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Child savers in Montana hoped to prevent scenes like this one in Butte. The children in the foreground are playing in a slag pile from a smelter. (Museum of the Rockies, Montana State University)
On the evening of January 25, 1907, Denver's Judge Ben Lindsey, the evangelic leader of the Juvenile Court Movement, spoke to the Butte Teachers' Association. Introduced as America's most popular judge, he told his enthusiastic audience that "the child is not a criminal; he is only capable of doing evil when the opportunity is given him and his environment is bad." He placed the burden of correcting the child directly on the shoulders of parents: "The place for the correction of a child is in its home and if parents prove negligent and unworthy the state should do the best it can to put itself in the place of loving and wise parents." Warming to his audience, the judge urged the creation of a juvenile court in Montana, assuring the teachers that such a court would attempt "to get at the causes of crime and eliminate the effects."

Montana's child savers, a diverse group of middle- and upper-class men and women, called for the creation of a juvenile court in the state's larger cities, staffed by judges of Lindsey's stature with a personal style of justice unencumbered by due

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1Butte Evening News, January 26, 1907. Lindsey was widely known throughout the United States as an advocate of the informal, personal style of dealing with young offenders. Ben B. Lindsey, "The Boy and the Court: the Colorado Law and Its Administration," Charities 13 (1904), 350-57.
process or legal technicalities. They founded, instead, a system characterized by centralization, bureaucratization, specialization, and an expansion of official power over children.

The Montanan child reformers agreed with Lindsey's diagnosis. Ignorant, neglectful parents and the child's environment, they concurred, were the root causes of delinquency and dependency. "Various are the causes responsible for the delinquency of a child," wrote M.L. Rickman, director of the Bureau of Child and Animal Protection, "the waywardness of a father, mother, or more remote ancestor, the nagging, beating, neglect or desertion of it by its parents, or the lack of a normal home and outside influences to counteract the omissions within." A young boy, he wrote, "do[es] not often plan and execute malicious deeds. He associates himself with others in his wrongdoing and the mother's arm is too weak to hold him away from his allegiance to the clan or the group." Girls were also affected by their environment. "The prevailing offenses of delinquent girls are incorrigibility and immorality. Girls find recreation at the picture shows and dances. They are reported as staying away from home at night or being out late."3

Although the reformers were confident that it was better for children in trouble to remain at home, parents who did not come up to expectation should have their children taken away by the state and placed in suitable homes or institutions. Troubled by visions of an Oliver Twist and a David Copperfield consumed by a cruel and inhumane legal system, the child savers concluded that in no case should children be incarcerated with adults where they would be subjected to punishment and tales of criminal exploits. Rather, they should be placed in institutions designed to reform and treat them.4

Targets of the reformers were children from urban, working-class families.5 Cities, particularly Butte, with their numerous base allures, were the proper location for the juvenile court.

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2The bureau was created in 1905 and assigned humane officers throughout the state. Montana Laws, 96 (1905). Its purpose, according to Otto Schoenfeld, its first director, was to elevate the family and environment of children in order to prevent delinquency and crime. First Report of the Bureau of Child and Animal Protection, November 30th 1904 [Helena, Mont., 1904], 8 [hereafter cited as Schoenfeld, First Report]. Initially, the authority of humane officers was limited to assisting local agencies in enforcing laws designed to protect children. In 1907 the legislature expanded its authority and gave humane officers the power of arrest. Montana Revised Codes of 1907, Penal Code, Section 1669.


5There was an urban bias among urban child savers. Ibid. at 36.
Moreover, working-class families must be uplifted because, according to Rickman, "As a rule delinquent children do not come from the best homes."\(^6\)

Reformers regarded the state's justice and municipal courts as the proper forums for carrying out their child-saving agenda.\(^7\) These courts, they suggested, were not hindered by the legal technicalities that often prevented district courts from achieving the best results. The right judge in such a legal environment could use moral persuasion and his charismatic personality rather than the coercive elements of law to cure delinquency. A hand on the shoulder, a friendly talk, and a handshake were more important than punishment or due process.

The inferior courts as constituted, however, were not suitable for the task. The superintendent of the Bureau of Child and Animal Protection, J.M. Kennedy, argued that "the justice court is essentially the poor man's tribunal. It is in these courts," he continued, "that most of the questions affecting the poor and delinquent are adjudicated. A mistake made in a District Court is likely to be corrected by appeal to the Supreme Court, but a mistake made in the inferior courts is very likely to remain a mistake.... Hence, it follows that the ignorant, the stupid, or the thoughtless magistrate is often the most serious stumbling block encountered by the social worker."\(^8\) Earlier, the editor of the Anaconda Standard had told his readers, "Vastly more will be required in the way of qualifications than has been required of any justice of the peace or police magistrate, and it is idle to establish a juvenile court without securing for the position of judge ... a man eminently endowed by nature, by intellect, by training, by disposition, by the affections to fill just such a position."\(^9\)

Reformers argued that the ballot box was not the appropriate way to select a judge for the juvenile court. If the choice of such a judge were left to an "election, or any kind of political scram-


\(^7\)Montana's constitution prohibited the legislature from establishing additional courts of general jurisdiction. The constitution vested judicial power "in a Supreme Court, District Court, and Justices of the Peace, and such other Inferior Courts as the Legislative Assembly may establish in any incorporated city or town." Montana Constitution, Article 8, Section 1 [1889]. Thus, if separate juvenile courts were established, they had to be created as inferior courts.


\(^9\)January 29, 1906.
Reformers in Montana believed that a poor, rural environment, like this sod house on a ranch near Dry House Springs, could lead children into delinquency. (Photograph by L.A. Huffman, 1902, courtesy Montana Historical Society)

ble," wrote the editor of the Billings Daily Journal, "the choice would almost inevitably result in failure. [T]he appointment," he informed his readers, "should be up to the mayor with reference to the council. Then let the mayor give it out that no person applying for the office, directly or indirectly, should be eligible. It is highly probable, if the mayor discarded all the usual run of politicians, he could find a suitable judge."¹⁰

Secure in the righteousness of their ideology and the correctness of their cause, the child savers set about the task of creating a juvenile court.

SEARCHING FOR A JUVENILE COURT: THE 1907 LAW

After Lindsey's speech to the schoolteachers, R.G. Young, the superintendent of Butte's schools, met the judge to map a strategy for creating a juvenile court. The next day Young rushed to Helena, where the state legislature was in session, with a copy of Colorado's juvenile-court law. On February 1, 1907, Senator J.B. Annin introduced two bills: Trials of Delinquent Children and Juvenile Criminals, and Proceedings for the Protection of Dependent and Neglected Children. Three days

¹⁰January 31, 1907.
Exposing children to saloons and alcohol, many child savers believed, inevitably led to criminal behavior. Helena's Kessler Brewing Company employees included the boys in the top row. (Photograph by Arthur Canning, Montana Historical Society)

later similar bills were presented to the House of Representatives. The House versions were eventually withdrawn, and intensive lobbying by the Montana Federation of Women's Clubs ensured the passage of the Senate bills without a dissenting vote. Eighteen days after the introduction of the bills, Governor Joseph K. Toole signed them into law.\(^{11}\)

The reformers were elated over the vague definitions of delinquency and dependency. Following the Colorado model, the new Montana law defined a delinquent as any child under seventeen years of age who violated any state law or city ordinance. In addition, “delinquency” included children who were incorrigible; who wandered about railroad yards; who patronized saloons, gambling establishments, pool halls, or houses of ill repute; or who were growing up in idleness and crime.\(^{12}\) The definitions of dependency and neglect were even more imprecise. A dependent child was any boy or girl under seventeen who was dependent upon the public for support; who was destitute or homeless; or who habitually begged or lived in a house of prostitution. A neglected child was one whose

\(^{11}\) *Senate Journal, 10th Session of the Legislative Assembly, 1907* [Helena, Mont., 1907] and *House Journal, 10th Session of the Legislative Assembly, 1907* [Helena, Mont., 1907].

\(^{12}\) *Montana Revised Codes of 1907*, Penal Code, sec. 9423.
home, as a result of cruelty or depravity on the part of the parents, was unfit to live in.\textsuperscript{13}

These vague definitions gave child reformers the best of two worlds. On the one hand, according to one commentator, the labels of "delinquent," "dependency," and "neglect" "satisfied the legal requirement of a specified charge," while on the other they "were so vague and all-encompassing that they placed no practical limit on the court's decision making power."\textsuperscript{14}

The new statutes mirrored the reformers' ideology that the environment and parents were responsible for the delinquency and dependency of children. The statutes gave judges broad powers to take jurisdiction over a child "whose environment [emphasis added] is such as to warrant the state, in the interest of the child, to assume its guardianship or support."\textsuperscript{15} Parents who sent their offspring to "rush the can" or otherwise contributed to their child's delinquency could be punished under the delinquency law to nine months' imprisonment and/or a one-thousand-dollar fine.\textsuperscript{16} The delinquency law gave courts broad authority to impose conditions upon parents that were best calculated to remove the cause of the delinquency. The dependency and neglect statute gave judges the authority to impose six months' imprisonment and/or a six-hundred-dollar fine on parents who were convicted of failing to support their children or who contributed to their child's neglect.

After adjudication, the statutes gave Montana's judges virtually unlimited authority to dispose of delinquent, dependent, or neglected children. The dependency and neglect law provided that the judge could "make such disposition of said child as seems best for its moral and physical welfare,"\textsuperscript{17} and could appoint an individual or an agency as a guardian for the child. Guardians could place the child for adoption or into suitable family homes on a temporary basis. Children committed to an institution were sent to the Orphans' Home.\textsuperscript{18}

\textsuperscript{13}Montana Revised Codes of 1907, Code of Civil Procedures, sec. 7829.
\textsuperscript{15}Montana Laws, 224 (1907), sec. 9423.
\textsuperscript{16}"Rushing the can" referred to the practice of parents or other adults sending children to the nearest saloon to buy beer.
\textsuperscript{17}Montana Laws, 92 (1907), sec. 6.
\textsuperscript{18}The State Orphans' Home was established in 1893 to provide a proper middle-class atmosphere for orphans, foundlings, and destitute children under the age of twelve. According to the Reverend Wiley Mountjoy, superintendent of the home, it "was not intended to admit orphans unless there were reasons other than orphanage, nor to exclude other destitute and dependent children simply
The delinquency law gave district court judges the power to place children on probation and to appoint the county sheriff, deputy sheriffs, or township constables as probation officers to serve without additional compensation. Children on probation were either returned to their families or placed in suitable homes "subject to the friendly supervision" of law officers. Delinquents who were incarcerated had to be sent to the reform school in Miles City or another institution—public or private—deemed suitable for children.19

The reformers were still not satisfied. The delinquency and dependency statutes failed to create a separate juvenile court within the state's major cities,20 instead giving exclusive authority over children to courts of general jurisdiction, i.e., district courts.21 This was already a common practice throughout the United States;22 moreover, in 1893 the legislature had given district court judges the responsibility to place children in the newly created reform school.23 In addition, lawmakers were unwilling to burden local governments financially with a new court. The arm of the law for juveniles, after all, was "not to make any additional expense by the introduction of the new system, but merely to provide that young boys shall not be treated as criminals, [although] their acts may be bad."24

The reformers were also unhappy with the statutory protections provided for children, whose procedural rights were

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because they were unfortunate enough to have parents living. As matter of fact orphans make up a very small per cent of admissions." State Orphans' Home Fifth Annual Report (Helena, Mont., 1898), 1.

19The reform school was created in 1893 and housed both male and female juveniles, Montana Penal Code, secs. 3085, 3090 (1895). Four years later an investigation revealed widespread physical abuse of children. The report indicated that "Out of 63 children who are inmates of this institution we find but two who had not received a severe whipping. While we believe in corporal punishment being administered for just causes, we do not believe it should be administered as it was being done for such small offenses, such as talking to each other in line, talking in the dormitory at night, talking at the table, for not being competent in sewing a patch on a garment ... for accidentally spilling water, breaking dishes and making unintentional mistakes; for not getting stitches close enough on clothing, and many like offenses." Valley County News, February 20, 1897; Ravalli Republican, February 24, 1897.

20Montana Laws, 309 [1907, delinquency law]; Montana Laws, 224 [1907, dependency and negligent law].

21Jurisdiction over children in the lower courts was limited to conducting preliminary hearings and committing offenders to jail pending their transfer to the district court. Report and Official Opinions of the Attorney General, 1910-1912 (Helena, Mont., 1912), 396.

22Sutton, "Juvenile Court," supra note 14 at 113.

23Montana Penal Code, sec. 3090 (1895).

24Great Falls Leader, February 2, 1906.
identical to those of adults. Children were charged and tried by information; they could demand a jury trial; and they could be represented by counsel. The requirement that they be tried by information meant that prosecutors alone could file charges against young delinquents. These officials, who often worked part-time, based their decisions to prosecute on the sufficiency of evidence and the seriousness of the crime, an approach that was not scientific enough for the crusaders. Children's delinquent actions should not be subject to legal scrutiny, they argued, but were evidence of conditions that demanded reform, not punishment. The sooner the children could be rescued from their surroundings, the more likely their behavior would change. Technical rules of pleading slowed this process and entangled the juvenile system in the intricacies of criminal law.

Children who demanded their statutory right to trial by jury hindered the judge in performing his own style of justice. Moreover, lawyers brought to trial technical rules of evidence and arguments that did not really pertain to children. The reformers believed that other statutory provisions did not go far enough in protecting children. Nothing in the law prevented children from being sent to a common jail. In addition, reformers deplored the partisan political nature of the crude probation system, which frequently became mired in protracted battles with local elected officials.

25Montana Revised Codes, Penal Code, sec. 9105 (1907).
26Research suggests that seriousness of crime and sufficiency of evidence play important roles in the prosecutor's decisions to file charges. It is assumed that similar criteria were used by prosecutors near the turn of the century. Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (Boston, 1969).
27Case precedent established that jury trials were not available to juveniles but had to be provided to adults charged under juvenile-court statutes. In 1892, the Minnesota Supreme Court upheld legislation denying juveniles destined for reform school the right to trial by jury. The court reasoned that "a person committed to the care and custody of a board in charge of an institution of the character of the Minnesota state reform school is not [undergoing] 'punishment,' nor is he 'imprisoned' in the ordinary meaning of those words." The court went on to assert that the state, in "exercising a wholesome parental restraint over the child[,] ... can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children." State v. Brown, 52 N.W. 935, 936 (1892).
Other courts declared portions of the juvenile-court law unconstitutional because the law failed either to give adults charged under the statutes the right to trial by jury or to provide for a twelve-person jury as required by some state constitutions. Robison v. Wayne Circuit Judges, 115 N.W. 682 (1908).
28Daily Interlake, June 9, 10, and 17, 1910.
THE SEARCH CONTINUES: THE 1911 LAW

In 1910 the child savers, dismayed by what they considered to be fatal structural and procedural flaws, launched a new campaign to create a “real” juvenile court. They clung to their view that juvenile courts must be decentralized and located in cities administered by men of stature. They realized, however, that a professional probation system was essential for the smooth, efficient, and scientific management of delinquent children. Superintendent J.M. Kennedy advocated this position by recommending that the legislature create a juvenile court in all cities with a population of more than twenty thousand, pointing out that “in the best governed American cities today juvenile courts and probation bureaus [emphasis added] are conspicuous and very valuable adjuncts of the machinery of law.” He reiterated the reformers’ position on the need for an appropriate judge and explained that “much depends upon the character and intelligence of the man called upon to preside over such a Court.”

Gathering their political forces, the reformers marched to the 1911 legislature with a new bill intended to cure the defects in the 1907 legislation. The legislature greeted them warmly, repealed the Trial of Delinquent Children law, and replaced it with the Delinquent Child and Juvenile Delinquent Act. However, legislators refused to require cities to create juvenile courts and maintained the district courts’ exclusive jurisdiction over young offenders. The child savers were somewhat placated by the realization that district court judges were forbidden to incarcerate children in any jail or common lockup.

Reformers were delighted with the new professional probation system. Under the new law, district court judges appointed and directed probation officers. These officials arrested youthful offenders, functioned as clerk of the court at

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29 Kennedy, Fourth Biennial Report, supra note 8 at 7.
30 Montana Laws, 320 (1911).
32 In 1909 the legislature enacted a law requiring district court judges to campaign for office on a nonpartisan ballot. 1909 Montana Laws, 160 (1909). Shortly after passage of the 1911 delinquency law, the Supreme Court of Montana declared the nonpartisan statute unconstitutional. Holliday v. O’Leary, 43 Mont. 161, 115 P. 204 (1911). Subsequently, district court judges frequently hired probation officers based on partisan political considerations.
33 District court judges were authorized to organize probation service for their districts, to hire a chief probation officer, and to appoint not more than two full-time deputies. Always looking for ways to reduce costs, the legislature permitted judges to hire as many voluntary probation officers as necessary.
trial, petitioned children into court, and served summonses on their parents. The new statute no longer spoke of "friendly supervision"; even home visits were often wrapped in a coercive atmosphere, with the probation officer threatening sterner conditions of probation or return of the child to court. According to one Montana child saver, the purpose of probation was "to investigate the home influences of those whom it is believed are being brought up in the wrong path and either by suggestion or force compel those responsible for the future of the child to change the surrounding influences." The power of law was also a way to force children into obedience. "Moral suasion," observed M.L. Rickman, "constitutes nine-tenths of probation work, but that may be lost without the other part which gives sufficient authority to enforce the law to preserve peace and protect the rights of the people." Judges in Montana apparently saw nothing inconsistent in placing children under the supervision of the person who had arrested, petitioned, and incarcerated them in the first place.

The failure of the personal model was accelerated by a tendency toward bureaucratization. The new delinquency statute devoted more space to describing the record-keeping function of probation officers than to their child-saving role. The law also required probation officers to investigate any case involving a child and to prepare a written report on the child's parents, home, school record, or anything that would throw light on his or her life and habits. The statute mandated written files of all cases assigned to the probation officer. Yearly reports, filed with the juvenile court, documented the number and disposition of all cases. Probation officials prepared the "Juvenile Delinquent Record" and "Juvenile Docket." The probation officer retained records of fines and child-support payments, reported on the collection and distribution of monies, and filed a quarterly report with the judge. These demands on professional probation officials transformed them into bureaucratic functionaries rather than child-saving advocates.

The delinquency statute provided for important procedural changes. Young offenders brought before the court were charged by petition rather than by information. The petition, filed by any reputable citizen, had to allege in a general way that the child had committed a delinquent act and that the

37 *Montana Laws*, ch. 122, secs. 3 and 14, 321 and 326 (1911).
Montana's Reform School Act provided for the construction of this orphanage at Twin Bridges. The home was intended to provide a middle-class environment for orphans, foundlings, and destitute children under the age of twelve. (Montana Historical Society)

parents were unfit or unwilling to care for the child. This petitioning process eliminated whatever legal oversight prosecutors might have exercised, and placed in the hands of the public at large the authority to charge children with delinquency. The process also eliminated the technical charging procedure in criminal law and made it easier for child savers to bring children to the attention of the judge.\(^3\)

Bowing to the personal concept of justice advocated by reformers, the legislature added to the statute a specific provision allowing judges to conduct trials of children in their chambers and to bar the public from those proceedings. Judges permitted only those with an interest in the child's welfare to be present, including the probation officer, agents of child-saving institutions and societies, and presumably parents and counsel—although the statute did not provide for their presence.\(^3\)

Delinquents, however, could still demand trial by jury, release on bail, representation by counsel, and appeals. Montana's child reformers remained skeptical of these provisions.

\(^3\)Montana Laws, ch. 122, sec. 4, 322 [1911]; see also Platt, Child Savers, supra note 4 at 141.

\(^3\)Montana Laws, ch. 122, sec. 8, 325 [1911].
They did not want juveniles to use the full panoply of rights provided by statute, nor did they anticipate that they would do so. They agreed with the Supreme Court of Pennsylvania that "whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it." The Supreme Court of Montana took a sharply different view.

In 1916 Mamie Satterthwaite was petitioned into the District Court in Helena and was charged with committing a delinquent act. The judge, without making a formal judgment, committed the young girl to the House of the Good Shepherd. The parents were not notified of the petition, and the child was not told that she had a right to trial by jury. The child's mother sought a writ of habeas corpus on the grounds that the state failed to abide by the statutory requirements of notice and trial by jury. The court agreed.

Chief Justice William Holloway, writing for a unanimous court, announced, "Either the accused child or its parent 'shall have the right to demand a trial by jury which shall be granted as in other cases unless waived.' The right to trial by jury is secure. It can be waived only in a manner provided by law." The court continued, and held that failure to notify the child or his or her parents about the right was reversible error.

This decision struck directly at the system of justice envisioned by reformers. If large numbers of children and their parents demanded the right to trial by jury, it would impede the judge's personal approach. Jury trials were slow, and often bogged down in technical language and procedures. The child savers and their allies believed that the decision violated the spirit of the juvenile court.

Their concern quickly faded when they discovered that neither juveniles nor their parents demanded trial by jury. Most cases were handled by probation officers and never reached court. When children did appear in court, it was easy for judges to convince them and their parents that it was in everyone's

41 In Re Satterthwaite, 52 Mont. 550, 160 P. 346 (1916).
42 Ibid. at 554.

43 In In Re Satterthwaite, the Montana Supreme Court held that to prove delinquency, the state must demonstrate that the child committed a violation of law and that the parents were unfit to raise the child. The court did not discuss the doctrine of parens patriae. The doctrine was used by other state courts to justify the informal procedures incorporated within juvenile court statutes. Douglas R. Rendleman, "Parens Patriae: From Chancery to the Juvenile Court," South Carolina Law Review 23 (1971), 205. Neil Howard Cogan, "Juvenile Law, Before and After the Entrance of 'Parens Patriae'," South Carolina Law Review 22 (1970), 147.
best interests not to demand their statutory rights. An episode that may be indicative occurred when five young boys appeared before the district court judge in Hamilton, Montana, charged with burglary. The magistrate told them that the hearing was not a trial, but an opportunity for him to gauge their attitude. One of the boys flunked the attitude test by refusing to confess to the crime. He was summarily sent to reform school.44

CONCLUSION

According to one authority, the structural features of the early juvenile court suggest that the child savers were more concerned with legal symbolism than with legal procedure.45 Although Montana's reformers believed that a separate city court, staffed by an appointed judge and supplemented by professional probation officers, offered the best chance to eradicate delinquency scientifically, they failed to protest when the legislature refused to decentralize the juvenile court. Perhaps the development of a professional probation system was considered sufficiently personal, or perhaps any structure was acceptable so long as it protected young offenders from the harshness of the common law and facilitated the removal of children from homes declared unfit.

More likely, many child savers eventually agreed with the argument made by political progressives that efficient administration and regulation required centralized authority.46 Montanans accepted this creed and created numerous administrative agencies and institutions, including a railroad commission, a voting board, a board of health, an insurance commissioner, an education commissioner, and a bank examiner.47 The juvenile court compares favorably with these administrative agencies.48 The court was designed to prevent and cure delinquency by reaching into the community and correcting the child's environment. This was to be achieved without concern for due process or the technicalities of law. Administratively, Montana's juvenile court mirrored the general tendency toward bureaucratization.

Moreover, the centralized structure created by the legislature had the advantage, from the reformers' perspective, of expand-

44Ravalli Republican, December 28, 1917.
45Sutton, "Juvenile Court," supra note 14 at 108.
ing state control over children beyond the cities into rural communities. This proved to be useful when new settlers rushed to the state to farm the drylands above the Missouri River. As new families moved into rural Montana, the number of children in the state doubled. The arrival of farmers and their families reinforced the belief held by many Montanans that "the farm family and the small town formed the sturdy bulwark of America." Transforming Montana into a rural society where traditional values prevailed required the assistance of the juvenile court because, Rickman pointed out,

In the matter of poor homes Montana towns and cities are not the worst offenders. With the rush of new settlers to occupy our vast agricultural areas we are facing a problem in the poor country home, without vine or shade trees or any other mark which indicates a comfortable dwelling place. Some homesteaders fail because of misfortune or poor management; others increase in wealth and tear down their barns to build greater, and continue to live in the same old shacks with their growing families, without any consideration for the comfort, convenience, pleasure or privacy of the true home.

A centralized juvenile court enabled the state to assert its child-saving authority in rural communities. Children were taken from their farm families and placed with their urban cousins in "proper" homes or institutions.

Centralizing the juvenile system in district courts legitimized the philosophy of child saving. Not all citizens were favorably inclined toward the child savers. Placing the juvenile court in courts of general jurisdiction gave the child-

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51Rickman, Eighth Biennial Report, supra note 6 at 12.

52Mennel, Thorns and Thistles, supra note 34 at 145. In Montana there was opposition to the child savers. J.M. Kennedy, the second director of the Bureau of Child and Animal Protection, lamented that in some instances the bureau’s work was hampered "and even nullified by gross ignorance, stupidity, or malevolence encountered in high public office." He charged that "A large number of good citizens remain utterly indifferent or deplorably ignorant of the aims and achievements of this Bureau.” Fourth Biennial Report, supra note 8 at 1.
reform movement more prestige, and more judicial authority when needed. The child savers had searched for and given lip service to a man who could personalize justice; instead, they created a system tending toward bureaucratization and increasing control over children’s lives.
Sylvester Pennoyer, c. 1887 (Oregon Historical Society)
NOT long after the Civil War, the editor of the Oregon Herald declared that the question Oregonians faced was "whether the government, freed from the vexed question of slavery, [should] be administered upon Democratic principles which prevailed in the Government for sixty years, or [should] return to ... Federal centralization." Oregon Democrats were among those who longed for a return to the Democratic principles of limited government and an antebellum constitutional order based on states' rights. Republicans, on the other hand, urged the expansion of the federal government. During the Reconstruction years, an essential difference between Democrats and Republicans was their vision of the Constitution and federal relations. Today, with a strong presidency and a recent history of a powerful Congress and an active federal judiciary, it is difficult to appreciate the contested nature of federal relations after the Civil War. At one extreme, radical Democrats favored a nation of independent states; at the other, zealous Republicans preferred a national empire.  

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1Portland Oregon Herald, March 21, 1867 [hereafter cited as Herald].
2For an analysis of these legal theories on the national level, see Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876 [New York, 1985] [hereafter cited as Kaczorowski, Politics of Judicial Interpretation], and idem, "To Begin the Nation Anew: Congress, Citizenship and Civil Rights after the Civil War," American Historical Review 92 (1987), 45-68 [hereafter cited as Kaczorowski,
The writings of two Oregonians fueled this controversy, and their perspectives illustrate the range of ideas regarding federal relations in the postwar years. Matthew P. Deady, a widely known Portland resident and a judge on the Ninth Judicial Circuit, wrote articles for a San Francisco paper and kept up a lively correspondence in which he frequently drew on his belief in the supremacy of the national government. A lesser-known figure in Oregon's history (though he later became governor), Sylvester Pennoyer, voiced his party's belief in states' rights and radical democracy while editing the Oregon Herald, the only statewide newspaper of the Democratic party. From the perspective of the centralized government of the twentieth century, it is easy for the historian to dismiss these editorials, replete as they are with hollow rhetoric and race baiting. In the context of the vital issues of Reconstruction, however, the importance of the underlying states'-rights legal theory stands out, and the editorials become crucial to understanding the state-federal dialogue preoccupying Oregonians in those years.

One of the critical issues of the Reconstruction years—the "money question"—became a battleground for these competing legal theories. Oregonians read daily editorials about the nation's currency and about financing the national debt. The state's courtrooms considered the constitutionality of two Oregon statutes—the Specific Contract Act and the Gold Tax Act—that challenged the Legal Tender Act of 1862. Permeating this controversy was the question of federalism. In Lane County v. Oregon, a case affirming Oregon's right to demand taxes in gold and not greenbacks, the United States Supreme Court mediated between the claims of states' rights and federal centralization. This 1869 decision articulated a new theory of federal relations (termed "dual federalism" by the legal historian Edward Corwin), in which the Court ruled that state and

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In the early 1860s Deady frequently wrote articles for the Bulletin, commenting on Oregon's politics, society, and economy. For many of these, see Deady Scrap Book, Oregon Historical Society, Portland, Oregon [hereafter cited as Deady Scrap Book]. O.C. Pratt to Deady, January 1, 1864, Matthew P. Deady Papers, Oregon Historical Society [hereafter cited as Deady Papers].

Oregon Laws, 1845-1864, 888-89; 915.
nation were independent and sovereign in their own spheres and that neither could infringe upon the powers essential to the other's independent sovereignty. It was Pennoyer's states'-rights position that the Court incorporated into its decision; his views that prevailed over Deady's vision of a consolidated government.

MATTHEW P. DEADY AND SYLVESTER PENNOYER: AN EDITORIAL DEBATE

The stage for the debate over states' rights and federal centralization was set when Oregon's political parties realigned during the Civil War. In the following years, the state's political balance shifted dramatically. Democrats, who had labored under the shadow of the Union-Republican party for six years, won an unprecedented majority of the state legislature in 1868. Following this sudden reversal, in editorials as well as legislation, they defended their principles of strictly limiting the national government to that expressly written in the United States Constitution. Meanwhile Republicans supported an enlarged federal government fostered by the war and Radical Reconstruction.

The renewed vigor of the Democratic party energized both the debate over federalism and the writing of Sylvester Pennoyer, who in December 1868 became editor of the Oregon

5Lane County v. Oregon, 74 U.S. 71 (1869), decided in the December term of 1868 [hereafter cited as Lane County v. Oregon]; Benedict, “Preserving Federalism,” supra note 2 at 41-42.


