890, showing Center Street (where it intersected with Los Angeles Street), on which justices Pierce and Shanley had their business addresses. (Anaheim Public Library)

The last complaints leveled against justice courts by the grand jury came with the indictment of Justice Landell for misconduct in office in 1895. Like the previous indictments of Freeman and Marks, this action was dismissed early the following year.⁵⁶ If grand juries said anything about the work in justice courts after 1895, it was complimentary. A typical acknowledgment was made by the grand jury of 1900 to justices Frank Shanley of Anaheim and Romualdo Marquez of Yorba for the neatness of their docket books.⁵⁷

After 1895 the tension surrounding the county's justice courts eased for other reasons. The tramp population began to decline, and the county's financial straits were less constricting. By the middle of the next decade, the county coffers were positively robust. Optimism was high, and individual wealth was sufficient for more than 250 men to list their occupation as "retired" when they filled out their application for the Great Register of 1906.⁵⁸ (Their average age was 56.8 years.)

⁵⁶For Landell's indictment, see the Grand Jury Report, County of Orange, 1895, p. 7. Despite failing to name Landell as the justice involved, his indictment by the grand jury of 1895 suggests that it was he and not Justice Jason Pierce who was being criticized in 1894.

⁵⁷Grand Jury Report, County of Orange, 1900, p. 5.

⁵⁸Index to the Great Register of Orange County, 1906.

Justices of the peace once again settled into their familiar, anonymous role as maintainers of public order. Landell's docket resumes in 1896, for which year the docket for Anaheim's other justice court, under Jason B. Pierce, is also available. By 1896 Pierce had been justice in Anaheim for well over a decade. He was born in Vermont in 1821 and arrived in the Santa Ana Valley at the end of the 1860s. First president of the board of trustees of the local irrigation company,⁵⁹ in 1876 he became a commissioner of the Cajon Water District.⁶⁰ By 1880 he had 250 acres of wheat planted, the largest number of anyone in the region.⁶¹ He became an agent of the Stearns Rancho,⁶² and his interests continued to broaden. The *Orange County Directory* of 1895-96 listed among his occupations city recorder, notary public, insurance agent and real-estate broker, but did not bother to mention that he was also a justice of the peace.⁶³

DIFFERENCES AND SIMILARITIES

With the records of both Anaheim justices available, it is possible to get an accurate picture of court activity within a busy township (see tables 6-11). Relying on numbers alone does not, of course, explain the differences between the two courts, which are quite striking in the sentencing patterns for vagrants. Landell and Pierce were both Republicans, with several years of court experience with vagrants by 1896. Like their colleagues in other courts, they had no doubt experimented with alternative sentencing, from "floaters" to hard labor. The economic and political constraints that had hampered their dealings with vagrants no longer pertained, and the justices could therefore sentence all defendants as they saw fit. Vagrancy defendants unlucky enough to be found guilty in Landell's court faced sentences ranging from ten days to several months in jail. A five-month sentence was given to Ah Foo, the only Chinese charged with vagrancy in the Anaheim records.⁶⁴ Pierce, on the other hand, dismissed some of the

⁵⁹ See the Docket Book of Anaheim Justice Court, Jason B. Pierce, Justice, October 25, 1870.

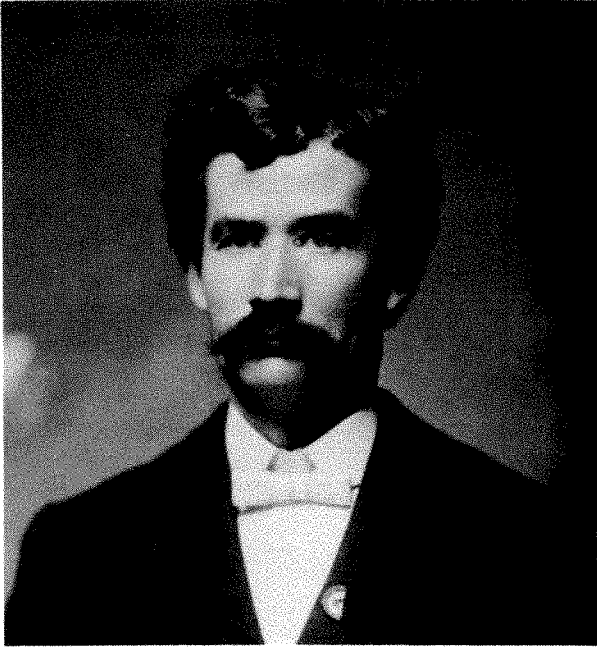
⁶⁰ Virginia L. Carpenter, *Placentia, A Pleasant Place* (Santa Ana, 1988), 42 [hereafter cited as Carpenter, *Placentia*].

⁶¹ *History of Los Angeles County*, supra note 25 at 153.

⁶² Carpenter, *Placentia*, supra note 60 at 87.

⁶³ *Orange County Directory, 1895-1896*, 102, 107.

⁶⁴ See the Docket Book of Anaheim Justice Court, James M. Landell, Justice, October 28, 1898. Ah Foo was again charged with vagrancy on May 8, 1899, in Justice Shanley's court, but no action was taken after the warrant of arrest was issued. See the Docket Book of Anaheim Justice Court, Frank Shanley, Justice, May 8, 1899.



James S. Howard served as justice of the peace in Anaheim from 1903 to 1921. (Anaheim Public Library)

vagrants who pled guilty before him, and his average sentence for vagrancy was less than ten days.

Neither the newspapers nor the justices themselves account for this disparity. Landell's harsh sentences reflected the county's growing capacity to fund its criminal-justice process, but his reasons for giving longer jail terms and Pierce's for giving shorter ones are not known. Earlier in the decade, Landell's sentences had not been unusually severe. Perhaps he was revenging himself for the accusations leveled against him, or was simply tired of playing the "floater" game.

Both Landell and Pierce, like Craddick before them, gave vagrants an audience and evaluated the merits of each case. Nothing that resembled a policy in such matters was ever in evidence. The vast majority of defendants charged with vagrancy pleaded guilty and were quickly dealt with, but just as many were set free after being admonished by the justices to choose better travelling companions and find employment.

Such an admonishment was delivered by Landell himself in 1892, before his sentencing habits changed. Vagrancy defendant E. Martin, who pled guilty as charged, was the recipient of this lecture. After considering Martin's sentence, Landell wrote: "On a due examination of the cause and finding that defendant had

unwittingly and at a late moment become an associate of the company of the boxcar, and feeling satisfied that defendant was a well meaning young man, [I] discharge [the] defendant with the caution to avoid bad company in the future."⁶⁵ Though Landell later had a change of heart, Pierce continued this practice until he ended his years of service in January 1898.

In addition to a stronger economy and improved relations with the rest of the legal system, other considerations were affecting the justice courts at the end of the decade. A newspaper article pasted in both Pierce's and Landell's docket books reported passage of a state law permitting townships that contained a city with an elected recorder, not an appointed one, to have only one justice of the peace. The decision affected Anaheim, each of whose justices realized that one of them would soon be off the bench. Moreover, at the end of December 1896 a new judicial district was created in Fullerton. Court officers were appointed on January 18, 1897: two constables and two justices. The district comprised the Fullerton and Yorba voting precincts, reducing the jurisdiction of the Anaheim justices. This township would itself be divided in 1899, when Justice Romualdo Marquez moved over to the new township (see Table 12 for his workload, which was never heavy).⁶⁶

On January 1, 1899, Pierce's and Landell's fears were realized when one of Anaheim's justice courts was abolished. Neither justice was around to see it, however, as both had stepped down from the bench when their terms expired at the end of 1898.

Frank Shanley, an insurance salesman as well as one of the founders of the First National Bank of Anaheim, became justice in 1899. He had arrived in the state three years earlier, and his service on the bench only solidified his already strong position in the community. His four-year tenure as justice was marked by a banker's precision in the keeping of his docket and stern jail sentences for the few vagrants who crossed his path. The twenty-nine vagrancy defendants before him faced sentences that averaged thirty days in length. They were never given the option of paying a fine (which might or might not have been possible for them), as they routinely would have been by his predecessors. (See Table 11 for Shanley's workload.)

When photographer James S. Howard became justice in January 1903, vagrants again had the choice of paying a fine, but the fines were so exorbitant that payment was unlikely, and Howard meted out the same lengthy jail sentences that Shanley had issued (see Table 11).

⁶⁵ Docket Book of Anaheim Justice Court, James M. Landell, Justice, November 17, 1892.

⁶⁶ By January 1, 1899, all townships in the county had only one justice of the peace except for Santa Ana, which, because of its size and population, retained two justices until January 1, 1903.

In 1905 Howard introduced an innovation to sentencing. On July 8, nine-year-old David Ruiz's thirty-day sentence for petit larceny was suspended on the condition that he report to probation officer S.O. Llewellyn every Saturday for six months.⁶⁷ A similar sentence was meted out to three juveniles accused of malicious mischief three weeks later.⁶⁸ Howard extended the practice to adults early the next year.⁶⁹

The Santa Ana Valley passed through many phases during the years covered by this study. In the early 1870s the region was sparsely populated, with isolated pockets of new settlement. The large Mexican ranchos were just beginning to break apart, encouraging new settlement. The people who had staked a foothold by 1875 forced a rail line to link the region with Los Angeles. Coupled with the completion of the Southern Pacific's line through the Tehachapis to Los Angeles, this gave rise to a population boom at the end of the decade. The boom slowed in the early 1880s, but resumed again with the arrival of the Santa Fe. The major beneficiaries were the towns along the rail lines. Anaheim, Orange, and Santa Ana all grew as a result of their railroad connections, while towns like Tustin, which was unsuccessful in wooing a major rail route, declined. Other communities off the railroad's line of march remained isolated to transient outsiders who burdened the areas they visited. During the uncertain early years of Orange County, the region displayed a "hold-the-line" mentality against dangerous outsiders, unnecessary expenses, and anyone who threatened to overwhelm the area's tenuous economy.⁷⁰ This mentality was extended to justices of the peace who could not properly balance maintaining public order against holding down the cost of their offices. By 1896 the community's fears began to ease somewhat as economic conditions improved, and by the middle of the next decade conditions were so good that the concerns of the 1890s seemed merely a bad dream.

⁶⁷Docket Book of the Anaheim Justice Court, James S. Howard, Justice, July 8, 1905.

⁶⁸*Ibid.*, *People v. A. Wirney, V. Lagourgue and D.A. Henrich*, July 31, 1905.

⁶⁹*Ibid.*, *People v. Ah Poy, Ah Sung, Ah Chuch, Ah Lung, and Ah Ching*, February 5, 1906. This was a gambling case.

⁷⁰Lawrence M. Friedman, *A History of American Law* (New York, 1973) 296. Friedman asserts that American priorities shifted when the frontier was widely perceived as being closed. Before 1890 American law was driven by what Willard Hurst has called the "release of energy." Legal institutions had been shaped to promote the entrepreneur and encourage expansion into open territories, but closure of the frontier forced a rethinking of legal priorities. Consolidation and entrenchment began to replace unrestrained development, affecting both the civil and criminal side of law. In Orange County in the early 1890s, where the new government's foothold seemed tenuous in the face of a series of local and national economic setbacks, holding the line against external and internal threats through legal remedies seemed perfectly justifiable.

Throughout the period, justices of the peace went about their business. All of them were successful, civic-minded entrepreneurs. For some of them, including Richard Egan, Charles Humphreys, and Sam Craddick, assuming the position was a means of establishing their reputation in the community to help promote their other ambitions. Others were already established when they became justice, and their assumption of civic leadership was a response to their place in the community in the best tradition of republicanism. These included Thomas Hull, James Landell, and Jason Pierce. Given the positions they held before becoming justice, it seems unlikely that they entered the office motivated solely by the wages to be gained. The detail and reflection that went into their justice dockets indicated that they understood the importance of their role, endeavored to learn the law and dispense it properly, and in so doing attempted to serve their communities. The justices who did not display this capacity did not remain in the office for long.

This study of justice courts in the Santa Ana Valley also helps to dispel the myth that every new community in the West was a violent one. There was only one lynching during the period (that of Francisco Torres in 1892), and despite intimations that a vigilance committee was in operation at Orange in the 1870s, no solid evidence of it has materialized.⁷¹ Santa Ana's influx of tramps was the cause of the meeting in Neill's Hall in January 1895 at which such a committee was discussed, but that was evidently the extent of it. The community was not without its rowdies, and fist fights and other batteries were common, but violent crime was virtually unknown. Table 13 shows that only 5% of a justice's time spent on criminal matters involved violent crime. Of these cases, nearly half were either dismissed or had no further action taken after filing. The odds on becoming a victim of a violent act were virtually nil for the average citizen of the community. Far more likely was an encounter with a vagrant.

The numbers in Table 14 confirm that vagrancy was a crime that followed railroads and concerned larger communities. The Fullerton/Yorba area was not heavily populated, but the main line of the Santa Fe passed through the region. Because no major rail line ran through Westminster and the community was dispersed and covered with farms, vagrants avoided the region. In Santa Ana they had not yet arrived during the years for which docket books have survived, but during the 1890s newspaper accounts suggest that it was the most heavily visited community by the associates of the company of the boxcar. Anaheim's numbers accurately reflected the extent of the problem in the larger railheads, while Orange showed a conspicuous zeal for prosecution. It is clear

⁷¹J.E. Pleasants, *History of Orange County, California* (Los Angeles, 1931) 402-6.

from a comparison of tables 13 and 14 that vagrancy was of greater concern to the community than the threat of violent assault. Evidence from the Santa Ana Valley may be added to that gathered by Roger McGrath on Bodie, California, and Aurora, Nevada, to show that the claim that new western communities were unusually violent was inaccurate.⁷²

In his analysis of justices of the peace in Washington Territory, John Wunder concluded that they were educated, middle-aged, politically active, land-owning men of considerable means.⁷³ This analysis suggests that justices in the Santa Ana Valley were much the same. They reflected the backbone of their society. They were its leaders and reinforced its values. Politically conservative, they appeared to deal with each case before them on its own merit. The character, background, and ethnicity of a defendant did affect sentencing, as did the year in which a case was heard and the societal circumstances. Justices frequently lectured the defendants before them, especially vagrancy suspects, on proper living. Cases were rarely appealed, and lawyers endorsed justices they respected by bringing work to their courts.

Justices of the peace served an important social as well as legal function. They bore the burden of the community's social ills. The presence of large numbers of vagrants in the 1890s was the greatest test of this function. Justices were called on to rid society of this perceived menace while not overburdening the community in the process. While the results of this undertaking were mixed, a stricter definition of the relationship between justices and the rest of the legal system was the most obvious result. Justices were successful in holding the line against vagrants, however, until economic conditions rebounded sufficiently for the vagrants themselves to dwindle in number. In the end, justices performed the function that they had since the days of their origin in England. As leaders of their communities, they assured their fellow citizens that they would persevere by brandishing the shield of law and wielding the staff of justice.

⁷²Roger D. McGrath, *Gunfighters, Highwaymen and Vigilantes: Violence on the Frontier* (Berkeley and Los Angeles, 1984).

⁷³Wunder, *Inferior Courts*, *supra* note 7.

APPENDIX: TABLES

TABLE 1
JUSTICES OF THE PEACE CONSIDERED IN THIS STUDY

	Age ¹	Place of Birth	Occupation	Terms Served
ANAHEIM				
Fox, A.V. ^{2,3}	62	New Hamp.	Hotelier	11/86?-10/90
Howard, James S. ²	43	Iowa	Photographer	01/03-01/21
Landell, James W. ²	53	Penn.	Farmer	11/90-01/99
Pierce, Jason B. ^{2,3}	63	Vermont	Farmer	07/8?-01/99
Shanley, Frank ²	56	Ireland	Insurance	01/99-01/03
FULLERTON/YORBA				
Marquez, Romualdo P. ²	33	California	Merchant	F 01/97-01/99 Y 01/99-08/06
ORANGE				
Craddick, Sam M. ²	35	Iowa	Real Est.	01/89-01/91 +01/95-01/99
SAN JOAQUIN/SANTA ANA				
Freeman, George E.	53	Maine	Contractor	01/82-03/03
Humphreys, Charles W. ²	39	Kentucky	Real Est.	01/76-12/86 +01/93-01/95
Johnson, J.J. ^{2,3}	41	N. Carolina	Farmer	02/71?-06/75?
Marks, Isaiah G.	40	Penn.	Solicitor	01/91-01/93
Ross, Jacob ²	35	Indiana	Farmer	02/83-01/85
Smith, C.F. ²	32	Mass.	Surveyor	01/87-01/89
SAN JUAN				
Egan, Richard ³	28	Ireland	Surveyor	00/7?-00/8?
WESTMINSTER				
Aldridge, Jon W. ^{2,3}	51	Indiana	Farmer	01/80-02/84
Fawcett, Thomas W. ²	70	Indiana	Farmer	01/91-01/93
Hull, Thomas C. ²	41	Ohio	Clerk	01/88-12/88
Lane, John	25	Ohio	Farmer	06/95-12/96
McCoy, Josiah ²	62	Penn.	Farmer	01/89-01/91 +01/93-01/07

TABLE 1 (*continued*)
JUSTICES OF THE PEACE CONSIDERED IN THIS STUDY

McKelvey, Sidney D. ²	36	Rhode Is.	Groc. Mer.	02/97-01/99
Smith, Luke E. ²	26	California	Clerk	01/93-07/93
Webster, David ^{2,3}	63	England	Postmaster	03/79?-01/93
Average age	45.76			

¹All ages are from the year the men were first elected justice.

²Indicates justices whose docket books were scrutinized.

³The first year of service as justice for Egan, Johnson, Fox, Aldridge, and Webster is unknown. Egan was 28 in 1870. There is no way to determine whether he was a justice before that year.