Across the rest of the nation, Civil War voting patterns were established in the 1850s. Oregon, settled by many Southern Democrats, lagged behind the rest of the country and realigned in 1862. See Joel H. Silbey, A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868 [New York, 1977], 175, 233 [hereafter cited as Silbey, Respectable Minority]; see also Jean H. Baker, Affairs of Party: Political Culture of Northern Democrats in the Mid-Nineteenth Century [Ithaca, New York, 1983] [hereafter cited as Baker, Affairs of Party].
The newspaper's editorial policy mirrored Pennoyer's own political sympathies. On the first day of circulation, the paper promised to uphold the principles of the Democratic party; to construct the Constitution strictly; to work against the enfranchisement of negroes, Chinese, and Indians; and to espouse Jefferson's and Jackson's view that "each state has the right to exercise all the powers of sovereignty, except such as have been delegated by them to the Federal Government." This was the embodiment of the party's principles across the nation. The party believed in a limited narrow constitutionalism that delegated specifically expressed powers to the national government and reserved all other rights for the states and the people. Furthermore, most Democrats opposed government interference in the economy and in the lives of citizens. Their laissez-faire approach to the Constitution led them to denounce congressional economic measures, such as the printing of greenbacks and establishing a national banking system, as well as to condemn amendments that would expand federal involvement in citizenship and suffrage rights. They argued that amendments like the Fourteenth and Fifteenth destroyed the balance of power essential to a sound, republican government.8

An editorial Pennoyer wrote in 1869 illuminates his Democratic ideology and his position in the debate over the balance of state and national governments. On June 12 that year, he quoted liberally from an earlier article in the San Francisco Evening Bulletin written by Judge Matthew Deady. In 1865 Deady had published an account of Oregon's ratification of the Thirteenth Amendment abolishing slavery. For Pennoyer's purposes, the passage of four years had not diminished the strength and significance of Deady's remarks.9

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7 As a frequent writer for the Albany Democrat and the Albany Inquirer, Pennoyer established himself as a Southern sympathizer and states'-rights Democrat, according to the Herald, December 1, 1868.


8 Herald, March 17, 1866; Silbey, Respectable Minority, supra note 6 at 5-31, 63-87; Edward L. Gamblill, Conservative Ordeal, Northern Democrats and Reconstruction, 1865-1868 (Ames, Iowa, 1981), 7-8; see also Baker, Affairs of Party, supra note 6.

9 See Deady Scrap Book, supra note 3; on Deady's life, see Matthew P. Deady, Pharisee Among Philistines: The Diary of Judge Matthew P. Deady, 1871-1892, ed. Malcolm Clark, Jr. (Portland, Oreg., 1975), xxxi-xxxvii [hereafter cited as Deady, Pharisee Among Philistines]; and Ralph James Mooney, "Matthew
Under the headline "The Constitutional Amendment," Deady discussed the importance of the Thirteenth Amendment in the postwar years. The first eleven amendments, he wrote, "were all restraints and limitations upon the power of the national government... They were the fruits and trophies of state rights triumphs—an ebb towards the weaker confederacy among stronger sovereignties... And now the tide turns, and we have again a flow of power to the centre [sic]. The National Government is granted additional power, and a new subject placed within its jurisdiction and withdrawn from that of the states."10

Deady welcomed the shift toward a powerful central government: "If we continue to grow in material greatness at the rate of the past, it is not improbable that by the middle of the two thousandth century, all legislative power will have been absorbed in the national government, and the States will have become only administrative departments of the empire." He predicted that the central ideological issue of the nation's next two hundred years would be this centralization, or "separation into many independent states." While he could see advantages and disadvantages to both, he concluded that "all experience points to the empire as the most preferable of the two."11


11Deady once wrote to J.W. Nesmith: "I am and always was a Federalist and have always believed in Hamilton's doctrines of a strong consolidated government." Nesmith to Deady [quoting Deady's previous letter], July 1869, Deady Papers, supra note 3; Bulletin, December 19, 1865, Deady Scrap Book, supra note 3 at 153; see also David Montgomery, Beyond Equality: Labor and the Radical Republicans, 1862-1872 [New York, 1967], 72-89 [hereafter cited as Montgomery, Beyond Equality]. Deady elaborated on his political philosophy in his autobiography prepared for Hubert Howe Bancroft. As a federalist, he was "a believer in the doctrine that the constitution created a government for a nation, supreme in its sphere, and the ultimate judge of its own powers, and not a mere compact between independent or sovereign states to be terminated at the will and pleasure of either of them." Bancroft, "History of the Life of Matthew P. Deady: A Character Study," in Chronicles of the Builders of the Commonwealth (San Francisco, 1890), 651.
Other Oregon leaders supported Deady's views. Jesse Applegate, who was active in Oregon's provisional and territorial governments before retiring to his farm, praised the judge's article; he believed that national consolidation was inevitable. The country would have another bloody war, he wrote, if the "states continue to be supreme over suffrage and other legislation touching life, liberty and property." In a subsequent letter he called the abridgment of states' rights a "present necessity." In less than fifty years, he predicted, the nation would have "a code of laws, and the qualification of a voter common to the whole union."\footnote{Applegate to Deady, February 10, 1866, April 15, 1866, Deady Papers, supra note 3; for the background of the Fifteenth Amendment and voting rights of blacks in Oregon, see McLagan, \textit{Peculiar Paradise}, supra note 9 at 71; Mooney, "Matthew Deady," supra note 9 at 572-73.}

Between the publication of Deady's \textit{Bulletin} article and Pennoyer's editorial four years later, the United States ratified the Thirteenth and Fourteenth amendments and the Democratic majority of the 1868 legislature rescinded Oregon's support of the Fourteenth Amendment.\footnote{The \textit{Oregonian} dubbed the 1868 legislature with its Democratic majority the "Ku Klux" in an editorial on October 14, 1868, as quoted in Johannsen, "Legislature of 1868," supra note 6 at 4.}

Pennoyer defended his own vision of the Constitution in an editorial. He quoted Deady extensively before declaring: "If a change must come let us by all means have independent states instead of imperial despotism. . . . We would rather be the citizen of a Republic than a citizen of a despotism whose rule extended to all climes." No one could deny, he continued, "the well established fact that our dual form of government on this continent has outlived its integrity. It did well so long as the masses were uncorrupted and restraints of the Constitution were respected. But those restraints are now entirely ignored by the Federal government, which is gradually absorbing power and imposing additional and excessive burdens."\footnote{\textit{Herald}, June 12, 1869.} In other words, the federal government had to be restrained and states' rights restored.

Pennoyer believed the Constitution articulated a delicate distribution of power between the legislative, executive, and judicial branches as well as a precise balance between state and federal authorities. Any unconstitutional exercise of power would disrupt this equilibrium and sink the country into anarchy or despotism. In 1868 it was Congress that posed the threat: an unchecked branch jeopardizing the entire system by trespassing on states' rights. This strict construction of the
Constitution formed the basis of Pennoyer's legal theory and surfaced throughout his critical editorials on Radical Reconstruction.

Integral to Pennoyer's legal theory was a limited constitutionalism borrowed from republican political ideology that harkened back to seventeenth- and eighteenth-century English republicanism. Democrats during and after the Civil War combined strains of republican ideology with their laissez-faire political theory. These additions included a suspicion of encroaching federal power, a fear of conspiracy and corruption, a demand for self-government under a limited Constitution as the only truly republican form of government; and a hope that the Democrats' ascent to power would regenerate society. Pennoyer himself used republicanism to distinguish his party and beliefs from the opposing Republican party. The purpose of the war, he maintained, was to keep the Union, not to redesign it. He upbraided the federal government for usurping state powers: "The states have certain rights," he wrote, "which they should guard with a jealous care, for in the preservation of these rights consists the protection of the personal rights of individual citizens." The state, in other words, was closer to the people and republican self-government than the power-hungry Congress. Pennoyer charged the Radical Republicans of aggrandizing their power, ignoring the values of equality, virtue, and the Constitution. They governed the country, he accused, by "bayonet and federal purse," corrupting its people with immoral luxury.

The gulf separating Pennoyer's and Deady's constitutional ideology also influenced their relationship. Pennoyer had difficulty complimenting the judge in print, while Deady called Pennoyer "Pilvester Annoyer" in his diary. In "passing jest," Deady once remarked to Pennoyer after the Fourteenth Amendment became law: "well Pennoyer your sister can marry a 'nigger' or hire a Chinaman now, which ever she pleases."


16Herald, February 8, 1869.

17Herald, January 20, 26, 1869.

18Herald, April 18, 1869; Deady, Pharisee Among Philistines, supra note 9 at 2:551; Deady to Nesmith, July 2, 1869, James W. Nesmith Papers, Oregon Historical Society.
Aside from this personal animosity, the Deady and Pennoyer editorials illuminate the ideas regarding federal relations in the late 1860s. In a world without a balanced state-federal structure, Pennoyer would choose a nation of independent states while Deady preferred consolidation. Not until the Supreme Court delineated the theory of dual federalism in a case regarding Oregon's right to levy taxes in gold would Oregonians have an alternative to these two extremes.

THE CURRENCY QUESTION AND POLITICAL ECONOMY

To finance the Civil War, Congress issued nearly $450 million of treasury notes to be used as legal tender for all transactions with the federal government (including taxes) and for debts between private individuals. These greenbacks, as people called them, could not be redeemed for gold at a bank. (The entire country had gone off the gold standard in 1861, when banks suspended specie payments.) The Legal Tender acts were part of a national monetary plan that included the establishment of a national banking system to facilitate the sale of bonds and an income tax for revenue.9

Reactions to the Legal Tender Act depended not only on regional concerns, but also on political ideology and self-interest. Underlying the entire controversy, however, was an understanding of the Constitution and the monetary power of Congress. The Constitution prohibited the states from coining money, regulating its value, emitting bills of credit, or making anything but gold and silver legal tender; it allowed Congress to coin money, regulate its value, and punish counterfeitters. However, it was the implied powers of Congress that Oregonians debated, including the right to charter banks; to issue bills

of credit (fiat money that did not bear interest); and to make paper money legal tender.  

In the western states, especially California and Oregon, most merchants and bankers loathed greenbacks. Oregonians traditionally used gold and silver coins, rather than bank notes and checks, in business transactions. San Francisco and Portland merchants especially despised the paper money when its value fluctuated below that of gold. The Democrat and former editor and publisher of the Oregon Statesman Asahel Bush, then a banker living in Salem, represented the sentiments of his class: “I was educated with some wholesome prejudices against paper money. . . . [The government’s] attempt to keep them [greenbacks] at par is a failure. . . . The certainty of the country being directly flooded with them has destroyed confidence in them.”

Oregon Democrats brought up on Jacksonian democracy distrusted the new paper money as much as the self-interested merchants and bankers did. As one of these Democrats, Pennoyer was a hard-money man throughout the war, harboring a penchant for gold and a grudge against national banks. After the war he supported the treasury’s policy of shrinking the supply of greenbacks to bring the paper to par with gold. This was the quickest way back to the gold standard. Pennoyer’s belief in limited constitutionalism led him to conclude that the Legal Tender Act of 1862 was invalid. Under the coining power, he believed, the Constitution did not expressly enumerate the

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20Hurst provides an extensive history of how Congress exercised its delegated and implied monetary powers throughout the nineteenth century in Legal History of Money, supra note 19 at 134-74; see also Dam, “Legal Tender Acts,” supra note 19 at 382-90.


Nugent states that the people on the West Coast were bullionists, demanding a speedy resumption of specie payment and free trade, but, as the following discussion makes clear, even within regions a variety of attitudes existed. Idem, Money and American Society, supra note 19 at 34-60; Sharkey, Money, Class and Party, supra note 19; Unger, Greenback Era, supra note 19.
right of Congress to make anything but gold and silver legal tender. In particular, it did not include the implied powers of printing paper money and chartering a national bank. Pennoyer's critique of the Legal Tender Act fitted perfectly into his party's theory of political economy. Democrats were suspicious of federal intervention in the economy: a high protective tariff, the Legal Tender Act, and the national bank all violated their laissez-faire approach to the economy. Pennoyer preferred a competitive free market without monopolies and the federal government's meddling.\textsuperscript{22}

But he did not remain a bullionist. He had supported the treasury's contraction policy in the hopes that the country would resume specie payments quickly and pay off the unwieldy national debt. By 1869 his views regarding money began to shift at the same time that the federal policy of contracting the money supply began to take its toll on the economy. In the capital-scarce Northwest, money was growing tighter. In 1868 Oregon Democrats had supported the use of greenbacks to pay the interest on the national debt, hoping that this would reduce economic distress and keep more gold circulating in the West.\textsuperscript{23}

As money became scarcer, inflationary schemes multiplied across the nation. One of the more conservative plans, devised by Ohio's governor, George Pendleton, quickly won the support of many Democrats. In February 1869, Pennoyer came out for Pendleton's "Ohio Plan." Pendleton wanted the government to stop paying interest on bonds and to use the nation's revenue to liquidate the principal. In addition, the bonds that did not guarantee payment in gold were to be paid off in greenbacks. [This was not what bondholders had bargained for when they bought their bonds with depreciated paper money; they anticipated interest payments in gold for many years to come.] The inflationary aspect of the plan included sufficient currency for

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\textsuperscript{22}Pennoyer's attitude toward greenbacks and banks owed a large debt to Andrew Jackson's war on the bank. Jackson denied that Congress had any authority to create paper money or to delegate the creation of currency to a private corporation. "Jackson's Veto of the Bank Bill, July 10, 1832," in Henry Steele Commager, ed., \textit{Documents of American History}, 5th ed. (New York, 1949), 270; Hurst, \textit{Legal History of Money}, supra note 19 at 150. Pennoyer also disliked paper money because it encouraged inflation, speculation, and wildcat banking; see \textit{Herald}, March 25, 1869. Unfortunately it is difficult to guess what Pennoyer's self-interest might have been, given the lack of information regarding his lumber business and real-estate holdings. On the Democrats' political economy, see Gambill, \textit{Conservative Ordeal}, supra note 8 at 7-8; Baker, \textit{Affairs of Party}, supra note 6 at 153.

\textsuperscript{23}\textit{Herald}, March 30, 1869; December 9, 1868. At the 1868 state convention the Democratic party adopted greenbackism, using the delicate language of "equitable adjustment." See \textit{Herald}, December 22, 1868; January 17, 1869; March 25, 1869; May 7, 21, 22, 1869; June 5, 1869.
business interests. The Ohio governor, in Pennoyer's words, "placed himself [on] the lists as the champion of the great laboring and taxpaying-class against the soulless, selfish bank owners and bondholders who have engineered the legislation of this country . . . to the enrichment of themselves . . . and the almost complete paralysis of the maritime and commercial prosperity of the country." For Pennoyer, this plan would help the government "close up the vilest system of favoritism and legalized swindling ever known in any country—the National
Banking System.” It would also reduce the “white slavery to taxation” and help recirculate money to the West.24

Pennoyer’s support for Pendleton and soft money was not a complete break from his past. The historian Robert Sharkey has found that many western Democrats—including Pendleton—moved from gold toward soft money in the late 1860s. Underlying both positions, according to Sharkey, was a fundamental distrust of banks, bankers, and bank notes. In 1869 Pennoyer added another culprit to this litany of evils: bondholders. Contraction had made the economic distress so severe in the West that many Democrats felt forced to accept greenbackism—while still holding on to their belief that paper money and the national banking system were illegitimate and unconstitutional.25

The mixed feelings with which Oregonians regarded paper money and federalism may also be seen in the controversy over the Specific Contract and Gold Tax acts passed by Oregon lawmakers in 1864. Following the lead of California, the legislature passed an act requiring courts to guarantee repayment of a debt according to the contract’s specific provisions, which typically required payment in gold. The Specific Contract Act protected creditors by keeping debtors from repaying with depreciated greenbacks. Formalizing a prevalent Western

24Herald, December 22, 1968; January 17, 1869; see also Unger, Greenback Era, supra note 19 at 17, 74. For a history of the financial policies that led Pendleton and other Democrats to support greenbackism, see Sharkey, Money, Class and Politics, supra note 19 at 58-79, 83-109, and Gambill, Conservative Ordeal, supra note 8 at 96-104, 123-42, on the various soft-money proposals, see Chester MacArthur Destler, American Radicalism: 1865-1901, Essays and Documents [New London, Conn., 1946]; Montgomery, Beyond Equality, supra note 11 at 87.

25Sharkey, Money, Class and Politics, supra note 19 at 105-7. Conservative Oregonians like Deady also supported the secretary of treasury’s policy of contraction, for quite different reasons from Pennoyer’s: they wanted to fund the national debt fully. Any mention of repudiation infuriated them, and they tagged their opponents “repudiators” when the 1868 Democratic convention demanded a quick liquidation of the national debt. Bondholders, especially, wanted their principal and interest paid in gold and not taxed. Jay Cooke to Henry W. Corbett, December 17, 1869, Henry Winslow Corbett Papers, Oregon Historical Society; Montgomery, Beyond Equality, supra note 11 at 87.

Corbett himself thought the Democrats’ “infamous platform” of 1868 increased Republican chances at the polls. Corbett to Deady, April 18, 1870, Deady Papers, supra note 3. The Oregonian also denounced the Democrats’ cries for repudiation; May 11, 18, and March 26, 1870. The newspaper’s editor, Harvey W. Scott, fought for “sound money” and the payment of government debts and interest in gold throughout his editorial career; see Leslie M. Scott, “Review of Mr. Scott’s Writings on His Favorite and Most Important Subjects,” Quarterly of the Oregon Historical Society 14 [1913], 140-210.
business practice, gold-clause contracts that had been in use in the West since 1862 were now enforceable in court. 26

Not all Oregonians endorsed the Specific Contract Act, however. Many questioned its legality and loyalty to the national government. When the Oregon legislature debated the bill in October 1864, dispatches from the secretary of the treasury stated that the California gold law was "against national policy." Oregon Representative J. Quinn Thornton of Benton County called the contract law "dissloyal in its principle, pernicious in its tendency and dangerous as a precedent." In a plea to the House and the people of Oregon, he wrote: "If any state can legislate as Oregon and California have legislated; then all states might have so legislated, and thus have totally destroyed the credit of the . . . government" and the war effort. This bill committed Oregon, he argued, "to the pestilent doctrines of state's rights . . . and brings the state in direct antagonism with the general government since it practically annuls the law of Congress." Despite Thornton's earnest defense of the Legal Tender Act, the legislature passed the specific contract law at the behest of bankers and merchants. 27

Thornton and others like him thought the act diminished the power and prestige of the national government. Many also suspected the act's constitutionality. Deady was convinced that the Supreme Court of California would void the state's specific contract law: "It is on a par with the personal liberty bills, the usual style of Yankee nullification, in disguise." 28 His broad reading of the Constitution and the implied powers of Congress led him to view the Legal Tender Act as constitu-

26Gilbert and Ellison both attributed the passage of the act to Oregonians' inexperience with paper money. Given the immense trade with San Francisco merchants, Portland merchants might also have felt pressure from California. Ellison, "Currency Question," supra note 21 at 39-45; Gilbert, Trade and Currency, supra note 21 at 112-15.

Oregon courts had already upheld gold-clause contracts, but the act's passage provided more security and ensured that these agreements would become even more common. Ibid., 113-14. The U.S. Supreme Court upheld California's 1863 specific contract law: Bronson v. Rodes (1869), Trebillock v. Wilson (1872); see also Ellison, "Currency Question," supra note 21 at 42. See also Gordon M. Bakken, "Law and Legal Tender in California and the West," Southern California Quarterly 62 (Fall 1980), 239-59.

27Salmon P. Chase and Hugh McCullogh [sic], The Specific Contract Law, Also Address to the People by J. Quinn Thornton," pamphlet, [[Salem?]]. Oregon, [1865?]], 7. Partisan newspapers across the state echoed Thornton's concerns about the patriotism and loyalty of the Specific Contract Act; see Ellison, "Currency Question," supra note 21 at 41-43.

28Deady to Bush, March 5, 1864, Asahel Bush Papers, Oregon Historical Society.
tional. The thought that private individuals could contract out of this congressional mandate annoyed him. Additionally, he did not think that the state could pass a law that violated a congressional act. He backed the national government’s efforts to fight the war with greenbacks and a national bank. The war powers of Congress made these measures constitutional. For Deady, the federal government had the power to dictate a financial system that the states could not nullify by sanctifying private gold contracts.

In contrast, Pennoyer praised the specific contract law. He believed that the states had given up their right to declare what was legal tender at the 1787 Constitutional Convention. But, he noted, this was the only restriction on the rights of Oregon. More importantly, the Constitution did not enumerate the right of Congress to make anything but gold and silver legal tender. For Pennoyer, the war-powers rationale did not apply to an illegitimate war and certainly did not apply after the emergency had ended. He preferred that Oregon’s legislature solve its own currency problem, since its representatives were closer to the people and the regional economy. Control of the money supply by Congress and the treasury ignored local conditions and regional differences and infringed upon the rights of the states.

Oregonians saw the Legal Tender Act and the specific contract statute through many different lenses: self-interest, public policy, regional bias, and political and legal ideology all contributed to their perspectives. Historians of the money question have analyzed all these facets, with the exception of how attitudes about federalism influenced the debate. Federalism was central to the way Oregonians framed the money question. Those espousing Republican views, Deady among them, championed the national banking system and a centralized government managing the money supply. Pennoyer, on the

29Orville C. Pratt, former associate justice of the Oregon Territory and later a judge in the San Francisco district court, agreed with Deady: “Our [Californian] specific contract law of last winter is an evasion of the Act of Congress . . . and as a consequence is in violation of it.” Pratt to Deady, January 1, 1864, Deady Papers, supra note 3; Bulletin, May 9, 1864, Deady Scrap Book, supra note 3 at 36.

30In terms of self-interest, Deady preferred the universal use of greenbacks; he received his own federal salary in paper money, which merchants discounted heavily. Deady to Ebert, March 13, 1856 [1865?], Deady Papers, supra note 3.

31Herald, January 10, 1869; for the various Democratic attitudes toward the Civil War and Republican policies, see Silbey, Respectable Minority, supra note 6 at 63-114.
other hand, joined Democrats in endorsing the specific contract law and other state measures to regulate the economy.32

LANE COUNTY v. OREGON AND THE EMERGENCE OF DUAL FEDERALISM

After the passage of the Legal Tender Act in 1862, William S. Ladd, a prominent Oregon banker, observed that on the matter of collecting and paying state taxes, "The question might arise in what [form] can the tax payer pay his taxes to the sheriff. . . . If notes are made 'legal tender' for debts would the sheriff [be] compelled to [use] them in payment for taxes?" Ladd recognized that the act called into question the state's established practices. Before 1862, Oregonians had paid all state taxes in gold and silver. Once greenbacks became legal tender, matters were less clear. Ladd recommended that the legislature amend the state code "to make it plain and distinct" that taxes must be paid in gold and silver coins. Despite this attempt to preclude litigation, several counties paid state taxes with greenbacks and had to go to court. In the same legislative session that passed the specific contract law, Oregon lawmakers adopted a bill requiring the collection and payment of state taxes in hard money.33

As with the specific contract law, Oregonians couched their debate over the Gold Tax Act in terms of national loyalty and centralization on the one side and states' rights on the other. Deady and Pennoyer again took to the newspapers. Deady considered that the legislature should respect the Legal Tender Act. Instead, it had acted in a spirit of "narrow minded selfishness," passing the Gold Tax Act "as if the state of Oregon were an isolated community." He believed that "the Law of Congress, as the Constitution of the United States decrees, is the Supreme law of the land, any state law or constitution to the contrary, notwithstanding. No legislation of the state of Oregon can add or impair the effect of this law. It is a law, independent

32Hurst discounts the importance of federalism and state-federal conflict, arguing that state action was severely limited by the Constitution. He also notes that on a practical level the state could do little, since the national economy became more interdependent after the Civil War. Idem, Legal History of Money, supra note 19 at 176. See also Sharkey, Money. Class and Politics, supra note 19 at 197; Unger, Greenback Era, supra note 19 at 76.

33See Ellison, "Currency Question," supra note 21 at 45; as an official of the Ladd and Tilton Bank, William Ladd endorsed the specific contract law and Gold Tax Act. Ladd to Deady, October 7, 1862, October 7, 1864, Deady Papers, supra note 3; see also Burrell, Gold in the Woodpile, supra note 21 at 41-91.
of the state and by virtue of the supreme power that made it." He concluded that the legislature had exhibited an “unnatural attitude of seminullification” in passing the act.34

Strong-headed Republicans agreed. James A. Ebert, a Willamette Valley hog farmer, found that the Gold Tax Act led the nation down a slippery path: “If one state has the right to demand gold coin for taxes, you must admit that every state has the same right.” He abhorred the thought “that our state passed nullification laws at the last session as much as South Carolina done in the days of Calhoun [sic],” and asked: “Does not an American citizen owe his first allegiance to the government of the United States and then to his own state? If that be the case then has not our state legislators threwed off that allegiance and repudiated the laws of the states [sic].” Deady joined Republican loyalists in upholding the constitutionality of the Legal Tender Act.35

Pennoyer rebutted the Republican cries for national supremacy with his states'-rights federalism. He believed that the Constitution did not expressly allow the printing of greenbacks. The document only restricted the states' right to coin legal tender. This could not stop the state from making foreign coin used for paying debts or taxes. The state could establish where, when, and in what form taxes would be paid.36

Immediately after passage of the Gold Tax Act, several Lane County citizens paid their county taxes in greenbacks, which the county in turn paid to the state. The state filed a complaint against Lane County to recover the amount of money due in gold. The county answered that it had already paid in lawful United States notes. On appeal, Oregon Supreme Court judges had to decide between the state’s right to demand taxes paid in gold coin and the congressional right to make paper money legal tender.37

34Ellison recounts the partisan newspaper editorials deriding the “treasonous” tax law. Republican editors claimed that it nullified the national currency act, while other editors pointed to the state power to tax and asked what was disloyal about exercising a sovereign right. Idem, “Currency Question,” supra note 21 at 45-47. Bulletin, May 9, 1864, Deady Scrap Book, supra note 3 at 36, 40.
35Ebert to Deady, March 25, 1865, Deady Papers, supra note 3. Though never a public servant, Ebert was an enthusiastic Republican. A.G. Walling, Illustrated History of Lane County, Oregon (Portland, 1884), 502; idem, Portrait and Biographical Record of the Willamette Valley (Chicago, 1903), 1406.
36Herald, January 10, 1869.
37Whiteaker v. Haley, 2 Oregon 128 (1865) 131 [hereafter cited as Whiteaker v. Haley]. The politics of this case were possibly more confusing than the legal issue. Pennoyer condemned bankers, banknotes, and bondholders and upheld the state’s right to endorse specific contracts and taxes paid in coin, while his
In *Whiteaker v. Haley*, Justice Joseph G. Wilson affirmed the Gold Tax Act. Since the Constitution did not expressly give Congress power over state taxes, and did not expressly prohibit the states from taxing, Wilson reasoned that the power to tax belonged to the states. He quoted Alexander Hamilton, known for "his liberal construction of Constitutional power," and for "carrying federal authority to its utmost limit," on the extent and power of the state and national governments regarding taxation. Under the federal Constitution, wrote Wilson, quoting again, the individual states "retain an independent and uncontrollable authority to raise revenue to any extent . . . by every kind of taxation except duties on imports and exports." According to Wilson, "revenue is the life of the state and for Congress to say when and where and in what matter it must be laid and collected, in other words, to say when it should breathe, would be giving Congress the sole power of life and death over a state. . . . Interference . . . would as effectively take away state independence as it would to wholly deny the right."39

Lane County hired the Radical Republican and former Senator George H. Williams to appeal Wilson's decision. Before the United States Supreme Court, Williams stressed a nationalist view of the Constitution and the congressional power to pass the Legal Tender Act. He asserted that Congress had an exclusive power to determine the kind of "money" used in the United States. By enacting the Legal Tender Act, he argued, Congress compelled every citizen to receive legal tender. "In addition citizens have a corresponding right to pay it out as money, which right is beyond the reach of state legislation." Oregon's requirement to pay taxes in gold gave the state an "absolute power over the property of citizens to be exercised
under the guise of taxation." He concluded that "When a law of Congress makes treasury notes lawful money of the United States, each citizen has, by virtue of that law, a right higher than state authority to pay all claims and demands against him, whether by state or individuals with the lawful money." In terms of public policy, Williams reminded the justices that the state legislation "clearly contravenes the financial policy of the government." Echoing the concerns of Ebert and Deady, he asked the bench what would happen if New York and other states passed such a law: the act of Congress, he concluded, would be "practically nullified." 40

Williams's final argument defended the congressional power to pass the Legal Tender Act under the constitutional provision to borrow money on the credit of the United States. The justice noted that

"many implied powers as great [as] and more doubtful than the one in question have been exercised by Congress, such as laying an embargo, acquiring foreign territory, establishing a national bank, and these have been sanctioned ... upon the ground so clearly laid down by Chief Justice Marshall in McCulloch v. Maryland that 'it is the right of the legislature to exercise its best judgement in the selection of measures to carry into execution the Constitutional power of the government.' " 41

The attorney for Oregon, Rufus Mallory, retorted that even if Congress had intended these notes as payment for state taxes, the Constitution did not permit it. The right of the state to a distinct form of organization, he stated, "necessarily carries with it the right to support and maintain that organization without congressional permission or congressional dictation." The state could choose its officers, provide a salary, and furnish the means of paying salaries. Without constitutional safeguards, Congress might "take control of all. If it has the power to say in what the tax of the state shall be paid, it has the power to say how much, by, and to whom it shall be paid." To give Congress that power would "place the states entirely at the mercy of that body for existence." Mallory concluded that


41Williams, Lane v. Oregon, Brief for Plaintiff in Error, supra note 40 at 17.
“to deny this power to the state and vest it in Congress [was] the utter annihilation of all State sovereignty and a consolidation of the Government” into an empire. Finally, in a hurried rejoinder to Williams’s defense of the Legal Tender Act, he denied that Congress had the power to pass it, briefly citing several speeches, letters and the 1787 Constitutional Convention proceedings to support his position.42

The attorneys’ arguments presented the Supreme Court justices with the choice between Mallory’s states’ rights or Williams’s nationalist legal theory. But the Court, through Chief Justice Samuel P. Chase, forged a new theory of federalism cut from the cloth of both arguments. Chase understood the key question to be the relationship between the state and national government. “The people of the United States,” he wrote, “constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the States in union there could be no such political body as the United States.”43 Chase described the “ample power” of the national government under the 1787 Constitution, but “in many articles of the Constitution,” he noted, “the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left, to them and to the people all powers not expressly delegated to the national government are reserved.” Each government had “different powers,” he declared, “designated for different purposes.”44

Though the Constitution “gave the power to tax, both directly and indirectly, to the national government,” the states retained a “concurrent power” that was essential to the state’s existence. “In respect, . . . to property, business and persons,” Chase continued, “within their [the states’] respective limits, their power of taxation remained and remains entire.” This power was absolute, unless both nation and state claimed to tax the same subject. In such cases “the United States, as the Supreme authority, must be preferred.” In all other cases, nothing could restrain the state’s taxing power except

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42Rufus Mallory, County of Lane v. State of Oregon, Brief for the Defendant in Error, Records and Briefs of the Supreme Court of the United States, No. 5, [n.d.], 9, 10.
43Lane County v. Oregon, supra note 5 at 76.
44Ibid.
the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress.  

In his decision Chase identified an inherent power of the state that he deemed essential to the sovereignty of the state: the power to tax. He wrote, "To the existence of the states, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government." He could not see "upon what principle the national legislation can interfere with the exercises of this power, original in the States, and never as yet surrendered." Thus the Legal Tender Act could not have been intended to infringe on the indispensable state taxing power. The Court, then, affirmed the Oregon Supreme Court's decision in favor of the Gold Tax Act.

In his vigorous description of the separate and distinct spheres and powers of the national and state government, Chase articulated a new theory of federal relations. The Court preserved what it considered essential to the functioning and sovereignty of each government. Since taxation was indispensable to the sovereignty of the state, and necessary for its survival, Congress had to be restrained. According to the Court's reasoning, there was an inherent limit on one government if it infringed on the sovereignty of the other. Another way to understand how the Court's federalism differed from the political discourse of Oregonians is to look at what the Court did not say. It did not affirm the doctrine of states' rights and declare the Legal Tender Act unconstitutional. Nor did it declare the Gold Tax Act invalid for impairing the supremacy of the national government and its Legal Tender Act. Instead, the Court said that both the state and the nation had separate and co-equal spheres with defined powers, essential to sovereignty. In *Lane County v. Oregon*, the Court used this new legal theory to define an inherent limitation on Congress; it could not interfere with a state's sovereign right to tax.

45Ibid. at 77.
46Ibid. at 76.
47Ibid. at 77.
The decision marked the first of several cases after the war in which the Court grappled with the complexity of the state-federal balance. In each case the Court quoted *Lane County* extensively. Taken together, these cases formalized the doctrine of dual federalism. The Court carefully defined a legal theory that mediated between these two competing demands in Oregon. In the words of Justice Samuel Nelson, the "state and general governments are separate and distinct sovereignties acting separately and independently of each other, within their respective sphere." When the two entities clashed, the Court decided the controversy by identifying which powers were essential to sovereignty.

During the Civil War and its immediate aftermath, federal judges employed a revolutionary theory of federal relations, based on a strong national government. Federal courts aggressively enlarged the central government's role in protecting the lives and civil rights of citizens, especially the freed blacks and white Republicans in the South. But, as has been shown, the expansive legal theory that federal courts had used before 1869 fell out of favor in the 1870s. The Supreme Court sacrificed the nationalist approach in favor of a theory that upheld both national and state laws it considered essential to the sovereignty and independent existence of each. *Lane County* was the earliest decision marking this new constitutional theory. Though generally unrecognized by legal historians, the case served as an important precedent. The Court decided *Lane County* before touching the politically heated question of the constitutionality of the Legal Tender Act and Reconstruction

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48 *Texas v. White*, 74 U.S. 700 (1869), was decided in the same term as *Lane County*. In this Reconstruction case, the Court wrote that "the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union." It was the Court's role to maintain the "indestructible Union composed of indestructible states." For other decisions that used dual federalism reasoning, see *Veazie Bank v. Fenno*, 75 U.S. 533 (1869) [hereafter cited as *Veazie Bank v. Fenno*]; *Hepburn v. Griswold*, 75 U.S. 603 (1869); *Collector v. Day*, 78 U.S. 113 (1870) [hereafter cited as *Collector v. Day*].

49 *Collector v. Day*, supra note 47 at 124.

50 Given the disagreements over paper money, it was not surprising that *Lane County* was only one of many paper-money controversies the Court decided. *Veazie Bank v. Fenno* [supra note 47] challenged the congressional act of 1865 that levied a ten percent tax on all bank notes printed by state banks. The act effectively taxed state bank notes out of existence, making the green U.S. Treasury notes dominant. The Court did admit that the ten percent tax infringed on the state's power to charter corporations, but nevertheless upheld the tax. *Veazie Bank v. Fenno*, supra note 47 at 541.

51 Kaczorowski, *Politics of Judicial Interpretation*, supra note 2 at xi-xiii, 173-226; see also idem, "To Begin the Nation Anew," supra note 2.
issues. This article argues that, although the facts of the Oregon case and its outcome appeared to be a neutral controversy in which to enunciate a new legal theory, political and ideological concerns permeated both sides of the conflict. For Oregonians like Deady and Pennoyer, at stake were a legal theory and a corresponding theory of political economy founded on completely opposing readings of the Constitution.  

OREGON'S AMBIGUOUS LEGACY

Lane County v. Oregon fixed dual federalism in the center of post-Civil War political thought regarding state and federal relations in Oregon. It was not a decisive victory for either side. The Court's rationale favored neither the states' rights of Pennoyer and his cronies nor Deady's federal centralization. The decision set the contours of the debate over federal structure for the next thirty years. It was an ambiguous legacy. Dual federalism, while mediating between the two theories of federalism, was also malleable. Both Pennoyer and Deady fitted the Court's holding into a different configuration of constitutional theory.

Deady endorsed the decision by carefully distinguishing between taxes and debts. He strictly constructed the Legal Tender Act, which stipulated that debts (and not state taxes) must be paid with greenbacks. He concluded that the 1862 act

in no way [interfered] with or included the subject of the collection and payment of state taxes. . . . So long as any state has the authority to levy taxes within its own limits for its own support, it must necessarily have the power to prescribe the kind and time of payment. It may require them in money generally, in money of a particular kind,—in labor or in the fruits of the earth. If the State of Oregon has required taxes levied by her authority to be paid in coin, in my opinion there is no power on earth to prevent it.  

52 Dam, in his article “Legal Tender Cases,” and Hurst, in The Legal History of Money, focus on the outcomes of decisions, rather than the ideology underlying the Court's reasoning. This leads Dam to ignore Lane County and Hurst to dismiss it. A careful analysis of the language and reasoning of the cases, and not the outcomes, however, illustrates the Court's preoccupation with state-federal relations in both cases. Dam, “Legal Tender Cases,” supra note 19 at 374-76; Hurst, Legal History of Money, supra note 19 at 180, n. 278.

53 Deady to Ebert, March 13, 1856 [1865?], Deady Papers, supra note 3.
For Deady, the case affirmed a narrow state right to determine the form in which taxes were paid. The judge also left open the possibility that a state might be deprived of the authority to levy taxes. To his thinking, a national government with expansive implied powers and few limitations was supreme. In the following decades he relied on his legal theory to limit the state's regulation of the economy.

Pennoyer also adapted the *Lane County* ruling into his states'-rights jurisprudence. He read Chief Justice Chase's reasoning broadly: A national government for national purposes was acceptable, as long as Congress observed its delegated powers. Implied powers of Congress still had no place in Pennoyer's jurisprudence. *Lane County*, in other words, left plenty of room for the state to exercise all of its reserved powers.

After the Civil War, Republicans and Democrats fought vehemently over the federal issues arising from the money question. For Oregonians like Pennoyer, it was not a foregone conclusion that the federal government would win the contest. Many Oregonians did not relish Hamilton's consolidated government, as Deady did. Democrats of the Jacksonian school believed that a states'-rights ideology was essential. Pennoyer's editorials offered a counterpoint to Deady's Republican centralization. By 1892, when Pennoyer joined Oregon Populists seeking to reshape an increasingly troubled political, economic, and social landscape, his insistence on states' rights as a remedy to the state's problems signaled that the controversy between these two ideologies was far from over.

54 Some historians have argued that westerners accepted federal centralization more readily than easterners because of the western states' lengthy territorial history and their dependence on federal subsidies for internal improvements and transportation. However, not all westerners accepted Reconstruction and expansion of the federal government's powers. Berwanger, *West and Reconstruction*, supra note 6 at 214.

Joseph A. Ball (Courtesy Carlsmith, Ball, Wichman, Murray, Case, Mukai, and Ichiki)
Joseph A. Ball: An Oral History

Editor's Note: Joseph Ball's oral history, of which a part is given here, was conducted by interviewers Laurence Jay and Dana Parks on October 19, 1991, and on April 11, 1992. This portion concerns his work as counsel to the President's Commission on the Assassination of President Kennedy. Appointed by Chief Justice Earl Warren, Mr. Ball worked for eight months interviewing witnesses and studying physical evidence to determine who was responsible for the assassination.

Joseph Ball, a leading trial lawyer in California, was born in Stuart, Iowa, in 1902. He is a graduate of Creighton University and the University of Southern California School of Law, and was admitted to the California Bar in 1927.

After working for a year as a deputy district attorney in Long Beach, Mr. Ball entered private practice there. In 1945 he founded the firm of Ball, Hunt, and Hart, and continues as a senior partner in what is now Carlsmith, Ball, Wichman, Murray, Case, Mukai, and Ichiki.

In 1956-57, Mr. Ball served as president of the State Bar of California. Three years later, Chief Justice Warren named him to the advisory committee overseeing the revision of the Federal Rules of Criminal Procedure. Mr. Ball also served six years on the state's Law Revision Commission. He has taught at the University of Southern California and at the National Institute for Trial Advocacy.

Pepperdine University awarded Mr. Ball a doctor of laws degree in 1971, and in 1973 the Los Angeles County Bar Association bestowed on him the Shattuck-Price Award.

Question: Earl Warren also called you again in 1964, I think, for the Commission [on the Assassination of President John F. Kennedy]. Is that how it got started?

Ball: I was at a meeting of the Law Revision Commission in Riverside, and a telephone call came from Washington in which one of the clerks of the Court said that Chief Justice Warren asked me if I could come back there and serve on the staff of the Warren Commission. And without any hesitation I said I could. It was just about a week after the assassination of President Kennedy. I said I could, and I did. I went back there on January 2 and walked in the office of the commission and said, "I'm ready to go to work."
Question: And how long were you back there?
Ball: I was actually back there until August. The report came in September, but I was through with my work the middle of August.

Question: Did you entirely leave practice for that tour?
Ball: Yes, I lived in Washington continuously until July and then went back and forth to Washington in July and August.

Question: Now, what was your function generally, and how was it assigned?
Ball: When I came into the office there was a young man from the attorney general's office, Harold Willens, in there, and two secretaries, and J. Lee Rankin, who was the chief counsel to the commission, and formerly solicitor general during the Eisenhower administration. And Rankin said, "We have divided this investigation into five parts, and you've been assigned to one part, to determine the identity of the assassin." That was the first assignment put out to any of the staff. He said, "You will be joined by a young man from Des Moines, Iowa, named David Belin."

So I went back to my office that was assigned to me then and they wheeled in ten thousand pieces of paper. They had the reports of the FBI, the CIA, the Dallas police department, the Dallas sheriff's department, and all these were packaged up there with a great big "Top Secret" across the top of it. I started to read them, and a week later David Belin came in, and he and I devised a method of coding the information. We didn't have computers in those days. We had to do it all by hand.

Question: I gather you didn't have paralegals, either?
Ball: Right, we didn't have any paralegals. So what we did was, we developed a code. A witness would be assigned a code number, and the subject matter would be assigned a code number. This way the information would be cross-indexed. We worked for a month at this, exhausting all the information. Then we developed a report to the commission recommending methods of investigation we thought were necessary.

The suggested investigation was of two kinds: one, to talk to witnesses who had never been interviewed by these people, these official agencies, and second, to reinterview witnesses who were key witnesses so that we would know we had the exact report. It was a good thing we did because many of the FBI reports were inaccurate.

I was amused in this last week or two, in the Senate investigation of the Supreme Court nominee [Clarence Thomas], to hear the senators state and tell the public audience that an FBI
report did not come to an opinion or define an opinion. It was simply a recitation of facts. Two FBI agents leave in the morning, and they record everything they do that day. Everybody they talk to, they ask them what their opinion is. They put in hearsay, they put in all kinds of evidence, guesses, and speculations. David Belin and I came to the conclusion that an FBI report was like a stream of consciousness. You had to edit it. And when we did examine the witnesses who were reported in there, we found out that a good many times the FBI report was wrong.

Anyway, that was the way we planned our investigation. No one told us what to do. We had that general assignment, the identity of the assassin, and we proceeded to find out who the assassin was from what evidence was available at that time. Down from Philadelphia came a young lawyer named Arlen Specter, who is now the senator from Pennsylvania. He was assigned to investigate the injuries to the President and also to Governor [John B.] Connally. As the three of us had parallel investigations, we worked together as sort of a team on, first, the identity of the assassin and, second, the injury to the president, which might be of some help in determining who was the assassin. We worked together as sort of a three-man team for the next six months.

During this time, Earl Warren was at the commission every morning at 8:00, and he was there until he had to go over to the Court. On days when they had arguments he had to be at Court at 9:30. He would leave, rush over there, put on his robe and go on the bench. Every night he was at the commission at five, reviewing what we had done that day. He was the most attentive of all the commissioners.

Question: So there really was a lot of interface, as we say now, between the commissioners and the staff, or was it more their absorption of the material you were giving them?

Ball: No, the commissioners never contacted the staff. They received all their information from us through writing. The only contact we had with the commission was through Rankin. Rankin was there every day. Norman Redlich, from New York University, who at that time was head of the tax-law review, he sort of became the editor of our report. He was Rankin's assistant. The chief justice, though, talked to us quite often.

I remember, about the middle of February—I'm getting a little ahead of myself. We filed our report with the commission the first of February, asked permission to investigate according to the recommendations. And they gave us approval, but we couldn't go into Dallas because, you'll remember, in February Jack Ruby was on trial for the murder of Lee Harvey Oswald.
And we were told not to come to Dallas because of the fact that we might affect the course of the trial. The verdict in Ruby came in the last of February or the first week in March, and we were in Dallas two days later.

Our investigation in Dallas took place in March, April, and May. But in February we had a hearing before the commission in which we called Marina [Mrs. Lee] Oswald as a witness. And the chief justice was there, and Gerald Ford was there, and Allen Dulles was there. I remember those three were there. When we got through we talked to Earl Warren—Redlich, David Belin, Arlen Specter, and I—and he said, “What do the autopsy surgeons say about the injuries?” And I said, “I don’t know.” And he said, “Why not?” I said, “Because we were told that we were not to interview witnesses before they were examined by the commission or deposed.” He said, “I never heard of such a thing.” I said, “I never did, either.” He said, “Listen, I want you to go out there today and see those autopsy surgeons and find out what they said.”

So Specter and I took a cab and went out to Bethesda [Naval Hospital] and interviewed these surgeons that afternoon. They told us they had taken color pictures, but they had turned those over to Robert Kennedy in the attorney general’s office. We came back, and then we set a date for the hearing for the autopsy surgeons, and they came in and they testified, and Arlen Specter examined them. That was his line of authority.

We went down to Dallas the first week in March. I might say that when I went on the staff they were calling us “senior counsel” and “junior counsel.” There were five senior counsel and five junior counsel and five others, fifteen lawyers altogether. But because of the fact that only two or three of the senior counsel functioned, we abandoned that distinction. Bert [Albert E.] Jenner of Chicago was there regularly every day, very faithful. There was a man from New Orleans there, and he was there for only the first six months. But their assistants did most of the work, or their junior counsel, so-called. So we abolished the titles and we all became just “staff counsel to the commission.” And the organization, my own group, didn’t change. I was there, David Belin, and Specter, and we worked together.

Anyway, we went down there, and the first day that we were in Dallas I went to see the U.S. attorney, who was named [Harold] Barefoot Sanders. And I said, “We need an automobile, and we need a driver.” And he said, “Well I’ll see what I can do. I’ll call the FBI.” We went to lunch and came back and he said, “[Director J. Edgar] Hoover said he can’t do it. He won’t do it.” I said, “Why?” He said, “I don’t know. He just won’t give you a driver, and he won’t give you a car.”
Question: Is this for transportation or demonstration?
Ball: For our transportation, to get around and talk to witnesses and bring witnesses in and examine them. Hoover told Sanders that if we wanted any witness examined, we were to submit a request, in writing, to Hoover. See, Hoover resented the fact we were down there examining witnesses. But we were doing our own investigation and we weren't going to rely upon the FBI. Hoover wanted to do all the work. He wanted to do the investigating work in the field, and we wanted to do it.

Question: I thought he had already done an investigation.
Ball: Well, he had. But then, there was more to be done. There were a good many witnesses who hadn't been examined. We insisted on examining the witnesses who had already given statements. We insisted on doing all the work ourselves, redoing all the investigations.

Question: Did he not understand that your mandate was to do an independent investigation from the FBI?
Ball: I never talked to Hoover, so I don't know what he thought. All I know is, he said if we wanted to inquire from a witness, to submit a request in writing. And that did not satisfy us. We wanted to talk to every witness ourselves.

Question: So do you think if you had actually submitted a request to Hoover that he might have denied your request?
Ball: Oh, no. He would have granted it. If we had submitted it in writing, he'd have sent a man out, and the man would have taken a statement and come back and given us the statement. But our approach was, we wanted to go out ourselves and talk to the witnesses.

Sanders said, "I'll call the Secret Service." The FBI at that time had forty-five investigators in Dallas, Secret Service had six. [The] Secret Service gave us one man and one car, and we had him all the time we were in Dallas, and we needed it, too, because if we would want a witness we'd send the agent out there and bring the witness into the U.S. attorney's office, put the witness under oath and examine him and take his deposition. The Secret Service man was not a trained investigator. He just acted as our driver.

We found out that there were fifteen witnesses, key witnesses, who had never been examined by the FBI, and I still don't know to this date why that did happen. They were on an overpass underneath which the parade was to proceed—down the street and underneath the overpass. And those fifteen witnesses were looking toward the cavalcade of cars that were coming down the street. We asked who they were. We got their
names. We asked why they hadn’t been examined. Nobody would tell us. So we got hold of the FBI and asked them to round them up and bring them in, which they did. And then Dave and I examined each one of them and took statements from them.

That’s an example, you see, of the fact that the investigation was not thoroughly done by the FBI, as Hoover claimed. As a matter of fact, we heard indirectly that Hoover claimed that there was no damned sense in our investigation. He’d already made it and had come to his conclusion. We differed with him, because we figured that it was our duty to find it out from witnesses ourselves before we’d make a report as to what our findings were.

To show the thoroughness of our investigation, the Texas School Book Depository was some two or three blocks from a place where witnesses said that Oswald got on a streetcar. After the shooting, after the people heard the shots coming from the sixth floor of the School Book Depository and several people saw a man there with a rifle shooting, Oswald was seen walking through a second-floor lunchroom and out into a room where there was a woman, Mrs. Reid, who was working. We were informed that Oswald got on a bus six or seven blocks away from the Depository, soon after he was seen by Mrs. Reid. The bus was unable to move because of traffic, and so he became impatient, got a transfer from the conductor, got off, and walked over to the Greyhound bus station, which is two blocks away, got a cab, traveled down to the rooming house where he was staying.

Using a stop-watch, Dave [Belin] and I started at the Texas School Book Depository, and walked over to where Oswald was reported to have boarded a bus. We timed that. We then walked from there to the Greyhound bus station. We timed that. We got the same taxicab and the same taxicab driver. We said, “Take us down to where you let him out.” He took us down and said, “Here’s where he got out.” I said, “Well, that’s two blocks from where he was living.” We had been out there before, and we knew the area. He said, “That’s right, but here’s where I let him out.” It was two blocks away.

So we walked back to the rooming house and timed that. One of the witnesses in the house, Earline Roberts, said that Oswald had come in, walked back to his room, changed his coat, and then walked out. He was next seen at the corner of Tenth and Patton, eight-tenths of a mile away from his rooming house, walking eastwardly down Tenth Street. A police officer named [Patrolman J. D.] Tippit driving a car passed him, looked at him, stopped, got out of the car, and told him to come
over to the car. Witnesses saw Oswald pull his revolver and kill Tippit right there on the street.

We timed our walk from Oswald's rooming house down to the Tenth and Patton place where the killing of Tippit took place. We did all this because of the fact that there was a certain time limit involved in this thing. The assassination was at 12:30. Tippit was killed at 1:16. We wanted to establish that Oswald could have left the School Book Depository, and done what he did within the time limit. And he did, because we did it ourselves. But that was all reported in our report.

Oswald was seen emptying his revolver in a bush by two women. He ran down the street carrying the revolver in his hand; two men saw him walking south on Patton. Next we learned from a witness, Mr. Brewer, who was a clerk in a shoe store on Jefferson Street, that he saw a man dart into the doorway of his store, which was a recessed doorway, and turn his back on the street when a police car drove by with its sirens on. He thought the man acted suspiciously, by walking into this covered doorway. Brewer had heard radio reports about the shootings of Kennedy and Tippit. Because the man was acting suspiciously, Brewer followed him several doors west on Jefferson Street, to a movie theater. While the cashier was selling tickets, the man went by her into the theater, without paying. At Brewer's suggestion, the cashier called the police. The police came, went into the theater, turned on the lights, and Brewer identified the man he had followed, who was Oswald. Oswald pulled his gun, and the police officer grabbed it, and the hammer came down on the web between his forefinger and his thumb. Then he took Oswald in.

Dave and I went over this area with every witness. We interviewed the witnesses that were there on the scene where Oswald killed Tippit. We asked them questions there, and they described it to us right there at the scene of the killing: the two women who lived on the corner who saw him cross their lawn and flee down Patton, and Helen Markham, who saw the murder from just across the street from where he killed Tippit, and a taxicab driver, Scoggin, who was eating his lunch on the corner of Tenth and Patton and who also witnessed the murder of Tippit. Altogether, there were six eyewitnesses to the murder of Tippit. We had each witness describe the murder of Tippit while we were at the scene of the murder, and made our report to the commission accordingly.

If you will read the report you will see that there were three black men, each at a window of the fifth floor of the Texas School Book Depository. One window was directly beneath the window from which a rifle was fired. They told us that they
heard the sound of rifle fire directly above them from the sixth floor. When the police went to the sixth floor, they found a pile of boxes in front of the window, and a paper sack. And on the floor beside that window were three cartridge shells. Oswald's fingerprints were on the boxes and on the paper sack.

The point is that on the fifth floor were the three blacks, one directly underneath this sixth-floor room in which the shells were found afterwards, then in the next two windows, two other blacks. They heard the sound of shooting from above. It's a wooden floor, and there are cracks in it. You can see through the flooring. They heard the sound of the gunfire, and they all heard the cartridges fall on the floor. Afterwards they ran down to another point on this floor and looked out the window to see where the motorcade was going.

If Oswald were at the sixth-floor window, the question was, how could he get down to the second floor within a certain time limit? We had a certain gauge on that because a police officer in the parade heard the shots, looked up, and saw a man in the window with a gun. He ran up to the entrance of the Texas School Book Depository, and he said, "There's a man with a gun upstairs." The manager of the Depository said, "Let's go in and find out." And they ran up the stairs to the second floor, because the elevator was on the top floor. And they saw a man going into the lunchroom. It was Oswald. The cop said, "Who is that?" and the Texas School Book Depository manager said, "Well, he works here." And then they went on up to the top floor.

Now, why is that significant? It was easy to account for him getting from the sixth floor down there if he used the elevator, but the elevator was up on one of the top floors. It was not used, undoubtedly. The FBI reported that the three black men had left the window and gone to a place where they could see the stairway and they saw no one come down that stairway. When we interviewed these witnesses, they stated: "That didn't happen. We didn't see anybody there. We couldn't see the stairway because in the first place it was enclosed at that point, but secondly the boxes were blocking our view."

When I called the witnesses before the commission, I had them state what they saw, and I showed them the statement of the FBI, and they said they didn't ever tell the FBI that. When we examined them, we had them testify to their actual memory. In order to show the commission where these three witnesses were at the time of the shooting, we had a police photographer take pictures of these people where they had been in the windows.

There was also a man with a hard hat, one of the hard-hat workers who had come over to watch the parade, and he was
sitting on sort of a stone wall when he heard the shots. He looked up there and there was a man with a gun, shooting from the window in the southeast corner of the sixth floor of the Book Depository. So he ran over right away and saw a police officer, and he said, "The gun was fired from that window up there." We had the police photographer take a picture of him also where he was sitting when he heard the shots.

I could go into great detail, but we worked in Dallas through March, April, and May. We ended up our investigation in Dallas about the middle of May. I forget how many depositions we took. I think it was 120. The important witnesses we brought back from Dallas and put them on the witness stand before the commission. I think there were twenty-five or thirty. We brought the surgeons back from the Parkland Hospital, and Arlen Specter examined them. I remember we brought back most of the witnesses who had witnessed the killing of Tippit.

The Mannlicher-Carcano rifle was found on the sixth floor of the Texas School Book Depository. The ballistics tests showed that the three cartridges that were on the floor by the window on the sixth floor were fired by that Mannlicher-Carcano rifle, to the exclusion of all other weapons. There was some lead in the limousine in which Kennedy was riding, and that was examined, and that lead came out of that gun, to the exclusion of all other weapons. There was a whole bullet found on the stretcher where Connally was lying, and that was examined by the FBI ballistics section, and they said that that whole bullet was fired by that gun.

There was evidence that Oswald had purchased the gun. On the morning of the assassination, he had come into work with a fellow worker from the Texas School Book Depository, and the worker said that Oswald was carrying a sack under his arm, in which there was some kind of heavy object. This sack, bearing Oswald's palm prints on its bottom, was found on the floor next to the window on the sixth floor of the Depository. It was 38 inches long. The question that was raised in our minds was, could the gun have fitted into that sack? The Mannlicher-Carcano was more than 38 inches long. The gun was 34 inches long when broken down. Anyway, the size of the gun was important in the development of our investigation.

I called up [an FBI] ballistics expert and asked him if I could talk to him about his ballistics evidence. He said, "I'll call you back." He did. He called back and he said, "Hoover says I can't talk to you." I said, "Why not?" He said, "Hoover said if you want to see our evidence, just call us. We'll come over, and we'll tell you what we know, but we can't talk to you." I said, "Could you see me five minutes before?" because I thought
this: if the Mannlicher-Carcano was so long that Oswald couldn't have carried it under his arm, is it possible that it could have been broken down by some means?

So I saw the ballistics expert five minutes before he went on the stand. That's the only time I talked to him. And I said, "Can you break down that stock from the barrel?" And he said, "Of course you can." I said, "How long would it take you?" He said, "Two minutes, three minutes." I said, "Would you need a screwdriver?" "No," he said. "I could do it with a ten-cent piece." I said, "Will you do that for me before the commission?" And he said, "Yes."

So I took a chance, and when he was before the commission that day I asked him to break down the rifle with a ten-cent piece, and he did it, which was an important bit of corroboration. Anyway there's a lot more detail I could go into.

I say this, that we all were given passes on airplanes, had a book of requisitions, so that if we wanted to go some place we'd go down there, and we'd write out a requisition and sign it, and we'd get a ticket. We'd go anywhere we'd wanted to.

We had to send people to Mexico City, New Orleans, Dallas, California. I flew to California to take the deposition[s] of two people who were on a bus, who identified Oswald as the person who had been on the bus traveling from Dallas to Mexico City before the assassination. We sent people to New Orleans to find out what had occupied Oswald's time in New Orleans when he was a member of the Fair Play for Cuba Committee, of which he apparently was the only member.

I don't want to go into great detail on the Warren Commission Report, but in the middle of May, Dave went back to Des Moines. He said he'd been away from his practice as long as he could. Arlen went back to Philadelphia the last part of May. And I started to put the evidence together for a report to the commission. And I worked until June 4 or so. I remember I worked all day Memorial Day. There was no heat and no cooling in our office, no air conditioning, and I worked all day in stifling heat.

Dave came back to help me. We got a report out of all the various facts that we had developed and how it compared with the FBI investigation and the Dallas Police Department's. It was a thick volume.