* * *

TABLE 2
ACTIONS IN SAN JOAQUIN/SANTA ANA JUSTICE COURT, 1871-1888

	CRIMINAL			Total	CIVIL	Comb. Total
	Felony	Misd'm'r	Not Stated			
1871	2	1	0	3	7 ¹	10
1872	1	3	0	4	43 ¹	47
1873	0	1	1	2	43 ¹	45
1874	2	5	0	7	17 ¹	24
1875 ²	0	1	2	3	9 ¹	12
1877	6	12	0	18	61	79
1878	2	14	1	17	76	93
1879	2	12	1	15	74	89
1880	1	15	1	17	50	67
1881	5	15	0	20	25	50
1882	8 ³	4	0	12	8	20
1883 ⁴	0	2	0	2	1	3
1884 ⁴	0	3	0	3	5	8
1885	2	14	0	16	39	55
1886	2	13	0	15	22	37
1887	3	10	0	13	7	20
1888	0	15 ⁵	0	15	16	31
Total	36	142	6	184	486	670

¹Of these 119 cases, 50 were for estray and no named defendant was listed.

²The docket for this year ends in June.

³Four of these cases were for the same action.

⁴Humphreys was not on the bench in 1883 and 1884, when his place was taken by Ross. The caseload increased on Humphreys's return.

⁵1 vagrancy.

* * *

TABLE 3
ACTIONS IN ORANGE JUSTICE COURT, JANUARY 1889-JULY 1890

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1889	0	4	39	43	21	64
1890	4	3	8	15	6	21
Total	4	7	47	58	27	85

* * *

TABLE 4
ACTIONS IN WESTMINSTER JUSTICE COURTS, 1879-1898

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Not Stated			
1879	0	0	0	0	18	18
1880 ¹	0	1	0	1	20	21
1881	0	0	0	0	6	6
1882	2	13 ²	1	16	6	22
1883	0	1	0	1	2	3
1884	0	1	0	1	2	3
1885	0	1	0	1	1	2
1886	0	0	0	0	7	7
1887	0	0	0	0	2	2
1888	0	12	0	12	5	17
1889	0	1	0	1	11	12
1890	4	11	0	15	13	28
1891	1	2	1	4	4	8
1892	0	6	0	6	10	16
1893	0	11 ³	0	11	3	14
1894	0	1	0	1	6	7
1895	1	5	0	6	7	13
1896	0	0	0	0	3	3
1897	0	2	0	2	13	15
1898	1	2	3	6	16	22
Total	9	70	5	84	155	239

¹Records are combined for both justice courts from this year until 1896. Records for only one court survive from 1896 through 1898.

²Twelve of these cases were for only two actions.

³1 vagrancy.

* * *

TABLE 5
ACTIONS IN ANAHEIM JUSTICE COURT,
NOVEMBER 1886-SEPTEMBER 1893

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1886	1	7	0	8	1	9
1887	15	42	2	59	11	70
1888	5	61	4	70	10	80
1889	8	27	11	46	14	60
1890	6	36	14	56	16	72
1891	1	28	25	54	21	75
1892	3	17	22	42	24	66
1893	3	14	7	24	18	42
Total	42	232	84	359	115	474

* * *

TABLE 6
CASES HEARD IN JUSTICE LANDELL'S COURT,
JULY 1896-DECEMBER 1898

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1896	1	7	0	8	10	18
1897	6	22	7	35	31	66
1898	1	15	6	22	14	36
Total	8	44	13	65	55	130

* * *

TABLE 7
DEFENDANTS IN JUSTICE LANDELL'S COURT,
JULY 1896-DECEMBER 1898

	Vagrancy	Other Criminal	Total
1896	0	12	12
1897	12	47	59
1898	7	25	32
Total	19	84	103

* * *

TABLE 8
CASES HEARD IN JUSTICE PIERCE'S COURT,
JANUARY 1896-DECEMBER 1898

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1896	13	52	16	81	30	111
1897	7	30	6	43	27	70
1898	7	14	0	21	16	37
Total	27	96	22	135	73	218

* * *

TABLE 9
DEFENDANTS IN JUSTICE PIERCE'S COURT,
JANUARY 1896-DECEMBER 1898

	Vagrancy	Other Criminal	Total
1896	37	78	115
1897	20	39	59
1898	0	21	21
Total	57	138	195

* * *

TABLE 10
TOTAL DEFENDANTS FOR BOTH COURTS, 1896-1898

	Vagrancy	Other Criminal	Total
1896	37	90	127
1897	32	74	106
1898	7	39	46
Total	76	203	279

* * *

TABLE 11
ACTIONS IN ANAHEIM JUSTICE COURT,
JANUARY 1896-JANUARY 1907

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1896	14	59	16	89	40	129
1897	13	52	13	78	58	136
1898	8	29	6	43	30	73
1899	1	14	3	18	20	38
1900	3	9	5	17	9	26
1901	4	12	6	22	11	33
1902	5	18	0	23	6	29
1903	2	23	6	31	16	47
1904	4	43	5	52	17	69
1905	3	20	10	33	33	66
1906	2 ¹	25	4	31	47	78
1907	0	5	1	6	0	6
Total	59	309	75	443	287	730

¹Same case, refiled.

* * *

TABLE 12
ACTIONS IN FULLERTON/YORBA JUSTICE COURT,
JULY 1897-NOVEMBER 1906

	Felony	CRIMINAL		Total	CIVIL	Comb. Total
		Misd'm'r	Vagrancy			
1897	2 ¹	3	0	5	1	6
1898	3	0	3	6	1	7
1899	0	0	0	0	1	1
1900	0	2	2	4	0	4
1901	0	1	0	1	0	1
1902	1	2	1	4	0	4
1903	2	5	0	7	4	11
1904	0	5	0	5	2	7
1905	0	0	0	0	2	2
1906	0	1	0	1	0	1
Total	8	19	6	33	11	44

¹Same case.

* * *

TABLE 13
VIOLENT CRIMES IN THE COURTS STUDIED,
FEBRUARY 1871-JANUARY 1907

	Violent Crimes ¹	Total Crim. Cases	Violent Crimes as % of Total Cases
Anaheim, 1886-1907	32	802	4
Fullerton/Yorba, 1897- 1906	4	33	12
Orange, 1889-1890	2	58	3
Santa Ana, 1871-1888	13	184	7
Westminster, 1879-1898	8	84	10
Total	59	1,161	5

¹Crimes considered in this table are: assault with a deadly weapon, murder, rape and assault to commit rape, and threatening to kill another.

* * *

TABLE 14
VAGRANCY IN THE COURTS STUDIED,
FEBRUARY 1871-JANUARY 1907

	Vagrancy Cases	Total Crim. Cases	Vagrancy as % of Total Cases
Anaheim, 1886-1907	159	802	20
Fullerton/Yorba, 1897- 1906	6	33	18
Orange, 1889-1890	47	58	81
Santa Ana, 1871-1888	1	184	.05
Westminster, 1879-1898	1	84	1
Total	214	1,161	18



San Diego in 1887, from Seventh and Ash streets (San Diego Historical Society)

THE WHITE MAN'S JUSTICE: NATIVE AMERICANS AND THE JUDICIAL SYSTEM OF SAN DIEGO COUNTY, 1870-1890

BY RICHARD W. CRAWFORD

On August 18, 1885, after fifteen minutes of deliberation, a Superior Court jury convicted three Native Americans on charges of burglarizing a saloon in the City of San Diego. For the thefts of a fiddle, a revolver, and a clock, the court sentenced Carlos, Tomas, and Sylvero to terms of ten years each in the state prison. The San Diego *Union* commented: "The sentence may appear to some persons a little severe, but these fellows needed harsh sentences, as they were old criminals, excepting one, and were almost constantly in the courts on some criminal complaint. Such men as these culprits have cost the taxpayers of San Diego county a great deal of money, and giving them a long leave of absence to San Quentin will relieve this country."¹

Among many forms of discrimination evident in San Diego County, the harsh treatment of Native Americans in the criminal-court system is striking. In the legal records, they appear often as both victims of crime and as defendants. The latter group—the alleged perpetrators of crime—are the focus of this study.

In the last decade, the use of legal records for the study of crime has grown rapidly among social historians. From quantitative analyses, particularly those focused upon specific communities, we can find out much about how the criminal-justice system

Richard W. Crawford is the archivist for the San Diego Historical Society.

¹San Diego *Union*, August 26, 1885.

functioned in the nineteenth century.² Such analysis can also be used in measuring the character of justice for ethnic groups, and is used here—supplemented by an examination of individual data from case files—to address questions concerning crimes committed by Native Americans. How these were treated by the courts, and their prevalence and nature, as well as the Native Americans' conviction rates, legal representation, gender, and sentencing are all considered.³ This essay also explores how Native Americans fared in the criminal-court system in relation to Anglos, Hispanics, and Chinese. In short, what do court actions in San Diego, as documented by contemporary legal records, tell us about the status of Native Americans in San Diego County in the late nineteenth century?⁴

THE JUSTICE COURTS

The lowest level of the San Diego judiciary—the justice courts—tried Native American defendants for a variety of complaints, including petit larceny, assault and battery, disturbing the peace, drunkenness, and all other misdemeanors that carried penalties not exceeding \$500 in fines or three months' imprisonment (see Table 1).⁵ While forbidden to try major crimes, the justice courts frequently held preliminary hearings in felony cases, which could be bound over to the higher courts when a justice believed felony prosecution was justified. About 12% of the actions heard in the

² See, in particular, Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (Chapel Hill, 1981); Charles A. Tracy, "Race, Crime and Social Policy: The Chinese in Oregon, 1871-1885," *Crime and Social Justice* (Winter 1980) 11-25, and Roger Lane, *The Roots of Violence: Black Crime in Philadelphia, 1860-1930* (Cambridge, Mass., 1986).

³ An examination of the true prevalence of Native American criminality is severely limited by the lack of reliable census data. The federal decennial census erroneously reported only 28 Native Americans in San Diego in 1870, 1,702 in 1880, and 478 in 1890. The actual percentage of the Native American population in San Diego, compared with other racial groups, is unknown, as is the question whether Native Americans committed crime at a disproportionately high rate. The authoritative study of Native American population figures is by Sherburne F. Cook, *The Population of the California Indians, 1769-1970* (Berkeley, 1976).

⁴ All known felony and misdemeanor actions against Native Americans in San Diego County between 1870 and 1890, from the justice and superior courts, were examined for this study. For misdemeanor actions, eleven extant justice court dockets were used. For comparative purposes, a 25% sampling of other racial groups was examined. All felony actions between 1880 and 1890 were studied, using superior court case files and Registers of Action. Court records used are housed in the Research Archives, San Diego Historical Society.

⁵ Over the years, changes in the state statutes periodically raised these limitations. By 1871 the limits for criminal cases had increased to \$1,000 in fines and one year's imprisonment.

justice courts of San Diego Township were preliminary hearings. These cases, of grand larceny, assault with a deadly weapon, robbery, murder, and other felonies, were bound over to either the grand jury or the superior court for further action.

Most cases heard in San Diego Township could be described as crimes against public order; disturbing the peace, intoxication, and vagrancy made up about 40% of the court's business. The rates for battery (16.7%) and petit larceny (13.4%) were also high. The prosecution rates for Native Americans was disproportionately high for only two offenses: disturbing the peace and public intoxication, with rates of 41.4% and 17.4% respectively. Interestingly, the courts in this period did not prosecute Native Americans for vagrancy. Nearly 8% of cases against Anglos were for vagrancy, but there were far fewer charges of disturbing the peace or drunkenness.

Selling liquor to Native Americans, which was prohibited in San Diego by local ordinance as well as the state penal code, required about 6% of the court's time.⁶ The consequences of this crime far exceeded the prosecution rate. San Diegans considered liquor the chief culprit in Native American criminality, at least within the City of San Diego. In 1884 the *San Diego Union* complained that Native Americans "obtain liquor in violation of the law, and are often seen lying on the streets drunk; the records of the Justice courts and the jail show that they are criminally expensive to the taxpayers."⁷ The newspaper suggested the Native Americans be expelled from the city at night, explaining:

It is well known that the Indians of this section are without morals. They are a degraded set and in their contact with the whites have copied only from the lowest classes. . . . In many places Indians are forbidden to come within town limits after nightfall. An ordinance to that effect here would be a good move.⁸

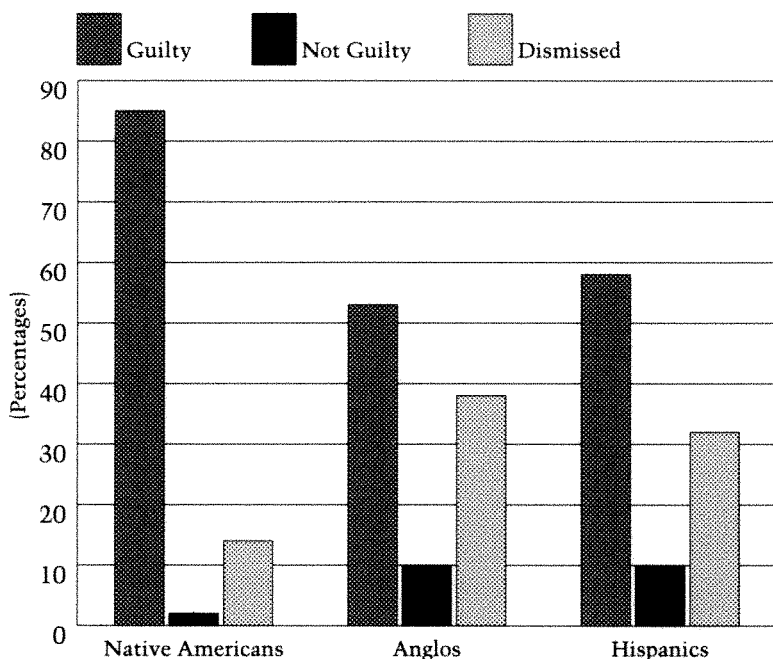
A more successful approach would seem to have been the aggressive prosecution of whiskey peddlers, but most cases were quickly dismissed and those convicted of the crime escaped with small fines. Epitomizing the problem was the career of Daniel C. Herrmann, a storekeeper repeatedly hauled before the justice court on charges of selling liquor to Native Americans. Between 1870 and 1886, he successfully fought prosecution in at least a dozen actions. Ably defended by an attorney on each occasion,

⁶The Common Council of the City of San Diego banned the sale or barter of "rum or spirituous liquors" to Native Americans in 1850. See *Minutes of Common Council*, September 30, 1850; *State Penal Code*, sec. 397.

⁷*San Diego Union*, November 22, 1884.

⁸*San Diego Union*, November 14, 1884.

FIGURE 1
CONVICTION RATES BY ETHNICITY



Source: Justice Court Dockets, 1870-1890

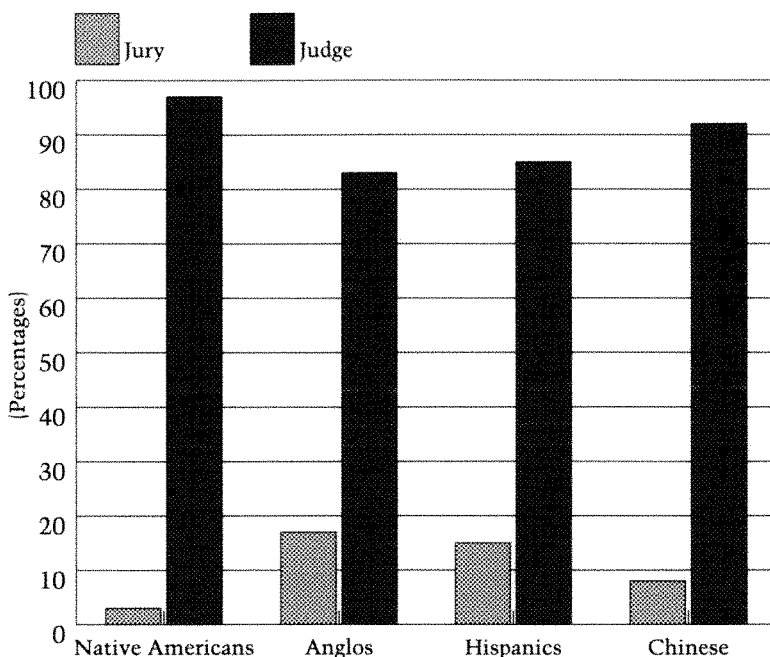
the prosperous merchant was convicted only once, paying a \$300 fine in lieu of jail time.⁹

One of the more striking statistics regarding Native Americans in the justice courts is the high rate of prosecution for women, as illustrated in Table 2. Generally, women were rarely charged with crimes in this period, appearing in only 5% of the actions. However, Native American women appeared in over 30% of the cases, most commonly for disturbing the peace, petit larceny, or battery.

The conviction rate for Native Americans versus the rates for all others in the justice courts is remarkable. As we can see in Figure 1, over 85% of the Native Americans prosecuted for misdemeanor crimes were found guilty. Only 1% received acquittals, while 14% received dismissals. This provides a grim comparison with the conviction rates for non-Native Americans. Among Anglos, only 52.2% were found guilty, 10.3% were

⁹Justice Court Docket 30:454; "Estate of Daniel Christian Herrmann," *Probate Court Case Files*, case no. 855.

FIGURE 2
VERDICTS BY JURY VS. JUDGE



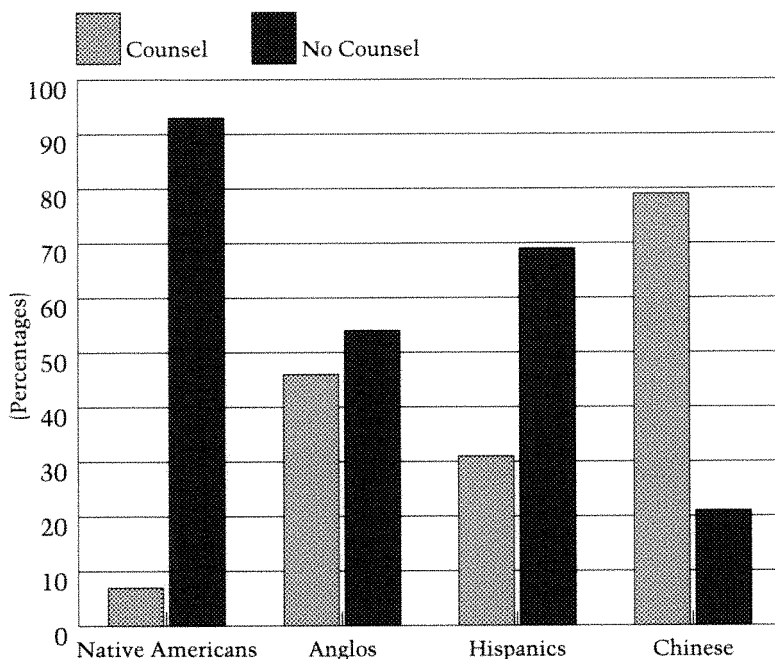
Source: Justice Court Dockets, 1870-1890

acquitted, and 37.5% received dismissals. The rates for Hispanics were similar: 58.2% found guilty, 10.5 acquitted, and 31.3 dismissed.