On June 4, 1964, the chief justice invited Arlen Specter and me to go with him and Gerald Ford to Dallas, presumably to take Ruby's deposition, because Ruby's trial was over, and we had received permission from his lawyer to talk to him. A fellow named Joe Tonahill was the lawyer from Dallas who represented Ruby at that meeting. The four of us left Washington one morning, on a Saturday morning, and I gave the chief
justice our first report. He read it on the way to Dallas, and when he got through he said, "You know, I've been a prosecutor all my life before I became a judge. I've never seen a more conclusive case." And I said, "I never have either."

Then we interviewed Ruby. Ruby would talk to the chief justice, but he wouldn't talk to anybody else. He said he trusted the chief justice. Then he seemed to take to Arlen Specter too. He seemed to like Arlen, I don't know why. Oh, I think I do, too, because Arlen was Jewish and Ruby was Jewish, and he seemed to think he could trust Arlen.

Then he said he wanted a lie-detector test. He said he was innocent. He had killed Oswald, but he was not a part of the assassination. He loved Kennedy, so that's the reason he killed Oswald. So the chief justice said all right, he'd see that he had a lie-detector test, and we prepared to do that. Arlen prepared questions, went back there, and submitted the questions to Ruby later, about a month later.

We reworked the first draft of the report. I came home that Saturday and stayed a couple of days, came back, and I remember that Redlich had gone over my draft and made a good many recommendations, suggestions about evidence that I didn't have in there. I worked on it until July. I came out here and went to the Ninth Circuit Conference at Lake Tahoe. Before I left, I left with Rankin the second report, which had been approved by David and also by Arlen Specter. I got back, and they had made some more changes in the report.

Then I set to work on footnoting. We had a professional historian from the University of Maryland there, and I talked to him about historical style. And he said a writer of history believes that you should have one footnote for every paragraph but no more, because otherwise it interferes with your reading. He said if you exhaust a subject in a paragraph all you have to do is show your source, let everybody else go and read the rest of it. So that's what I did. I footnoted the report and went back and turned it over to Rankin the last of July or so.

Then I went to the Democratic National Convention in Philadelphia the next week or two, in August, and I got bored with what was going on there, and I went on back to Washington. I remember I went in my office and I got a telephone call from Stanley Mosk's son [Richard]. He had just graduated from Harvard in June. He was not admitted to the bar, but he'd come in there as a clerk. And he said, "I'm working on your report." And I said, "Well, what are you doing that for?" And he said, "Well, I'm footnoting it." So I said, "Well, I footnoted it." He replied, "Well, they said you didn't have enough footnotes."

Question: No more than one per paragraph?
Ball: That's right. I think I left Washington that last week. I might have gone back in September once. Dave did, I know.

Question: It sounds to me like you really were committed to this enterprise and this labor.

Ball: I lived at the Madison Hotel, where I kept all my clothes. So when I left to come home, I came home every other weekend for a couple of days, and I would not give up the room, I just kept the room all the way through. It cost me $20 a night. Imagine that. That same room now would cost $200.

Question: But seriously, I get the impression that some of your equals as seniors, originally so designated, didn't go into this with all—

Ball: They didn't function, but the young men did. It was a young man's investigation. I stayed there and finished my work. Bert [Jenner] stayed there and finished his work. Let me see if there's any other senior. Arlen Specter was not aided and assisted by any senior. He worked by himself.

Question: Was it Warren, or something even more personal to you than that, that got you so committed to this project?

Ball: Well, I was interested in the project. It was an interesting project. With Earl Warren, when the paperwork started coming in there with our depositions—we'd have so many depositions a week that would come from Dallas—every weekend or every Friday night Warren would load up on papers, depositions and reports and transcripts of hearings before the commission, take them home and he'd spend the whole weekend reading them.

I went to dinner many nights with Earl Warren. He'd come and ask me if I wanted a ride. I'd say yes, so he'd take me home, and he and I would sit down and we'd have a drink before dinner, and then Mrs. Warren would serve us dinner and Earl and I would talk over the events of the previous week and what we had learned and what our conclusions were. But he read every word of every transcript.

Question: I'm curious, did you ever have any independent ballistics tests conducted yourself, apart from the FBI?

Ball: Yes, there was a ballistics test, I think from the crime lab of the Illinois State attorney general's office. I think there were one or maybe two other ballistic areas where they tested.

Question: Were you concerned about the veracity of the FBI report at all, because you said in terms of the report of the three
black men you were referring to that they were completely wrong and that they were very lax?

Ball: Well, there was not a deliberate wrong. It was sort of—it was the way the FBI reported things. They report not only what witnesses tell them but what they believe happened; not conclusions, but they say, "undoubtedly he took the elevator down" or something like that without any basis of fact. It was that it was without basis of fact, and I was able to show there was no basis by the fact that the black men said that they couldn't see the stairway.

No, I didn't worry about the ballistics. The ballistics people were honest people. They were skilled people. We had Oswald's fingerprints on the rifle, his palm print on the sack that he carried. We had traces of the blanket in which the rifle was wrapped at the place where it was kept outside of Dallas, a small town outside of Dallas. Oswald's wife and child lived there with a friend. Oswald lived in Dallas.

No, we didn't have any suspicion, but it was checked. It was all checked, all the scientific information was checked by other people. We had handwriting experts, two or three, I think.

Question: So any errors that were made by the FBI you think were a question of technique rather than deliberate?

Ball: I don't think there was any deliberate falsification by the FBI. They were inaccurate at certain times. It was the inaccuracy of their investigation that worried us rather than anything deliberate. You talk to these people, they were honest men, they were sincere, honest people. Hoover wouldn't in any way affect the judgment of the men on the street. Hoover's attitude was, though, that it was investigated and that was final and that was all there was to it, and they didn't appreciate this nonsense of a bunch of college boys going out there and looking, investigating crime.

Question: Well, quite apart from the critics or questioners of your investigation, of the commission's investigation, if you had it to do over again would there be anything different, or any other resources or approaches that you'd take, to make it more comfortable for history?

Ball: No. One time a few years afterwards I was talking to Ed[ward Bennett] Williams, and there had been publicity about an attempt by the CIA to kill Castro, and he said, "Did you know that?" And I said, "No, we didn't." He said, "Would it have made any difference?" I said, "I think it would. It would be another line of investigation, but nothing has come out of the investigation of the CIA attempt to kill Castro that would
in any way affect our judgment on what happened. All it would have done is show maybe a motive on somebody's part to try to get Castro killed or get Kennedy killed."

But I don't know what else we could have done. You know, in the report, if you see it, we say this: "We have found no evidence of a conspiracy, that Oswald conspired with anyone to assassinate the President. It may be that in the future evidence will be developed which will show to the contrary or show that there was a conspiracy, but we are unable at this time to prove a negative." That's the way I feel now. I haven't heard anything come out since then that would in any way have affected my judgment.

I was talking to somebody the other day. They said that they had seen a picture on one of the broadcasting discussions of this subject, a picture of a man behind a fence next to the Texas School Book Depository. Well, I've seen every photograph that was taken offered by anybody, and I never saw a man behind the fence, and I don't think anybody else has, either, though it has been reported that there's pictures showing a man behind the fence.

No, I don't know anything we could have done. We worked hard, eight hours a day for a good many months there. And I can say this, that they're the brightest group of young men I've ever worked with. All of them were lawyers, graduated as lawyers. They all had law-review experience. Some had been editors of law reviews in some of the best schools in the nation—Yale, Harvard, Michigan, Chicago, California.

Question: At least some of them had trial experience?
Ball: Yes, but I had more trial experience than anybody there. I was well satisfied when they got through that we had come to the right conclusion. I didn't see any other conclusion possible, the evidence was overwhelming. He bought the gun, he fired the gun, people saw him fire the gun, and the shells were there. Of course, nobody in all the critics, they haven't attacked the ballistic evidence.

Question: No, I think maybe they're mostly trying to put something—
Ball: They're trying to say there was another rifle there. The latest attempt was they called a House committee in 1977 and made an investigation of this again, spent seven million dollars, and they came to the same conclusions we did.

Question: There has been quite a bit of controversy about the bullet that was found on Connally's stretcher, because appar-
ently it was found in a rather pristine condition. Did you look into that?

Ball: We sure did.

Question: Isn’t it a little strange that [a] bullet could go through several people, bounce around and come out—

Ball: Well, if you’d understand what happened. The muzzle velocity of that Mannlicher-Carcano is two thousand feet per second. That bullet went through Kennedy’s neck just to right of the midline and below the collar, and it came out below the trachea. It hit no bone. It went through the soft tissue, muscle tissue. The fibers of the coat were pointed in, and where it came out the fibers of the shirt were out. It also took out part of the tie, going that way, so there is no question that was the angle of movement.

They estimated that those trials we had—trials of the bullet going through similar resistance—that it was probably traveling at about 1,750 to 1,760 feet per second when it came out of his neck. Connally was directly in front of him [Kennedy], and we have said before, where would that bullet go, going that fast? We said the only way it could go is right straight ahead. We figured a bullet going that fast goes straight, and the only place it can go is to hit Connally. The bullet entered Connally in his back and came out near just below the nipple, around the right rib.

Question: Did it go through the seat of the car before it went through Connally?

Ball: No. It went right through Connally above the jump seat—where the jump seat fits in there. Right at about where the armpit is. And Connally in the picture [Zapruder film] was wrapped [around] like this [indicating]. We had the Zapruder film, you know. And it hit the rib, went through his right wrist, and ended up in his left thigh. Now, we examined the substance of that bullet and also compared it with the substance of the lead in Connally’s wrist, and they were chemically identical. Ten years later, the House Committee on Assassinations conducted a review of the findings of the commission and agreed with all of them. And they raised up this question that the critics had, of how could this bullet be in almost pristine condition? It wasn’t pristine. It was blunted on the top, and it was a little damaged on the bottom. And dented as well.

There had been developed since [the commission made its investigation] by the physicists a way of testing substances called the neutron test, where you bombard a substance with neutrons, and if you want to see whether that’s the same
substance you bombard the sample, and you can tell with certainty whether or not one sample comes from another. A neutron activation test was made in 1977, I guess it was, and the physicists that examined it said that this lead in Connally's wrist came from that bullet, so there is no question it went through Connally, it went through that wrist and hit his leg. No question now at this late date.

We examined it from the fact there is no other place that bullet could go. We know where it came from because the ballistics checks on the rifling on the marked face of the bullet showed it came from that gun, and the gun was up in the Texas School Book Depository and Connally was down in the car, and Kennedy was down in the car. So the trajectory had to be down toward the car in line with the car's travel.

We had tests made also of other bullets going through similar things. The bullet is not necessarily destroyed unless it hits some solid object that will cause it to disintegrate. For example, the bullet that hit Kennedy in the head—portions of the bullet were found in the car, one beside the driver, weighing about 44 grams, which was the nose of the bullet, and one beside the passenger, which was 21 grams. They were recognizable as having been fired from the Mannlicher-Carcano rifle. They were destroyed. Why? Because the bullet went through the back of the head and came out of the side and blew the whole side of his head off. That, of course, caused the bullet to disintegrate. The skull was fractured and fell partially into the street.

So they did raise that question. If this is a pristine bullet, how could it have gone through Kennedy and Connally? It was explained by the fact that it didn't hit anything solid until it hit that wrist and then it deflected right to the left. It didn't go through his lung. It sort of went . . .

Question: It came out between his ribs, then? It didn't hit his ribs?

Ball: It came out and hit the rib just below the nipple and it changed its direction to the left. We had tests made by marksmen firing bullets from various angles and through different types of material. We became well satisfied that the only way that you could explain the fact this bullet traveling at this terrific speed would have gone any place except into Connally's body.

Question: So, even in spite of hitting a bone in his chest, one of his ribs, and his—

Ball: It didn't exactly contact the bone directly. It struck the rib. It shattered the rib, sort of an oblique manner, and it went
right off that way. So that's really the only hard substance it hit.

Question: It didn't hit any bones in his wrist, either?
Ball: Yes. It hit a bone in the wrist, but they estimated the speed at that time, the orthopedic surgeon said that if it were going faster than four hundred feet per second, it would have destroyed the wrist, and it hit the radius, fractured the radius, and went through the—came out on this palm surface here.

Question: Did it hit any bones in his leg, as well?
Ball: No. Just the soft tissue. Went in about that far is all [indicating].

Question: But in spite of having hit two bones, then the bullet would not have been deformed? I mean slightly.
Ball: Yes, it was slightly deformed. It wasn't completely, but here's the way we worked it out. We know a bullet went through Kennedy's neck. We know when it went through Kennedy's neck it was traveling at a terrific speed, [approximately] 1,760 feet per second. Where did it go? Governor Connally was directly in front of Kennedy. We know that Connally was hit by a bullet. We know that because we know the course of the bullet. How could a bullet have been shot from that Texas School Book Depository and go through Connally if it didn't first go through Kennedy? Because Kennedy was blocking off Connally. So that the only way that bullet—the only thing that bullet could do is go through Connally. It was a necessary conclusion.

Now, of course, the critics made a lot of fun of our claim. The "single-bullet theory," as they called it, was developed by Arlen Specter, and when he first submitted it to me I thought, "Well, that explains something I have been worried about." When I first went down there and I saw this Zapruder film, and I heard the testimony as to the damage to Connally's body, and I just eliminated the incident of something done to Kennedy's neck, and I said, "Well, where did the bullet come from that went through Connally's body?" We know a bullet went through Connally's body. We know that that bullet went through Connally's body was on that stretcher. And that bullet was fired from behind; the only place it could have been fired from because the ballistics testimony was exact that that was fired from the Mannlicher-Carcano. Therefore, you have that set of facts, the fact that bullet came through Kennedy's neck and didn't do any damage to Kennedy's neck at all. It would not have killed him. He might have had a sore muscle up in there—sore muscles. We know where it came out and if it was
going directly at [approximately] 1,760 feet per second, the only place it could go is through Connally's back. It was our reasoning that we went on the single-bullet theory.

And now it's been established, ten years later, fourteen years later, I guess, by new tests developed by the physicists as to substances—neutron test—establish without any question that that bullet found on Connally's gurney was the same bullet that went through Connally's wrist. So you can say the biggest damage to the bullet would have been when it went through Connally's wrist, because it was only an oblique hit on the ribs. So whether the bullet was in a pristine condition or not, it's the bullet that went through Connally.

Question: Speaking of the gun, there is some issue about whether it's possible to even fire a gun that requires hand movement to be fired twice in an extremely short period of time.

Ball: We figured that out, and you'll read in our report the FBI said that the minimum time to load, aim, and fire was 2.3 seconds. Well, there are three shots we know of that came out of there because there were three cartridges exploded. We could time the bullet—the time between the second and—let's say the first shot missed, as an example. And the second shot went through Kennedy's neck into Connally's body. The third shot killed Kennedy. It hit him, went through his head. Now, we know we can time the amount of time between the second and third shots through this Zapruder film. We broke that down into frames, and each frame was one-eighteenth of a second. The time between the second and third shots was measured as 5.4 seconds.

Now, the critics, this particular critic on this film here [JFK] said the Warren Commission claimed to get out three shots in 5.4 seconds, which we never did. We said that one—the shot that killed Kennedy took 5.4 seconds. Now, if you figure that the other two shots were at a minimum 2.3 seconds, you'd have 4.6, plus 5.4, you'd have 10 seconds for the three shots, which everybody admits is adequate. Actually, if it took just as long for the second—first and second—shots as it did for the third shot, you'd have about 16 seconds. There is no way you can time the first and second shots. You can, however, time the difference between the second and the third shots; the time he [Oswald] pulled the trigger on the shot that went through Kennedy's neck to the time he pulled the trigger on the third shot, which hit Kennedy's head, was 5.4 seconds. You can time that from the picture [Zapruder film]. So there was plenty of time. They say in the picture [JFK] that the FBI said nobody can do that. That isn't true. We had all kinds of tests. We had
marksmen and expert marksmen, fine marksmen, poor marksmen and everybody pull that—and we got the average in there. Everybody agreed that 2.3 seconds was the minimum. But they said if you double that, the fact somebody would take some time—

Question: Did he take aim, did he aim? I think that’s what amazes people.

Ball: It would be 2.3, if you double that, 4.6, and you double it and everybody admits that would be plenty of time to take aim also. But here we have a measurement on that shot of 5.4, that was for one shot, not for three shots. They [the moviemakers] didn’t misconstrue. They misstated our findings.
British Columbia's chief justice, Sir Matthew Begbie, dismissed the first prosecution under the potlatch law on a technicality and questioned the law itself. (Provincial Archives of British Columbia)
“A WORSE THAN USELESS CUSTOM”: THE POTLATCH LAW AND INDIAN RESISTANCE

BY DOUGLAS COLE AND IRA CHAIKIN

In 1884 the Canadian government passed an amendment to the Indian Act outlawing the potlatch—that seemingly profligate, ruinous gift-giving ceremony of many of the Indians in British Columbia.¹ The “potlatch law” emerged in response to a ceremony seen as a barrier to the assimilation of native peoples into Euro-Canadian, Christian society. British Columbia’s Indians had their own responses to the law, based on their own values and perceptions. Some abandoned the potlatch altogether; some altered their ceremonies so that they appeared more western; still others made adaptations but refused to compromise the potlatch system’s most salient features.

The dominion government’s decision to ban the potlatch was based on numerous arguments submitted by Indian agents, missionaries, and, to a lesser extent, christianized Indians. Their reasons for the ban varied, though they frequently overlapped. The most immediate concern was health: hundreds

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¹The dates are sometimes confused in the literature. In June 1883, the cabinet passed an order-in-council requesting the Indians to abandon the custom; on July 7 the governor-general issued a proclamation to “enjoin, recommend, and earnestly urge” Indians to abandon the potlatch. On April 19, 1884, an amendment to the Indian Act, effective January 1, 1885, made anyone engaging or assisting in a potlatch ceremony guilty of a misdemeanor.
of Indians gathered in close quarters for weeks, sometimes months, of winter feasting without proper housing or sanitation made infection and sickness inevitable, especially among the very young. Similarly, morality became an issue as potlatches were seen to encourage the prostitution of native women as a source of funds. Another issue, which grew with intensity over the years, was that schools could not flourish as long as the winter was given over to endless, shifting celebrations. Far the most important concern, however, was economic: potlatches were based on the hoarding of goods, not for the saving of capital or for industry, but for what appeared to be senseless waste. "It is not possible," wrote Indian Reserve Allotment Commissioner G.M. Sproat, "that Indians can acquire property, or become industrious with any good result, while under the influence of this mania." The potlatch, to Sproat and other local officials, was a waste of time and resources, incompatible with the government's goal of Indian economic and social progress. Lawrence Vankoughnet, who was in charge of Canada's Indian Affairs department, considered it a "worse than useless custom." Outlawed at the same time was the tamananawas dance, the winter secret-society ceremony typified by the Kwakiutl hamatsa, or cannibal ritual.

In passing the legislation, the government was strongly persuaded by the near unanimity with which the indictments against the ceremony were expressed. The late-twentieth-century skeptic might discount the views of the missionaries, but it is more difficult to do so with the opinions of men like Sproat, the former Hudson's Bay Company manager, George Blenkinsop, and the ethnologist G.M. Dawson, whose pronouncements against the potlatch came from close observation, long personal experience, and a strong desire to improve the deteriorating condition of British Columbia's Indians.

Proscriptions against the potlatch may have been compelling within the assumptions of Euro-Canadian society, but the Indians, who did not share such assumptions, remained unconvinced. While they were often willing to rid their ceremonies of features objectionable to Europeans, the great majority of them wanted to continue their customary system and could see little reason not to do so. They sought to avoid conflict with the law, to bend its interpretation and to temper its enforcement, even to seek its repeal. If none of these methods was successful,

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2These generalizations are made from the arguments presented in departmental reports in the Canada Sessional Papers [hereafter cited as Sessional Papers], and the Department of Indian Affairs, National Archives of Canada [hereafter cited as DIA], esp. vol. 3628, file 6244-1. DIA, vol. 3669, f. 10,691, Sproat to Sir John Macdonald, October 17, 1879; DIA, vol. 3628, f. 6244-1, Vankoughnet to Privy Council, June 19, 1883.
however, many of them were prepared, certainly with a sense of their own strength and the government’s limitations, to defy the authorities.

Indian disaffection with the ban was evident from the outset. The Kwakiutl doubted the wisdom of doing away with the potlatch, and the Cowichan considered it wrong for the government to prevent it. After hearing the government’s position, the Nootka replied:

It is very hard to try and stop us; the White man gives feasts to his friends and goes to theatres; we have only our ‘potlatches’ and dances for amusement; we work for our money and like to spend it as we please, in gathering our friends together and giving them food to eat, and when we give blankets or money, we dance and sing and all are good friends together; now whenever we travel we find friends; the ‘potlatch’ does that.

Indian support for the potlatch was most often expressed in terms of traditional usage. The ceremony, wrote the Nass River Indians, “has been a custom prevalent among our people for many generations.” The Cowichan considered it “our oldest custom,” and Indians on the northern coast honored it as “the oldest and best of our festivals.”

Indians also cherished the potlatch as an institution that sustained other social needs and traditions. The gatherings allowed an enlarged network for arranging marriages according to custom and provided a forum where questions affecting property, rank, and precedence could be adjusted. To the Nootka, related Agent Harry Guillod, the potlatch was “a bond of amity” between neighboring bands.

A particular concern was the demand to avoid disgrace by redeeming debts in public. “How can I pay my debts unless they are all here to witness?” asked a Cowichan shaman. Chief Ken-a-wult of Qaumichan was frank: “I shall be shamed by all

\(^5\)Sessional Papers, 1882, supra note 2 at no. 6, 165, Guillod, September 22, 1881, 170; Blenkinsop, September 23, 1881, 170; 1885, no. 3, 97, William H. Lomas, July 24, 1884.

\(^4\)Sessional Papers, 1885, supra note 2 at no. 3, 101, Guillod, October 1, 1884.

\(^3\)DIA, vol. 3628, f. 6244-1, chiefs of the Nass River Indians to A.W. Vowell, August 30, 1895; chiefs of Cowichan Agency to Macdonald, February 26, 1887; Charles Todd to H. Moffat, January 22, 1889.

\(^2\)ibid., Napoleon Fitzstubbs to the attorney general of British Columbia, March 13, 1890; Sessional Papers, 1882, supra note 2 at no. 5, 164, Guillod to Superintendent Israel W. Powell, September 22, 1881; DIA, vol. 3628, f. 6244-1, Guillod to Powell, July 7, 1886.
Indians if I do not pay what I owe in the old manner, that is in the presence of all others." Public giving conformed, wrote a Skeena magistrate, "to the publicity of all their tribal affairs."

Customary and honorable, the potlatch was also defended as a harmless institution. Claims were made that it was an "innocent pastime of a nature similar to that indulged in by [the Indians'] white brothers"; that it did no more injury than European customs, which included giving presents, "often for some past, or the expectation of some future, favor." For those without theaters and unable to read, it provided their only diversion. It was their "winter amusement" and "the only amusement left them." Indeed, the potlatch was "an assurance or benefit society" that aided the old, the crippled, and the destitute. It repaid the elderly for all they had provided in their more productive years. Were it stopped, many would not have enough to live on. "Old people and infirm are fed and clothed during the long winter months, who otherwise would starve," wrote one of their supporters.

Indians insisted that they had already abandoned many of their old ways, but should be permitted to continue the oldest and best of their traditions. "We have given up fighting with each other," wrote the Cowichan chiefs. "We have given up stealing, and many other old habits, but we want to be allowed to continue the 'Potlach' and the Dance." Chief Maquinna of the Nootka, displaying his mask and paraphernalia, told how his people had given up all their bad customs, such as fighting, slavery, stealing, and tribal feuds, at the request of white chiefs, "but it was very hard to ask them to give up a custom which was intermixed with all their thoughts and feelings, an incentive to industry, a great help to the white trade in Victoria, which encouraged friendly relations with other tribes, being an occasion for amusement and rejoicing, and had been handed down to them by their ancestors."

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7 DIA, vol. 3628, f. 6244-1, Comeaken "Doctor," quoted in Cowichan chiefs in regard to the Potlatch Act to Lomas, April 8, 1885; vol. 3831, f. 63,210, Lomas to Moffat, November 15, 1889, Statement of Ken-a-wult of Qualicum, November 14, 1889; vol. 3628, f. 6244-1, Fitzstubbs to attorney general of British Columbia, March 13, 1890.

8 DIA, vol. 3628, f. 6244-1, chiefs of Cowichan Agency to Macdonald, February 26, 1887; Vowell to deputy superintendent general, September 6, 1895; vol. 3631, f. 6244-6, Todd to Vowell, October 1895; vol. 3628, f. 6244-1, C.W.D. Clifford to Fitzstubbs, n.d. [March 1890].

9 DIA, vol. 3628, f. 6244-1, Fitzstubbs to attorney general of British Columbia, March 13, 1890; Mamalilacala [sic] petition to Governor Nelson, August 10, 1889; Clifford to Fitzstubbs, n.d. [March 1890].


11 Sessional Papers, 1886, supra note 2 at no. 4, 82, Guillod, August 13, 1885.
The Indians' most earnest appeal was to fairness. The law was simply unjust. The ceremonies were always orderly and free from lawlessness, and they could not see why their social gatherings should be stopped when they did not in any other way break the law. Did not the whites celebrate Christmas, give feasts, dance, and distribute presents? The potlatch was a social custom like Christmas, only on a larger scale. "We believe," wrote a group of Nass River chiefs, "that it is our right just as much as it is the right of our white brethren to make presents to each other."

This appeal was part of an insistent desire to live within the law and a regret at being forced outside it by a statute the Indians could neither understand nor respect. "We are trying to live in peace," wrote the Mamalillilkulla Kwakiutl, "and want to be friendly to all." On the Nass River, Indians were willing to keep the law of "our Great and Good Mother Queen Victoria whom we all love," but felt "very keenly this interference." The Cowichan asked for the law's repeal, "that we may not be breaking it when we follow customs that are dear to us." Some concluded that the new law was based on a tragic mistake. "The White Chief does not understand our ways," said Cehawitawet of Comeaken, and the Nass River chiefs complained that "the aim and object of the Potlach is apparently misunderstood by the White people who made the laws."

Dissent came largely from the converted. On the Nass, Christian Indians asked the Indian superintendent in British Columbia, Israel Powell, to forbid the custom among the heathen outside their villages; an 1883 petition from the same area had asked for its legal abolition. The Christian Indians, however, represented only a minority; the great majority wished to continue their customary potlatch system.

The first showdown between Indian opinion and government enforcement occurred among the Cowichan Salish. Chief Lohar was intent upon repaying his debts and those of his son, who had just died. Lohar's determination to do his duty threw Agent...
William H. Lomas into a panic. With up to three hundred Indians gathered to participate in Lohar's potlatch and with no police force available, Lomas appealed to Powell for help. Arriving at Comeaken, Powell quickly realized that enforcement of the law against several hundred defiant Indians would be futile. He capitulated. So long as Lohar was merely repaying debts, it was not really a potlatch.\(^6\)

Powell defended his actions at some length to Ottawa, concluding with a frustrated confession of "the helplessness one experiences in attempting with means at command, to enforce any law such as the prohibiting the Potlach." Fortunately, the Indians had shown themselves "amiable to moral suasion" and the excitement had been quieted. He had every reason to believe that a majority would conform in time. The system, he wrote in his annual report, "will cure itself." Ottawa accepted Powell's rationale: his decision appeared justifiable under the circumstances.\(^7\)

In the first test of the law, the Indians had won. Indian resistance and government powerlessness were evident elsewhere than at Comeaken. "I do not see any way to successfully enforcing the law," reported Harry Guillod from Ucluelet. His only assistance in preserving order among the estimated thirty-five hundred Indians of his agency were the chiefs and native policemen, and the latter were subordinate to the strongly pro-potlatch chiefs. The Kwakiutl at Mamaliliikulla and Fort Rupert, wrote Agent R. H. Pidcock, were "very defiant in the matter."\(^8\) Further north the situation was no different. Charles Todd, the agent in the newly created Northwest Coast agency, possessed insufficient force to go against the will of the Indians, most of whom were otherwise law-abiding.\(^9\)

According to the anthropologist Franz Boas, who visited British Columbia Indians several times in the 1880s, the law "can not be enforced without causing general discontent." Indian settlements were so numerous and the agencies so large
that "there is nobody to prevent the Indians doing whatsoever they like." Boas illustrated his point with the example of Chief Cheap, a Xumtaspi Kwakiutl whom Pidcock had appointed constable and given a uniform and flag. "It was made his special duty to prevent dances and feasts," wrote Boas, "and since that time he dances in his uniform and with the flag."20

The law, once so urged upon Ottawa by officials on the coast, went without application. The overwhelming opposition of the Indians, paired with the utter inability of the Department of Indian Affairs to enforce its own proscriptions, meant that the ban could not be enforced. The department's feebleness came in part from lack of local police support, a symptom of the recurring disagreement between provincial and dominion governments over most aspects of Indian administration in British Columbia.

The provincial government, while accepting responsibility to enforce federal criminal law, maintained that Indians were solely a federal responsibility. The federal government, with no police force of its own, was totally dependent upon the province for enforcement of the Indian Act. If the province refused to cooperate, the department had no means of imposing its will.