Several things appear to have influenced conviction rates, such as the presence of counsel for the defendants, the use of juries versus judges, and the reliance upon interpreters in court. Both attorneys and juries were far less likely to be present in the trial of a Native American than in the trial of an Anglo, a Hispanic, or a Chinese. Fewer than 4% of Native American defendants received a trial by jury—far less than the rate for Anglo and Hispanic defendants (see Figure 2)—while only 6.3% of Native American, versus 45.6% of Anglo, defendants were represented by an attorney (see Figure 3). Hispanic defendants were represented 30.9% of the time. The few Chinese prosecuted had the best representation—78.6%.

Justices were required to inform all defendants of their right to counsel, an obligation that justices took seriously, but in the lower courts this obligation was not accompanied by any law requiring the appointment of public defenders for indigent

FIGURE 3
REPRESENTATION BY LEGAL COUNSEL



Source: Justice Court Dockets, 1870-1890

defendants.¹⁰ The lack of attorney representation may also explain why few Native Americans were accorded trial by jury. Only 3.3% of these actions were tried by juries, compared with 16.8% for Anglo defendants and 15% for Hispanics.

The necessity for interpreters undoubtedly contributed to the disposition of Native American actions. Spanish-speaking interpreters were used for Native American defendants in 86.7% of the cases.¹¹ Hispanic defendants used interpreters 68.1% of the time, Chinese 54.6%. Given this strong reliance on interpreters, and the absence of legal representation, it is worth questioning how much Native American defendants understood about the legal proceedings against them.

The sentencing process in the justice courts also worked against the interests of Native Americans. A typical sentence for

¹⁰ *California Penal Code*, sec. 987.

¹¹ It is interesting to note that Native American languages were rarely spoken by the defendants in court. Spanish had long since replaced the native dialects in common speech among Native Americans.

a petty crime, such as disturbing the peace or public drunkenness, would be a small fine—usually about ten dollars—with jail time for defendants unable to pay. Jail time, which frequently meant hard labor on the city streets, would be allotted in the ratio of one or two days' imprisonment for each dollar of the fine. Obviously, sentencing practice favored any defendant with the means to pay while it guaranteed imprisonment (or the chain gang) for indigents. However, justices were sometimes willing to suspend jail time if it appeared that payment of fines would be forthcoming. For Carlos Rios, a Hispanic convicted of intoxication, a sentence of five days' imprisonment was suspended for one week, to enable him time to obtain the means to pay a ten-dollar fine.¹² Antonio Agave, ordered to pay a fine of seven dollars, was permitted to leave court after sentencing to "procure the money, or provide security for the payment thereof."¹³

These examples of judicial benevolence rarely applied to Native Americans, who were most often judged as indigent, with no means to pay fines. Among eighty-four cases studied, justices fined only 8.2% of the Native Americans. The remaining 91.8% received either outright jail time or the choice between jail and a fine. Anglo defendants were fined 43.6% of the time, jailed only 21.3%, and fined or jailed in 35.1% of the cases.

THE SUPERIOR COURT

Records of the Superior Court of San Diego offer a different perspective on treatment of Native Americans in the judicial system. Native American criminal prosecutions totaled thirty-seven in the 1880s—nearly 10% of the court's criminal actions. Anglo defendants appeared in 70.1% of the cases, Hispanics in 18.6%, and Chinese in 1.8%.

Felony cases tried in the same court may be divided into three general categories:¹⁴ crimes against the person, involving actions of violent force or the threat of force, such as assaults, manslaughter, murder, attempted murder, robbery, and rape; crimes against property, including burglary, forgery, embezzlement, arson, and—the most common offense tried in superior court—grand larceny; and crimes against public order such as perjury, conspiracy, or fraud. Additionally, about 4% of the actions heard in superior

¹² *City of San Diego v. Carlos Rios*, April 7, 1877, *Justice Court Docket*.

¹³ *City of San Diego v. Antonio Agave*, May 22, 1878, *Justice Court Docket*.

¹⁴ The evolution of the types of felonies prosecuted in California is examined by Lawrence M. Friedman and Robert V. Percival in "The Processing of Felonies in the Superior Court of Alameda County, 1880-1974," *Law and History Review* (Fall 1987) 413-36.

court were appeals from the justice courts, all of which, in San Diego during the 1880s, involved either Anglo or Hispanic defendants.

Among these three categories of felonies, crimes against a person accounted for 35% of the actions heard in San Diego's superior court. However, among Native American defendants, 47% of the cases involved such crimes. Murder cases alone totaled 18.5% of Native American felonies; assault with a deadly weapon involved 13.2% of the cases. Both percentages are more than double the rates for Anglo or Hispanic defendants.

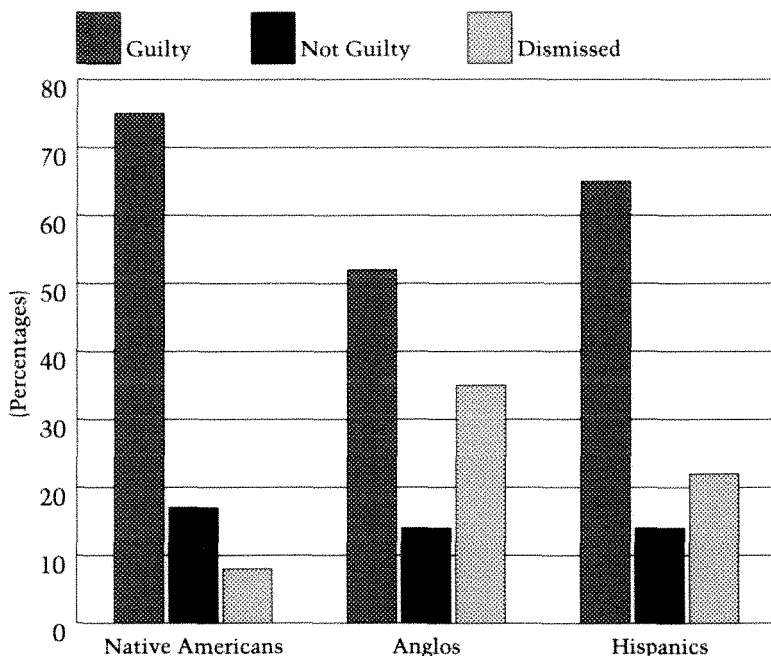
Crimes against property present a different picture. It is remarkable, though hardly surprising, that Native Americans were seldom prosecuted for what we would consider today white-collar crimes. Living and working at the bottom of the socio-economic scale in San Diego, Native Americans were simply not in a position to commit certain kinds of felonies. In San Diego's superior court, Native Americans were never prosecuted for embezzlement, forgery, obtaining money under false pretenses, fraud, or similar crimes, which were common among Anglo defendants. Native Americans and Hispanics rarely committed burglaries. About 14% of the felony actions in superior court involved crimes against property.

Grand larceny, representing 21% of the cases in superior court, accounted for 33% of Native American prosecutions and about half of all Hispanic actions. For Native Americans and Hispanics, grand larceny was usually committed in rural areas of San Diego County, often involving horse or cattle theft. Of the dozen Native Americans charged with grand larceny, seven were accused of stealing cattle. Six were found guilty and given sentences that ranged from one to three years in state prison. But the testimony in these cases does not reveal cattle rustling. The cattle were usually found slaughtered for their meat, suggesting that hunger, not greed, precipitated the actions. The case of *People v. Antonio* is typical. Admitting in court that he had shot and butchered a cow, Antonio confessed that he had divided the meat with another Native American but had discarded the hide and carcass. He received a three-year sentence in San Quentin.¹⁵

Between 1880 and 1890, the conviction rate in superior court for Anglo defendants reached 50.9% (see Figure 4). Acquittal rates came to 14.1% and the rate of dismissal 35%. Conviction rates for Hispanics were higher, at 64.8%, with 14.1% found not guilty; dismissals came to 21.1%. Again, the story for Native Americans is depressing. Seventy-five percent of the Native American defendants received guilty verdicts versus 16.7% found not guilty. The most telling statistic is the rate for dismissal—only

¹⁵ *People v. Antonio*, Superior Court Case Files, case file no. 570.

FIGURE 4
CONVICTION RATES BY ETHNICITY



Source: Superior Court Case Files

8.3%. Throughout the decade, Anglo defendants were four times as likely and Hispanics more than twice as likely to have their cases dismissed as Native Americans.

The high conviction rates for Native Americans have several explanations. Legal representation was minimal—required by statute only at the trial stage where court-appointed attorneys were the norm. As we have seen, Native American defendants typically faced preliminary hearings in the justice courts without the benefit of any counsel. Most Native Americans (65%) had the benefit of trial by jury, which rendered guilty verdicts in 71% of the cases, not-guilty in 29% of the actions. Bench trials, or trials without a jury, resulted in a much higher conviction rate—91%, with the remaining 8% of the cases being dismissed on motion of the district attorney. Superior court judges dispensed their Native American cases with a heavy hand—in the 1880s, not a single Native American received acquittal in a nonjury trial.

Anglos, Hispanics, and Chinese took advantage of jury trials by a 68% rate, similar to the percentage for Native Americans. While 64% of these juries rendered guilty verdicts, 20% found



A Native American settlement in San Diego, near 22nd Street and Logan Avenue, ca. 1879 (San Diego Historical Society)

defendants not guilty. Notably, hung-jury verdicts released 3.5% of the Anglo defendants and 4.3% of the Hispanics. None of the Native American criminal actions in this court resulted in hung-jury decisions.

The sentencing process in the 1880s was relatively simple. The state penal code mandated fixed prison terms without any provision for probation or early parole. Although the statistics are far from conclusive, it seems that in superior court Native Americans were treated no more harshly in the sentencing process than Anglos or Hispanics. The average prison sentence for assault with a deadly weapon was two years for Native Americans, 1.5 years overall. For attempted murder the average sentence was the same, 1.5 years. In grand-larceny cases Native Americans fared better, receiving average terms of 1.5 years versus 2.9 years for Anglos and two years for Hispanics. There were, of course, exceptions, such as the case of the Native Americans Carlos, Tomas, and Sylvero, convicted for burglarizing a saloon in San Diego and sentenced to ten years each. The average prison term for Anglos convicted of burglary was 2.5 years.

CONCLUSION

What can be concluded about the treatment of Native Americans in San Diego's judicial system in the late nineteenth century? In the justice courts, without the means to employ counsel, they almost never received legal representation. Lack of counsel

also meant fewer jury trials, with predictable consequences in the conviction rates. The assumed indigent status of most Native American defendants led justices to impose jail time instead of fines. The language barrier (nearly all Native American defendants required the use of Spanish-speaking interpreters) hindered due process. For most Native American defendants, hearings were quick and perfunctory—a guilty sentence and time in jail.

In the superior court system, Native Americans fared marginally better. State law required that they be represented by an attorney at the trial stage regardless of their economic status. While their conviction rate of 75% exceeded the rates for Anglos by nearly 25% and for Hispanics by 10%, the length of prison sentences, with a few exceptions, did not exceed the average. The absence of Native American defendants in white-collar crimes corroborates indications from the justice courts that Native American criminality usually occurred in the lowest economic strata of San Diego society.

These findings are less indicative of overt racism in the courts than they are of a judicial system that was structurally unaccommodating to a poor minority group. While bias and prejudice were a tragic element of contemporary life, as evidenced by newspapers of the day and countless first-hand accounts, court records suggest that Native Americans in San Diego—impoverished, unschooled, illiterate in the language of the majority, and unprotected by common civil rights accorded to that majority—were wholly unequipped to cope with a legal system created for, and administered by, white society.

 APPENDIX: TABLES

 TABLE 1
 MISDEMEANOR ACTIONS BY VERDICT (JUSTICE COURT)

Cause	NATIVE AMERICANS				OTHERS			
	Guilty (%)	Not Guilty (%)	Dis- missed (%)	N	Guilty (%)	Not Guilty (%)	Dis- missed (%)	N
Assault	66.6		33.4	3	25.0	62.5	12.5	8
Battery	91.7	8.3		12	71.4	8.6	20.0	35
Disturbing Peace	94.3		5.7	35	83.0	8.5	8.5	59
Intoxication	100.0			16	100.0			14
Petit Larceny	78.6		21.4	14	48.1	14.8	37.1	27
Selling Liquor to Native Americans				0	45.4		54.6	11
Vagrancy				0	90.9		9.1	11

Source: Justice Court Dockets, 1870-1890

* * *

 TABLE 2
 MISDEMEANOR ACTIONS BY GENDER (JUSTICE COURT)

Cause	NATIVE AMERICANS			OTHERS		
	Male (%)	Female (%)	N	Male (%)	Female (%)	N
Assault/Battery	43.7	56.3	16	100.0		46
Cruelty to Animals	100.0		2	100.0		10
Disturbing Peace	68.5	31.5	38	88.1	11.9	59
Intoxication	100.0		16	100.0		14
Petit Larceny	85.7	14.3	14	90.7	9.3	32
Selling Liquor to Native Americans			0	94.8	5.2	19

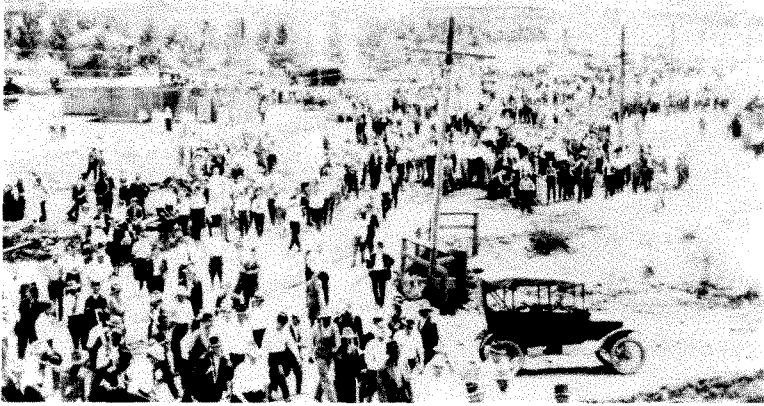
Source: Justice Court Dockets, 1870-1890

* * *

TABLE 3
CONVICTION RATES BY CAUSE (SUPERIOR COURT)

Cause	NATIVE AMERICANS			N	Guilty (%)	OTHERS		N
	Guilty (%)	Not Guilty (%)	Dis-missed (%)			Not Guilty (%)	Dis-missed (%)	
Assault/Battery				0	92.0	4.0	4.0	24
Assault with								
Deadly								
Weapon	60.0	20.0	20.0	5	50.0	25.0	25.0	28
Attempted								
Murder	33.3	33.3	33.4	3	37.1	11.4	51.5	35
Burglary	100.0			5	68.0	10.0	22.0	50
Embezzlement				0	37.5	12.5	50.0	8
Forgery				0	53.3	6.7	40.0	15
Gambling				0			100.0	5
Grand Larceny	66.6	25.0	8.4	12	69.2	9.3	21.5	65
Murder	71.4	14.3	14.3	7	35.0	35.0	30.0	20
Obtaining								
Money Under								
False								
Pretenses				0	66.6	16.7	16.7	6
Perjury				0	36.4	9.0	54.6	11
Petit Larceny				0	85.8		14.2	7
Rape	100.0			1	60.0	40.0		5
Resisting an								
Officer				0	60.0	40.0		5
Robbery	100.0			2	43.8	12.4	43.8	7

Sources: Superior Court case files and Registers of Action, 1880-1890



Strikers and sympathizers were taken from their homes at gunpoint and marched to Bisbee's central plaza. (Collection Barbara Jenkins Cooley)



"No human being in his senses doubts that the men deported from Bisbee were bent on destruction and murder," wrote Theodore Roosevelt to Felix Frankfurter. Here the deportees are shown being herded onto cattle cars. (Collection Barbara Jenkins Cooley)

PHELPS-DODGE AND ORGANIZED LABOR IN BISBEE AND DOUGLAS

BY MARSHAL A. OLDMAN

Since the nineteenth century, one of this country's most successful mining concerns has had some of the most troubled relationships with organized labor of any such corporation. Under the guidance of James Douglas and his son, Walter, Phelps-Dodge discovered, developed, and mined one of the world's most productive bodies of copper ore. The Copper Queen in Bisbee, Arizona, produced more than any single mine in the continental United States and accounted for as much as 5 percent of the global annual copper production for many decades.¹ It supported one of the largest smelting operations in existence in Douglas, Arizona, justified the construction of the El Paso and Southwest Railroad (a Phelps-Dodge subsidiary until it was sold to Southern Pacific), and generated substantial employment in El Paso, Texas, where the smelted ore was finished.

Until United States Supreme Court Justice Felix Frankfurter's opinion upheld rulings by the National Labor Relations Board in 1941, Phelps-Dodge refused to allow or recognize any union or collective bargaining agent other than its own labor organization.² Although company wages were some of the highest in the industry, the company undoubtedly regularly engaged in virtually every labor practice declared unlawful under the Wagner Act of 1935, which established the National Labor Relations Board.³ Often the disputes were dramatic. Eventually, the Supreme Court was required to make seminal rulings to bring the company into the modern world of labor relations.⁴

Marshal A. Oldman is a senior partner in the law firm of Cappadona and Oldman, Encino.

¹*In re Phelps-Dodge*, 28 NLRB 73, 445 [hereafter cited as *In re Phelps-Dodge*].

²*Ibid.* at 464, 489.

³*Ibid.* at 488.

⁴*Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) [hereafter cited as *Phelps-Dodge v. NLRB*].

When Arizona became a state in 1912, mining was its single most important industry. Pits and mines at Bisbee, Globe, Ajo, Morenci, and Jerome employed thousands of men and caused several of the state's townships to be founded.⁵ The Western Federation of Mines (an AFL affiliate) attempted to organize the workers, while the mine owners were determined to keep the unions off the premises.

Many farmers, ranchers, and small-businessmen had sided against the owners of the mines, which were viewed as being owned and operated by corporate giants in New York. During 1912 Republicans in Congress made a last-ditch effort to bring Arizona in as part of New Mexico, fearing that the Democrats would control the state government and congressional delegation.⁶ However, their efforts were unavailing. Arizona became a separate state, and the Democrats obtained full control of the state and its congressional delegation.

Under Governor George W. P. Hunt's guidance, legislation was enacted providing worker's compensation and an eight-hour day for mine workers.⁷ More importantly for the mine owners, Arizona created a tax system that taxed the value of mine property, the machinery used to operate the mines, and the value of produced ore.⁸ (During the next couple of years, mining produced 38.3 percent of all public revenues in the State of Arizona.⁹) In addition, the Hunt administration was openly pro-labor and seemed willing to assist the process of organizing the mines.¹⁰

Mine operators were alarmed by the increasing labor activity and by the state's wish to use mining profits to pay for an increasingly large share of public services.¹¹ After war broke out in Europe in August 1914, mine profits soared. The price of copper rose from 13 cents to 23 cents a pound during the next year, and by 1916 had reached 26.5 cents a pound, with no substantial increase in costs.¹² Operators began taking steps to ensure that profits would not be hurt by any state or labor activity. Under the leadership of Walter Douglas, Phelps-Dodge was especially

⁵James W. Byrkit, *Forging the Copper Collar, Arizona's Labor Management War, 1901-1921* (Tucson, 1982) [hereafter cited as Byrkit, *Forging the Copper Collar*].

⁶Ibid. at 39-40.

⁷Ibid. at 52.

⁸Ibid. at 78-79. "Special Report of the State Tax Commission of Arizona on Mining Taxation," March 17, 1913, quoted in *ibid.* at 5-7.

⁹Ibid. at 79. "Mine Taxation in Arizona is Entirely in Hands of State Tax Commission," *Mining Congress Journal* 1 (1915) 9:445.

¹⁰Byrkit, *Forging the Copper Collar*, *supra* note 5 at 49-62.

¹¹Ibid. at 65, 81.

¹²Ibid. at 69.

aggressive about acquiring newspapers throughout the the state and in making local government, especially the county sheriffs, more responsive to its needs.¹³

By 1916 the perceived dangers of union agitation, combined with articles in an increasingly mine-controlled press, were effectively undermining Democratic control of Arizona's government. Sympathy for the miners was hurt by Hunt's handling of strikes and labor agitation at Clifton-Morenci,¹⁴ and Hunt himself was defeated in an election whose results he contested, regaining the governorship only after an appeal to the Arizona Supreme Court.¹⁵

As the United States approached war in April 1917, a growing patriotism added enormously to the mining companies' power when minerals were perceived as being essential to the country's war efforts. Any activity that threatened production was viewed as sabotage and treason financed by Germany. Within the mining towns and the work force, companies organized "loyalty leagues" to boost production and help sell war bonds.¹⁶

Notwithstanding this patriotic fervor, many mine workers were angered by the huge company profits being made while their own real wages were falling under the pressure of wartime inflation. With the AFL affiliate unable to organize successful union activity, many workers, especially recent immigrants, became attracted to the Industrial Workers of the World.¹⁷ Led by syndicalists and Marxists, the IWW struck fear in the heart of big business and government at all levels. Members of the pacifist organization were accused of treason and of being financed by Germans.¹⁸ After the war, the union broke under the weight of federal prosecution; most of its leaders were required to pay substantial fines and endure federal prison terms. Any mention of the IWW was guaranteed to turn any strike or organizing activity into a major confrontation.

During May and June of 1917, strikes developed throughout the Arizona mines. The mining companies claimed to find evidence of IWW participation, and used their journalistic power to brand the strikes as disloyal, foreign, and pro-German.¹⁹ On June 27, 1917, the Copper Queen in Bisbee was heavily struck. Phelps-Dodge saw production levels fall as thousands of miners refused

¹³Ibid. at 64-68.

¹⁴Ibid. at 82.

¹⁵Ibid. at 93.

¹⁶Ibid. at 248.

¹⁷Ibid. at 120.

¹⁸Ibid. at 135.

¹⁹Ibid. at 150.



Some of the nearly two thousand strikers leaving the center of town to board the cattle cars taking them to New Mexico. (Collection Barbara Jenkins Cooley)

to cross picket lines.²⁰ Walter Douglas and the Phelps-Dodge management began placing increasing pressure on local authorities to break the strike. Governor Thomas Campbell requested United States Army intervention and Colonel James J. Hornbrook, acting on orders to prevent violence, traveled from nearby Fort Huachuca to observe the situation in Bisbee with Sheriff Harry Wheeler. Finding no disorder, Hornbrook refused to order any intervention in the strike and merely kept troops on hand to watch and observe.²¹

By July Phelps-Dodge's patience was at an end, and Walter Douglas traveled from New York to meet with local management in his private railroad car outside Bisbee. For the next two days he conferred with Sheriff Wheeler, local officials, and company management to organize a response to the continuing strike.²² Wheeler quickly formed an armed posse of two thousand men while Phelps-Dodge organized rail traffic on its El Paso and Southwest Railway and local management and officials targeted potential troublemakers for deportation.

At four in the morning of July 12, the posse began rounding up strikers, alleged agitators, and known sympathizers. People were woken, taken from their homes at gunpoint, and marched to the

²⁰Ibid. at 160.

²¹Ibid. at 164.

²²Ibid. at 186-89.

central plaza of Bisbee, where Main Street and Brewery Gulch still come together. Two people were killed and scores were injured as more than two thousand were rounded up. The posse was armed with every conceivable kind of firearm, including strategically placed machine guns that could fire on the crowd in case of riot. A troop of United States cavalry added an official air to the proceedings.

By late morning, the crowd was being marched to the baseball field in the Warren district. Once there, strikers willing to return to work, together with people mistakenly included in the round-up, were freed. Ultimately, 1,186 persons were loaded onto twenty-eight El Paso and Southwestern cattle cars for the trip to New Mexico.²³ Among them was the pro-labor lawyer William B. Cleary, who wanted to participate in the deportation and help the miners claim their anticipated damage awards.²⁴

The deportation train proceeded east into New Mexico until it reached Columbus. No preparations had been made to receive it. The governor of New Mexico began organizing food and shelter and asked for the army to take control of the deportees.²⁵ While local commanders hastily inquired of the War Department whether they should treat the deportees as prisoners, they placed the men under military discipline, organized further food and shelter, and indicated that they were generally not free to leave. Eventually the deportees were allowed to depart at their own discretion. Most of them joined up to fight in France and the rest broke camp by early fall.²⁶

In Bisbee the Copper Queen resumed full production as the strike ended. The town settled down, satisfied with itself for having so easily disposed of the threat of German sabotage, potential Communist agitation, and union organizing of any sort. However, despite attempts to keep the deportation localized, the federal government became concerned with the deportation and undertook legal action.

THE LEGAL RESPONSES

President Wilson had appointed Secretary of Labor William B. Wilson to chair a commission to investigate labor complaints arising out of the deportation and other problems around the country. On November 1, 1917, the National Mediation Commission traveled to Bisbee, conducted hearings, and took written

²³Ibid. at 204.

²⁴Ibid.

²⁵Ibid. at 214.

²⁶Ibid. at 260. *Bisbee Daily Review*, September 18, 1917.

depositions. Felix Frankfurter, then a young assistant secretary of labor, acted as counsel and secretary for the commission. Much testimony was taken from both anti-corporate and union officials as well as from the mine managers.²⁷

On November 6, 1917, Frankfurter filed the commission's findings in a report that dismissed the mine operators' allegations that the miners had jeopardized life and property. The report declared the company's actions in causing the deportation "wholly illegal."²⁸

The report concluded with five recommendations for action. These were that "All illegal practices and denial of rights safeguarded by the Constitution and statutes" should cease at once; that Arizona State and Cochise County officials should seek legal "vindication" for violation of state laws; that if the United States draft law had been interfered with, the United States attorney general should be notified; that the Interstate Commerce Commission should prosecute anyone who interfered with interstate communication; and that Congress should make deportation a violation of federal law.²⁹

By the end of November 1917, a copy of the report had been reviewed by William C. Fitts, assistant United States attorney general. He traveled to Tucson, where he met the United States attorney for Arizona, and corresponded with William Wilson, United States Secretary of Labor. Wilson wanted the mine owners prosecuted to prevent further deportation or other violent anti-union activity. Slowly, Fitts and others began to build a case against the deporters and the mine operators.³⁰

Warrants for the arrest of Sheriff Wheeler, Walter Douglas, and twenty other members of management were made on indictments issued by a federal grand jury in Tucson. The warrants were served on May 15, 1918, and the defendants filed a demurrer at their arraignment on May 18. The government indictment charged the defendants with violation of Section 19 of the Federal Criminal Code (a successor to the 1870 Civil Rights Statute), which stated:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution of laws of the United States, or because of his having so exercised the same, or if two or more

²⁷Byrkit, *Forging the Copper Collar*, supra note 5 at 265.

²⁸"Report of Mediation Commission on Bisbee Deportation," November 6, 1917, Bisbee Mining and Historical Museum, Bisbee, Ariz.

²⁹Ibid.

³⁰*Forging the Copper Collar*, supra note 5 at 57.

persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.³¹

On December 2, 1918, United States District Judge William Morrow sustained the demurrer on all counts as to all defendants. In a twelve-page opinion, he analyzed the existing law and determined that the deportation was a matter left for the states and that no federal law had been broken.³² The opinion quotes from sections 186 and 205 of the Arizona Penal Code regarding kidnapping and false imprisonment, and states that these are matters left to the police powers of the states by the Tenth Amendment.³³

Morrow distinguished the federal kidnapping law by stating that Congress passed the statute solely to aid the enforcement of the laws against slavery and involuntary servitude.³⁴ He also distinguished a number of cases raised by the government concerning violation of Section 19. The opinion found that each of the cases either protected a specific federal right existing under the Constitution or involved state action. None of the cases involved the private action of individuals concerning rights of citizenship under the laws of a state, which Morrow found to be the case in Bisbee.

The government attorneys relied heavily on *Baldwin v. Franks*,³⁵ in which defendants were held on an indictment of driving and expelling Chinese aliens from Nicolaus, California. Notwithstanding the similarity to the Bisbee problem, Morrow distinguished this case by referring to the obligation imposed by the Treaty of November 17, 1880, with the Empire of China for the protection of Chinese living in the United States. Apparently, none of the Bisbee deportees was a subject of the Celestial Kingdom.³⁶

In his concluding paragraph, Morrow questioned why the matter had been brought in federal court rather than being left to

³¹*United States v. Wheeler, et al.*, 254 F. Rptr. 611, 612 [hereafter cited as *United States v. Wheeler*].

³²*Ibid.*

³³*Ibid.* at 615.

³⁴*Clight v. United States*, 197 U.S. 207.

³⁵*Baldwin v. Franks*, 120 U.S. 678.

³⁶*United States v. Wheeler*, *supra* note 31 at 623.

Arizona. The court considered the representation by Attorney General Fitts that the government would face too much bias and prejudice in Cochise County to obtain any redress for the deportees. However, while lamenting that situation, if it were true, the judge ruled that the court ought not to enlarge the statute to include an offense not within its constitutional authority.³⁷

THE BUSINESS OF ARIZONA

After this discouraging opinion, the government appealed on a writ of error to the United States Supreme Court, which rendered its opinion on December 13, 1920.³⁸ In a short opinion, the Court divided the question into one of determining whether state action that involved a federal constitutional issue had occurred, or whether only individual wrongs that were subject to prosecution under state statute had been perpetrated.

While acknowledging that Article Four, section 2, of the Constitution requires the states to extend the same privileges and immunities to the citizens of other states as it extends to its own, the Court clearly states that these protections are enforceable by the several states and do not involve a constitutional right in the absence of state action. The Court found that no state action was involved with the Bisbee deportation and that prosecution of any criminal action was the business of Arizona.³⁹

The Court in particular distinguished *Crandall v. Nevada* from *United States v. Wheeler*, even though both cases involved the fundamental right of ingress and egress.⁴⁰ *Crandall* involved a tax enacted by statute on nonresidents leaving the state of Nevada, involved state action, and violated the Fourteenth Amendment by denying the federally protected right of travel. *Wheeler* involved no action by Arizona, and prosecution for violation of Arizona's statutes rested squarely with the state. The ruling may differ from modern precedent, but it effectively ended all federal prosecution and returned the matter to Arizona.

While the appeal was pending, George Hunt was declared the winner of the contested governor's election in 1916. On resuming office, he opened his own investigation of the deportation and urged prosecution. The deportees brought a civil action against Phelps-Dodge and other principals. The Cochise County attorney,

³⁷Ibid. at 624-25.

³⁸*United States v. Wheeler*, 254 U.S. 281.

³⁹Ibid. at 298-300. The Court relied principally on the *Slaughterhouse* cases (16 Wall. 36), *Corfield v. Coryell* [4 Wash. C.C. 381], and *Ward v. Maryland* (12 Wall. 418).

⁴⁰*Crandall v. Nevada*, 6 Wall. 35.

John R. Ross, commenced his own investigation. Preliminary hearings were held by William C. Jack, justice of the peace, and counsel took depositions throughout the country to gather evidence.⁴¹

Anticipating prosecution, the mining companies terminated negotiations leading to civil settlements and fired any employee signing criminal complaints.⁴² On February 7, 1920, two hundred and ten citizens of Bisbee were arraigned at the Cochise County Courthouse in Tombstone. Because Sheriff Wheeler was so popular, prosecutors dismissed him and proceeded against Harry E. Wooten, Loyalty League member and Phelps-Dodge employee. His trial involved the defense of "necessity," wherein the IWW was placed on trial in order to show that it and the Germans were behind the 1917 copper strikes. The deportation was claimed to be merely a patriotic response to the depredations of radical unionism and German sabotage. The defense called witness after witness as proof of its assertion of patriotism, and the jury acquitted Wooten on the first ballot and strongly recommended against prosecuting any of the remaining defendants. The verdict meant the collapse of any efforts to redress the deportation.⁴³

The Bisbee deportation and its aftermath may seem puzzling to students of law in the 1990s, but it should be remembered that union activity is far more widely accepted as a legitimate part of labor relations today than it was at the time of World War I. Frankfurter's views on labor activity were a matter of controversy even in progressive circles, and certainly were not broadly accepted by the public at large. The IWW, in particular, elicited almost hysterical reactions in people because of its alleged foreign and Communist influences and connections.⁴⁴ Typical of these reactions was Theodore Roosevelt's letter to Frankfurter dated December 19, 1917, excerpts from which are in the appendix to this article.

It is thus not surprising that Phelps-Dodge was successful in controlling labor relations through various company-sponsored unions until the passage of the National Labor Relations Act in July 1935. With minor changes, the company attempted to comply with the act while maintaining the substance of its own union plan. This led to a major confrontation between the company and the NLRB, during which the board invalidated the company union. Phelps-Dodge was required to accept the Interna-

⁴¹Byrkit, *Forging the Copper Collar*, supra note 5 at 291.

⁴²Ibid.

⁴³Ibid. at 292.

⁴⁴Ibid. at 147-48. See also *Los Angeles Times*, July 1, 1918; *New York Times*, July 1, 1917; *Bisbee Daily Review*, July 3, 1917.

tional Mine Mill and Smelter Workers' Union as the collective bargaining agent for its employees.⁴⁵ By the time the matter reached the Supreme Court, Justice Frankfurter was able to express the last word on Phelps-Dodge's treatment of its employees, in what was to become one of the seminal decisions on the act and labor relations.⁴⁶

Between the deportation and the enforcement of the NLRB decision, labor relations were quietly regulated through unions and associations sponsored by the company and terminable by the company on thirty days' notice. Typically, employees were divided according to their work areas in order to vote. The final plan, ultimately rejected by the NLRB, called for representatives to be elected from eleven separate work areas in the Douglas smelter operation.⁴⁷ Under previous plans, elections were conducted on company property, meetings were held on the premises, worker representatives were paid by the company for their time, and the association was the sole bargaining agent for the employees. The association and the company would meet periodically to discuss pay, working conditions, and employee problems. Any dispute that could not be resolved by agreement was subject to arbitration. The final plan attempted to comply with the National Labor Relations Act by making the employees' association more independent. The representatives were no longer paid by the company, elections were held offsite, and employees were members only if they applied and paid dues. Eventually, the association was denied access to the premises for the purpose of recruiting members and holding elections.⁴⁸

Since the employees' association was the only recognized agent, attempts by the International Union of Mine Mill and Smelterers were given a vastly different reception. Employees joining the union were in various ways discharged or denied rehiring, in what the NLRB found to be an unfair labor practice for the purpose of discriminating against those attempting union organization. Most frequently, such employees would have their status reduced from "steady work" and would be forced to become "rustlers" (temporary workers). Normally this happened when a furnace was shut down at the Douglas smelting plant and the workers were placed on a temporary status; plant procedures enabled workers with higher seniority to "bump" workers on other shifts with lower rank. However, more senior workers who joined the union were told that this policy had been discontinued.

⁴⁵*In re Phelps-Dodge*, *supra* note 1.

⁴⁶*Phelps-Dodge v. NLRB*, *supra* note 4.

⁴⁷*In re Phelps-Dodge*, *supra* note 1.