In 1889, however, Pidcock, acting only with a native constable, successfully arrested Hamasack of Mamalillikulla. The charge went for trial in Victoria before Chief Justice Sir Matthew Begbie. Throwing the case out of court on a technicality, Sir Matthew went on to cast doubt on the law itself. The statute did not define "potlatch"; if Parliament wanted to create a new offence, previously unknown in law, then the term should be defined.21 In the face of Begbie's shattering obiter, the potlatch law was "a dead letter." "To attempt what the law will not support," wrote agent Lomas, "can only create a feeling amongst the Indians antagonistic not only to their Agent but to the Indian Department generally." Ottawa realized this: "It would not appear," it wrote, "to be absolutely incumbent upon the Indian Agent to take any measures to prevent the celebration of the potlach festivals."22 By 1895, the law was not only "a dead letter," but judged by most local


21DIA, vol. 3628, f. 6244-1, Moffat to Vankoughnet, August 20, 1889, with copy of Begbie's judgment. See also David R. Williams, _The Man for a New Country_ : Sir Matthew Baillie Begbie (Sydney, B.C., 1977), 102-103, 118.

22DIA, vol. 1648, Pidcock to Vowell, March 16, 1893; vol. 3831, f. 63, 210, Lomas to Vowell, January 9, 1890; Vankoughnet to Edgar Dewdney, January 29, 1890.
officials as virtually unnecessary, perhaps even unjust.

The Indians had triumphed. Aided by Begbie's judgment and the provincial government's intransigence, they had thwarted the best intentions of federal Indian policy. Even after the law had been amended to meet Begbie's objections, Ottawa realized that its "ability to retain the law must depend on the exercise of discretion with regard to its enforcement." The Kitwanga Indians were probably right: the potlatch law, they had told magistrate Napoleon Fitzstubbs in 1890, "was as weak as a baby."23

In all this, the Indians had strong advantages. They were more numerous in most areas of the coast than European settlers, and most white British Columbians prized the peacefulness of the Indians and wanted no provocations. Neither did the provincial government. It would accept conflicts over real issues, such as land and resource use, but not over something that British Columbians thought of largely as a harmless, even picturesque, diversion. In 1890 Lomas reported that Cowichan potlatches had the moral support of the local white population, "who see no harm in them, but look upon them as a kind of fair at which they can be amused and buy baskets and other Indian curios." Jim Sil-ka-met's Nanaimo potlatch in 1895 was visited daily by hundreds of whites, "both Ladies and Gentlemen and even little children." Victorians could watch potlatches at the Songees reserve across the harbor and there observe a picture "which artists who love quaint phases of art, would have gone miles to see."24 Public feeling seems to have been that the government had no reason and no right to interfere when no other laws were broken. "I believe the majority of the people of this province are opposed to any forcible interference with the harmless customs of the natives," wrote William Dwyer in the Province. He seemed to represent the prevailing attitude.25

In April 1897 the member for Victoria, Henry Dallas Helmcken, noting that the Indian Act's potlatch clauses had caused the Indians to be "greatly disaffected" and that enforcement was "likely to cause serious trouble," urged the immediate repeal of the law. Seven members spoke on the issue, the majority obviously in favor of allowing the Indians to retain

23DIA, vol. 3628, f. 6244-1, deputy superintendent general to Vowell, September 11, 1895; Kitwanga Council to Fitzstubbs, quoted in H.K.A. Pocock to Fitzstubbs, March 12, 1890.
24DIA, vol. 3831, f. 63,210, Lomas to Vowell, January 9, 1890; Victoria Province, March 21, 1896; DIA, vol. 3628, f. 6244-1, Lomas to Vowell, March 18, 1896; Vancouver Province, January 8, 1902; Colonist, January 20, 1901.
25Victoria Province, February 29, 1896; Victoria Province, March 21, 1896; Colonist, April 1, 1896; Colonist, March 15, 1896.
“this harmless old custom.” Modified by an amendment calling for repeal only after an inquiry by the federal government, the resolution passed without recorded dissent.26 The legislature’s resolution underscored the lack of support for the potlatch law among both the provincial government and the general public.

Ottawa, already aware “that the sympathy of a large portion of the community is extended to the Indians when attempts are made to put a stop to the ceremony,” took the legislative assembly’s resolution seriously.27 It asked A.W. Vowell, Powell’s replacement as Indian superintendent in British Columbia, for a report. He responded by reaffirming the wisdom of discretion. “To a certain extent the Indians [were] very much dissatisfied with the law,” but, by taking “the greatest precautions,” he had avoided serious conflict. As long as “prudence and good judgement” were used, there should be no cause for difficulty. Repeal would cause considerable dissatisfaction among Protestant missionaries and would undermine the natives’ respect for government.28

Ottawa’s conclusions followed Vowell’s recommendation. Because native religious and economic systems were involved in the potlatch, because of the strong sympathies of the white community, and because of the difficulties of enforcement in many localities, the utmost caution was required. Patience and education were proving successful and the festivals, when held at all, were “gradually assuming the character of harmless social gatherings from which the most objectionable features have disappeared, and giving away has been in the main confined to the relief of the aged and the destitute.”29 The policy of suasion, not coercion, seemed to be working.

THE GROWING CHRISTIAN ORBIT

The potlatch system did seem to be on the retreat throughout most of the province. The law was a factor. It had survived the challenge of public opinion and provincial opposition. Enforced by only a single court conviction,30 it nevertheless

26Colonist, April 13, 1897; Vancouver News Advertiser, April 14, 1897.
27DIA, vol. 3628, f. 6244-1, deputy superintendent general of Indian Affairs to A. Sutherland, general secretary, Methodist Church, March 20, 1897.
28Ibid., Vowell to deputy superintendent general, May 22 and June 1, 1897.
30Bill Uslick, a Stalo Salish from the Chilliwack area, was prosecuted, with Vowell’s encouragement, in 1896, and received a two-month sentence. Vowell’s actions in this case were exceptional.
stood as a proscription and a threat. Although it was not invoked through summonses, it loomed behind missionaries' and agents' admonitions. More important than the law, however, was the accelerating pace of Christian conversion.

Most of British Columbia's native population was now within the orbit of Christian influence. All along the coast, missionaries labored among the converted and sought to extend their influence over a declining number of heathen. By 1910 the vast majority of British Columbia's Indians were adherents of one Christian church or another.

This widespread shift to missions in a matter of two or three decades was, according to one scholar, "one of the most striking phenomenon [sic] in the post-contact history of British Columbia." The embracing of Christianity was a result of voluntary conversion, itself a reaction to the massive change growing around Indian communities. Motives varied among individuals and groups. Material advantage was one consideration, since many of the missions operated stores. Missionaries could also offer expertise in technology, especially in sawmilling, and possessed medicines against diseases impervious to traditional remedies. They were opponents of disruptive forces, particularly liquor, that threatened communities. Often they were mediators in the new land and resource regulations that increasingly impinged upon the Indians. Most commonly, they offered a way of life that many sought as an answer to the crisis brought by the erosion of the old. The Christian mission might promise a defense against the depopulation, social disorganization, and demoralization that threatened native life.

Useful though the missionaries may have been, they extracted a price for their intervention. Heathenism and most of its attachments had to go. Some, like William Duncan at Metlakatla, demanded total transformation. Others permitted compromises if they seemed compatible with their faith. The Indians often found their own compromises. In most areas, elements—perhaps whole complexes—of native practice were transformed into conduct that, while apparently conforming with western habits, continued traditional patterns of behavior.

Among the Masset Haida, the potlatch had disappeared almost without resistance, certainly without defiance, by the

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turn of the century. While smaller potlatches may have continued in stealth for a time, within sixteen years of the missionaries’ arrival the great public assemblages were things of the past. The last totem-pole raising was held in 1890, the goods given away a pitiful shadow of previous largess. The most plausible explanation for the rapid demise of the northern Haida potlatch was the drastic decline in Haida population, which put severe constraints on the custom. Federal law had little to do with it. No Indian agent was posted to the Charlotte Islands until 1910, Charles Todd, who had previously had jurisdiction over them, scarcely visited the Haida. If there was a central cause in the decline of the Haida potlatch, it came from the Haida themselves. In their effort to cope with the crisis of population decline and their threatened dissolution, they turned to the model of material advantage they saw at Metlakatla. The Masset Haida embraced Christian leadership and the western way of life, discarding traditional customs deemed incompatible with the new.

Beneath the change was a great deal of old Haida culture. Crests, songs, dances, and myths died away, but names and titles remained. Feasts substituted for most potlatching occasions, especially at deaths, but also on completion of a house and even in place of the old face-saving potlatch. Gift giving was prevalent at mourning and memorial feasts. Anglican ritual was grafted onto the mortuary potlatch to such an extent that the Haida no longer thought of their ceremony as a potlatch. The ceremony became one of tombstone raising, yet remained “structurally and functionally unaltered.”

Elsewhere in the north, by 1900 the potlatch had been tamed in a somewhat similar fashion. The Skidegate Haida went

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34Blackman, “Creativity in Acculturation,” supra note 33 at 401; Mary Lee Stearns, Haida Culture in Custody: The Masset Band (Seattle and Vancouver, 1981), 177 [hereafter cited as Stearns, Haida Culture in Custody].

35See DIA, vol. 3864, f. 84,502. Todd, for example, was in Masset in 1899, his first visit to the islands in four years.

36Stearns, Haida Culture in Custody, supra note 34 at 217; Blackman, “Ethnohistoric Changes,” supra note 33; idem, “Totems to Tombstones,” supra note 33 at 51.
through much the same process, though under Methodist auspices. The Coast Tsimshian, under mission influence at Metlakatla, Port Simpson, and Kincolith had all but abandoned it. Feasting among the Gitksan, Nishga, and Tsimshian expanded and was enveloped within Christmas, Easter, and other holy and secular holidays. Labelling the distribution of goods and money as a feast rendered innocuous a ceremony discouraged by the churches and forbidden by law. Here, too, feasts, tombstone raisings, and memorial services were substituted for the traditional potlatch, either independently or by mutual emulation and example. The changes remained uneven and incomplete. The Gitksan continued to feast, dance, and potlatch throughout the period, erecting poles almost continually. In Alaska the Tlingit had traditionally potlatched much along the lines of their Haida and Tsimshian neighbors, but by the turn of the century many were ready to abandon the practice. More than 140 of them signed a petition urging that the ceremony be outlawed, and eighty Sitka Christians renounced their old laws and customs and demanded that Governor John G. Brady "command all natives to change and that if they did not they should be punished." In 1904 Tlingit chiefs renounced their old customs. While the potlatch persisted in remote Yakutat and even at Hoonah for a time, the Tlingit potlatch was disappearing, its passing unaffected by any law prohibiting it.

Among the Nootka and the Coast Salish of Vancouver Island, the pattern was slightly different. Here the potlatch continued with something of its pre-law zeal, but divested of whatever repugnant features it might once have been thought to possess. Potlatches were often integrated into Christian occasions among the latitudinarian Catholic culture to which most Cowichan and Nootka had become attached. Even among the Salish, however, the potlatch was disappearing, especially in the Fraser Valley. A major cause was the increasing importance of work in the berry fields and the canneries, which made the traditional long summer Salish gatherings less convenient. The last Fraser Valley potlatch took place in about 1915, a decade

37Blackman, "Creativity in Acculturation," supra note 33 at 409; Philip Drucker, "Comment," in Arctic Anthropology 14 (1977), 90.

after its disappearance among the Washington State Salish.³⁹

The exception to Vowell's successful policy of "patience and moral suasion" were the Kwakiutl of the central coast,⁴⁰ where the potlatch continued as strong as ever—perhaps even more strongly than before the enactment of the law.

Canadian lay and mission authorities had long regarded the Kwakiutl as the most "incorrigible" of all British Columbia groups. Powell wrote of their "almost intractable character." The Reverend A.J. Hall, on his arrival in 1878 at Fort Rupert, wrote, "The testimony of everyone I have met is that they are a bad set"; they were, he later told Powell, "a most difficult lot to civilize."⁴¹ While grasping economic opportunities, they resisted imported values. To a degree almost unknown elsewhere, the Kwakiutl, according to Boas, "completely shut themselves off from the European."⁴² And in 1883 Powell wrote of them that they "appear to desire to resist, inch by inch, so to speak, the inroads of civilization upon old savage custom." Agents repeatedly remarked on the importance given the potlatch by the Kwakiutl, and of their "determined opposition" to its end. "I was told by the older men," wrote agent Pidcock in 1895, "that they might as well die as give up the Custom."⁴³ Missionaries, agents, and the presence of a proscriptive statute could not stamp it out.

What probably made the Kwakiutl potlatch exceptional was a combination of the hazy gradation in ranks, especially among neighboring groups brought into closer relations by post-contact developments, and the ability to obtain rank by marriage, even by multiple marriages. Among the Tsimshian, Tlingit, and Haida, marriages were unimportant as vehicles to

³⁹Wayne P. Suttles, "Spirit Dancing and the Persistence of Native Culture among the Coast Salish," in idem, Coast Salish Essays (Vancouver and Seattle, 1987), 207-208 [hereafter cited as Suttles, Coast Salish Essays]. Another reason, Suttles suspects, was the decline of the native economic system, within which, according to his redistributive model of the potlatch, the custom "played its key regulatory mechanism."

⁴⁰DIA, vol. 3629, f. 6244-2, deputy superintendent general of Indian Affairs to Vowell, December 6, 1904.


⁴³Sessional Papers, 1884, supra note 2 at no. 4, 108, Powell, October 31, 1883; 1882, no. 6, 171, Blenkinsop, September 23, 1881; DIA, vol. 1648, Pidcock to Vowell, Monthly Report, February 1895.
alter rank and gain prerogatives; among the Kwakiutl and Bella Coola, marriages were the major vehicle for enhancing prestige. Among the Kwakiutl alone were serial marriages not only permitted, but honored. This link between marriage and the potlatch, with one acting as a "feeder" to the other, became a vexing point for Indian administrators.

Absorption into the Body Politic

By 1913 Vowell's policy of tolerant discretion was ending. He had retired in 1910 and was not replaced. In Alert Bay the agent was William Halliday, who disliked the potlatch system but would take no action unless told to. More significant, in Ottawa a new deputy superintendent general of Indian Affairs, Duncan Campbell Scott, had been appointed. The new policy, emanating from Scott, played itself out largely among the "incorrigible" Kwakiutl.

Scott is best known as a poet, described by Rupert Brooke as "the only poet in Canada." Professionally, however, he was a career Indian Affairs official, a successful bureaucrat "gifted with that mixture of guile and idealism that is the mark of the highest sort of civil servant," as a compiler of his poems put it. Scott's view, postulating the inevitability of assimilation, was both typical of his age and within the mainstream of long-standing government policy. "The happiest future for the Indian race is absorption into the general population," wrote Scott, "and this is the object of the policy of our government." Few would have challenged—and none evidently did—his assertion in 1920 that "our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department."

Scott doubled appropriations for Indian health and education

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Duncan Campbell Scott, deputy superintendent general of Indian Affairs, attempted to end the potlatch among the Kwakiutl.

and—most important in this context—moved with impatience against practices that, in Canada's fifth decade, still hindered the integration of Indians into the mainstream. In British Columbia, this meant the wasteful potlatch still practiced in the province, especially by the Kwakiutl.

Scott instructed Halliday to enforce the law, and Halliday did, arresting Johnny Bagwany and Ned Harris when they
insisted on holding a potlatch against his warning. The two Kwakiutl pleaded guilty; with the Vancouver jury recommending mercy, they received only a suspended sentence. Another prosecution ended similarly, and a third was dismissed by a grand jury.

Scott and Halliday had wanted conviction and penalties. Instead they got suspended sentences and an outright dismissal. All four offenders remained at liberty, and one of the judges told Halliday that no crime had been committed even if there was a statute, and that he doubted whether any judge in British Columbia would give more than a suspended sentence. After these setbacks, Scott and Halliday quit the campaign.

Five years later, they tried again, this time after altering the rules. Scott succeeded in getting the act amended, changing the offense from criminal to summary—a simple, but not a minor, change. The agent, as justice of the peace, could now try a case, convict, and sentence. Convictions were likely, penalties even more so. This change gave Scott and Halliday a strong weapon.

In the winter of 1918-1919, Halliday, under instructions from Scott, again enforced the law. This time it was against Likiosa (Johnnie Seaweed) and Kwosteetsas (Japanese Charlie). Tried before Halliday in his capacity as justice of the peace, they were convicted and sentenced to two months at Oakalla Prison Farm, the first Indians sentenced to penal servitude under the 1885 potlatch law. They appealed, but before the case came up another four charges were laid in Alert Bay. This trial, in March 1919, was again heard by Halliday. Appearing for the defence was a Vancouver lawyer, Frank Lyons. The department countered with the distinguished counsel J.H. Senkler. Quickly realizing he could not win before the agent acting as judge, Lyons negotiated an agreement signed by the four defendants, the two appellants, and seventy-three others who were in the courtroom. All agreed that they would potlatch no more but would be free to seek repeal of the law. Senkler and Halliday accepted the proposal. The guilty were given suspended sentences. To Halliday it was "a great moral victory" that would stamp out the potlatch evil in his agency.

This was not quite how the Kwakiutl saw it. They took the agreement to mean that the government would investigate the law and, finding it unjust, would change it. They had long been asking for "a good straight man to come and see all the Indians

50Uslick excepted.
so that you may know exactly what the potlatch is. This interpretation that there would be an inquiry, Lyons and Senkler agreed, was an unwritten condition behind the agreement. For the Kwakiutl, the 1919 agreement was their victory,
too. They were confident that the law was a mistake and that any inquiry would see its injustice.

The promised inquiry, stonewalled by Scott, fell by the wayside. So did the Kwakiutl's promise. But Halliday still had his law, his instructions, and, for the first time, a Royal Canadian Mounted Police detachment posted at Alert Bay.

In January 1920 Sergeant Donald Angerman laid eight charges. All were sentenced to two months in Oakalla, the first to serve sentences under the law.\footnote{Uslick again excepted.} The next winter came another conviction and imprisonment, and, in the winter of 1921-1922, five more convictions and imprisonments. Then came the biggest case of all, the result of Dan Cranmer's Village Island potlatch, the largest ever recorded on the central coast.

In February 1922, Angerman summoned thirty-four persons before Halliday's bench. The first witnesses quickly established the strength of his case (built on two informants who had been there). The defense lawyer, changing all pleas to guilty, asked the leniency of the court, based on an agreement, signed by all defendants and fifty others, to potlatch no more. Angerman refused to accept this virtual duplication of the 1919 Lyons agreement. That, he said, had been ignored. He wanted tangible evidence of good faith: all Kwakiutl should voluntary surrender all their potlatch property. Halliday adjourned the court for a month, pending acceptance of Angerman's terms. Almost all the Cape Mudge Lekwiltok, Village Island Mamalillikulla, and Alert Bay Nimpkish accepted, in return for suspended sentences. But the Fort Ruperts and some others did not, and were given two-month terms in Oakalla. Angerman then brought cases against seventeen more participants at Cranmer's potlatch. Twelve were convicted and received sentences. In all, twenty-two went to Oakalla in April 1922. Halliday thought that the Kwakiutl potlatch was at an end. Occasional small affairs might occur, but there was "absolutely no danger of any great potlatches taking place again."\footnote{DIA, vol. 3630, f. 6244-1, pt. 2, Halliday to Scott, April 10, 1922; Halliday to McLean, Monthly Report, April 1922.}

Scott's 1913 enforcement had prompted anger and protest all along the southern coast. Agent Charles Cox reported from Alberni of the indignation caused by the Alert Bay convictions, but differentiated the ceremonies of his Nootka charges from the extremes of the Kwakiutl. The anthropologist Edward Sapir, who was working in Alberni, found the Nootka "very much disturbed by the renewed rigour with which the old more
or less dead letter potlatch law was being applied." The Cowichan and Gitksan protested the ban. The most visible response, however, was the flood of petitions sent to Ottawa from the south coast.

The arguments had changed little since the passage of the act thirty years before. Their weight fell on the injustice of the law and how it suppressed an institution that was at worst merely harmless. The native petitioners insisted that their potlatch, still regarded as "one of our oldest and best customs," was innocuous. It interfered with no one and with no others' rights, contained nothing criminal or degraded, and "no mishap or sin of any kind." In short, said one of them, "We don't see any fault in it." Not only was the potlatch harmless, but it was "a good thing for us all," said another. The system "help[ed] every Indian," especially those who could not get work and those too old to work. The potlatch spread the wealth by periodic distribution. Everyone received a share and the poor and the old "feels happy." A pension principle was at work: "When we give a potlatch we insure our lives & our children when we get old & unable to work for our selves."56

The Indians still argued, in a petition probably drafted by Sapir, that potlatches were their "chief sources of pleasure and amusement." Songs, dances, games, puzzles—"all these things are the best, as regards native amusements, that the indian has been able to create in the course of generations." Without them "life is made gloomy."57

These features, both harmless and positive, led the Indians to believe that the government had erred. They refused to consider that such a law could stand if the government were correctly informed. As the Kwakiutl and Salish insisted, "peoples dont understand our Costume [sic]," "the white man

57DIA, vol. 3269, f. 6244-3, West Coast Indian chiefs to Scott, December 4, 1914.
do n't understand our fashion." "We think the law is not right and that you have been mistaken," the Kwakiutl chiefs wrote Scott: "the Government has not been fully and correctly informed and we would respectfully ask you to send a good straight man to come and see all the Indians so that you may know exactly what a potlatch is." 58

The most insistent refrain of the petitioners was injustice, an injustice based partly on misunderstanding but partly on intolerance. "We maintain," the West Coast chiefs' petition stated, "that this law is quite uncalled for, that it works needless hardships on our people, and that it is diametrically opposed to the principles of tolerance and justice which we have been taught to believe are the laws of this country." 59

Misunderstanding, intolerance, injustice: these were the Indians' bedrock appeal. "This is our own and it is our fashion." "All we want is justice, and therefore we are not afraid to tell you that the law about the potlatch is not just." 60

Not all views expressed supported the potlatch. Anti-potlatchers among the Sechelt and Fraser Valley Salish as well as a few Christian Kwakiutl submitted letters and petitions of their own. The potlatches and dances, insisted the Salish petitions, "are absolutely opposed to civilization, religion, prayer, etc., that at the time of the Indian dances two or three months are passed by the pagan Indians in mere wild enjoyment, laziness and very often drunkenness; that a great deal of money and other resources are spent uselessly, for nothing or worse." 61

Scott, the recipient of all these letters, resolutions, and petitions, maintained his own views. Potlatches were "most harmful to the Indians," and their continuance could not be justified. Moreover, the great majority of Indians, convinced of their harmfulness, had voluntarily given them up. "The efforts of the Department have been directed to the promotion among the Indians of industry, progress and morality, all of which are greatly hindered by indulgence in the potlatch." 62 This was


62 DIA, vol. 3629, f. 6244-3, Indian chiefs of Sechelt Band to secretary, Department of Indian Affairs, December 9, 1914.

Scott's view, this his policy. The law would remain the law and it would be enforced.

Little wonder that Charles Nowell, writing on behalf of a meeting of chiefs at Fort Rupert, expressed the utter hopelessness of all their attempts at a remedy of their grievances. They had spent money for lawyers to defend men put in jail, "but they have never done any good"; they had spent money to send a delegation to Ottawa, "but it was no use"; they had asked the government to send an investigator to come and listen to both sides, but no one had come.63

In July 1922 the Kwakiutl tried another route. They sent a delegation to a Vancouver meeting of the Allied Tribes of British Columbia and other Indians. The Kwakiutl had earlier shown little interest in the Allied Tribes' organization; now they sent a sizable delegation to the 1922 meeting. The main agenda of the assembly was the land question, but the Kwakiutl, largely unaffected by that, were there to air their potlatch grievances. The attempt to turn the meeting against the potlatch law failed.64

The move was probably doomed in advance. The Allied Tribes largely comprised the executive, dominated by Andrew Paull, a devout Squamish Catholic, and Peter Kelly, an ordained Methodist. Mainly devoted to recognition of aboriginal land titles, its other concerns—better education, improved medical care, and more control over Indian funds—were intended to modernize the Indians. The Allied Tribes and their leadership were not keen on taking the organization in a quite different direction.65

The Kwakiutl had tried almost everything, even toying with the idea of enfranchisement to evade the Indian Act.66 "All these things that we have done has not done us any good," wrote Nowell. Yet they tried the political and parliamentary process once more, asking H.S. Clements to use his parliamentary seat "to speak to the government for us."67 He was sympa-

64DIA, vol. 3630, f. 6244-1, pt. 1, Dickie and DeBeck to Scott, August 2, 1922.
66See DIA, vol. 6810, f. 470-2-3, pt. 7, Moses Alfred, Charles Nowell, Peter Knox, and Harry Mountain to Clements, March 28, 1920. "We remember you told us when you was here that if we'd be franchised we could have our Potlash [sic]!" If enfranchised, the Kwakiutl would have lost their native status, thus losing both the benefits and the penalties of the Indian Act. While Scott and the department encouraged (even sought to compel) the enfranchisement of "civilized and self-supporting" Indians, that route as a means of having "our Potlash" was unlikely to have been countenanced.
thetic, but Scott remained immovable. In 1922 Leon J. Ladner defended the potlatch in the House, but received little satisfaction.\(^6\) Public opinion, while no doubt still opposed to the law and its enforcement, had little effect. It remained, as the Kwakiutl's lawyer, E.K. DeBeck, noted, "apathetic and listless" on all Indian matters.\(^6\)

Against the determined opinion of the deputy superintendent-general, the Kwakiutl and other potlatchers were powerless. Their allies—retained legal counsel, a handful of anthropologists, a sympathetic fisheries inspector, some local merchants, one or two backbench MPs, and a vague but entirely unmobilized public opinion—were impotent. Departmental views were solid and frozen; contrary opinions were ignored, even suppressed. Native opinion meant even less.

Indian protests made no impact because they carried no threat. With natives now far outnumbered by whites, with transportation and communications transformed, with a federal police force established on the coast, the Department of Indian Affairs' policy could be enforced without concern. Moreover, Scott operated with almost total freedom within his sphere. Ministers responsible had other things on their minds, and they came and went—nine in the years between 1913 and Scott's retirement in 1932—while he remained. Operating in a minor department that seldom made headlines and even less often exercised the attention of Parliament or cabinet, he was free to set policy and effect its implementation.\(^7\) In a matter about which few cared deeply, an entrenched bureaucrat had the liberty to do virtually as he pleased. Indian affairs concerned few people, most of whom were not even voters.\(^7\)

\(^6\)House of Commons, Debates, January 19, 1922, 3191-92.

\(^6\)University of British Columbia Library, Leon J. Ladner Papers, Ladner to Stewart, May 11 and 15, 1922; Charles Stewart to Ladner, May 17, 1922; Ladner to DeBeck, May 31, 1922; DeBeck to Ladner, May 20, 1922.

\(^7\)Such was a fact of the Canadian government. H.G. Blair, the deputy minister for immigration, had much the same latitude in enforcing an almost personal policy of excluding Jews, even those fleeing Nazism, from Canada. Irving Abella and Harold Troper, None Is Too Many: Canada and the Jews of Europe, 1933-1948 (Toronto, 1986).

\(^7\)There is no evidence, however, for Paul Tennant's assertion that the potlatch law was used to stifle Indian political organizations by giving "agents and police a convenient means of discouraging assemblies of any sort," or that "the jailing of potlatch holders removed the Indian leaders with the most traditional authority." While it is true that "the commencement of prosecutions coincided with the first province-wide Indian political activity" (the Allied Tribes movement of 1913-1926), the coincidence seems purely fortuitous. Idem, "Native Political Organization in British Columbia, 1900-1969: A Response to Internal Colonialism," BC Studies 55 (Autumn 1982), 16.
Yet, as the following years were to show, the Indians were not supine victims of Scott, or of Parliament, the courts, the agents, or the mounted police. When their petitions secured neither a modification of the law nor even a commission of investigation, the Kwakiutl gave up on the process. Petitions and appeals having had no effect, the Kwakiutl fell back on their own resourcefulness. They found ways around the law.

**The Potlatch Goes Underground**

The prosecutions of 1922 had demoralized the Kwakiutl, but by 1927 they had recovered and established a pattern of evasion. No open potlaching was done at Alert Bay. With agent and police in the village, the ceremony went underground — secretly or from house to house. When Jimmy Sewid married Flora Alfred at Alert Bay in 1927, his grandfather “gave a big potlatch,” but “he just went around to the houses and gave money and other things to the people to honor me,” while Sewid’s mother called the women together in the Alfred home and gave them dishes, pails, and other utensils. Potlatches could be disguised as Christmas dinners and gift giving as holiday presents. There were variations on the strategy.

“Real old-time potlatches” continued at inaccessible locations, notably Kingcome Inlet. The Gilford Islanders moved there to winter in the 1920s, largely to be free for potlatching. Their village was two miles up a shallow, snag-infested river that froze over in winter. It was so situated that no one could approach, day or night, without being seen. “There in their frosty isolation they potlatched as much as they pleased.”

Less secure villages were second-best: Village Island, Fort Rupert, even Cape Mudge.

A third stratagem, the “disjointed potlatch,” was invented in 1931. The law was so written that the giving away had to be part of a festival, dance, or ceremony. The Kwakiutl simply split the thing in half, having their dances on one occasion and then giving away later, making it difficult to prove that the one was part of the other. That year Halliday observed fifteen

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72 American Museum of Natural History, Department of Anthropology, C.F. Newcombe to P.E. Goddard, January 1, 1924.


74 Philip Drucker and Robert F. Heizer, *To Make My Name Good: A Re-examination of the Kwakiutl Potlatch* (Berkeley, 1967), 32 [hereafter cited as Drucker and Heizer, *To Make My Name Good*].
hundred sacks of flour being delivered at Village Island, brought by a man who said merely, "Here is some flour I’ve brought to help you over the hard winter." When Charles Nowell landed nine hundred sacks at Fort Rupert, he told the police that it was nothing more than "an act of Christian charity for the benefit of poor people who were hard up." These strategies defeated all efforts at securing evidence. The single Kwakiutl prosecution after 1927 was under the weaker provision against dancing off one’s own reserve.