⁴⁸*Ibid.*

The NLRB also found that new workers with virtually no seniority were given jobs while discharged rustlers were given none.⁴⁹

The NLRB issued its opinion in December 1940, finding that the employees' association was a controlled organization, that it was part of a plan to further unfair labor practices, that the demotions and termination of employees who had joined the union were part of a plan to coerce employees and to discourage collective bargaining, and that sections 7 and 8 of the National Labor Relations Act had been repeatedly violated. The board ordered Phelps-Dodge to cease and desist from interfering with the formation and administration of an employee organization; disregard the "collective bargaining agreement" with the company-sponsored employees' association; disestablish the employees' association formed under company sponsorship; stop discouraging membership in the union; reinstate with back pay employees who had been discharged for having joined the union or for wearing a union button; and to stop all activity that interfered with, restrained, or coerced, assisted, or otherwise affected the formation of employee organizations designed to allow the workers to engage in collective bargaining through its own representatives.⁵⁰

The board found labor violations at the Copper Queen Mine at the same time.⁵¹ A strike settled after the effective date of the act (July 5, 1935) gave rise to new charges of unfair labor practices for failing to rehire strikers and for failing to hire former employees who had joined the union. The board ordered reinstatement with back pay as the remedy for unfair practices by Phelps-Dodge, and required the company to offer employment to those who had acquired suitable replacement work. The issues arising out of the NLRB order eventually found their way to the United States Supreme Court by way of the Second Circuit.⁵²

On a writ of certiorari, Justice Frankfurter delivered the opinion of the Court, supporting the National Labor Relations Act as Congress's solution to the problems of labor peace.⁵³ Recognizing the need for a policy for the formation of labor associations that would give employees the same bargaining power as their employers, the justice supported the NLRB's plan to permit the formation of unions, even though the plan could not redress the wrongs done to former employees. Stating clearly that the act did not create solely private remedies, Frankfurter hailed Congress's right to ensure the free flow of commerce by creating an administrative

⁴⁹Ibid.

⁵⁰Ibid. at 488.

⁵¹*Phelps-Dodge v. NLRB*, 113 F. 2d 202 (1940).

⁵²Ibid.

⁵³*Phelps-Dodge v. NLRB*, *supra* note 4.

agency to regulate labor relations. Citing past efforts, including his own on the National Mediation Commission in World War I, the justice pointed to the act's clauses forbidding intimidation by companies with the design of thwarting union formation.⁵⁴

Although the Bisbee deportation was not mentioned in the opinion, it is not difficult to imagine that Frankfurter had it in mind in endorsing the NLRB's remedies against Phelps-Dodge. With the enforcement of the act, great unions took hold throughout American industry. Companies such as Phelps-Dodge were no longer able to prevent union formation and collective bargaining.

For a time, unions in the United States assured workers a standard of living unmatched anywhere in the world. However, the act could not prevent the rise of foreign competition. This has undermined American industry with less expensive labor and often with superior products. Copper mining has experienced the same decline as many other American industries. In 1975 the Copper Queen Mine in Bisbee closed. Its large union work force was dispersed. In 1982 the union refused to agree to a new contract and declared a strike at the remaining pits operated by Phelps-Dodge in Arizona. The company replaced the strikers with nonunion labor and continued with its operations. In 1990 the company decided to reopen the Copper Queen operations by using a new chemical process. Assuming the testing is successful, the company plans to resume mining operations with only a fraction of the employees formerly required to operate a mine of its size.⁵⁵

APPENDIX

The following is an excerpt from a letter from Theodore Roosevelt to Felix Frankfurter, dated December 19, 1917:

My Dear Mr. Frankfurter:

Thank you for your frank letter. I answer it at length because you have taken, and are taking, on behalf of the Administration an attitude which seems to me to be fundamentally that of Trotsky and other Bolsheviki leaders in Russia; an attitude which may be fraught with mischief to this country. . . .

I have just received your report on the Bisbee Deportation. One of the prominent leaders in that deportation was my old friend Jack Greenway who has just been commissioned a Major in the army by President Wilson. Your report is as thoroughly mislead-

⁵⁴Ibid.

⁵⁵Interview with Tom Vaughan, Curator of Archives, Bisbee Mining and Historical Museum, Bisbee, Ariz., September 20, 1990.

ing a document as could be written on the subject. No official, writing on behalf of the President, is to be excused for failure to know, and clearly to set forth, that the I.W.W. is a criminal organization. . . . No human being in his senses doubts that the men deported from Bisbee were bent on destruction and murder. If the President through you or anyone else had any right to look into the matter, this very fact shows that he had been remiss in his clear duty to provide against the very grave danger in advance. When no efficient means are employed to guard honest, upright and well-behaved citizens from the most brutal kind of lawlessness, it is inevitable that these citizens shall try to protect themselves; . . . and when either the President or the Police, personally or by representative, rebuke the men who defend themselves from criminal assault, it is necessary sharply to point out that far heavier blame attaches to the authorities who fail to give the needed protection, and to the investigators who fail to point out the criminal character of the anarchistic organization against which the decent citizens have taken action. Here again you are engaged in excusing men precisely like the Bolsheviki in Russia, who are murderers and encouragers of murder, who are traitors to their allies, to democracy, and to civilization, as well as to the United States, and whose acts are nevertheless apologized for on grounds, my dear Mr. Frankfurter, substantially like those which you allege. In times of danger nothing is more common, and nothing more dangerous to the Republic, than for men—often ordinarily well-meaning men—to avoid condemning the criminals who are really public enemies by making their entire assault on the shortcomings of the good citizens who have been the victims or opponents of the criminals. . . . It is not the kind of thing I care to see well-meaning men do in this country.

Sincerely yours,

Theodore Roosevelt

Source: Bisbee Mining and Historical Museum

PROCEEDINGS

THE 1990 NORTHERN JUSTICE CONFERENCE
June 7-9, 1990, Anchorage, Alaska
Alaska Bar Association, Alaska Court System

Since the advent of *glasnost* and *perestroika* in what was then still the Soviet Union, the virtual ice curtain that separated Alaska and Siberia throughout the cold war has melted, and today there is consistent and growing communication between the farthest east and farthest west points of Asia and America. Every week finds scores, if not hundreds, of Soviets in Alaska's principal cities—Anchorage, Fairbanks, and Juneau—and its many towns and villages. At the same time, Alaskans themselves have perhaps gained a greater awareness of the many things they have in common with residents of Canada's northern territories: long winters, remote and isolated communities, vast areas of undeveloped and unoccupied land punctuated by native villages and a few larger urban centers, aboriginal populations still struggling to understand and adapt to the dominant immigrant culture, and a host of social problems and challenges rooted principally in the scarcity of population and cross-cultural interaction.

Such problems are endemic not only to Alaska and the Canadian territories, but to the whole of the North, and the easing of Soviet restrictions on travel to the United States suggested to officers of the Alaska Bar Association the idea of a general, international conference on northern justice. After much planning and waiting, the conference was held in Anchorage in early June of 1990. Hundreds of registrants from Canada, Alaska, and the Pacific Northwest attended, together with an impressive six-member delegation from the Soviet Union. Alaska's governor addressed the conference, and more than fifty jurists participated as presenters, either directly, as single speakers, or as panelists in a series of moderated dialogues modeled after those on Public Broadcasting's *The Constitution: That Delicate Balance*. Some classic questions of law were considered (for instance, the conflict presented by knowledge of the innocence of a condemned man gained in the context of lawyer-client confidentiality), but most problems posed pertained more directly to the North, including environmental protection, the clash of economic development and wilderness preservation, and the question of justice among native peoples. Conference proceedings were published in the spring of 1991. They include the speeches delivered in plenary session, and transcripts of the dialogues.

The professed goal of the conference was to gain greater understanding of the common parameters and challenges of justice in the North, and certainly many avenues of understanding were explored and endorsed. However, the fact that Soviet and

North American jurists were meeting for the first time in modern memory to carry on a free, formal discussion, and that much of the gathering's format was participatory-interrogatory, mitigated against much sustained scrutiny of the many questions posed. Probably the most significant achievements of the meetings were that they were held at all, and that they established a precedent for international consideration of the North as a field of inquiry for legal and juridical concerns. Everyone who spoke agreed that such inquiry was a positive step, even if many experienced some difficulty in articulating its benefits with any degree of precision. The meetings took place in an atmosphere of enthusiastic friendship and goodwill—itself a major accomplishment, given the differences of language, difficulties of travel, infrequency of contact, preoccupation with provincial affairs, and recent political history.

The written record of the conference suggests that two fundamental perceptions were effectively presented. The first was essentially a matter of information: the Soviet system of justice bears little resemblance to the systems in the United States and Canada. As part of the opening session, organizers asked a Soviet, an Alaskan, and a Canadian jurist to outline the justice system in their respective countries. Judge Walter Carpeneti of the Alaska Superior Court gave a comprehensive but brief outline of the American system, in which he stressed the sources of law (constitutional, statutory, regulatory, and common law), the adversarial basis of representation and the independence of the bar, the delicate nature of judicial review, and above all the prevailing supremacy of the rule of law. Justice Roger Kerans of the Supreme Court of the Yukon Territory and the Alberta appellate court discussed the Canadian arrangement, paying particular attention to the two northern territories (Northwest Territories and the Yukon), to federalism and the role of "Section 96" judges (national judges who sit in provincial courts), and the differences between British and Canadian law: the Canadians have added to their British heritage the federated system and a Charter of Human Rights and Freedoms, which limits the power of government at all levels and reserves to the judiciary a policing power over government, a function achieved in the United States by judicial review. Kerans also provided considerable information on the structure of law regarding aborigines in the Canadian North. No treaties have ever been executed with Indians of the Yukon or with the Inuit (Eskimos), a circumstance shared by virtually all of Alaska's natives.

The Hon. Vladimir Krutskikh, chief of the Legal Policy Department of the Russian Republic, was quite forthright in telling the conference that none of these basic principles of law in the West yet adhered in the Soviet Union, although the new openness of Soviet society and the movement toward autonomy in the fifteen

republics offer hope for the future. The rule of law has not prevailed in the Soviet Union, he explained, and lawyers are not autonomous, being dependent upon the government for basic office and logistical support. Vasilii Vlasihin, head of legal studies at the Institute of United States and Canadian Studies in Moscow, reiterated this point in a separate speech, and added that neither is there yet the separation of constitutional powers nor a common law in the Soviet Union. In one of the dialogues Krutskikh illuminated the status of the Soviet bar with an anecdote concerning a lawyer who complained to a judge who was not listening to his pleading. The lawyer allowed that he was disappointed that the judge seemed already to be writing his decision even before the lawyer had made his case. The judge corrected him: he had already written the decision in the lawyer's case the day before, the judge explained; now he was writing the decision for tomorrow's case. The Soviets, Krutskikh said, had come to the conference in North America to learn.

A second major point made in the presentations dealt with the application of the laws of the dominant society to the aborigines of the Soviet, Canadian, and American North. In the Soviet Union no special consideration is provided for aborigines, except that they are permitted higher bag limits than other citizens for the taking of fish and game. Although the Canadian Parliament and the United States Congress have provided some special status for native peoples, Chief Judge Heino Lilles of the Yukon Territorial Court argued in a speech on the administration of justice in remote and isolated communities that, because of cross-cultural bias, western law works greatly to the disadvantage of the natives. Justice Warren Matthews, chief of the Alaska Supreme Court, alluded to this problem in his opening remarks to the conference, noting that, among its other extremes, Alaska has the highest rates in the States of alcohol abuse and suicide. Lilles argued that natives are disadvantaged by ignorance of how the system works and by cultural reticence, and cannot get a fair hearing in Canadian and American courts because lawyers and judges are culturally conditioned against understanding why they are so often in trouble with the law. He called for dramatic change, urging that natives themselves design a system of adjudication to fit their culture, rather than immigrants' trying to force natives to fit the western system.

While Judge Lilles's analysis was not new, its continuing relevance was instructive. The difficulties of dealing with cross-cultural bias were reflected in two of the dialogues, "Northern Communities as Developing Nations," conducted by Chief Judge Barbara Rothstein of the Western Washington U.S. District Court, and "Northern Native Populations and the Law," conducted by Judge William Byrne, Jr., of the Central California U.S. District Court. Judge Byrne deftly led the participants to a dilemma in

which they had to choose between individual and aboriginal rights, both protected by constitutional and statute law. Responses in this and a closing, unstructured session suggested that many western jurists, while appreciating the legal sources of aboriginal status, are not ready to embrace the idea of a system of jurisprudence generated by the natives themselves.

In final remarks Judge Matthews was moderate in assessing the achievements of the conference. International friendship and understanding, he said, were the chief goals advanced by the enterprise. On the basis of these published proceedings, he was right to hope, with the other speakers, that future conferences would be undertaken, and that they would surpass this promising beginning in promoting international and intercultural understanding.

Stephen Haycox
University of Alaska, Anchorage

BOOK REVIEWS

West of Hell's Fringe: Crime, Criminals, and the Federal Peace Officer in Oklahoma Territory, 1889-1907, by Glenn Shirley.

Norman: University of Oklahoma Press, 1990, 496 pp., illustrated, \$16.95, paper.

A former police officer, Glenn Shirley has spent much of his life researching and writing about outlaws and lawmen in Oklahoma. When he was about to revise his earlier book, *Six-gun and Silver Star* (1955), he found that "so many corrections and additions" needed to be made that he decided to "present a new work entirely" (vi), hence *West of Hell's Fringe*. Shirley admits that the legends of the Oklahoma bandits "overshadowed the legends of the lawmen who fought them" (v), and perhaps because of this he writes more extensively about federal marshals and their deputies in his new book than he has tended to in the past.

Hell's Fringe was the name given the border between the Oklahoma Territory (created in 1889) and the Indian Territory, at a time when the area had become a haven for desperadoes. Wily outlaws like the Dalton brothers and Bill Doolin and lesser bandits like Zip Wyatt and Al Jennings traversed the land, committing seemingly endless robberies and murders and sometimes dying in the attempt. In 1892 Grat and Bob Dalton were killed while robbing two banks in Coffeyville, Kansas. Four years later Bill Doolin met his end in a shootout with a U.S. deputy marshal. The Wild West, as depicted in the gunfight in 1891 between U.S. Deputy Marshal Ed Short and "Black-Faced Charley" Bryant in which both were killed, with Bryant dying as he had wanted, "in one hell-firin' minute of smoking action" (67), was coming to an end.

Shirley has consistently written about federal marshals and their deputies with knowledge and understanding, and this work is no exception. The author covers the operation of the marshal's office and the personalities of the incumbents, such as Everett Nix and Patrick Nagle, whose job included going after horse thieves, counterfeiterers, and anyone who cut timber on Indian or government lands. Political appointees who were tied to the work of federal judges, the marshals had a major problem with the authorities in Washington, D.C.: getting their expense accounts approved and receiving their just compensation. In addition, federal deputy marshals were never adequately paid for the long hours and dangerous work they performed day in, day out. Yet such lawmen, according to Shirley, laid the "foundation for peace and greatness" in Oklahoma (vi).

Shirley's treatise on crime and federal peace officers in the Oklahoma Territory is likely to remain the most significant study

of the time for the foreseeable future. Any criticisms this reviewer has of this well-documented and readable book, with its excellent index, indicate only minor shortcomings. Sometimes the reader may have trouble determining the year in which an event occurred, and—of greater concern—use of the term “Wild Bunch” for the Doolin gang is confusing, since the Wild Bunch has become synonymous with Butch Cassidy in western lore. Such remarks, however, do not greatly detract from this fine piece of social history about one of the last frontiers in North America.

Harold J. Weiss, Jr.

Jamestown Community College, New York

Practicing Law in Frontier California, by Gordon Morris Bakken. Lincoln: University of Nebraska Press, 1991, 192 pp., illustrated, bibliography, \$35.00, cloth.

For the second work in its series “Law in the American West,” the University of Nebraska Press has focused on legal practice in California during the period 1850 to 1890. Drawing upon his incomparable knowledge of that state’s legal history, particularly manuscript sources (as in his earlier *California Legal History Manuscripts*), Gordon Bakken has produced a book that is both valuable and interesting. It also admirably complements the initial Nebraska volume, *Federal Justice in California, 1851-1891*.

A fundamental assumption of *Practicing Law in Frontier California* is that people are “law-minded,” and that their behavior is heavily influenced by legal considerations. By relying extensively on original sources—letters, diaries, autobiographies, and firm histories—the author lets California’s early lawyers speak for themselves. Their professional activities afford valuable insights into how fundamental social changes reshaped their state, from the rush for gold to industrialization and urbanization.

These early lawyers encountered “frontier turmoil, fluid standards of practice, growing demands for specialization, increased professional education, and an emerging professional identity in a maturing state.” Many of them were already trained when they reached California, some of them with quite impressive eastern credentials (although their origins were increasingly middle western and western). Bakken traces the shift in education in the profession, from traveling with lawyers and judges on circuit and reading Blackstone to a greater emphasis on college and professional training. These early lawyers were also extensively involved in forming local legal libraries, founding legal newspapers, and augmenting their education by studying the growing number of treatises on American law.

Some of the most effective analysis in this work relates to day-to-day professional practice. It was during the frontier period that law firms developed, ties to business were made, specialization occurred, and bar associations were formed, altering forever the uncomplicated practice that had initially existed. The author devotes much attention to specific areas of practice, his main focus being on the litigation of particular causes of action. It is helpful to read these chapters in conjunction with Bakken's *Development of Law in Frontier California* (1985), which concentrates on doctrinal evolution.

A major component of frontier practice was debt collection, especially in a state that was notorious for being a debtors' haven. Equally important were questions of land and mining titles. Two sources of much difficulty were Mexican land grants and pervasive squatting. (One of the frontier lawyer's foremost tasks was to create stability by quieting titles.) Another thing keeping lawyers busy in early California was tort practice, generated in large measure by the growth of the railroads. Much as with debt practice, the increasing number of tort cases encouraged the development of negotiation and settlement rather than courtroom skills; this resulted in widespread reliance on settlement conferences. Nonetheless, enough significant cases were litigated to persuade Bakken that tort law was the most rapidly changing body of law during the frontier period.

One of the most interesting chapters of *Practicing Law in Frontier California* deals with the intimate involvement of these early practitioners with growing corporate diversity. More and more, lawyers were becoming business planners and advisers as much as litigators as the state experienced ever greater urbanization and agricultural industrialization.

Bakken also discusses developments in criminal practice. Although the vigilante approach was decreasing, it did suggest many of the reforms in criminal law that were implemented at the time. Special emphasis was placed upon simplicity of procedure, as well as the certainty and severity of punishment. The author suggests that an important influence was that of increasing bar professionalism at the same time as "urbanization and industrialization imposed a social discipline that slowed the rate of crime" (113). One result of these influences was the development of professional correctional institutions.

While economic and technological forces were shaping the practice of law, the public image of the profession was also changing significantly. Bakken suggests that it became necessary—especially in refuting criticism of unsatisfactory professional preparation—to demonstrate that law, although an open and democratic profession, was also a learned one. Much like today, a second public concern related to the costs of legal representation. As the author demonstrates, one effective device employed by

both rural and urban practitioners to enhance their image was to join social, fraternal, and civic organizations.

Every page of Bakken's new work reflects his knowledge of primary and secondary sources, while his abundant notes contribute substantially to the narrative. The author achieves his goal of relating the development of law in late-nineteenth-century California to the social fabric, culture, and daily lives of the people. It is unfortunate that he attacks the competing approach to legal history of critical legal studies, but this is a cavil. *Practicing Law in Frontier California* offers a rewarding study of this formative period of the West's legal history.

R.H. Clark
Washington, D.C.

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.

Bakken, Gordon Morris, "Was There Arsenic in the Air? Anaconda versus the Farmers of Deer Lodge Valley," *Montana: The Magazine of Western History* (Summer 1991).

Carter, Kent, "Federal Indian Policy: The Dawes Commission, 1887-1898," *Prologue* 22 (Winter 1990).

Green, Michael S., "Senator McCarran and the Roosevelt Court-Packing Plan," *Nevada Historical Society Quarterly* 33 (Winter 1990).

Johnson, David A., "Judge Matthew Deady and the Political Culture of Oregon," *Oregon Benchmarks* 7:3 (Fall 1991).

Johnson, Ralph W., "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians," *Washington Law Review* 66:3 (July 1991), 643-718.

Moreland, J. Wm., "American Indians and the Right to Privacy: A Psycholegal Investigation of the Unauthorized Publication of Portraits of American Indians," *American Indian Law Review* 16 (1991).

Munger, F., "Legal Resources of Striking Miners—Notes for a Study of Class Conflict and Law," *Social Science History* 15 (Spring 1991), 1-34.

Naske, Claus-M., "Ernest Gruening and Alaska Native Claims," *Pacific Northwest Quarterly* 82:4 (October 1991), 140-48.

Pisani, Donald J., "The Origins of Western Water Law: Case Studies from Two California Mining Districts," *California History* 70:3 (Fall 1991), 242-57.

Savage, Mark, "Native Americans and the Constitution: The Original Understanding," *American Indian Law Review* 16 (1991).

Tepker, Harry F., Jr., "Hallucinations of Neutrality in the Oregon Peyote Case," *American Indian Law Review* 16 (1991).

Titus, A. Costandina, "Howard Cannon, the Senate, and Civil Rights Legislation, 1959-1968," *Nevada Historical Society Quarterly* 33 (Winter 1990).

Wolfley, Jeanette, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans," *American Indian Law Review* 16 (1991).

Woolsey, Ronald C., "Conflicting Cultures and Law and Order in Frontier Southern California," *The Californians* 8 (January/February 1991).

MEMBERSHIPS, CONTRIBUTIONS AND GRANTS

AS OF MARCH 15, 1992

FOUNDER

\$3,000 or more

William H. Donner Foundation, New York
Farella, Braun & Martel, San Francisco
Gibson, Dunn & Crutcher, Los Angeles
James Irvine Foundation, San Francisco
Latham & Watkins, Los Angeles
M.J. Murdock Charitable Trust, Vancouver
Paul, Hastings, Janofsky & Walker, Los Angeles
Pillsbury, Madison & Sutro, San Francisco
United States Court of Appeals for the Ninth Circuit, San Francisco

PATRON

\$1,000-\$2,999

Adams, Duque, & Hazeltine, Los Angeles
Arter, Hadden, Lawler, Felix & Hall, Los Angeles
Atlantic Richfield Company, Los Angeles
Bancroft-Whitney Company, San Francisco
Braun, Jerome I., Esq., San Francisco
Brobeck, Phleger & Harrison, San Francisco
Bronson, Bronson & McKinnon, San Francisco
Buchalter, Nemer, Fields & Younger, Los Angeles
Caulfield, Hon. Barbara A., Mill Valley
Corinblit & Seltzer, Los Angeles
Cotchett, Illston & Pitre, Burlingame
Crosby, Heafey, Roach & May, Oakland
Dewey Ballantine, Los Angeles
Fenwick & West, Palo Alto
Fried, Frank, Harris, Shriver & Jacobson, Los Angeles
Graham & James, San Francisco
Greenberg, Glusker, Fields, Claman & Machtinger, Los Angeles
Haight, Brown & Bonesteel, Santa Monica
Heller, Ehrman, White & McAuliffe, San Francisco
Hufstedler, Shirley M., Esq., Flintridge
Irell & Manella, Los Angeles
Janofsky, Leonard S., Esq., Santa Monica
S.S. Johnson Foundation, Redmond
Jones, Day, Reavis & Pogue, Los Angeles
Kinnaird, Dennis E., Esq., Los Angeles
Lane, Powell, Spears, Lubersky, Portland
Littler, Mendelson, Fastiff & Tichy, San Francisco
Litton Industries, Inc., Beverly Hills
McAniff, Edward J., Esq., Los Angeles
McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno
McCutchen, Doyle, Brown & Enersen, San Francisco
McKenna & Cuneo, Los Angeles
Milbank, Tweed, Hadley & McCloy, Los Angeles
Milberg, Weiss, Bershad, Spechthrie & Lerach, San Diego

Mitchell, Silberberg & Knupp, Los Angeles
Morgan, Lewis & Bockius, Los Angeles
Morrison & Foerster, San Francisco
Munger, Tolles & Olson, Los Angeles
Musick, Peeler & Garrett, Los Angeles
O'Melveny & Myers, Los Angeles
Orrick, Herrington & Sutcliffe, Sacramento
Riordan & McKinzie, Los Angeles
Schwabe, Williamson & Wyatt, Portland
Sheppard, Mullin, Richter & Hampton, Los Angeles
Sidley & Austin, Los Angeles
Skadden, Arps, Slate, Meagher & Flom, Los Angeles
Stradling, Yocca, Carlson & Rauth, Newport Beach
Sutro, John A., Sr., Esq., San Francisco
Thelen, Marrin, Johnson & Bridges, San Francisco
Unocal Corporation, Los Angeles
Wells Fargo Bank, San Francisco
Ziffren, Brittenham & Branca, Los Angeles

STEWART

\$750-\$999

Stutman, Treister & Glatt, Los Angeles
Tuttle & Taylor, Los Angeles

SPONSOR

\$500-\$749

Alioto & Alioto, San Francisco
Ater, Wynne, Hewitt, Dodson & Skerritt, Portland
Baker & McKenzie, Los Angeles
Bancroft, Avery, McAlister Foundation, San Francisco
Barker, Leroy J., Esq., Anchorage
Bechtel Corporation, San Francisco
Best, Best & Krieger, Riverside
Betts, Patterson & Mines, Seattle
Broad, Schulz, Larson & Wineberg, San Francisco
Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, Long Beach
Castle & Cooke, Los Angeles
Chandler, Tullar, Udall & Redhair, Tucson
Chevron Corporation, San Francisco
Cooley, Godward, Castro, Huddleson & Tatum, San Francisco
Daily Journal Company, Los Angeles
David B. Gold Professional Law Corporation, San Francisco
Diepenbrock, Wulff, Plant & Hannegan, Sacramento
Donovan, Leisure, Newton & Irvine, Los Angeles
Fulbright & Jaworski, Los Angeles
Garlington, Lohn & Robinson, Missoula
Great Western Financial Corporation, Beverly Hills
Hillsinger & Costanzo, Los Angeles
Hoecker, McMahon & Wade, Los Angeles
Howard, Rice, Nemerovski, Canady, Robertson & Falk, San Francisco
Hughes, Hubbard & Reed, Los Angeles
Lasky, Haas, Cohler & Munter, San Francisco
Law Firm of Elwood S. Kendrick, Esq., Los Angeles
Lewis, D'Amato, Brisbois & Bisgaard, Los Angeles
Lillick & Charles, San Francisco
Lionel, Sawyer & Collins, Las Vegas

McDonald, Russell W., Esq., Reno
Miller, Nash, Wiener, Hager & Carlsen, Portland
Morgan, Wenzel & McNicholas, Los Angeles
Pacific Gas and Electric Company, San Francisco
Perkins Coie, Seattle
Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland
Procopio, Cory, Hargreaves & Savitch, San Diego
Quinn, Kully and Morrow, Los Angeles
Rosenfeld, Meyer & Susman, Beverly Hills
Rutan & Tucker, Costa Mesa
Snyder, Christina Ann, Esq., Los Angeles
Stern, Neubauer, Greenwald & Pauly, Santa Monica
Stoel, Rives, Boley, Jones & Grey, Portland
Sullivan, McWilliams, Lewin & Markham, San Diego
Townsend & Townsend, San Francisco
Walzer, Stuart B., Esq., Los Angeles

GRANTOR

\$250-\$249

Ashford & Wriston, Honolulu
Barger, Richards D., Esq., Los Angeles
Bauer, Julien R., Esq., San Francisco
Beatty, Thomas D., Esq., Las Vegas
Blecher & Collins, Los Angeles
Bogle & Gates, Anchorage
Brown, Louis M., Esq., Los Angeles
Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland
Byrd, Christine Swent, Esq., Studio City
Byrne, Jerome C., Esq., Los Angeles
Cabrer, Elizabeth J., Esq., San Francisco
Cades, J. Russell, Esq., Honolulu
Cartwright, Slobodin, Bokelman, Borowsky, Wartnick, Moore & Harris,
San Francisco
Charles, Allan E., Esq., San Francisco
Cooper, White & Cooper, San Francisco
Cosgrave, Vergeer & Kester, Portland
Cotkin, Collins & Franscell, Los Angeles
Cronin, Fried, Sekiya, Kekina & Fairbanks, Honolulu
Crowley, Haughey, Hanson, Toole & Dietrich, Billings
Culp, Guterson & Grader, Seattle
Davis, Wright, Tremaine, Portland
DeConcini, McDonald, Brammer, Yetwin & Lacy, Tucson
Doyle, Morris M., Esq., San Francisco
Eberle, Berlin, Kading, Turnbow & McKilveen, Boise
Elam, Burke & Boyd, Boise
First Interstate Bancorp, Los Angeles
Fogel, Feldman, Ostrov, Ringler & Klevens, Los Angeles
Frohnmayr, Deatherage, Pratt, Jamieson & Turner, Medford
Gellhorn, Ernest, Esq., Los Angeles
Goldstein, Gersham, Esq., Portland
Goodsill, Anderson, Quinn & Stifel, Honolulu
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma
Greeley, Walker & Kowen, Honolulu
Guild & Hagen, Ltd., Reno
Hahn & Hahn, Pasadena
Hancock, Rothert & Bunshoft, San Francisco
Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco

Haralson, Kinerk & Morey, Tucson
Harrang, Long, Watkinson & Arnold, Eugene
Henigson, Robert, Esq., Los Angeles
Hochman, Salkin & DeRoy, Beverly Hills
Hoge, Fenton, Jones & Appel, Inc., San Jose
Horvitz & Levy, Encino
Hutcheson, J. Sterling, Esq., San Diego
Jeffer, Mangels, Butler & Marmaro, Los Angeles
Jennings, Engstrand & Henrikson, San Diego
Jennings, Kepner & Haug, Phoenix
Jett & Laquer, Lawyers, Pasadena
Judicial Arbitration & Mediation Services, Inc., Orange
Kaye, Scholer, Fierman, Hays & Handler, Los Angeles
Kendrick, Elwood S., Esq., Los Angeles
Kilkenny, Hon. John F., Portland
Kirby, Michael L., Esq., San Diego
Kleinberg, James P., Esq., San Jose
Kunz, Donald R., Esq., Phoenix
Law Offices of David M. Harney, Los Angeles
Lewis and Roca, Phoenix
Lindsay, Hart, Neil & Weigler, Portland
Loeb & Loeb, Los Angeles
Manatt, Phelps, & Phillips, Los Angeles
Mattson, Marcus, Esq., Los Angeles
McCormick, John M., Esq., Los Angeles
McDonough, Holland & Allen, Sacramento
Mead Data Central, Inc., Dayton
Murchison & Cumming, Los Angeles
Nibley, Robert, Esq., Los Angeles
Niles, John G., Esq., Los Angeles
Novack, Kenneth M., Esq., Portland
Oldman, Marshal A., Esq., Encino
Orloff, Monford, Esq., Portland
Pacific Enterprises, Los Angeles
Ross & Scott, Los Angeles
Rubin, Eagan & Feder, Beverly Hills
Smith, Gerald K., Esq., Phoenix
Stephens, Berg, Lasater & Rogers, Los Angeles
Sullivan & Cromwell, Los Angeles
Sullivan, Roche and Johnson, San Francisco
Sussman, Shank, Wapnick, Caplan & Stiles, Portland
Talcott, Lightfoot, Vandavelde, Woehrle & Sadowsky, Los Angeles
Vargas & Bartlett, Reno
Vaughn, William W., Esq., Los Angeles
Warren, Robert S., Esq., San Marino
Wilcox, Jonathan J., Esq., Woodside
Williams, Kastner & Gibbs, Seattle
Wolff, Payson, Esq., Beverly Hills

SUSTAINING

\$100-\$249

Armstrong, Hon. Orville A., San Marino
Bakaly, Charles B., Jr., Esq., New York
Bakken, Professor Gordon Morris, Placentia
Barrett, Clark A., Esq., San Mateo
Beard, Ronald S., Esq., Los Angeles
Berg, Timothy, Esq., Phoenix

Bonne, Jones, Bridges, Mueller & O'Keefe, Los Angeles
Bonyhadi, Ernest, Esq., Portland
Booth, Mr. and Mrs. Brian, Portland
Bosl, Phillip L., Esq., Long Beach
Briggs, Jeffrey C., Esq., Los Angeles
Browning, Hon. James R., San Francisco
Burns, Hon. James M., Portland
Busch, Joseph P., Esq., San Juan Capistrano
Butler, S.D., Esq., San Francisco
Carlock, George Read, Esq., Phoenix
Carroll, Hon. Earl H., Phoenix
Carver, Professor John A., Denver
Castles, James B. Esq., Portland
Cathcart, David A., Esq., Los Angeles
Chalker, Charlotte N., Esq., Tacoma
Chernick, Richard, Esq., Los Angeles
Christensen, Hon. A. D., Fresno
Clagett, Mr. Fred, King City
Clute, John E., Esq., Spokane
Condon, Wilson L., Esq., Anchorage
Curtis, Hon. Jesse W., Newport Beach
Damon, C.F., Jr., Esq., Honolulu
David, Hon. Leon T., Danville
de Grasse, Michael E., Esq., Walla Walla
Dodd, William H., Esq., Honolulu
Dotten, Michael C., Esq., Portland
Dunham, Scott H., Esq., Los Angeles
Dwyer, Hon. William L., Seattle
Edlund, William I., Esq., San Francisco
Enersen, Burnham, Esq., San Francisco
Fasman, Michael J., Esq., Beverly Hills
Federal Bar Association, Los Angeles Chapter, Los Angeles
Ferguson, Hon. Warren J., Santa Ana
Ferris, Alfred G., Esq., San Diego
Fitzgerald, Hon. James M., Anchorage
Fletcher, Hon. Betty B., Seattle
Foster, Stephen F., Esq., Billings
Frank, John P., Esq., Phoenix
Freese, Paul L., Esq., Los Angeles
Freitas, Robert E., Esq., Los Angeles
Fruin, Richard L., Jr., Esq., Los Angeles
Fuller, Maurice D.L., Esq., San Francisco
Goodwin, Hon. Alfred T., Pasadena
Gordan, John D., III, Esq., New York
Gould, David, Esq., Los Angeles
Haight, Fulton, Esq., Santa Monica
Handzlik, Jan Lawrence, Esq., Los Angeles
Hanger, Charles E., Esq., San Francisco
Harrington, Richard, Esq., San Francisco
Hart, Allan, Esq., Portland
Helmer, M. Christie, Esq., Portland
Highberger, William F., Esq., Los Angeles
Hill, Earl M., Esq., Reno
Houser, Douglas G., Esq., Portland
Hug, Hon. Proctor, Jr., Reno
Jeffrey, Lois E., Esq., Irvine
Johnson, Geri Anne, Esq., Eureka
Kadison, Stuart L., Esq., Los Angeles