Such evasions rested upon the solidarity of the Kwakiutl. All ranks closed after the trauma of 1922. Not even the Christian Indians would cooperate. The local constable found himself "up against a stone wall." To inform meant, as a young Cape Mudge man told Halliday, that the informer "would be an outcast amongst all the Indians." Enforcement had become impossible. In 1933 Halliday’s successor, Agent Murray S. Todd, complained that his position was intolerable: the potlatch, he reported, had reached its greatest height in many years, with the Indians "bolder and quite open in carrying it out." His superior in Victoria reported that "We are about as far away from doing anything effective toward the suppression of the potlatch system as when actions against the Indians were started years ago."

Todd and his superiors were still not done. In 1936 the government brought to Parliament a bill that would authorize an agent or the Royal Canadian Mounted Police to seize any excess goods that they reasonably believed to be intended for potlatch purposes. In the House of Commons the independent member for Comox-Alberni, A.W. Neill, himself a former Indian agent who had served under Vowell during the period of deliberate nonenforcement, blasted the proposal as unreasonable, unjust, and un-British. His attacks, seconded by others, forced the minister to withdraw the amendment. After that failure, Indian Affairs left the potlatch alone. It was better, wrote the provincial superintendent, to leave the matter to the good sense of the Indians, hoping that church and school would do more than would prohibitive measures to eliminate the

77DIA, acc. 80-81/18, box 10, G.H. Clark to B.C. Police, June 15, 1931; vol. 3631, f. 6244-5, Halliday to Scott, February 26, 1931.
79House of Commons, Debates, March 20, 1936, 1236-1300; April 23, 1936, 2120-21.
The Kwakiutl evaded prohibitions against the potlatch by separating gift-giving from ceremonial dancing. (Courtesy of the Royal British Columbia Museum, Victoria, B.C.)

practice. The department made no more attempts to enforce the law among the Kwakiutl.

Ironically, despite the end of enforcement, the potlatch declined, victim to alterations in the structure of the fishing industry, to the Depression, to Anglican persuasion and pentecostal evangelization, and to the lack of interest among young people. The change from sail and oar to gasoline fishing boats put the Kwakiutl at a disadvantage against their white and Japanese competitors. Then came the Depression, which, when at its worst, dropped the value of the fish pack by almost two-thirds. Moreover, attitudes were changing. Agent F.E. Anfield commented that the young men “are not interested,” while the Reverend E.W. Christmas lamented that “the young men will not memorise the ceremonial chants and harangues as their fathers have.”

Jimmy Sewid wrote of the 1930s that he “began

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79 DIA, acc. 80-81/18, box 10, D.M. Mackay to H.W. McGill, March 4, 1938.
to feel that it was not right to have these potlatches." Altered attitudes affected not just the young. The Apostolic Mission, a pentecostal group that had great success in the interwar period, was strict in imposing among its adherents a renunciation of the potlatch. Customary marriages disappeared in those years, no longer acting as "feeders."

By the 1940s, though they continued to be held, potlatches appeared, even to the Kwakiutl, irrelevant to wartime and postwar problems. In three years of hearings, from 1946 to 1948, before a joint parliamentary committee to revise the Indian Act, the potlatch and the potlatch law went unmentioned. The brief of the British Columbia Native Brotherhood, presided over by a high-ranking Kwakiutl, failed to mention the law or to argue for its repeal. Comments on the subject in The Native Voice were infrequent and, when they did appear, were negative. The potlatch and the law had ceased to be an issue, either to Indian Affairs or to the Indians. Overshadowed by questions of land, enfranchisement, education, taxation, welfare, fisheries, and trapping, "the whole potlatch issue just disappeared." Thus, when the revised Indian Act was passed in 1951, it contained no mention of the potlatch.

A Lack of Consensus

It is tempting, in considering the history of the potlatch, to argue that the law, for all its symbolism, had little to do with what actually happened between 1885 and 1951. After all, there was only one successful prosecution (and it a minor one) before 1914, and almost all convictions came in eight years from one agency. The law was left unenforced far more than enforcement was ever attempted, and even those attempts were more often futile than not. The potlatch, in any easily recognizable form, disappeared from sight in most of the province without the law's having demonstrably caused its demise. Moreover, in American sections of the Northwest Coast, where no statutory provisions against the potlatch existed, the ceremony withered and died at least as soon as in Canada.

Comparisons between Canada and the United States are difficult. Although no law against the potlatch existed south of the border, agents and their extralegal courts often acted as if one did, and American missionaries, who had a quasi-official

81Spradley, Guests Never Leave Hungry, supra note 73 at 110.
83Forrest LaViolette, The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia (Toronto, 1961), 95.
authority, exercised the same zeal as their Canadian counterparts.\footnote{See Francis Paul Prucha, \textit{The Great Father: The United States Government and the American Indians} (Lincoln, 1984), 646-48; William T. Hagen, \textit{Indian Police and Judges} (New Haven, 1966).} It seems true, however, that among the Coast Salish, the last potlatch on the American side of the border was held in about 1905 and on the Canadian side in about 1915.\footnote{Wayne P. Suttles, "Spirit Dancing and the Persistence of Native Culture among the Coast Salish," in \textit{idem, Coast Salish Essays}, supra note 39 at 207. Such dates are a little difficult, since potlatch-like activity did continue. T. T. Waterman, writing in 1921, could talk of a potlatch by John Seattle of Auburn, given in "recent years," which cost $1,400. Idem, \textit{Notes on the Ethnology of the Indians of Puget Sound} (New York, 1973), 82.} The Makah of Cape Flattery retained theirs less than did their Nootka kinsmen on Vancouver Island.\footnote{For the Makah, see Elizabeth Colson, \textit{The Makah Indians: A Study of an Indian Tribe in Modern American Society} (Manchester, England, 1953), 15-18, 222-23; for the Quileute, see George A. Pettit, "The Quileute of LaPush," \textit{Anthropological Records} 14 (1960), 83, 112.} In Alaska, where American Indian legislation did not apply and where there were no Bureau of Indian Affairs agents, the potlatch died away soon after the turn of the century. In Canada, on the other hand, the potlatch, despite the law, continued among some groups and expanded among the Kwakiutl. One could even argue (as some scholars have) that the law promoted among some Indians a kind of rebellious backlash that promoted its perpetuation.\footnote{Drucker and Heizer, \textit{To Make My Name Good}, supra note 74 at 33-34.}

While an argument could be made that the law had, on balance, no real effect upon the potlatch, the story is much too varied to accept such easy generalization. The law was there, and it made some difference to Indian conduct. It may have had little to do with how the Haida or the Coast Tsimshian or the Nootka acted, but it most certainly influenced the Kwakiutl and the Gitksan. Ineffective as it may ultimately have been, the law did affect their feasts and dances, and did fester among many as both a real and a symbolic grievance. It appears that the potlatch law gained a symbolic importance far exceeding its actual effects.

The Indians of British Columbia, in general, exercised considerable autonomy on the issue. They did with their potlatches pretty much what they wanted to do, the Kwakiutl between 1919 and 1927 always excepted. In many areas natives opted, largely at their own volition, to alter or abandon the ceremony. The Coast Salish, the Haida, the Coast Tsimshian, and the Nishga fall generally into this category. Others, such as the Gitksan and the Nootka, continued to potlatch, according to the altered circumstances of their lives, with little heed for
the law or any other external agency. Pressure to discontinue, as elsewhere, came largely from within. Only among the Kwakiutl, and then only for a brief period (and to a much lesser extent among the Gitksan), was their autonomy severely compromised by legal sanctions. For a longer time, and among many Indians, the law was viewed as negligible. When a Catholic priest told some Hagwilgit Indians that they should not potlatch because of the threat of the law, they merely giggled.88

One point often overlooked is that no native consensus existed on the issue. Native petitioners were instrumental in the original adoption of the law, and a number of similar appeals for enforcement are dotted through the record. One could argue that by 1900 or so, a majority of Indians might well have favored the law. Neither the Allied Tribes of British Columbia nor the Native Brotherhood backed repeal. The Allied Tribes’ leadership turned back the 1922 pro-potlatch motion and the Native Brotherhood deliberately avoided any stance, even when led by a Kwakiutl, William Scow. On the Skeena, younger Gitksan would join the Brotherhood only if it opposed feasts and the formal assumption of names and titles, while older ones would have nothing to do with it if it did. At Hazelton, fifty-five younger Gitksan met in January 1940 to petition the department to allow them to elect their own village council because “the older generation, namely our chiefs and elders of this village seem to prefer to practise the old customs and ceremonies” instead of endeavoring “to lead us into a mode of life which would tend to improve our living conditions.”89 The potlatch was not simply an issue that placed whites against Indians; it more often pitted Indians against Indians.

Some perspective on the law can be drawn from the proscription of the thirst and sun dances among the Canadian Prairie Indians.90 These ceremonies, which also involved mutilation of

89Philip Drucker, The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast (Washington, D.C., 1958), 121; DIA, f. 971/3-5-V, Charles Palsey and Charles Clifford to S. Mallison, January 6, 1940.
the flesh and gift giving, could take up to six summer weeks, and were seen by missionaries and Indian administrators as incompatible with civilized and settled life. The 1895 revision to the act was made specifically to attack Prairie ceremonies, and, while enforcement was tempered by a fear of mutiny and by a lack of enthusiasm on the part of the Mounted Police, there were arrests from 1895 and imprisonments soon after, including that of Chief Piapot. The Indians responded with petitions, arguing that the prohibition violated treaty rights and religious freedom, and that their ceremonies were similar to white holiday celebrations and dances and were their only amusement. The threat of the law and other factors brought ceremonial modifications, including the virtual disappearance of self-mutilation by the turn of the century. The dancing went on, however, despite the efforts of school officials, agents, and police. Department agents might announce that suasion had brought the last sun dance, but the ceremonies continued, even undergoing a revival in about 1914.

Scott's accession to power was followed by measures similar to those against the British Columbia potlatch. In 1914 he secured an amendment that prohibited Indians from participating in dances outside their own reserves. A number of convictions followed, but the desire to secure Indian cooperation and enlistments in the war effort brought a temporary relaxation. The Cree, Blood, and Blackfoot, however, were recipients of Scott's 1918 zeal and of the new summary procedures. With Royal Canadian Mounted Police cooperation, 1921 and 1922 were, as in British Columbia, the peak years of prosecution. The Indians again petitioned, pleading for religious tolerance and an end to discrimination, again comparing their ceremonies to those of the whites. Like their counterparts on the coast, they continued their practices in stealth—at night and in remote locations—and completed their give-aways after the event. By 1925 or so, enforcement had flagged and the sun or thirst dances, although often smaller and shorter, had persisted, and were often celebrated quite openly.

While Prairie ceremonies changed in many ways, according to Brian Titley, "the transformation was as much the product of conscious adaptation as it was the result of the department's designs." Prairie Indian experience almost exactly duplicated that of coastal natives. Ceremonial life was interrupted by the

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91Titley, A Narrow Vision, supra note 47 at 166.
92This was applied only twice in British Columbia: in the West Coast agency in 1921 and in the Kwawkewlth agency in 1935.
93Titley, A Narrow Vision, supra note 47 at 183.
legislation, but forms of the ritual complex persisted widely. The Plains Indians, however, suffered a comparatively large number of arrests and imprisonments. Perhaps because the Prairie ceremonies were an integral part of native religious beliefs while the potlatch, although part of a larger native world view, was almost entirely a social and economic institution, the presence of the law remained an issue on the Prairies after World War II.

In the proscriptions against the potlatch and other ceremonies, it is clear that British Columbia’s Indians were not merely hapless victims. That the law went largely unenforced was in great measure a result of native resistance, sometimes of defiance. In this resistance, local sympathies lay largely with the Indians. The federal government had to overcome these sympathies, especially when manifested by judges and juries. Once the enforcement measures seemed perfected, the Indians—certainly both the Kwakiutl and the Gitksan—devised stratagems that defeated further attempts at enforcement. In the contests over the law—at Comeaken, before Begbie’s bench, in the suspended sentences and dismissals following Scott’s enforcement attempts, in the inventiveness that led to the frustration of agents and superintendents after 1927, and, eventually, in the dropping of the law in 1951—the Indians won at least as often as they lost.
Having survived the San Francisco earthquake and fire of 1906 nearly intact, the records of the federal district court for the Northern District of California are an invaluable aid in assessing the work of the lower federal courts in the nineteenth century. From the establishment of that court in 1851, Ogden Hoffman served as the sole judge for the northern district until his death forty years later. Documents from his lengthy tenure offer many opportunities for an examination of the nature of the judicial process, the development of a federal judge, and the workings of the common law.

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2For these broader questions, see Fritz, Federal Justice in California, supra note 1.
addition, his cases provide a detailed picture of federal trial court practice in a variety of doctrinal contexts. As Lawrence Friedman has observed, the empirical analysis of data from courts over time "is of particular value, because it is sensitive to changes in legal culture, and in the functions of the courts."³

Hoffman's tenure afforded him virtually all the jurisdiction that a federal district court of the nineteenth century could: circuit court powers, special land jurisdiction, and proceedings in bankruptcy, as well as the admiralty, criminal, and common-law and equity dockets. His cases reveal how a nineteenth-century federal trial court was used, by whom, and with what effect.

During Hoffman's tenure approximately nineteen thousand cases were filed in his court in eight different dockets (see Table 1), yet it would be misleading to assume that many filings automatically meant a heavy caseload or that few filings implied the opposite. Essentially, it depended on the docket and the type of case involved. For instance, although more than twice as many bond cases as land-grant cases were filed, the bond cases were perfunctorily disposed of, while the land cases preoccupied Hoffman for years. Thus, the numbers distort the work of the court and Hoffman's labors unless one understands how the various dockets functioned.⁴

Given the size of the dockets, it was impractical to examine all of them with equal attention for this study. Although each of the 19,009 cases was examined, the private admiralty, criminal, and land dockets were the most scrutinized, followed by the common-law and equity and United States admiralty dockets. Those receiving the most scrutiny dealt with the core of matters that concerned most other district courts during the latter half of the nineteenth century. Moreover, slighting the land-grant litigation would have ignored its central importance to Californians and distorted Hoffman's judicial role. Because the bond cases and habeas corpus petitions were largely formulaic and repetitive, only a limited review of them seemed necessary, given the focus of Hoffman's judgeship. Likewise, the bankruptcy docket entailed normally routine, if time-


consuming, administration of the short-lived Bankruptcy Act of 1867. Still, both the bankruptcy and Chinese habeas corpus cases have intrinsic interest that warrant more detailed treatment than the scope of the present study allowed.

With the exception of the northern district's special land-grant jurisdiction, the dockets most closely examined involved litigation that spanned Hoffman's forty-year period. The year-by-year breakdown of cases filed in all dockets (see Table 2) suggests a fairly constant rate of judicial business in his court, with the exception of the late 1880s. A more accurate impression of his work, however, may be gained from the graph plotting the private admiralty and criminal law and private land-grant dockets (see Table 3). The sporadic nature of criminal filings reflects to some degree how judicial business in Hoffman's court came in successive waves of different dockets. The heavy, but erratic, filings in bankruptcy between 1867 and 1878 and in the Chinese habeas corpus docket between 1882 and 1891 may be seen in Table 4. Only the combination of all dockets creates the impression of steady judicial business.

Hoffman's greatest judicial labors occurred in five somewhat overlapping periods. Initially, the availability of a federal court of admiralty on the West Coast brought an immediate surge in that docket, both in private litigation and suits brought by the United States. The greatest number of admiralty cases were filed during this early period, roughly between 1851 and 1854, and a large number of suits were initiated in the common-law and equity docket. By the mid 1850s, just as this first increase in business was abating, Hoffman embarked on a second period of intense labor dealing with private land grants coming on appeal from the federal Board of Land Commissioners appointed by the president. For the better part of the next decade, the judge found himself deeply involved in land litigation. A measure of the involvement of the United States attorney's office in challenging these grants was the significant decline of prosecutions in the criminal and United States admiralty dockets in the 1850s.

After a short period of decreasing involvement with the land

6 Act of March 2, 1867, 14 U.S. Stat. 517.

6 The typicality of Hoffman’s work load and disposition of cases is difficult to gauge because of the relative dearth of comparable information from other nineteenth-century federal district courts. Mary K. Bonsteel Tachau’s Federal Courts in the Early Republic: Kentucky, 1789-1816 (Princeton, 1978) is very helpful for the early period, but most studies of federal courts in the latter half of the nineteenth century are not archivally based. See, for example, Stephen B. Presser, Studies in the History of the United States Courts of the Third Circuit (Washington, 1982), and Jeffrey B. Morris, Federal Justice in the Second Circuit (New York, 1987).
cases, Hoffman's work load grew as a result of the Bankruptcy Act of 1867. For more than a decade, bankruptcy matters preoccupied his court, both in terms of petitions filed in that docket and collateral actions filed in the common-law and equity docket. By the late 1870s, when repeal of the Bankruptcy Act had eliminated that source of litigation, a fourth period of judicial labor—of less intensity than its predecessors—began with the increase of criminal matters. Although criminal cases continued to be filed until the end of Hoffman's tenure, a fifth and final period of work was to overshadow any previous ones. From 1882 the Chinese habeas corpus cases dominated Hoffman's docket and engaged his energies until his death in 1891.

Such an overview of the judicial business before Hoffman's court must take into account the operation of specific dockets as follows.

### Private Admiralty

The tremendous initial growth in admiralty litigation may clearly be seen in Table 3. During the first four years of Hoffman's court, more than 30 percent of all the admiralty cases the judge would hear were filed; about half his entire docket emanated from filings within the first decade. From the 1860s onward, however, the admiralty filings remained fairly constant.

Of the some three thousand cases filed, contract-related actions overwhelmingly predominated over tort-related actions. The breakdown by subject of Hoffman's admiralty docket (see Table 5) shows that libels by sailors seeking their wages were the single most frequent type of action brought. In fact, in terms of the number of sailors using Hoffman's court, 35 percent is probably a low figure. That figure represents only the number of suits initially brought by sailors for their wages. Quite often, however, sailors and others were allowed to intervene or essentially to join the suit brought by another party against a ship. It was not unusual for more than a dozen different parties with different causes of actions to make claims
against a ship that had been libelled. For this reason, the number of persons using Hoffman's admiralty court substantially exceeded the number of libels filed.

Despite the fact that seamen's wage cases led the list of types of suits brought in admiralty, businessmen and merchants accounted for over half the litigation brought in that docket. The eleven categories in Table 5 that dealt with commercial litigation (categories 2-11 and 13) amounted to 54 percent of the total. In libels for wages (category 1) and suits dealing with their maltreatment by officers and captains due to abandonment, assaults, or false imprisonments (which largely constituted the marine tort category in Table 5), seamen accounted for some 39 percent of all admiralty litigation. The final group of litigants—more important than their numbers would suggest—were passengers on ships, who constituted 4 percent of all cases filed.

It is clear that the northern district was overwhelmingly a plaintiff's court in admiralty, with sailors, businessmen, and passengers winning a decree or settlement in 78, 75 and 72 percent of the time, respectively (see Table 6). Seamen lost their suits only 9 percent of the time, businessmen only 12 percent, and passengers 20 percent of the time. The actual figures for cases settled were probably higher than we are led to believe. Whereas decrees for or against the plaintiff were invariably part of the case file, some of the cases denominated
"abandoned" or "disposition unknown" may well have resulted in unrecorded settlements.\(^8\)

On the other hand, a breakdown of commercial litigation in the admiralty docket shows a greater variation of success rates for specific categories of such litigation, but the same tendency for settlements or decrees in favor of plaintiffs may be observed (see Table 7). With the exception of the seven general-average cases (Table 5), favorable decrees or settlements were obtained by merchants from 67 percent of the collision cases to 89 percent of the bottomry-bond cases. The lower percentage for collision cases reflects the fact that they invariably entailed two diametrically opposite versions of how the accidents occurred. Virtually all the other types of commercial litigation involved suits on maritime liens, which usually resulted in satisfaction for the plaintiff providing the lien could be established. Decrees against the plaintiff, excepting general-average cases, occurred in only 5 to 19 percent of the cases.

One of the most interesting statistics of Hoffman's admiralty docket is the trial rate, which by today's standards is unusually high. Of all 2,931 cases filed (see Table 1), 1,330, or 45 percent, went to trial (see Table 8). Some 41 percent of seamen's wage cases and 68 percent of passenger contract cases went to trial, while 750, or 48 percent, of all commercial litigation cases did so. As high as these rates are, they may have been higher still. Because it was not possible to determine which cases were settled after going to trial as opposed to those settled beforehand, all such cases were considered to have been settled before trial. Only cases that ended in a decree for one party or the other, therefore, constituted the trial rates, even though a number of the cases settled undoubtedly first went to trial.

Taking into account that most trials in the latter half of the nineteenth century were brief by today's standards, their sheer number was onerous for Hoffman. Libels for seamen's wages were usually quickly disposed of, as were many of the libels for supplies, labor, and other services provided to ships. Breach of contract of affreightment cases tended to take more time, as did libels for bottomry bonds and possession. In more complicated cases, trials could take several weeks. Cases dealing with collisions, salvage, and breach of passenger contract involved the most testimony and, hence, occupied the most time. Without the benefit of law clerks and—until the 1870s—without stenographers on a regular basis, Hoffman's perusal of

\(^8\)A study of a state trial court overlapping Hoffman's period shows a similar pattern of dispositions for plaintiffs in contract actions and civil actions generally. See Francis W. Laurent, The Business of a Trial Court [Madison, 1959], 244-47, 249-50, 262-64 [hereafter cited as Laurent, Trial Court].
evidence, note taking of testimony, and disposition of cases in admiralty were staggering feats, particularly in the first several years of his judgeship.

If Hoffman's trial rate in admiralty differed significantly from that of today, the appellate rates for that docket closely mirrored the contemporary pattern of a small number of appeals. Of the 2,931 cases filed, only 106 (or 4 percent) were ever appealed; of these, the circuit court affirmed in 72 cases, affirmed with modifications in 23 instances, and reversed in 11. Only seven cases were ever appealed to the United States Supreme Court, resulting in one affirmation, two affirmances with modifications, and four reversals.9

UNITED STATES ADMIRALTY

All the cases in the United States admiralty docket were filed by the United States attorney's office, usually for forfeiture of cargo or ships pursuant to revenue statutes.10 Occasionally, penalties were also sought for violation of the statutes. More than 90 percent of all prosecutions were related to revenue violations. Twenty-one percent of such forfeitures were for opium, cigars, and matches—commodities with which the Chinese were prominently connected, either as users or manufacturers and sellers. For the most part, the cases filed in this docket followed the criminal prosecution of individuals for revenue violations.

To a lesser extent than with private admiralty cases, a spurt of United States cases were filed during the first years of Hoffman's court. However, most of them were filed during the 1860s and afterward, more than half of them between 1861 and 1871. The hiatus of prosecutions from the 1850s to the early 1860s parallels the period of greatest activity in the land docket. It seems more likely that the United States attorney's

9These rates of appeal were calculated from the information in the following docket books in the Bancroft Library: “Judgment and Decree Book,” vol. A [June 5, 1851-August 31, 1861] [D.C.N.D.Cal.]; “Judgment Record in Admiralty,” vol. 1 [December 31, 1855-July 26, 1861] [C.C.N.D.Cal.]; “Judgment Record in Admiralty,” vol. 1 [March 18, 1863-July 1864] [C.C.N.D.Cal.]; and “Decree Register, Admiralty,” vol. 1 [July 30, 1863-April 12, 1893] [C.C.N.D.Cal.].

10The United States admiralty docket was composed of two separate series of cases. The first series (covering the period 1851-1867) corresponds to entries in “Admiralty Register, United States and Private Cases,” vol. 1, and “Admiralty Register, U.S. Cases,” vol. 2, NDA. The second series (covering the period 1867 until after the end of Hoffman's tenure) corresponds to entries in “Admiralty and Common Law Register, U.S. Cases,” vols. 3-4, NDA.
preoccupation with land claims in the district court, rather than an absence of prosecutable revenue offenses, accounts for the fact that only sixty of the 1,372 cases were filed in the ten years between 1853 and 1862. This discretionary element in federal prosecutions was even greater in the filing and disposition of cases in Hoffman's criminal docket.

PRIVATE ADMIRALTY (CHINESE HABEAS CORPUS)

Although technically part of the private admiralty docket, the Chinese habeas corpus cases deserve to be considered separately. Because the Chinese were detained on ships arriving in San Francisco, their habeas corpus petitions were directed to Hoffman in his capacity as an admiralty judge, but he clearly regarded them as unrelated to his admiralty business. The most striking aspect of the Chinese cases was their number (see Table 9). Starting with only four petitions in 1882 (the year of the First Chinese Exclusion Act), they grew to gargantuan proportions—nearly 3,300 petitions in 1888. Altogether, from 1883 to 1891 the habeas corpus petitions accounted for 37 percent of the more than nineteen thousand cases filed during Hoffman's tenure. Despite the fact that the hearings were short, allowing the judge to hear several a day, their sheer volume meant that he labored incessantly for most of his last nine years on the bench.

The federal circuit court sitting in San Francisco also received Chinese habeas corpus petitions. From 1882 until January 1888, almost four thousand habeas corpus writs were filed by Chinese petitioners (including some 2,375 before Hoffman's district court). During these years the federal courts released or discharged approximately 87 percent of the Chinese petitioners. This was largely due to how Hoffman and the other federal judges in San Francisco interpreted the Exclusion Acts in light of national treaty obligations to China and the judges' commitment to due process and notions of equality before the law. Widespread hostility to continued Chinese immigration engendered severe public criticism of Hoffman and his colleagues, and resulted in increasing congressional efforts to exclude Chinese immigration in 1884 and 1888. Between October 1, 1888, and December 1, 1890, a total of 1,401 Chinese habeas corpus cases were filed. Of the 620 cases decided by the end of that period, 533, or 86 percent, ended in the discharge of the petitioners, while only 87, or 14 percent, were

11 The cases for the Chinese habeas corpus petitions correspond to entries in "Admiralty Register, Private Cases," vols. 5-14, NDA.
A Canton certificate, issued by the Chinese government under the 1882 Exclusion Act. (Courtesy National Archives)
remanded. Ultimately, efforts by the Chinese to use the federal courts to ameliorate the effects of exclusion were a losing battle, especially after 1891.

**BOND CASES**

In a sense, these maritime cases were part of the United States admiralty cases because they were all filed by the United States attorney, but they were filed in their own docket and, unlike United States admiralty, extended only from 1851 to 1867. The docket fluctuated partly because of the incentives inherent in the fee system for compensating federal prosecutors, which may be traced in the earliest bond cases filed in the northern district.

Routinely, importers posted a bond to cover duties due on foreign goods. If a certificate verifying that shipment of goods had originated from a domestic port was not produced within six months, the government could seek duty on the goods as imports. Between August and October 1851, United States Attorney Calhoun Benham filed over five hundred cases against importers of goods to San Francisco, alleging a failure to comply with revenue regulations by not demonstrating that the goods were exempt from import duties. His successor, Samuel Inge, complained in 1853 about the many cases that Benham had filed in which "nothing has been done beyond the initiation of a suit." Inge eventually discontinued all the libels in question. Still, at a fee of four dollars per libel, Benham received more than two thousand dollars in fees in one year for what amounted to a perfunctory process.

Between 1851 and 1867, more than eleven hundred bond cases were filed by various United States attorneys. To some extent it may be argued that the filings were justified as a means of making San Francisco's commercial community aware of the revenue regulations and the determination of federal authorities to enforce them. Even so, revenue prosecu-

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14 The bond cases correspond to entries in "Common Law and Equity Register, U.S. Cases," vols. 1-2, NDA.

15 Samuel W. Inge to Gilbert Rodman, July 15, 1853, Letters Received From United States Attorneys, Marshals, and Clerks of Court, California, 1851-1898, Solicitor of the Treasury, Record Group 206, NA.
tions, as for example in the bond cases, provided considerable revenue for the United States attorney while the fee system lasted and when other dockets (such as criminal and land) had little business. Despite the number of these cases, they caused little protracted work for Hoffman, since most of them were discontinued by the United States attorney after the appropriate verification of port of shipment or after duties had been paid.

PRIVATE LAND GRANTS

On the other hand, the fewer than five hundred land cases presented some of the greatest challenges to Hoffman and preoccupied him for more than a decade.\(^\text{16}\) After the initial filing of cases on appeal from the Board of Land Commissioners in the mid-1850s, it took some time to hear the merits of each case and the additional, often lengthy, evidence and testimony of the parties. The land-grant "appeals" essentially became new trials before Hoffman's court. Beyond the question of the validity or invalidity of claims (involving challenges and counterclaims that frequently persisted for decades), Hoffman played a notable role in adjudicating the surveys of confirmed claims during the 1860s.

The importance of these land cases was exemplified by the high percentage of appeals to the United States Supreme Court. Whereas only 7 of 2,931 (less than 1 percent) of private admiralty cases found their way to the Supreme Court, 59 of 458 land cases (or 13 percent of the total) were appealed to the highest federal court. The result of this protracted litigation took its toll upon land claimants (seventeen years is the estimated average length of time from filing to confirmation), but in the long run such lawsuits usually met with success. By 1878, 79 percent of the private land grants filed before the Board of Land Commissioners had been confirmed by the federal courts.\(^\text{17}\)

The adjudication of these land cases formed the principal exception to the free rein federal prosecutors in the northern

\(^{16}\)The land-grant cases correspond to entries in "Register Land Cases," NDA. The cases for this docket, however, are not in the NA, but in the Bancroft Library.

\(^{17}\)A general overview of the California land-grant litigation is in William W. Robinson, Land in California (Berkeley, 1948), which is also the source of the estimated time for litigation. The impact of the protracted litigation upon Hispanic Californians is traced in Leonard Pitt, The Decline of the Californios, A Social History of the Spanish-Speaking Californians, 1846-1890 (Berkeley, 1970).
Also taxing Hoffman's energies were the more than twenty-five hundred bankruptcy cases filed between 1867 and 1878. The judge's conscientiousness and penchant for detail were seriously challenged by the voluminous documentation created by even the simplest bankruptcy. Although Hoffman had much administrative assistance in the form of bankruptcy registers (appointed officers of the bankruptcy court), the final judicial decision was always his. At least 30 percent of the bankruptcies involved businesses, and these tended to be more complex and to create more problems in terms of distributing assets than personal bankruptcies. The Bankruptcy Act itself was fraught with a number of ambiguities which Hoffman, in common with other district judges, struggled with and sought to interpret in the light of subsequent statutory amendments. In addition, most of the common-law and equity cases filed dealt with bankruptcy matters that were unusually time-consuming.

One of the most interesting features of the bankruptcy docket was its wide geographical base. Whereas virtually all other litigation before the northern district (land claims excepted) tended to originate from the Bay Area counties and especially San Francisco itself, slightly more than half the bankruptcy cases were filed from outside the city. About five hundred cases, or 19 percent of the total, came from the Gold Rush counties, far from the hub of the state's commercial activity. Bankruptcy petitions were filed in every California county then in existence, and the docket essentially brought the presence of the federal court to a wider area than did any

18See Correspondence on California Land Claims, Boxes 1-9, Department of Justice, RG 60, NA.
19The bankruptcy cases correspond to entries in "Bankruptcy Registers," NA.
20For some of the difficulties involved in interpreting the 1867 act, see Charles Warren, Bankruptcy in United States History (1935; reprint, New York, 1972), 95-128.
other docket during Hoffman’s tenure. Admittedly, the county bankruptcy registers were local men, but the promise of relief from debt came from the federal government as exercised by the federal district judge sitting in San Francisco.

**COMMON LAW AND EQUITY**

As indicated, with the passage of the Bankruptcy Act of 1867, bankruptcy constituted an important source of cases filed in the common-law and equity docket. In fact, some 48 percent of the cases were bankruptcy-related (see Table 10). Many of them involved large amounts of money and, as might be expected, produced proportionate documentation. For example, in 1853, several holders of promissory notes successfully sued for over $51,000. In some cases, the stenographic record exceeded several thousand pages and included numerous depositions. Merely sorting through the evidence was a considerable task. Apart from bankruptcy matters, Hoffman heard an array of cases dealing with land (for example, actions to recover possession of land), contracts (for example, assumpsit and debt actions, suing on bills of exchange), torts (for example, abatement of nuisance and damages for seduction), and statutory violations (for example, recovering duties overcharged by the port collector). Most of these were filed in the docket on the basis that the litigants were residents of different states.

**CRIMINAL**

The Congressional Act that organized California’s federal courts gave the northern district judge circuit and district court jurisdiction over civil matters, but failed to specify criminal matters. Congress corrected this omission in 1853, thus giving Hoffman criminal circuit court jurisdiction for two years before the establishment of a special circuit court in 1855. Hoffman’s criminal docket comprised three major categories: crimes occurring within a maritime context, violations of

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21 Cases during 1851-1859 correspond to dockets entitled “Common Law and Equity Register, Private Cases,” vols. 1-2, NDA. Cases during 1868-1907 correspond to “Common Law and Equity Register,” vol. 3, NDA. There were no cases for the period 1860-1867.

22 The criminal docket was also split into two dockets during Hoffman’s period, the first covering 1851-1867 and the second from 1867 to 1891. The cases for both series correspond to “Register, Criminal Cases,” vols. 1-5, NDA.

federal statutes (especially revenue laws), and violations of federal authority (see Table 11). Some 1,522 of the total of 2,937 of criminal cases filed dealt with revenue matters, but this source of judicial business was hardly constant. The general graph plotting the criminal docket (Table 3) reveals the sporadic nature of the filings. In fact, relatively few criminal cases were filed until after the Civil War, nearly 70 percent of the total being between 1879 and 1891 (see Table 12). Mere numbers of cases filed did not necessarily entail significant judicial
labor, but clearly most of Hoffman's work in hearing criminal matters occurred in approximately the last decade of his judgeship.

Maritime-related crimes accounted for 16 percent of Hoffman's criminal docket and dealt with the commonplace crimes of assault, battery, and manslaughter. Of these maritime cases, crimes against the person predominated almost to the exclusion of crimes against property (see Table 13). Quite typical were the prosecutions against captains and their officers for beating or cruelly punishing sailors. Most of the maritime criminal cases involved either conduct that exceeded the limits of maintaining shipboard discipline or resistance to a captain's rightful authority. Attacks on officers, mutiny, and refusals to sail were in a sense the obverse of the violence and cruelty inflicted upon the sailors.

The disposition of violent crimes reveals a difference in the rates at which sailors, as opposed to their captains and officers, were convicted (see Table 14). For mutiny, which primarily involved sailors as defendants, convictions were obtained in 57 percent of the cases. On the other hand, when captains and other officers were prosecuted for inflicting cruel and unusual punishment or for beating sailors, they were convicted only 39 and 47 percent of the time, respectively. More telling were the distinctions Hoffman drew between the two groups in meting out harsher sentences to sailors than to their superiors. Captains and their officers were acquitted substantially more often (34 percent for beatings and 43 percent for cruel and unusual punishment) than were sailors (20 percent for assaults on officers and 24 percent for mutinous behavior). This harsher treatment of sailors is the more revealing since, overall, there was a nearly two-to-one incidence of convictions over acquittals for admiralty crimes.

Numerically, the largest source of criminal litigation before Hoffman's court (nearly 80 percent of the total) stemmed from crimes arising under federal statutes. Included under that broad heading were maritime-related statutes, revenue laws, and miscellaneous federal statutes. Table 15 provides a more specific breakdown of the crimes filed under this heading. Only a handful of cases dealing with maritime-related statutes were filed, nearly all of which concerned prosecutions of ship owners.

for exceeding the legally permissible limit of passengers they could carry for their particular type of vessel. These cases formed, as it were, the criminal component of the civil actions brought in private admiralty for breach of passenger contract.

By far the largest category involving federal statutes entailed revenue laws, of which 97 percent dealt with a failure to pay appropriate taxes and duties, the illegal sale and distribution of liquor, and smuggling opium (see Table 15). Almost 60 percent of the prosecutions for failure to pay business taxes and licenses dealt with the sale and manufacture of cigars and matches; such cases were predominantly filed during the heyday of the anti-Chinese movement, starting in the late 1870s.

The miscellaneous category of prosecutions under federal statutes constituted some 33 percent of the statutory prosecutions. Within this category were the 313 cases involving the illegal sale of naturalization certificates (40 percent of the 782 total). Of these, all but one were dismissed or transferred to the circuit court, and Hoffman thus spent little time on them. This category included the bulk of crimes against property, including robbery and misuse of the mails, counterfeiting, cutting timber on United States land, and breaking into federal buildings. Like most criminal filings in Hoffman’s court, these cases were increasingly prosecuted, beginning in the late 1870s (see Table 3).

In a number of criminal prosecutions arising under federal statutes, most, if not all, of the United States attorneys’ filings for certain crimes, such as the illegal sale and distribution of liquor and the sale of naturalization certificates, resulted in nolle prosequi (see Table 15). These dismissals largely reflected a decision to prosecute that was later retracted. Nonetheless, the United States attorneys experienced considerable success in obtaining convictions for revenue violations, notably against Chinese defendants.

Prosecutions against non-Chinese and Chinese for revenue violations dealing with the sale and manufacture of cigars and matches present a telling comparison. Between 1879 and the end of 1882, over six hundred cases were filed for such violations; Chinese were the defendants in nearly 70 percent of them (see Table 16). Chinese defendants were convicted more than twice as often as non-Chinese (50 percent to 22 percent), and were far less apt to have a nolle prosequi entered in their case (22 percent to 46 percent).

More surprising, however, was the greater willingness of Chinese than non-Chinese defendants to go to trial, and their higher rates of acquittal by juries. While non-Chinese defendants pleaded guilty 20 percent of the time, Chinese defendants
did so approximately half as often. An analysis of the cases vindicates the Chinese choice: the acquittal rate for Chinese defendants was 5 percent higher than for non-Chinese (17 percent to 12 percent). Thus, despite their high conviction rate, going to trial meant that a significant number of Chinese defendants avoided the sentences they would have faced by pleading guilty. Nonetheless, the effort to prosecute the Chinese, and their higher acquittal rate, suggests that the United States attorney may have pursued Chinese defendants even in weak cases. If non-Chinese defendants and their lawyers hoped for more lenient sentences by entering guilty pleas, they were disappointed. Hoffman imposed the same sentences whether the jury returned a verdict of guilty or the defendant pleaded guilty.25

The final category of statutory crimes involved violations of process of court, which constituted only 5 percent of the total number of criminal cases filed. Nearly 90 percent of this category involved perjury, resisting federal authority, or defaulting jurors or witnesses. Most of these prosecutions occurred in the 1880s. Many of the cases—especially those dealing with perjury and defaulting jurors and witnesses—appear to have been filed not necessarily for convictions, but as a means of discouraging any unethical behavior on the part of the parties to litigation before the federal court.

As with the private admiralty docket, criminal cases often went to trial. For criminal prosecutions within admiralty, those arising under federal statutes, and violations of process of court, the cases went to trial 76, 47, and 21 percent of the time, respectively (see Table 17). Overall, the trial rate was 50 percent, which meant that Hoffman held nearly fifteen hundred criminal trials. Even with relatively short trials, their number—compressed within roughly the last decade of Hoffman’s judgeship—involved much extra work for the northern district’s judge.

The cases filed against sailors, ship captains, and their officers represent virtually all the so-called crimes against the person found in Hoffman’s criminal docket. Comparing the sentences for such crimes with those for crimes against property suggests the relative value placed on human life versus property, particularly when contrasted with state practice. Lawrence Friedman and Robert Percival have studied criminal prosecutions in the San Francisco Bay Area county of Alameda.

25United States District Court, Northern District of California, Criminal Case Files, 2d Series, 689-1649 passim, RG 21, NA [hereafter cited as Crim. Cases, 2d Ser.].
between 1870 and 1910. Their findings indicate that sentences imposed by state judges followed the statutory range of penalties, with murder, manslaughter, robbery, and deadly assaults receiving the longest sentences. On the other hand, shorter sentences were imposed for such crimes as burglary, forgery, and embezzlement. Convictions for manslaughter in state court brought an average sentence of nearly eight years, while assaults with a deadly weapon resulted in average sentences of three years.26

While Hoffman's court experienced a substantially narrower range of crimes, the federal court criminal docket shows a rather different pattern. Sentences for similar crimes tried before federal district court were substantially less harsh than sentences imposed by state courts. The stiffest penalty for a manslaughter conviction in Hoffman's court was a two-year sentence. Moreover, captains served little more than two and a half months on average for deadly assaults, and in many cases they and their officers faced only modest fines.

An even greater disparity existed within Hoffman's criminal docket between sentences for crimes against the person and those against property. While the unlucky sailor convicted of assaulting his superior officer with a knife formed a singular exception by receiving five years at hard labor, people convicted of possessing, passing, or manufacturing counterfeit money routinely faced three to six years' hard labor in state prisons, in addition to paying, on occasion, fines of up to five hundred or one thousand dollars. Forgery of money orders or United States bonds brought equally high sentences. John T. Best, a clerk for the government engineer in charge of a California lighthouse district, was caught forging an office voucher for $9,500. Hoffman sentenced him to ten years at hard labor in San Quentin.27

Theft, burglary, and robbery also brought high penalties compared with sentences for shipboard violence and maltreatment. Postal clerks convicted of stealing letters faced from one to six years in prison. In 1883 Fred Wright got a year's hard labor in San Quentin for removing a five-dollar "greenback" from a letter, while eight years later "Julius Caesar" received the same sentence for breaking into the appraiser's building to steal four pairs of shoes. Robbery of the United States mails, moreover, brought the heaviest sentences Hoffman imposed:

26Friedman and Percival, Roots of Justice, supra note 24 at 206-210.
27For counterfeiting cases, see Crim. Cases, 2d Ser., supra note 25 at 731-32, 832, 858, 1017, 1023, 1214, 1264, 1420, 1805, 1840, 2015, 2262-63, 2573, 2645-46, and 2722-23; for forgery cases, see Crim. Cases, 2d Ser., 1369, 2619, and 2777; U.S. v. Best, Crim. Cases, 2d Ser., 1499.
between three and ten years, and on one occasion a life sentence, at hard labor (to be served in the state prison at Folsom, since a federal penitentiary was not available). Even such crimes as sending obscene materials through the mails (in this case, information on contraception), false voter registration, and selling liquor to Indians brought heavy sentences compared with crimes against the person.28

The conclusion suggested by a comparison of criminal sanctions imposed by Hoffman is that he regarded attacks on property as more serious than those against sailors or even officers. To some degree, this attitude merely reflects federal criminal statutes prescribing a range of penalties and, in that sense, coincides with findings by Friedman and Percival. Nevertheless, federal judges, like their state counterparts, enjoyed considerable discretion in imposing sentences, given a wide range of possible sanctions for a crime. That Hoffman felt willing on one occasion to punish a sailor convicted of assault with a deadly weapon with five years at hard labor underscores his far greater leniency in most cases except for those against property. Given the state court experience of Alameda County, it may be that his relatively light sentences for assaults, beatings, and even manslaughter were due less to a lack of shared values between the state and federal courts than to the specific context of such crimes.

Hoffman’s criminal docket also demonstrates the independence enjoyed by nineteenth-century federal prosecutors. The Judiciary Act of 1789 gave the attorney general no authority to supervise or direct United States attorneys; such authority came only with the creation of the Department of Justice in 1870. Before that, and even afterward, numerous federal departments sought to maintain control over the conduct of their litigation through communications to local federal prosecutors. Yet, before 1870, the only official grant of supervisory power over United States attorneys went to the Treasury Department. This lack of centralized administrative supervision, and Hoff-

28For postal theft, see Crim. Cases, 2d Ser., supra note 25 at 1207, 1757, 2007, 2545, 2716-17, and 2731; Crim. Cases, 2d Ser., U.S. v. Wright, 1757, and U.S. v. "Julius Caesar," 2759. For robbery, see Crim. Cases, 2d Ser., 1912, 2697, 2735, and 2743. See also 910 [four years in state prison for stealing gold from the San Francisco Mint] and 1962 [four years at hard labor for breaking into a post office]. The individual convicted of misusing the mails received two years at hard labor in San Quentin, see Crim. Cases, 2d Ser., 2659. The standard penalty for false voter registration was a five-hundred-dollar fine and three years in county jail; see Crim. Cases, 2d Ser., 1906-8, 1935, and 1938.

Persons convicted of selling liquor to Indians routinely faced fines of between fifty and one hundred dollars and county jail terms from several months to one year; see Crim. Cases, 2d Ser., 1398, 1401, 1440, 1503-4, 1566, 1568, 1577-78, 1788-92, and 1860.
man's understanding of his limited role in controlling the work of United States attorneys, largely explains the dynamics of federal prosecution in the northern district.\textsuperscript{29}

The financial inducements for federal officials, including United States attorneys, provide only one possible reason certain cases were filed in Hoffman's court. A variety of other pressures, some public and some private, help account for what cases were prosecuted, as do the demands placed on the United States attorneys to deal with noncriminal matters. The most striking aspects of the statistics of Hoffman's criminal docket over forty years are the fluctuations, cycles, and gaps in criminal prosecution. Actual crime and criminal violations are unlikely to have remained constant during the period, but, by the same token, they hardly disappeared for years at a time or suddenly reappeared, as the statistics might imply. Instead, we can see the dynamic and discretionary nature of federal criminal prosecution in the nineteenth century. The quality of criminal justice in the northern district rested as much on the conscientiousness and integrity of its various United States attorneys as it did on Judge Hoffman.

Evaluating the significance of the lower federal courts in the nineteenth century requires a better understanding of how those courts functioned, what business they did, who used them, and with what results. This study is a preliminary step in that direction, and presents data on the history of one district court. While it would be premature to claim that the findings for the northern district hold true for the rest of the federal judiciary, they are, nonetheless, quite suggestive. The court in California may have been unique in some respects, but it probably had much in common with many other district courts.

The range of subject matter and the variety of litigants in Hoffman's admiralty docket suggests that we may have underestimated the importance of nineteenth-century federal trial courts. Hoffman's court, for example, was a major commercial court in the state's most important city, of use to and valued by businessmen as well as sailors and passengers on vessels. The commercial importance of water transportation in the nineteenth century underscores the role that the admiralty courts played in American economic history, especially as federal admiralty jurisdiction expanded.

Moreover, the usefulness of Hoffman's court to so many different types of plaintiffs who used his court—largely with

success—requires a reexamination of theories that suggest that law primarily developed and courts largely operated in the nineteenth century in ways to promote commercial and entrepreneurial interests. The cases filed and resolved in the northern district indicate that the relationship between law and economics in the period is more complex and dynamic than some scholars have depicted. Theories of law and society and broad interpretations are important to our growing understanding of American legal history, but such ideas must incorporate law in action historically, including the actual practice of law in the courts. With such comparison and incorporation, it will be possible to increase our comprehension of the role of law in nineteenth-century America.

### Table 1
**Cases Filed in All Dockets, 1851-1891**

<table>
<thead>
<tr>
<th>Docket</th>
<th>Number of Cases Filed</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Admiralty</td>
<td>7,080</td>
<td>37%</td>
</tr>
<tr>
<td>(Chinese habeas corpus)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal docket</td>
<td>2,937</td>
<td>16%</td>
</tr>
<tr>
<td>Private Admiralty</td>
<td>2,931</td>
<td>15%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>2,598</td>
<td>14%</td>
</tr>
<tr>
<td>United States Admiralty</td>
<td>1,372</td>
<td>7%</td>
</tr>
<tr>
<td>Bond cases</td>
<td>1,147</td>
<td>6%</td>
</tr>
<tr>
<td>Common law and equity</td>
<td>486</td>
<td>3%</td>
</tr>
<tr>
<td>Private land grants</td>
<td>458</td>
<td>2%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>19,009</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

### Table 2
**Cases Filed in All Dockets, 1851-1891**

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent of Total</th>
<th>Year</th>
<th>Percent of Total</th>
<th>Year</th>
<th>Percent of Total</th>
<th>Year</th>
<th>Percent of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1851</td>
<td>795 (4%)</td>
<td>1865</td>
<td>238 (1%)</td>
<td>1879</td>
<td>443 (2%)</td>
<td>1880</td>
<td>289 (2%)</td>
</tr>
<tr>
<td>1852</td>
<td>351 (2%)</td>
<td>1866</td>
<td>338 (2%)</td>
<td>1881</td>
<td>283 (2%)</td>
<td>1882</td>
<td>229 (2%)</td>
</tr>
<tr>
<td>1853</td>
<td>604 (3%)</td>
<td>1867</td>
<td>442 (2%)</td>
<td>1883</td>
<td>352 (2%)</td>
<td>1884</td>
<td>574 (3%)</td>
</tr>
<tr>
<td>1854</td>
<td>543 (3%)</td>
<td>1868</td>
<td>764 (4%)</td>
<td>1885</td>
<td>649 (3%)</td>
<td>1886</td>
<td>689 (4%)</td>
</tr>
<tr>
<td>1855</td>
<td>428 (2%)</td>
<td>1869</td>
<td>493 (3%)</td>
<td>1887</td>
<td>1,353 (7%)</td>
<td>1888</td>
<td>3,468 (18%)</td>
</tr>
<tr>
<td>1856</td>
<td>174 (1%)</td>
<td>1870</td>
<td>316 (2%)</td>
<td>1889</td>
<td>475 (3%)</td>
<td>1890</td>
<td>1,158 (6%)</td>
</tr>
<tr>
<td>1857</td>
<td>74 (—)</td>
<td>1871</td>
<td>318 (2%)</td>
<td>1891</td>
<td>99 (1%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1858</td>
<td>84 (—)</td>
<td>1872</td>
<td>315 (2%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1859</td>
<td>126 (1%)</td>
<td>1873</td>
<td>345 (2%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1860</td>
<td>48 (—)</td>
<td>1874</td>
<td>271 (1%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1861</td>
<td>54 (—)</td>
<td>1875</td>
<td>266 (1%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1862</td>
<td>49 (—)</td>
<td>1876</td>
<td>378 (2%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1863</td>
<td>118 (1%)</td>
<td>1877</td>
<td>409 (2%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1864</td>
<td>147 (1%)</td>
<td>1878</td>
<td>460 (2%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Total</td>
<td>19,009 (100%)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
TABLE 3
ADMARIAL, CRIMINAL LAW AND PRIVATE LAND GRANT CASES,
1851-1891

Number of Cases

0 1851 1856 1861 1866 1871 1876 1881 1886 1891

Year

Criminal Law Docket
Private Admiralty Docket
Private Land Grant Docket
Table 4
Bankruptcy and Chinese Habeas Corpus Cases, 1867-1891

![Graph showing Bankruptcy and Chinese Habeas Corpus Dockets, 1867-1891.](image-url)
### Table 5
**PRIVATE ADMIRALTY, SUBJECT MATTER, 1851-1891**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sailors' wages</td>
<td>1,035</td>
<td>35%</td>
</tr>
<tr>
<td>Breach of contract of affreightment</td>
<td>434</td>
<td>15%</td>
</tr>
<tr>
<td>Libel for labor</td>
<td>169</td>
<td>6%</td>
</tr>
<tr>
<td>General average</td>
<td>7</td>
<td>—</td>
</tr>
<tr>
<td>Libel for supplies</td>
<td>329</td>
<td>11%</td>
</tr>
<tr>
<td>Bottomry bond</td>
<td>47</td>
<td>2%</td>
</tr>
<tr>
<td>Money advanced</td>
<td>78</td>
<td>3%</td>
</tr>
<tr>
<td>Wharfage</td>
<td>31</td>
<td>1%</td>
</tr>
<tr>
<td>Possession</td>
<td>67</td>
<td>2%</td>
</tr>
<tr>
<td>Pilotage/towage</td>
<td>135</td>
<td>5%</td>
</tr>
<tr>
<td>Salvage</td>
<td>123</td>
<td>4%</td>
</tr>
<tr>
<td>Breach of passenger contract</td>
<td>125</td>
<td>4%</td>
</tr>
<tr>
<td>Collision</td>
<td>136</td>
<td>5%</td>
</tr>
<tr>
<td>Marine tort</td>
<td>125</td>
<td>4%</td>
</tr>
<tr>
<td>Miscellaneous tort or contract</td>
<td>90</td>
<td>3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>2,931</td>
<td>100%</td>
</tr>
</tbody>
</table>
**Table 6**  
**Private Admiralty, Disposition of Litigation, 1851-1891**

<table>
<thead>
<tr>
<th>Litigants</th>
<th>Decree for Plaintiff</th>
<th>Decree for Defendant</th>
<th>Case Settled</th>
<th>Case Abandoned</th>
<th>Disposition Uncertain</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seamen*</td>
<td>332 (32%)</td>
<td>89 (9%)</td>
<td>472 (46%)</td>
<td>55 (5%)</td>
<td>87 (8%)</td>
<td>1,035 (100%)</td>
</tr>
<tr>
<td>Businessmen**</td>
<td>565 (36%)</td>
<td>185 (12%)</td>
<td>613 (39%)</td>
<td>26 (2%)</td>
<td>167 (11%)</td>
<td>1,556 (100%)</td>
</tr>
<tr>
<td>Passengers***</td>
<td>60 (48%)</td>
<td>25 (20%)</td>
<td>31 (24%)</td>
<td>2 (2%)</td>
<td>7 (6%)</td>
<td>125 (100%)</td>
</tr>
</tbody>
</table>

*Libels for wages  
**Commercial litigation was defined to include the following categories of libels: breach of contract of affreightment, libel of labor, general average, libel for supplies, bottomry bonds, money advanced, wharfage, possession, pilotage/towage, salvage, and collision.  
***Libels for breach of passenger contract.
<table>
<thead>
<tr>
<th>Commercial Litigation</th>
<th>Decree for Plaintiff</th>
<th>Decree for Defendant</th>
<th>Case Settled</th>
<th>Case Abandoned</th>
<th>Disposition Uncertain</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of contract of affreightment</td>
<td>142 (33%)</td>
<td>61 (14%)</td>
<td>176 (41%)</td>
<td>5 (1%)</td>
<td>50 (11%)</td>
<td>434</td>
</tr>
<tr>
<td>Libel for labor</td>
<td>65 (38%)</td>
<td>15 (9%)</td>
<td>71 (42%)</td>
<td>2 (1%)</td>
<td>16 (10%)</td>
<td>169</td>
</tr>
<tr>
<td>General average</td>
<td>2 (28%)</td>
<td>3 (43%)</td>
<td>-</td>
<td>2 (29%)</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>Libel for supplies</td>
<td>127 (38%)</td>
<td>16 (5%)</td>
<td>144 (44%)</td>
<td>9 (3%)</td>
<td>33 (10%)</td>
<td>329</td>
</tr>
<tr>
<td>Bottomry bond</td>
<td>38 (80%)</td>
<td>4 (9%)</td>
<td>4 (9%)</td>
<td>-</td>
<td>1 (2%)</td>
<td>47</td>
</tr>
<tr>
<td>Money advanced</td>
<td>37 (47%)</td>
<td>11 (14%)</td>
<td>23 (30%)</td>
<td>2 (3%)</td>
<td>5 (6%)</td>
<td>78</td>
</tr>
<tr>
<td>Wharfage</td>
<td>13 (42%)</td>
<td>2 (6%)</td>
<td>11 (36%)</td>
<td>-</td>
<td>5 (16%)</td>
<td>31</td>
</tr>
<tr>
<td>Possession</td>
<td>15 (22%)</td>
<td>11 (16%)</td>
<td>32 (48%)</td>
<td>1 (2%)</td>
<td>8 (12%)</td>
<td>67</td>
</tr>
<tr>
<td>Pilotage/Towage</td>
<td>20 (15%)</td>
<td>26 (19%)</td>
<td>76 (56%)</td>
<td>3 (2%)</td>
<td>10 (7%)</td>
<td>135</td>
</tr>
<tr>
<td>Salvage</td>
<td>59 (48%)</td>
<td>13 (11%)</td>
<td>33 (27%)</td>
<td>2 (1%)</td>
<td>16 (13%)</td>
<td>123</td>
</tr>
<tr>
<td>Collision</td>
<td>47 (35%)</td>
<td>23 (17%)</td>
<td>43 (32%)</td>
<td>2 (1%)</td>
<td>21 (15%)</td>
<td>136</td>
</tr>
<tr>
<td>N=1,556</td>
<td>565 (36%)</td>
<td>185 (12%)</td>
<td>613 (39%)</td>
<td>26 (2%)</td>
<td>167 (11%)</td>
<td>1,556</td>
</tr>
</tbody>
</table>
### Table 8
**Private Admiralty, Trial Rates, 1851-1891**

<table>
<thead>
<tr>
<th>Litigation</th>
<th>Percent of Cases Going to Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sailors’ wages</td>
<td>41%</td>
</tr>
<tr>
<td>Breach of passenger contract</td>
<td>68%</td>
</tr>
<tr>
<td>Marine tort</td>
<td>37%</td>
</tr>
</tbody>
</table>

**Commercial Litigation:**
- Breach of contract of affreightment: 47%
- Libel for labor: 47%
- General average: 71%
- Libel for supplies: 44%
- Bottomry bond: 90%
- Money advanced: 62%
- Wharfage: 49%
- Possession: 39%
- Pilotage/towage: 34%
- Salvage: 59%
- Collision: 52%

Subtotal Average: 48%
Private Admiralty Average: 45%

---

### Table 9
**Private Admiralty, Chinese Habeas Corpus Cases, 1882-1891**

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1882</td>
<td>4 (—)</td>
</tr>
<tr>
<td>1883</td>
<td>116 (1%)</td>
</tr>
<tr>
<td>1884</td>
<td>376 (5%)</td>
</tr>
<tr>
<td>1885</td>
<td>475 (7%)</td>
</tr>
<tr>
<td>1886</td>
<td>321 (5%)</td>
</tr>
<tr>
<td>1887</td>
<td>1,083 (15%)</td>
</tr>
<tr>
<td>1888</td>
<td>3,297 (47%)</td>
</tr>
<tr>
<td>1889</td>
<td>332 (5%)</td>
</tr>
<tr>
<td>1890</td>
<td>1,046 (15%)</td>
</tr>
<tr>
<td>1891</td>
<td>30 (—)</td>
</tr>
</tbody>
</table>