Kahn, Michael A., Esq., San Francisco
Karlton, Hon. Lawrence K., Sacramento
Katz, Herbert, Esq., Los Angeles
Kay, Hon. Alan C., Honolulu
Kazan, Steven, Esq., Oakland
King, Hon. Samuel P., Honolulu
Kirschner, Richard H., Esq., Los Angeles
Kleinfeld, Hon. Andrew I., Fairbanks
Kolb, Theodore A., Esq., San Francisco
Krischer, Gordon, Esq., Los Angeles
Lavine, Hon. Richard A., Los Angeles
Lavine, Ruth J., Esq., Los Angeles
Lee, Bartholomew, Esq., San Francisco
Lentz, Robert H., Esq., Los Angeles
Levi, Hon. David F., Sacramento
Link, George H., Esq., Los Angeles
Littman, Allan N., Esq., San Francisco
Lydick, Hon. Lawrence T., Laguna Beach
Malcolm, Thomas R., Esq., Irvine
Marsh, Hon. Malcolm F., Portland
Martinez, Vilma S., Esq., Los Angeles
Mathews, Mr. John J., Portland
Mayo, Stephen A., Esq., Mill Valley
McAllister, Kirk W., Esq., Modesto
McCracken, Steven C., Esq., Newport Beach
McDonough, John R., Esq., Los Angeles
McGuirl, Maureen, Esq., Los Angeles
McIntyre, Mr. and Mrs. Edward J., San Diego
McNichols, Michael E., Esq., Lewiston
Mignella, Hon. Michael, Phoenix
Montali, Dennis, Esq., San Francisco
Morgan, Janet, Esq., San Francisco
Morris, Steve, Esq., Las Vegas
Morrow, Margaret M., Esq., Los Angeles
Moulds, Hon. John F., Sacramento
Myers, Smithmoore P., Esq., Spokane
Nelson, Hon. Thomas G., Boise
Newell, Donald P., Esq., San Diego
O'Connell, Kevin, Esq., Los Angeles
Ordin, Andrea S., Esq., Pacific Palisades
Orlebeke, W. Ronald, Esq., Concord
Orloff, Mr. Chet, Portland
Orrick, Hon. William H., Jr., San Francisco
Paine, Hamblen, Coffin, Brooke & Miller, Coeur D'Alene
Parise, John S., Esq., Garden Grove
Peckham, Hon. Robert F., San Francisco
Pepe, Stephen, Esq., Los Angeles
Poore, Roth & Robinson, P.C., Butte
Real, Hon. Manuel L., Los Angeles
Renfrew, Charles B., Esq., San Francisco
Richter, Harlan M., Esq., Piedmont
Robertson, A. James, II, Esq., San Francisco
Rohde, Stephen F., Esq., Los Angeles
Rosenblatt, Hon. Paul G., Phoenix
Rupp, John N., Esq., Seattle
Saferstein, Harvey I., Esq., Los Angeles
Schweich, Jerome F., Esq., San Francisco
Selna, James V., Esq., Newport Beach

Shallenberger, Garvin F., Esq., Costa Mesa
Slater, Jill Sherry, Esq., Los Angeles
Smaltz, Donald C., Esq., Los Angeles
Smith, Hon. Fern M., San Francisco
Sneed, Hon. Joseph T., San Francisco
Somerville, Lawrence W., Esq., Arcadia
Sommer, John R., Esq., Sierra Madre
Sparks, John E., Esq., San Francisco
Steuer, David S., Esq., Palo Alto
Svetcov, Sanford, Esq., San Francisco
Tallman, Richard C., Esq., Seattle
Taylor, John D., Esq., Pasadena
Thompson, Hon. Bruce R., Reno
Thompson, Hon. James H., Reno
Toor, Bruce A., Esq., Los Angeles
Trautman, William F., Esq., San Francisco
Treiman, Jaak, Esq., Canoga Park
Trost, J. Ronald, Esq., Los Angeles
Tuft, Malcolm, Esq., Auburn
Vaughan, Barry C., Esq., Los Angeles
Vogel, Charles S., Esq., Los Angeles
Wasserman, Comden & Casselman, Tarzana
Westover, John H., Esq., Phoenix
Whitmore, Sharp, Esq., Fallbrook
Wiggins, Hon. Charles E., Reno
Wilson, Donald, Jr., Esq., Phoenix
Zakheim, Rosalyn S., Esq., Culver City

ADVOCATE

\$50-\$99

Aguirre, Michael, Esq., San Diego
Allemann, Hon. Richard, Phoenix
Allen, Robert, Esq., Phoenix
Aldorf, Robert, Esq., Seattle
Anderson, Edward V., Esq., San Jose
Andrews, Bradley, Esq., Boise
Armstrong, Rex, Esq., Portland
Arnold, Kenneth James, Esq., San Francisco
Aronovsky, Ronald G., Esq., Oakland
Ashland, Hon. Calvin K., Los Angeles
Atkinson, Allegra A., Esq., San Francisco
August, Ray, J.D., Ph.D., Pullman
Bader, W. Reece, Esq., San Francisco
Bagdonas, Kathy, Esq., Walnut Creek
Baker, Frederick D., Esq., San Francisco
Banfield, Norman C., Esq., Sun City
Barnhisel, Peter L., Esq., Corvallis
Bauman, Frank A., Esq., Portland
Belknap, Michal, Ph.D., San Diego
Berg, Lori Nelson, Esq., Newport Beach
Bilby, Hon. Richard M., Tucson
Blumenthal, Allen, Esq., Los Angeles
Boochever, Hon. Robert, Pasadena
Boucher, Harold I., Esq., San Francisco
Browning, William F., Esq., Great Falls
Buehler, John W., Esq., Portland
Cahill, James S., Esq., Los Angeles

Calo, Robert R., Esq., Los Angeles
Campisi, Dominic J., Esq., San Francisco
Canby, Hon. William C., Phoenix
Cann, Frederic E., Esq., Portland
Carney, Robert R., Esq., Portland
Carr, Willard Z., Esq., Los Angeles
Chao, Cedric C., Esq., San Francisco
Cheifetz, Walter, Esq., Phoenix
Chinen, Jon J., Esq., Honolulu
Choy, Hon. Herbert Y. C., Honolulu
Christopher, Warren, Esq., Los Angeles
Chu, Morgan, Esq., Los Angeles
Clark, Ronald H., Esq., Washington
Clary, Everett B., Esq., Los Angeles
Clement, Daniel G., Esq., Los Angeles
Cleveland, Charles A., Esq., Spokane
Clifford, Mr. Henry H., Pasadena
Clifton, Richard R., Esq., Honolulu
Cochran, Steve, Esq., Los Angeles
Collisson, Peter D., Esq., Irvine
Coppess, Michael J., Esq., Pasadena
Coppie, Robert H., Esq., Boise
Cosgrave, Mr. Walter J., Napa
Cox, Thomas W., Esq., Edmonds
Cranston, John M., Esq., San Diego
Crew, Eugene, Esq., San Francisco
Crispo, Lawrence A., Esq., Los Angeles
Crittenden, Nicole A., Esq., San Francisco
Crotty, Anne L., Esq., San Marino
Danneman, Dale A., Esq., Phoenix
De Luce, Richard D., Esq., Los Angeles
Derham, Richard, Esq., Seattle
Dillman, Lori Huff, Esq., Los Angeles
Dinkler, Sara Church, Esq., San Francisco
Draper, Marti Ann, Esq., Pasadena
Drooyan, Richard E., Esq., Sherman Oaks
Dyer, Noel John, Esq., San Francisco
East, Mrs. Louise, Eugene
Ebner, Robert M., Esq., West Covina
Eckardt, Richard W., Esq., Los Angeles
Ellis, James R., Esq., Seattle
Enright, Hon. William B., San Diego
Fenton, Lewis L., Esq., Monterey
Fernandez, Hon. Ferdinand, Upland
Fisher, Richard N., Esq., Los Angeles
Fisher, Barry A., Esq., Los Angeles
Fleischer, Professor Lawrence, Brooklyn
Fleming, Macklin, Esq., Los Angeles
Fong, Kevin M., Esq., San Francisco
Foss, H. Weston, Esq., Seattle
Franks, Hon. Pamela J., Phoenix
Fredenburg, John M., Esq., Sacramento
Freedman, Kenneth D., Esq., Phoenix
Fried, L. Richard, Jr., Esq., Honolulu
Friedman, Professor Lawrence M., Stanford
Friedman, Stanley L., Esq., Los Angeles
Fritz, Christian G., Ph.D., Albuquerque
Froman, Sandra S., Esq., Tucson

Fuhrman, William A., Esq., Boise
Gilliam, Hon. Nancy, Pensacola
Gillick, Mary F., Esq., San Diego
Gisser, Michael V., Esq., Los Angeles
Glynn, Gregory C., Esq., Los Angeles
Goldberg, Lawrence, Esq., San Francisco
Goodwin, David B., Esq., Oakland
Gorenfeld, William R., Esq., Ventura
Gould, Ronald M., Esq., Seattle
Graham, Gary L., Esq., Missoula
Gray, Leslie B., Esq., Sparks
Grube, Hon. James R., San Jose
Hagan, Hon. Alfred C., Boise
Hall, Kirk R., Esq., Portland
Hall, Hon. Cynthia Holcomb, Pasadena
Hanft, John K., Esq., San Francisco
Hansen, Peter O., Esq., Portland
Harrison, Mark I., Esq., Phoenix
Hastert, Diane D., Esq., Honolulu
Hauk, Hon. A. Andrew, Los Angeles
Haven, Thomas E., Esq., San Francisco
Hellman, Professor Arthur, Pittsburgh
Hemminger, Pamela L., Esq., Glendale
Hemovich, Michael J., Esq., Spokane
Herman, Richard P., Esq., Balboa Island
Herr, Leonard, Esq., Visalia
Hicks, James B., Esq., Los Angeles
Hiefield, Preston C., Jr., Esq., Bellevue
Holland, Hon. H. Russell, Anchorage
Holtz, Richard R., Esq., Anaheim
Hoopes, John R., Esq., Phoenix
Hopkins, French, Crockett, Springer & Hoopes, Idaho Falls
Hovis, Hon. James B., Yakima
Hunt, Clarence S., Esq., Long Beach
Irvine, Patrick, Esq., Phoenix
Isham, Richard B., Esq., Visalia
Jacobson, Steven B., Esq., Honolulu
James, Robert, Esq., Great Falls
James R., Lynch, Esq., Glendale
Johnson, Arthur C., Esq., Eugene
Kadans, Joseph M., Esq., Las Vegas
Kelleher, Hon. Robert J., Los Angeles
Kelly, Patrick M., Esq., Los Angeles
Kenyon, Hon. David V., Pasadena
King, Michael B., Esq., Seattle
Kirkham, James F., Esq., San Francisco
Kleindienst, Richard G., Esq., Tucson
Kobrin, Janet A., Esq., Pasadena
Kossoff, Kenneth W., Esq., Los Angeles
Kroft, Stephen A., Esq., Marina Del Rey
Kuehne, Benedict P., Esq., Miami
Kupperman, Henry J., Esq., Los Angeles
Lambros, Theodore P., Esq., San Francisco
Lane, William Gregory, Esq., Newport Beach
Lax, Hon. Kathleen T., Los Angeles
Lester, Robert I., Esq., Los Angeles
Levy, Madeleine R. Loni, Esq., Anchorage
Lew, Hon. Ronald S. W., Los Angeles

Lierz, Richard, Esq., Boise
Lloyd, Thomas E., Esq., Ellicott City
Logerwell, Donald L., Esq., Seattle
Long, Gregory A., Esq., Los Angeles
Loomis, Andrew French, Esq., Oakland
Loreto, Paul D., Esq., Huntington Beach
Lowe, William R., Esq., Los Angeles
Lund, James L., Esq., Beverly Hills
Maher, Patrick J., Esq., San Francisco
Mandel, Maurice, II, Esq., Balboa
Mangum, H. Karl, Esq., Flagstaff
Marcus, Hon. Stephen, Temple City
Martin, Alan G., Esq., Beverly Hills
Martin, Jill, Esq., Woodbridge
Mason, Jeffrey L., Esq., San Diego
McBurney, George W., Esq., Los Angeles
McCoy, Thomas M., Esq., Los Angeles
McDermott, Thomas J., Jr., Esq., Los Angeles
McFeeley, Neil D., Esq., Boise
McKee, Hon. Roger Curtis, San Diego
McLaughlin, Joseph M., Esq., Los Angeles
McLaughlin, Lawrence J., Esq., Los Angeles
McNamara, T. Neal, Esq., San Francisco
McNaul, Jerry R., Esq., Seattle
McNulty, James F., Jr., Esq., Tucson
Meaders, Donald W., Esq., Pasadena
Melchior, Kurt W., Esq., San Francisco
Merkel, Philip L., Esq., Huntington Beach
Merkin, Frederick N., Esq., Los Angeles
Merrill, Hon. Charles M., San Francisco
Mesch, John K., Esq., Tucson
Middleton, R. Collins, Esq., Anchorage
Milam, Robert D., Esq., Sacramento
Millard, Neal, Esq., La Canada
Miller, Richard S., Honolulu
Miller, Scott D., Esq., Los Angeles
Morris, Andrew S., Jr., Esq., Richmond
Morrison, Charles T., Jr., Esq., Los Angeles
Morton, Kathryn D., Esq., San Mateo
Munson, Hon. Alex R., Saipan
Myles, Elliott A., Esq., Piedmont
Nafisi, Terry, San Francisco
Napolitano, Janet, Esq., Phoenix
Nasatir, Michael D., Esq., Santa Monica
Nelson, Laura, Esq., Palo Alto
Norris, Hon. William A., Los Angeles
North, Diane, Esq., Redwood City
O'Brien, Hon. Ben L., San Jose
O'Brien, Charles F., Esq., Monrovia
Odgers, Richard W., Esq., San Francisco
Orange County Federal Bar Association, Balboa
Orloff, Jon, Ph.D., Lake Oswego
Outcault, Richard F., Jr., Esq., Los Angeles
Parker, Vawter, Esq., San Francisco
Pasternak, David J., Esq., Los Angeles
Peterson, Thomas M., Esq., San Francisco
Petrik, Paula, Ph.D., Orono
Pizzulli, Francis C., Esq., Santa Monica

Pomerantz, Glenn D., Esq., Los Angeles
Porter, John E., Esq., Los Angeles
Pregerson, Hon. Harry, Woodland Hills
Preovolos, Penelope A., Esq., Kentfield
Price, Hon. Edward Dean, Fresno
Ragan, Charles R., Esq., San Francisco
Ralphs, Donald S., Esq., Pacific Palisades
Rattner, Jonathan E., Esq., Palo Alto
Reed, Hon. Edward C., Jr., C.J., Reno
Reese, John R., Esq., San Francisco
Richards, Kent D., Ph.D., Ellensburg
Richey, Andria K., Esq., South Pasadena
Roach, Catherine B., Esq., Seattle
Roberts, Philip J., Ph.D., Laramie
Robinson, David K., Jr., Esq., Coeur D'Alene
Roethe, James N., Esq., San Francisco
Rosen, Morton, Esq., Encino
Rothrock, Judith A., Esq., Arcadia
Rothschild, Lowell E., Esq., Tucson
Rubin, Michael, Esq., San Francisco
Ryan, Hon. Harold L., Boise
Salinger, Thomas S., Esq., Costa Mesa
Scheiber, Susan B., Esq., Los Angeles
Schmidt, Owen L., Esq., Portland
Schroeder, Hon. Mary M., Phoenix
Schwab, Hon. Howard J., San Fernando
Sears, George A., Esq., Sausalito
Selvin, Molly, Ph.D., Los Angeles
Sheldon, Charles H., Ph.D., Pullman
Shohet, Grace C., Esq., San Francisco
Sideman, Richard J., Esq., San Francisco
Silver, Steven E., Esq., Phoenix
Silverman, Kay, Esq., Scottsdale
Sims, John Cary, Esq., Sacramento
Sitver, Hon. Morton, Phoenix
Skopil, Hon. Otto R., Jr., Wilsonville
Smith, Selma Moidel, Esq., Encino
Smith, Stephanie M., Esq., Las Vegas
Smith, N. Randy, Esq., Pocatello
Solomon, Rayman L., Assoc. Dean, Chicago
Somach, Stuart L., Esq., Sacramento
Stephens, Hon. Albert Lee, Jr., Los Angeles
Stovall, John F., Esq., Bakersfield
Stumpf, Felix F., Esq., Reno
Sweigert, Hon. Philip K., Seattle
Taira, Eric M., Esq., Redondo Beach
Talt, Alan R., Esq., Pasadena
Tang, Hon. Thomas, Phoenix
Tang, Kenneth S., Esq., Pasadena
Tellam, Mr. Frederick G., San Diego
Thompson, Hon. David R., San Diego
Thorndal, John L., Esq., Las Vegas
Tonsing, Michael J., Esq., Oakland
Toscher, Steven, Esq., Beverly Hills
Trotta, Ms. Victoria K., Phoenix
True, III, John M., Esq., Berkeley
Turk, A. Marco, Esq., Los Angeles
Uelmen, Gerald F., Esq., Santa Clara

Ulrich, Paul G., Esq., Phoenix
University of Alaska, Fairbanks
Van Hole, William R., Esq., Boise
Van Slyck, Willard N., Esq., Tucson
Vance, Norman P., Esq., San Francisco
Vlahos, John J., Esq., San Francisco
Walsh, Brian W., Esq., San Francisco
Warburton, Austen D., Esq., Santa Clara
Warner, Ralph, Esq., Berkeley
Wasby, Stephen L., Ph.D., Albany
Weatherhead, Leslie R., Esq., Spokane
Weatherup, Roy G., Esq., Northridge
Webber, Stephen E., Esq., Los Angeles
Weil, Ruth M., Esq., Los Angeles
White, William F., Esq., Lake Oswego
White, Krista, Esq., Redmond
White, Michael A., Esq., Saipan
Wiener, Robin D., Esq., Los Angeles
Wilken, Hon. Claudia, San Francisco
Wilkins, Hon. Philip C., Sacramento
Willett, Robert E., Esq., Los Angeles
Williams, Hon. Spencer M., San Jose
Williamson, Warren R., Esq., San Diego
Workman, Thomas E., Jr., Esq., Los Angeles
Wright, Charles E., Esq., Portland
Wright, Hon. Eugene A., Seattle
Wright, Gordon K., Esq., Los Angeles
Zilly, Hon. Thomas C., Seattle

SUBSCRIBING

\$25-\$49

Abrams, Ms. Barbara, Portland
Aguilar, Hon. Robert, San Jose
Alameda County Law Library, Oakland
Alaska State Library, Juneau
Allen, Russell G., Esq., Newport Beach
Allyn, Ms. Jill, Seattle
American Antiquarian Society, Worcester
Anderson, Harold, Ph.D., San Francisco
Arizona Bar Association, Phoenix
Arizona Department of Libraries, Phoenix
Arizona Historical Society, Tucson
Arizona State University, Tempe
Association of the Bar—City of New York, New York
Baldwin, Mr. Bruce A., Pasadena
Bancroft Library, Berkeley
Banning, Robert J., Esq., Pasadena
Baum, Lawrence A., Ph.D., Columbus
Bederman, Professor David J., Atlanta
Beresford, Hon. Robert, Los Gatos
Bianchi, Carl F., Esq., Boise
Birk, David J., Esq., Aurora
Boone, Mr. Daniel A., Davis
Boseker, John F., Esq., Washington
Boston College, Newton Centre
Boston Public Library, Boston
Boston University, Boston