Total: 7,080 (100%)
**Table 10**
**Common Law and Equity Cases, Subject Matter, 1851-1891**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Number and Percent of Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bankruptcy</td>
<td>233 (48%)</td>
</tr>
<tr>
<td>Contract</td>
<td>67 (14%)</td>
</tr>
<tr>
<td>Land</td>
<td>53 (11%)</td>
</tr>
<tr>
<td>Action to recover duties</td>
<td>42 (9%)</td>
</tr>
<tr>
<td>Breach of passenger contract</td>
<td>34 (7%)</td>
</tr>
<tr>
<td>Tort</td>
<td>22 (5%)</td>
</tr>
<tr>
<td>Miscellaneous equitable relief</td>
<td>13 (3%)</td>
</tr>
<tr>
<td>Transfer to circuit court</td>
<td>7 (1%)</td>
</tr>
<tr>
<td>Uncertain</td>
<td>7 (1%)</td>
</tr>
<tr>
<td>Action for a penalty</td>
<td>6 (1%)</td>
</tr>
<tr>
<td>Patent/Copyright</td>
<td>2 (―)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>486 (100%)</strong></td>
</tr>
</tbody>
</table>

**Table 11**
**Criminal Cases, Subject Matter, 1851-1891**

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
<th>Percent of All Criminal Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Crimes within Admiralty</td>
<td>470</td>
<td>16%</td>
</tr>
<tr>
<td>II. Crimes arising under federal statutes</td>
<td>2,333</td>
<td>79%</td>
</tr>
<tr>
<td>A. Maritime matters*</td>
<td>29</td>
<td>1%</td>
</tr>
<tr>
<td>B. Revenue matters**</td>
<td>1,522</td>
<td>52%</td>
</tr>
<tr>
<td>C. Violation of other federal statutes***</td>
<td>782</td>
<td>27%</td>
</tr>
<tr>
<td>III. Violations of Process of Court (federal authority)****</td>
<td>134</td>
<td>4%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>2,937 (I-III)</td>
<td>100%</td>
</tr>
</tbody>
</table>

* For example, excess number of passengers or fraudulent ship’s registry
** For example, failure to pay business tax or license or the illegal sale or distribution of liquor
*** For example, the misuse or robbery of the mail or counterfeiting
**** For example, perjury or resisting federal authority
### Table 12
**Criminal Cases, 1851-1891**

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent of Total</th>
<th>Year</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1851</td>
<td>3 (—)</td>
<td>1872</td>
<td>19 (1%)</td>
</tr>
<tr>
<td>1852</td>
<td>26 (1%)</td>
<td>1873</td>
<td>40 (1%)</td>
</tr>
<tr>
<td>1853</td>
<td>30 (1%)</td>
<td>1874</td>
<td>9 (—)</td>
</tr>
<tr>
<td>1854</td>
<td>31 (1%)</td>
<td>1875</td>
<td>8 (—)</td>
</tr>
<tr>
<td>1855</td>
<td>4 (—)</td>
<td>1876</td>
<td>6 (—)</td>
</tr>
<tr>
<td>1856</td>
<td>3 (—)</td>
<td>1877</td>
<td>10 (—)</td>
</tr>
<tr>
<td>1857</td>
<td>0</td>
<td>1878</td>
<td>5 (—)</td>
</tr>
<tr>
<td>1858</td>
<td>1 (—)</td>
<td>1879</td>
<td>360 (12%)</td>
</tr>
<tr>
<td>1859</td>
<td>1 (—)</td>
<td>1880</td>
<td>226 (8%)</td>
</tr>
<tr>
<td>1860</td>
<td>9 (—)</td>
<td>1881</td>
<td>211 (7%)</td>
</tr>
<tr>
<td>1861</td>
<td>0</td>
<td>1882</td>
<td>172 (6%)</td>
</tr>
<tr>
<td>1862</td>
<td>0</td>
<td>1883</td>
<td>181 (6%)</td>
</tr>
<tr>
<td>1863</td>
<td>0</td>
<td>1884</td>
<td>122 (4%)</td>
</tr>
<tr>
<td>1864</td>
<td>7 (—)</td>
<td>1885</td>
<td>82 (3%)</td>
</tr>
<tr>
<td>1865</td>
<td>34 (1%)</td>
<td>1886</td>
<td>287 (10%)</td>
</tr>
<tr>
<td>1866</td>
<td>108 (4%)</td>
<td>1887</td>
<td>162 (6%)</td>
</tr>
<tr>
<td>1867</td>
<td>134 (5%)</td>
<td>1888</td>
<td>67 (2%)</td>
</tr>
<tr>
<td>1868</td>
<td>252 (9%)</td>
<td>1889</td>
<td>67 (2%)</td>
</tr>
<tr>
<td>1869</td>
<td>186 (6%)</td>
<td>1890</td>
<td>42 (1%)</td>
</tr>
<tr>
<td>1870</td>
<td>6 (—)</td>
<td>1891</td>
<td>24 (1%)</td>
</tr>
<tr>
<td>1871</td>
<td>2 (—)</td>
<td>Total</td>
<td>2,937 (100%)</td>
</tr>
</tbody>
</table>

### Table 13
**Crimes Within Admiralty, Subject Matter, 1851-1891**

<table>
<thead>
<tr>
<th>Crimes within Admiralty</th>
<th>Number and Percent of Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beatings (of sailors)</td>
<td>199 (42%)</td>
</tr>
<tr>
<td>Assault with dangerous weapon</td>
<td>81 (17%)</td>
</tr>
<tr>
<td>Mutiny (denying captain’s authority)</td>
<td>58 (12%)</td>
</tr>
<tr>
<td>Cruel and unusual treatment (of sailors)</td>
<td>44 (10%)</td>
</tr>
<tr>
<td>Desertion</td>
<td>30 (7%)</td>
</tr>
<tr>
<td>Failure to go to sea</td>
<td>21 (5%)</td>
</tr>
<tr>
<td>Larceny/conversion/receiving stolen goods</td>
<td>15 (3%)</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>10 (2%)</td>
</tr>
<tr>
<td>Murder</td>
<td>6 (1%)</td>
</tr>
<tr>
<td>Other</td>
<td>6 (1%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>470 (100%)</td>
</tr>
</tbody>
</table>
### Table 14

**Disposition of Crimes Within Admiralty, 1851-1891**

<table>
<thead>
<tr>
<th>Crimes within Admiralty</th>
<th>Acquittal</th>
<th>Conviction</th>
<th>Nolle Prosequi</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beatings (of sailors)</td>
<td>67 (34%)</td>
<td>94 (47%)</td>
<td>38 (19%)</td>
<td>199 (100%)</td>
</tr>
<tr>
<td>Assault with dangerous weapon</td>
<td>16 (20%)</td>
<td>44 (54%)</td>
<td>21 (26%)</td>
<td>81 (100%)</td>
</tr>
<tr>
<td>Mutiny (denying captain’s authority)</td>
<td>14 (24%)</td>
<td>33 (57%)</td>
<td>11 (19%)</td>
<td>58 (100%)</td>
</tr>
<tr>
<td>Cruel and unusual treatment (of sailors)</td>
<td>19 (43%)</td>
<td>17 (39%)</td>
<td>8 (18%)</td>
<td>44 (100%)</td>
</tr>
<tr>
<td>Desertion</td>
<td>4 (13%)</td>
<td>12 (40%)</td>
<td>14 (47%)</td>
<td>30 (100%)</td>
</tr>
<tr>
<td>Failure to go to sea</td>
<td>5 (24%)</td>
<td>15 (71%)</td>
<td>1 (5%)</td>
<td>21 (100%)</td>
</tr>
<tr>
<td>Larceny/conversion/receiving stolen goods</td>
<td>0 (0%)</td>
<td>6 (40%)</td>
<td>9 (60%)</td>
<td>15 (100%)</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>6 (60%)</td>
<td>1 (10%)</td>
<td>3 (30%)</td>
<td>10 (100%)</td>
</tr>
<tr>
<td>Murder</td>
<td>1 (17%)</td>
<td>1 (17%)</td>
<td>4 (67%)</td>
<td>6 (100%)</td>
</tr>
<tr>
<td>Other</td>
<td>1 (17%)</td>
<td>0 (0%)</td>
<td>5 (83%)</td>
<td>6 (100%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>133 (28%)</strong></td>
<td><strong>223 (47%)</strong></td>
<td><strong>114 (24%)</strong></td>
<td><strong>470 (100%)</strong></td>
</tr>
</tbody>
</table>
### TABLE 15
**Disposition of Crimes Arising Under Federal Statutes, 1851-1891**

<table>
<thead>
<tr>
<th>Category</th>
<th>Acquittal</th>
<th>Conviction</th>
<th>Nolle Prosequi</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Maritime Matters</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excess number of passengers</td>
<td>2 (8%)</td>
<td>13 (54%)</td>
<td>9 (38%)</td>
<td>24</td>
</tr>
<tr>
<td>Fraudulent ship's registry</td>
<td>0 (0%)</td>
<td>2 (67%)</td>
<td>1 (33%)</td>
<td>3</td>
</tr>
<tr>
<td>Excessive steam pressure</td>
<td>1 (100%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>0 (0%)</td>
<td>1 (100%)</td>
<td>0 (0%)</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>3 (10%)</td>
<td>16 (55%)</td>
<td>10 (35%)</td>
<td>29</td>
</tr>
<tr>
<td><strong>B. Revenue Matters</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to pay business tax/license</td>
<td>106 (10%)</td>
<td>548 (51%)</td>
<td>412 (39%)</td>
<td>1,066</td>
</tr>
<tr>
<td>Illegal sale/distillation of liquor</td>
<td>9 (3%)</td>
<td>14 (5%)</td>
<td>249 (92%)</td>
<td>272</td>
</tr>
<tr>
<td>Smuggling opium</td>
<td>17 (12%)</td>
<td>90 (63%)</td>
<td>35 (25%)</td>
<td>142</td>
</tr>
<tr>
<td>Assessor's failure to make returns</td>
<td>1 (6%)</td>
<td>0 (0%)</td>
<td>16 (94%)</td>
<td>17</td>
</tr>
<tr>
<td>Fraudulent customs invoice</td>
<td>1 (11%)</td>
<td>0 (0%)</td>
<td>8 (89%)</td>
<td>9</td>
</tr>
<tr>
<td>False income returns</td>
<td>3 (33%)</td>
<td>1 (11%)</td>
<td>5 (56%)</td>
<td>9</td>
</tr>
<tr>
<td>Impersonating revenue agent</td>
<td>0 (0%)</td>
<td>3 (50%)</td>
<td>3 (50%)</td>
<td>6</td>
</tr>
<tr>
<td>Other</td>
<td>0 (0%)</td>
<td>1 (100%)</td>
<td>0 (0%)</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>137 (9%)</td>
<td>657 (43%)</td>
<td>728 (48%)</td>
<td>1,522</td>
</tr>
<tr>
<td>C. Violation of Other Federal Statutes</td>
<td>Acquittal</td>
<td>Conviction</td>
<td>Nolle Prosequi</td>
<td>Total</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-----------</td>
<td>------------</td>
<td>----------------</td>
<td>-------</td>
</tr>
<tr>
<td>Sales of naturalization certificates</td>
<td>1 (14%)</td>
<td>0 (0%)</td>
<td>200 (100%)*</td>
<td>313</td>
</tr>
<tr>
<td>Misuse/robbery of mails</td>
<td>22 (22%)</td>
<td>46 (45%)</td>
<td>34 (33%)</td>
<td>102</td>
</tr>
<tr>
<td>Counterfeiting</td>
<td>21 (22%)</td>
<td>55 (57%)</td>
<td>20 (21%)</td>
<td>96</td>
</tr>
<tr>
<td>False voter registration</td>
<td>11 (12%)</td>
<td>12 (13%)</td>
<td>71 (76%)</td>
<td>94</td>
</tr>
<tr>
<td>Selling liquor to Indians</td>
<td>12 (17%)</td>
<td>44 (62%)</td>
<td>15 (21%)</td>
<td>71</td>
</tr>
<tr>
<td>Cutting U.S. timber</td>
<td>2 (4%)</td>
<td>16 (33%)</td>
<td>31 (63%)</td>
<td>49</td>
</tr>
<tr>
<td>Other</td>
<td>3 (14%)</td>
<td>5 (23%)</td>
<td>14 (64%)</td>
<td>22</td>
</tr>
<tr>
<td>Chinese related*</td>
<td>10 (43%)</td>
<td>4 (17%)</td>
<td>9 (39%)</td>
<td>23</td>
</tr>
<tr>
<td>Breaking into federal buildings</td>
<td>1 (14%)</td>
<td>6 (86%)</td>
<td>0 (0%)</td>
<td>7</td>
</tr>
<tr>
<td>Violation of neutrality laws</td>
<td>1 (20%)</td>
<td>3 (60%)</td>
<td>1 (20%)</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>84 (11%)</td>
<td>191 (24%)</td>
<td>395 (51%)</td>
<td>782</td>
</tr>
</tbody>
</table>

* An additional 112 cases involving naturalization certificates were transferred to the circuit court.

** Importation of prostitutes or false use of entry certificates
<table>
<thead>
<tr>
<th>Chinese Defendants</th>
<th>Conviction</th>
<th>Acquittal</th>
<th>Guilty Plea</th>
<th>Nolle Prosequi</th>
<th>Total Number of Prosecutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1879</td>
<td>75</td>
<td>21</td>
<td>15</td>
<td>30</td>
<td>141</td>
</tr>
<tr>
<td>1880</td>
<td>61</td>
<td>22</td>
<td>5</td>
<td>34</td>
<td>122</td>
</tr>
<tr>
<td>1881</td>
<td>47</td>
<td>23</td>
<td>10</td>
<td>20</td>
<td>100</td>
</tr>
<tr>
<td>1882</td>
<td>29</td>
<td>6</td>
<td>14</td>
<td>8</td>
<td>57</td>
</tr>
<tr>
<td>Totals</td>
<td>212 (50%)</td>
<td>72 (17%)</td>
<td>44 (11%)</td>
<td>92 (22%)</td>
<td>420 (100%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-Chinese Defendants</th>
<th>Conviction</th>
<th>Acquittal</th>
<th>Guilty Plea</th>
<th>Nolle Prosequi</th>
<th>Total Number of Prosecutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1879</td>
<td>18</td>
<td>9</td>
<td>16</td>
<td>49</td>
<td>92</td>
</tr>
<tr>
<td>1880</td>
<td>13</td>
<td>6</td>
<td>2</td>
<td>13</td>
<td>34</td>
</tr>
<tr>
<td>1881</td>
<td>8</td>
<td>5</td>
<td>7</td>
<td>11</td>
<td>31</td>
</tr>
<tr>
<td>1882</td>
<td>2</td>
<td>3</td>
<td>12</td>
<td>15</td>
<td>32</td>
</tr>
<tr>
<td>Totals</td>
<td>41 (22%)</td>
<td>23 (12%)</td>
<td>37 (20%)</td>
<td>88 (46%)</td>
<td>189 (100%)</td>
</tr>
</tbody>
</table>
### Table 17
**Criminal Cases, Trial Rates, 1851-1891**

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Number Going to Trial Within Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Crimes within Admiralty</td>
<td>470</td>
<td>356 (76%)</td>
</tr>
<tr>
<td>II. Crimes arising under federal statutes</td>
<td>2,333</td>
<td>1,088 (47%)</td>
</tr>
<tr>
<td>A. Maritime matters</td>
<td>29</td>
<td>19 (65%)</td>
</tr>
<tr>
<td>B. Revenue matters</td>
<td>1,522</td>
<td>794 (52%)</td>
</tr>
<tr>
<td>C. Violation of other federal statutes</td>
<td>782</td>
<td>275 (35%)</td>
</tr>
<tr>
<td>III. Violations of Process of Court</td>
<td>134</td>
<td>28 (21%)</td>
</tr>
<tr>
<td>Total (I-III)</td>
<td>2,937</td>
<td>1,472 (50%)</td>
</tr>
</tbody>
</table>


A persistent criticism of studies in American judicial history is that they are top-heavy. Historians of legal institutions have traditionally focused on the workings of the United States Supreme Court, while biographers have spotlighted the careers of the Court's popular justices. This emphasis is understandable, given that the Court (under the rubric of constitutional law) often has the final word on important national issues. Yet, as James Willard Hurst has noted, the history of the Supreme Court is only a small part of our legal history. A true understanding of the richness of American legal history demands that we learn what has transpired in the trenches of the legal system; that is, what has occurred in the legislatures, administrative agencies, and trial courts (both state and federal), for that is where many critical issues were first presented and often finally resolved.

From the historian's perspective, the challenge presented by an examination of the work of less visible institutions is daunting. For example, although Supreme Court opinions are readily available in published form, lower court decisions generally are not. Often there is a dearth of archival material on the lives of state and federal trial judges who never moved up the ladder to more visible appellate court positions.

Anyone who has encountered these research problems will appreciate the effort of Christian Fritz, who has written an illuminating study about the United States District Court for the Northern District of California during the second half of the nineteenth century. Federal Justice in California is really a hybrid book, for it is at once an institutional history of the Northern District court, while also being a biography of the court's alter ego, Judge Ogden Hoffman. Hoffman served as district judge from the court's creation in 1851 until his death forty years later.

The book's principal strength is its analysis of the Northern District as a legal institution. The author's ability to synthesize important themes from the mass of data he confronted will be a model for other studies of trial-level courts. Fritz has exam-
ined the docket of Hoffman's court and has drawn some revealing conclusions about the matters that occupied the judge's time.

The docket of a trial court is far more instructive about a community's everyday legal problems than an appellate court's, because relatively few cases are submitted for appellate review. The case filings in a trial court arguably present a microcosm of the society that the court serves. Fritz's analysis of Northern District cases during Hoffman's tenure reflects the economic, political, and social problems that nineteenth-century Californians encountered. It is not surprising that the types of cases and numbers of filings varied widely as different issues emerged. When new settlers entered the state from 1851 to 1860, for instance, admiralty and private land-grant cases made up much of the docket. By the 1880s, however, the focus of litigation had changed, as Hoffman spent more time hearing Chinese-immigration cases and criminal prosecutions.

A telling point in Fritz's study is that in the nineteenth-century United States District Court, judges had little control over their own dockets. While appellate courts can often choose the cases they wish to hear, a court of original jurisdiction does not have this luxury, but must decide cases within its jurisdiction. The body that had the greatest effect on Hoffman's docket was Congress. As the national legislature expanded the jurisdiction of the lower federal courts, Northern District case filings fluctuated, sometimes wildly. In the years after Congress enacted the Bankruptcy Act of 1867, for example, Hoffman was faced with thousands of cases in this new area of law. Yet the filings ended abruptly when Congress repealed the law in 1878. Likewise, when Congress passed the Chinese Exclusion Acts in the early 1880s, Hoffman suddenly had to devote much time to the tedious process of hearing numerous habeas corpus petitions.

Also determining a district court's case load are the litigants. Fritz's discussion of the Northern District's criminal prosecutions is instructive on this issue. While Hoffman's criminal-law docket was relatively insignificant during the first twenty-five years of his tenure, it increased dramatically in the late 1870s. More than three-quarters of all his criminal cases were filed between 1877 and 1891. Fritz attributes much of the change to the conduct of the United States attorneys, who at the time worked with few constraints from Washington. An especially aggressive United States attorney could thus create work for the court. Other than by dismissing cases, there was no mechanism whereby the court could limit its criminal docket. Hoffman was certainly not the last judge to feel frustrated as institutions over which he had little or no control changed the
nature and volume of his responsibilities. The burgeoning federal court dockets of the twentieth century reveal that, from the perspective of judicial administration, we have not progressed much since his time.

Relying on sometimes slim sources, Fritz has given us a nice introduction to Hoffman. A New Yorker by birth, Hoffman attempted to follow in the footsteps of his father, who was a lawyer and a Whig politician of some note. Ogden Hoffman moved to San Francisco in 1850, where he used his eastern Whig connections to gain appointment as the first United States District Judge for the newly created Northern District of California. Despite his attempts at advancement, he was never elevated to a higher judgeship. The author attributes the thwarting of Hoffman's plans to Stephen Field, the dominant judge in the Ninth Judicial Circuit.

Fritz contrasts the careers of Field and Hoffman at a number of points, especially where the judges clashed on specific issues, such as San Francisco's pueblo title dispute and the interpretation of the Chinese Exclusion Acts. The reader senses a certain frustration on the author's part as he attempts to discern a philosophy that guided Hoffman's actions. The judge emerges as a conservative Whig/Republican who worked to uphold national judicial authority in a manner that would not bring dishonor on his court, and as being somehow above the fray. In the end this analysis is not altogether satisfying, and the reader never discovers a principled motivation for Hoffman's positions. Perhaps the lesson is that the search for a trial judge's judicial philosophy is difficult when the judge follows precedent, leaves no significant extrajudicial writings, and is not overtly political.

*Federal Justice in California* complements the historical literature on the positive role federal courts played in facilitating commercial activity during the nineteenth century. In an important chapter on Northern District admiralty cases, Fritz reveals how Hoffman decided cases with a consistency that commercial interests came to respect. The judge was by no means simply pro-business. Many of his decisions, such as those enhancing passenger safety and the protection of cargo, went against shippers and increased the cost of doing business. In the long run, however, rules that raised industry standards also promoted business growth. Thus Hoffman enjoyed the esteem of commercial groups even if he did not always rule in their favor.

Philip L. Merkel
Western State University

What do J. Edgar Hoover, Earl Warren, Vincent Hallinan, Babe Ruth, and James J. Rolph, Jr., have in common? As Harry Farrell informs readers of Swift Justice: Murder and Vengeance in a California Town, each of them played a role (albeit, in Ruth's case, a tenuous one) in one of the most notorious episodes of vigilante justice ever perpetrated in the United States.

In late November 1933, thousands of outraged citizens of San Jose sought to avenge the brutal murder of Brooke Hart, a highly regarded figure in the city. The objects of their wrath were the hapless kidnappers and alleged murderers, Jack Holmes and Harold Thurmond. The events leading to the lynching of the two men are recounted by the author in painstaking detail and set against a vividly described Depression-era backdrop of wealth, poverty, despair, and crime.

Although most Americans probably equate the term "lynch mob" with an image of a band of Southern whites hell-bent on punishing their black victims, readers of Swift Justice quickly learn that dark skin and southern geography are not prerequisites for the hangman's noose. Nor, the reader finds, does a northern setting guarantee adherence to constitutionally mandated due-process rights of the accused.

Instead, as Farrell goes to great lengths to illustrate, power, prestige, and the press played critical roles in determining the fate of the pitiful antagonists. As is occasionally the case in contemporary society, many of the organizations responsible for protecting the rights (and lives) of Holmes and Thurmond between the time of their arrest and their trial failed miserably when called upon to perform their appointed tasks. These were, most notably, state and federal law-enforcement officials, and state, federal, and local members of the bar.

One of the most telling examples of this abdication of duty involved the action (and inaction) of California's governor, James Rolph, Jr., in the face of repeated requests for armed reinforcements to repel the ever-growing mob of vigilantes immediately after the recovery of Hart's body. The governor not only refused to respond to the Santa Clara County sheriff's many entreaties for additional manpower before the episode, but publicly declared after the lynching that he would pardon anyone charged in connection with it.

Farrell is to be commended for the manner in which he recounts the part played by some members of the Fourth Estate in inciting the vigilantes. Using language chillingly similar to
that of some today who urge that the rights of the accused must, of necessity, give way to the rights of the victim, many journalists wrote such inflammatory articles on the kidnapping and its aftermath that San Jose's citizens clamored for swift "justice." The San Francisco Chronicle editorialized, for example, "There is only one thing to do with the murderers of Brooke Hart. That is to hang them, legally but promptly... the gallows should end two lives which have forfeited all rights except that to be executed by the law" (pp. 146-47).

Were Holmes and Thurmond guilty of the crimes for which they were charged? Did they act alone? These and other crucial questions are unlikely ever to be answered with certainty, since the accused and many of their accusers are now dead. Nevertheless, Farrell deserves praise for his meticulous and scholarly research and for writing about a dark moment in California's legal history.

Todd D. Irby
Santa Ana, California.


At the turn of the century, West Texas, southern New Mexico and Arizona Territories, and northern Chihuahua, with El Paso as a focal point, represented the quintessential "Wild West." There could be found gunslingers, cattle rustlers, train and stage bandits, shootouts, and outlawry of just about any kind. And there were famous tough guys, men who had a criminal background, who sometimes killed other men and women, and who assumed positions of legal responsibility—sheriffs, deputy United States marshals, constables, rangers, and detectives hired by cattlemen's associations. Known as gunmen, they represented the region's best hope for self-control and for justice. Depending on gunmen for law and order was a risky business, but there was no shortage of available participants. One of them who has not previously been investigated by historians is George Scarborough, the subject of Robert DeArment's new biography.

Scarborough was born in Natchitoches Parish in Louisiana in 1857 and moved to West Texas with his family when he was fifteen. He was a displaced white southerner who, had he been born ten years earlier, might have fought in the Civil War and then joined the border gangs that terrorized settlers in Mis-
souri, Kansas, and Oklahoma. However, after working on a ranch and starting his own family (eventually he had seven children), he accepted a position as deputy United States marshal in El Paso. There he became involved in a series of adventures when he was attempting to bring villains to justice. He was indicted for murder three times, and after either quitting or being fired from his job, he went to work as a detective for the Cattlemen's Association in Grant County, New Mexico Territory. He moved his family to Deming, and established himself throughout the Gadsden Purchase lands as a brutal law enforcer. In 1898, at the age of 40, George Scarborough died after being shot by one of a gang of three thieves he was tracking; his murderer was never discovered.

DeArment's painstaking research is most impressive, particularly in local legal sources and the rich volumes of Southwest newspapers. Scarborough's immediate relatives were suspicious of writers and tried to prevent any inquiries; nevertheless, the author has successfully assembled a biography of someone on whom there is not a great deal of direct information. Unfortunately, this paucity has led DeArment to include much speculation and material not necessarily relevant to the topic at hand. Although he handles the speculation with aplomb and is careful to explain different nuances and alternatives, all too frequently there is an abundance of detail, especially during the years Scarborough spent in El Paso. This sometimes leads to confusing leaps in time, and for a time the subject himself becomes lost in the plethora of outlawry, shootings, and other evil doings.

Much of the writing is superfluous. The Indians are "hostile" or "marauding" (pp. 6, 19); Martin Mroz, who is killed by Scarborough, has a wife who is not simply a wife but a "voluptuous wife" (p. 95). Although Scarborough is frequently cast as "The Virginian," the story lacks the language skills of Owen Wister, Larry McMurtry, or Louis L'Amour. As an example, when the outlaw Vic Queen leaves Mexico to return to El Paso, DeArment writes, "Queen was ready to face the music but found that lawmen were not playing his song anymore" (p. 135). This verbiage is surpassed only by the description of Scarborough's successful acquittals on charges of murder. "Gunsmoke," we are told, "had swirled around the head of George Scarborough at the time of the Mroz and Selman shootings, smoke that only took seconds to dissipate, and it had taken almost two years to remove the legal cloud that had hung over his head after these killings" (p. 160).

Despite these flaws, although George Scarborough does not really flesh out what it was like to be an officer of the law in the Southwest in the late nineteenth century, it does provide a
strong sense of the setting in which law enforcement was practiced, and for this alone the book is significant. As for western legal history, it is more of a "western" than a balanced "legal history."

John R. Wunder
University of Nebraska

**BRIEFLY NOTED**


This collection of essays, by one of this country's finest writers, is divided into three sections. Of these, "Habitat," the second, is the most germane to western legal history. Its four essays examine those characteristics that define the West, not the least of which is its limited water supply, as Wallace Stegner repeatedly reminds us. How has this aridity shaped the West and its people? What is the impact of the enormous federal presence in the West? What makes someone a westerner? These and other questions the author discusses contribute to our understanding of western legal history. The three essays in "Personal," the first section, offer introspective trips through Stegner's past, while "Witnesses," the last part, contains insights on some of his favorite authors and on the art of fiction that will send readers back to the library shelves.


Seven of the contributors to this first publication from the Center of the American West are lawyers. They were joined by historians, journalists, politicians, writers, and artists in two recent conferences at the University of Colorado at Boulder. These were intended to create a dialogue about the West's future. The voices are diverse, but they advocate essentially one point of view: although we have despoiled the West, we may yet be able to save it. The essays, poems, testimonies, diatribes, and photographs are a good introduction to the region's serious issues and to several of its more thoughtful
advocates and visionaries, among them the poet Ed Dorn, the former governor of Arizona Bruce Babbitt, and the historian Patricia Nelson Limerick.


Between November 1889 and July 1890, six states bordering Canada—Washington, Montana, North and South Dakota, Idaho, and Wyoming—entered the Union. The twelve essays in this collection celebrate their centennials by exploring characteristics these states may share, from the history of economic development to Native American policy. Two legal historians, Roland DeLorme and John Wunder, examine the question of regional exceptionalism in the law. Each reaches a different conclusion. DeLorme finds little to distinguish between the violence and federal law enforcement in the six western states and their eastern counterparts. Wunder, on the other hand, in his examination of divorce cases and in state courts' admission of Native American testimony, argues that the northern-tier states developed a legal culture unique to them. These and the other essays editor William L. Lang has assembled raise significant questions about this long-overlooked region.
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.


Vest, Jay Hansford C., "The Concept of Wilderness: A Proprietary Right Over the Land?" *Western Wildlands* 17 (Summer 1991).

Whitehead, John, "Hawai‘i: The First and Last Far West?" *Western Historical Quarterly* 23:2 (May 1992), 153-78.


Zanjani, Sally, "‘Hang Me If You Will’: Violence in the Last Western Mining Boomtown," *Montana: The Magazine of Western History* 42:2 (Spring 1992), 38-49.

Compiled with the assistance of Helen Peterson and Pauline Afuso.
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