Brandt, Evelyn K., Esq., Santa Barbara
Brearley, Ms. Jacqueline, Hacienda Heights
Breun, Raymond L., Esq., St. Louis
Brewster, Donald P., Esq., Los Angeles
Brigham Young University, Provo
Brown, Hon. Volney V., Jr., San Gabriel
Brunet, Edward J., Esq., Portland
Bryan, Hon. Robert J., Tacoma
Burke, Albie, Ph.D., Long Beach
Burke, Bari R., Esq., Missoula
Byrnes, Martha C., Esq., Los Angeles
California Historical Society, San Francisco
California State University, Stanislaus, Turlock
California Supreme Court Library, San Francisco
California Western School of Law, San Diego
Caracristi, Ms. Stephanie, San Francisco
Caruso, Robert D., Esq., Las Vegas
Chambers, Hon. Richard H., Tucson
Champlin, Nicholas A., Esq., Albany
Chiappinelli, Professor Eric A., Seattle
Chomsky, Professor Carol, Minneapolis
Cleary, John J., Esq., San Diego
Clements, Richard R., Esq., Los Angeles
Clinton, Gordon S., Esq., Seattle
Cohn, Hon. Avern, Detroit
College of William & Mary, Williamsburg
Columbia University Law School, New York
Connolly, Mr. Mark J., Lawrence
Coombe, George W., Jr., Esq., San Francisco
Cormode, John, Esq., Mountain View
Cornell University, Ithaca
Court of Appeals, Sacramento
Creighton, J. Kenneth, Esq., Reno
Croddy, Marshall, Esq., Los Angeles
Crume, Peter, Esq., Santa Rosa
Cruz, Robert G. P., Esq., Agana
CUNY Law School at QC, Flushing
Dalhousie University, Halifax
Davis, Mr. Lewis A., Orinda
De Paul University, Chicago
Del Duca, Dr. Patrick, Los Angeles
DeSantis, Ms. Adrienne P., Petaluma
Detroit College of Law, Detroit
Dickinson School of Law, Carlisle
Diedrich, William L., Jr., Esq., San Francisco
Dougherty, Michael H., Esq., Glendale
Drayton, John N., Ph.D., Norman
Duffy, Charles P., Esq., Portland
Duke University School of Law, Durham
Fallgatter, Thomas C., Esq., Bakersfield
Feeney, John, Esq., Flagstaff
Fernandez-Bonner, Josefina, Esq., Los Angeles
Finger, Arlene C., Los Alamitos
Fisher, Mr. William W., III, Cambridge
Fitzgerald, Carol C., Esq., Las Vegas
Fitzgerald, William J., St. Charles
Florida State University, Tallahassee
Ford, Hon. Richard T., Fresno

Fordham University, New York
Forgnone, Robert, Esq., Los Angeles
Foster, Ms. Juliana, Santa Fe
Frank, Richard H., Esq., San Francisco
Franklin, Hon. Selim S., Costa Mesa
Frazer, Douglas H., Esq., Washington
Fredrickson, Ms. Adrienne, San Francisco
Funston, Richard Y., Ph.D., San Diego
Gates, Paul W., Ph.D., Ithaca
Gene Autry Western Heriage Museum, Los Angeles
Georgetown University Law Center, Washington
Goble, Professor Dale, Moscow
Golden Gate University, San Francisco
Gonzaga University, Spokane
Grebow, Arthur, Esq., Los Angeles
Gregor, Eugene C., Esq., New York
Griffith, Michael, San Francisco
Guam Territorial Law Library, Agana
Hall, Kermit L., Ph.D., Gainesville
Hardy, Thomas L., Esq., Bishop
Harvard Law School, Cambridge
Hastings College of Law, San Francisco
Havelock, John E., Esq., Anchorage
Hawkins, Vinton J., Esq., Sacramento
Haws, Robert, Ph.D., University
Hedglen, Thomas L., Esq., Los Lunas
Henry E. Huntington Library & Art Gallery, San Marino
Hensher, Alan Lewis, Esq., Los Angeles
Hermiston High School, Hermiston
Hietter, Mr. Paul T., Carol Stream
Hill, Hon. Irving, Los Angeles
Hinman, Harvey D., Esq., Atherton
Hofstra University, Hempstead
Holden, Ms. Margaret K., Portland
Howes, Prof. Edward H., Sacramento
Hubbell, Robert B., Esq., Encino
Hulse, James W., Ph.D., Reno
Hunt, Roger L., Esq., Las Vegas
Hupp, Hon. Harry L., San Gabriel
Idaho State Historical Society, Boise
Idaho State Law Library, Boise
Indiana University, Bloomington
Information Access Company, Belmont
Information Access Company, Foster City
Institute of the North American West, Seattle
Jackson Research Projects, Davis
Jefferson National Expansion Historical Association, St. Louis
John, Carson, Esq., Los Angeles
Judiciary History Center, Honolulu
Judiciary of Hawaii, Honolulu
Jusem, Mr. Pablo, Tucson
Kell, Lee Davis, Esq., Portland
Kincaid, Valerie E., Esq., Los Angeles
King, Garr M., Esq., Portland
Klitgaard, Mark, Esq., San Francisco
Knauff, Ms. Elizabeth, San Francisco
Konan University Hogakubu Kyo, Kobe
Koop, Mark Alan, Esq., Berkeley

Kupel, Douglas E., Esq., Phoenix
Kuribayashi, Laurie A., Esq., Honolulu
L'Universite Laval, Quebec
Langum, Professor David J., Birmingham
Larson, Lawrence G., Esq., Granada Hills
Lascher, Edward L., Esq., Ventura
Lee, Kathryn A., Ph.D., Seattle
Lehman, Norma Carroll, Esq., Birmingham
Letson, Jaye, Esq., Los Angeles
Levinson, Sam L., Esq., Seattle
Levit, Victor B., Esq., San Francisco
Leyton-Brown, Kenneth, Ph.D., Regina
Library of the U.S. Courts, Tacoma
Lillard, Monique C., Esq., Moscow
Limerick, Patricia N., Ph.D., Boulder
Littlefield, Mr. Douglas, Oakland
Livermore, Putnam, Esq., San Francisco
Loftus, Ms. Mary P., San Marino
Long Beach City Attorney's Office, Long Beach
Los Angeles County Law Library, Los Angeles
Los Angeles Public Library, Los Angeles
Louisiana State University, Baton Rouge
Loyola University of Los Angeles, Los Angeles
Luther, Jay W., Esq., San Francisco
Lyons, Samuel A. B., Esq., Honolulu
Mackey, Thomas C., Ph.D., Louisville
MacQuarrie, Judith, Esq., San Ramon
Makus, Mr. Eric John, Los Angeles
Maricopa County Law Library, Phoenix
Marquette University, Milwaukee
Marshall, Francis N., Esq., San Francisco
Matsuda, Professor Mari, Los Angeles
McConnell, Stephen J., Esq., Los Angeles
McCormick, Loyd W., Esq., Orinda
McCurdy, Charles W., Ph.D., Charlottesville
McGeorge School of Law Library, Sacramento
McLaren, John, Esq., Victoria
McReynolds, R. Michael, Ph.D., Bethesda
Mercer University, Macon
Merrill, Barton C., Esq., Goleta
Miller, M. Catherine, Ph.D., Lubbock
Miller, Juanita V., Esq., Los Angeles
Miller, Fred B., Esq., Portland
Misey, Robert J., Jr., Esq., Washington
Mitchell, Thomas C., Esq., San Francisco
Montana Historical Society Library, Helena
Montana State Law Library, Helena
Morisset, Mason D., Esq., Seattle
Morris, Professor Jeffrey, Bayside
Morrow, Wayne L., Santa Monica
Mortimer, John E., Esq., Altadena
Muhn, James, Wheat Ridge
Multnomah Law Library, Portland
Murphy, James M., Esq., Tucson
Museum of History and Industry, Seattle
Myers, Billie Sue, Esq., Ephrata
Naske, Claus-M., Ph.D., Fairbanks
National Archives—Pacific Southwest Region, Laguna Niguel

National Archives—Pacific Sierra Region, San Bruno
National Archives and Records Administration, Pacific N.W. Region, Seattle
Natural History Museum, Los Angeles
Nelson, Hon. Dorothy W., Pasadena
Nevada Historical Society, Reno
Nevada Supreme Court, Carson City
New York University, New York
Nicklason, Fred, Ph.D., Washington
Northwestern School of Law, Portland
Northwestern University, Chicago
Nunis, Doyce B., Jr., Ph.D., Los Angeles
O'Reilly, John F., Esq., Las Vegas
O'Reilly, Professor Kenneth, Anchorage
Oakes, Royal F., Esq., Los Angeles
Ohio Supreme Court, Columbus
Oklahoma City University, Oklahoma City
Orange County Law Library, Santa Ana
Orth, Susan, Esq., Tujunga
Owens, Kenneth N., Ph.D., Sacramento
Panner, Hon. Owen M., Portland
Parks, Marian Louise, M.A., Corona del Mar
Pasadena Public Library, Pasadena
Pence, Hon. Martin, Honolulu
Penrod, James N., Esq., San Francisco
Pepys, Mark B., Esq., Los Angeles
Petrie, Bernard, Esq., San Francisco
Pisani, Donald J., Ph.D., Norman
Pollock, John P., Esq., Los Angeles
Portman, Barry J., Esq., San Francisco
Preston, Robert J., Esq., Portland
Pro, Hon. Philip M., Las Vegas
Quackenbush, Hon. Justin L., Spokane
Rapoport, Nancy, Esq., Columbus
Rees, Paul G., Jr., Esq., Tucson
Regent University, Virginia Beach
Riseley, Mr. Jerry B., Sepulveda
Roberts, Hon. Raymond, Auburn
Rockefeller, Nicholas, Esq., Malibu
Rosemead Library, Rosemead
Rusco, Elmer R., Ph.D., Reno
Rutgers Law Library, Newark
Saint Louis University, St. Louis
Samford University, Birmingham
San Bernadino County Library, San Bernadino
San Diego County Law Library, San Diego
San Diego Historical Society, San Diego
San Diego State University, San Diego
San Francisco Daily Journal, San Francisco
Santa Clara University, Santa Clara
Sarko, Lynn Lincoln, Esq., Seattle
Schaeffer, Bernard E., Esq., Melrose Park
Schwantes, Mr. Robert S., Burlingame
Schwarzer, Hon. William W., Washington
Scott, Mr. Lewis E., Beaverton
Seton Hall University, Newark
Sharlot Hall Historical Society, Prescott
Shearer, Hugh, Esq., Honolulu
Sherick, Florence A., Esq., Tujunga

Sherland, Ms. Cordelia, Los Angeles
Shotwell, Mr. J. Arnold, Bay Center
Shurts, Mr. John L., Eugene
Skiles, Mr. Jay L., Salem
Smith, Mark M., Esq., San Francisco
South Butte County Municipal Court, Oroville
South Texas College of Law, Houston
Southern Methodist University, Dallas
Southwestern University School of Law, Los Angeles
Sowers, Mrs. Margaret S., Palo Alto
Speidel, Russell J., Esq., Wenatchee
St. John's University Law Library, Jamaica
St. Mary's University, San Antonio
St. Thomas University, Opa Locka
Stafford, William V., Esq., Irvine
Stager, Mr. John C., Norco
Stanford University, Stanford
Stanley, Mr. John J., Placentia
State Historical Society of Wisconsin, Madison
State of Nevada Division of Historic Preservation and Archaeology, Carson City
Stern, Michael L., Esq., Los Angeles
Stetson University, St. Petersburg
Steward, H. Dean, Esq., Santa Ana
Strand, Hon. Roger G., Phoenix
Stromberg, Ross E., Esq., Los Angeles
Stutz, Lynn C., Esq., San Jose
SUNY at Buffalo, Buffalo
Syracuse University, Syracuse
Taniguchi, Nancy J., Ph.D., Turlock
Taylor, Mrs. Beatrice P., Boise
Temple University, Philadelphia
Tonkon, Mrs. Moe M., Portland
Torkelson, Ms. Susan E., Salem
Tuft, Mark L., Esq., San Francisco
Tulane University, New Orleans
U.S. Department of Justice, Washington
U. S. District Court, San Jose, San Jose
United States Court of Appeals for the Eleventh Circuit, Atlanta
United States Court of Appeals for the Sixth Circuit, Cincinnati
United States Court of Appeals for the Seventh Circuit, Chicago
United States Supreme Court Library, Washington
Universitat Autònoma De Barcelona, Barcelona
University of Alabama, Tuscaloosa
University of Arizona, Tucson
University of British Columbia, Vancouver
University of California at Berkeley, Berkeley
University of California at Davis, Davis
University of California at Los Angeles, Los Angeles
University of California at Santa Barbara, Santa Barbara
University of Chicago, Chicago
University of Colorado, Boulder
University of Denver, Denver
University of Detroit, Detroit
University of Florida, Gainesville
University of Georgia, Athens
University of Hawaii, Honolulu
University of Idaho, Moscow
University of Iowa, Iowa City

University of Kentucky, Lexington
University of La Verne, La Verne
University of Maine School of Law, Portland
University of Miami, Coral Gables
University of Michigan, Ann Arbor
University of Minnesota, Minneapolis
University of Montana, Missoula
University of Nebraska, Lincoln, Lincoln
University of Nevada, Las Vegas, Las Vegas
University of Nevada, Reno, Reno
University of New Mexico, Albuquerque
University of Notre Dame, Notre Dame
University of Oklahoma, Norman
University of Oregon, Eugene
University of Pennsylvania, Philadelphia
University of Pittsburgh School of Law, Pittsburgh
University of Puget Sound, Tacoma
University of San Diego, San Diego
University of San Francisco, San Francisco
University of South Carolina, Columbia
University of Southern California, Los Angeles
University of Texas, Austin
University of the West Indies, Bridgetown
University of Utah, Salt Lake City
University of Victoria, Victoria
University of Virginia, Charlottesville
University of Washington, Seattle
University of Washington Libraries, Seattle
University of Wisconsin, Madison
University of Wyoming, Laramie
Valparaiso University, Valparaiso
Van Leeuwen, Ms. Jessica, Los Angeles
VanBurkleo, Sandra F., Ph.D., Detroit
Vanderbilt Law Library, Nashville
Villa Julie College, Stevenson
Waggoner, Mr. Robert M., Glendale
Wake Forest University, Winston-Salem
Walch, Richard, Esq., Los Angeles
Walker, George R., Esq., Monterey
Wallace, Hon. J. Clifford, Chief Judge, San Diego
Wallwork, Nicholas J., Esq., Phoenix
Walther, Steven T., Esq., Reno
Walton, Mr. Bruce, Pasadena
Washburn University, Topeka
Washoe County Law Library, Reno
Wayne State University, Detroit
Weatherford, Gary D., Esq., San Francisco
Wedgwood, Professor Ruth, New Haven
Weightman, Ms. Judy, Honolulu
Weiss, Deborah, Esq., Studio City
Weiss, Professor Harold J., Jr., Jamestown
Wendenburg, Vanessa M., Esq., Salinas
Western New England College, Springfield
Western State University, Fullerton, Fullerton
Western State University, San Diego, San Diego
Western State University, Irvine, Irvine
Whitman College, Walla Walla
Whittier College School of Law, Los Angeles

Wickersham, Robert E., Esq., San Francisco
Widener University, Wilmington
Widener University/Harrisburg, Harrisburg
Willamette University, Salem
Williams, David R., Q.C., Duncan
Wilson, Ms. Jane, Santa Monica
Woodlock, Hon. Douglas P., Boston
Wright, James H., Esq., Honolulu
Wunder, John R., Ph.D., Lincoln
Wynne, Edward J., Jr., Esq., San Francisco
Yale Law Library, New Haven
York University Law Library, North York
Young, Stanley, Esq., Palo Alto

GENERAL SUPPORT, HONORARY, AND MEMORIAL CONTRIBUTIONS

General Support

Gersham Goldstein, Esq., Portland
Hon. Charles E. Wiggins, Reno
In Honor of the Centennial of the U.S. Court of Appeals, Ninth Circuit
Louis M. Brown, Esq., Los Angeles
Federal Bar Association, Arizona Chapter
Hon. John F. Kilkenny, Portland
McCutcheon, Doyle, Brown & Enerson, San Francisco
John N. Rupp, Esq., Seattle
In Memory of Judge William P. Gray
Mr. Chet Orloff, Portland
Jonathan E. Rattner, Esq., Palo Alto
In Support of the book *Building Justice: A History of Courthouses in the
American West*
Ralph Warner, Esq., Berkeley

The Public Historian

Volume 13, Number 3

Special Issue on Preservation Technology

Introduction *Michael G. Schene*

Technology Transfer, Historic Preservation, and Public Policy
Ray A. Williamson and Jannelle Warren-Findley

The Fragility of Paper: Can Our Historical Records Be Saved?
Nancy E. Gwinn

When Cultures Collide: Computer Technology and the Cultural
Resources Professional *Betsy Chittenden*

The National Maritime Initiative: An Interdisciplinary
Approach to Maritime Preservation *James P. Delgado*

Nonintrusive Site Evaluation and Stabilization Technologies for
Archaeological Resources
Douglas D. Scott and Paul R. Nickens

Mapping History Using Geographic Information Systems
John J. Knoerl

Cultural Landscapes and the New Technologies *Cathy Gilbert*

Preservation Technologies: As Answers Get Easier, Questions
Remain Hard *Carroll Pursell*

The Public Historian is the official publication of the
National Council on Public History. Subscriptions to TPH
are a benefit of membership in the NCPH, which may be
obtained for \$32 for individuals or \$45 for institutions from
University of California Press, 2120 Berkeley Way,
Berkeley, CA 94720. Single issues of the Preservation
Technology special issue are also available from the Press
(individuals, \$8; institutions \$11.25).
