

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 6, NUMBER 1 WINTER/SPRING 1993

Western Legal History is published semi-annually, in spring and fall, by the Ninth Judicial Circuit Historical Society, 125 S. Grand Avenue, Pasadena, California 91105, (818) 795-0266. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts—particularly the federal courts—in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

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Western Legal History

125 S. Grand Avenue

Pasadena, California 91105

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ISSN 0896-2189

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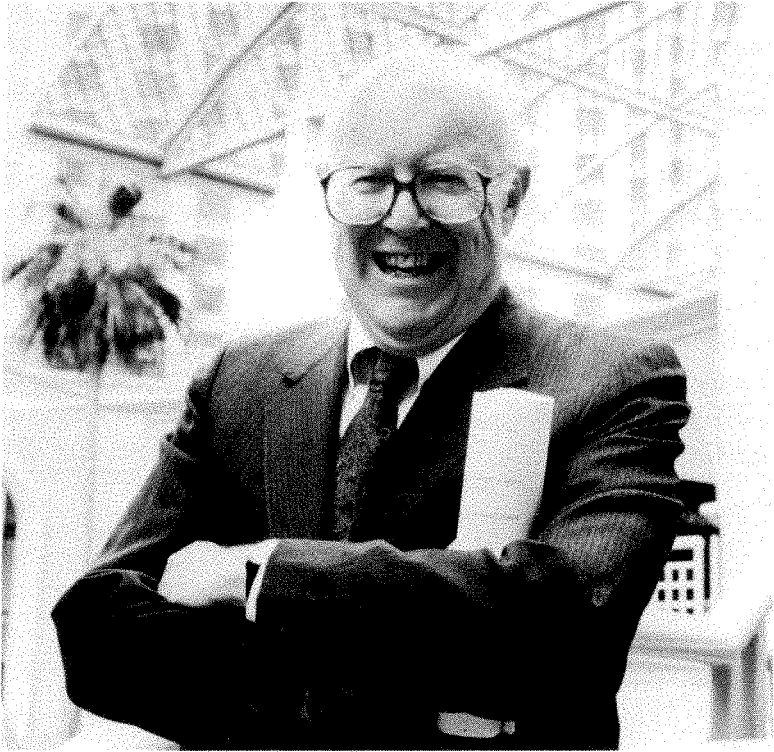
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Cover Photograph: This tableau, staged in Yellowstone National Park in 1918, symbolizes the excesses of patriotism opposed by Montana's Judge George Bourquin. (Montana Historical Society)



(Courtesy of ABAJ/David Weintraub)

ROBERT F. PECKHAM 1920-1993

The recent death of U.S. District Court Judge Robert F. Peckham was a personal loss for the many who enjoyed his friendship and for the entire bench and bar, whose members have benefitted from his contributions as a judge and a public-spirited citizen.

He was indeed a most remarkable man. For twenty-seven years, including the last twelve as chief judge, he presided over his courtroom with intelligence, integrity, and compassion, exemplifying the ideal judicial temperament. During those years he rendered several landmark decisions, including granting a stay of execution of the death penalty in California and overseeing the desegregation of the San Francisco Police Department and the San Jose School System. He struck down as racially discriminatory the school's use of I.Q. tests to assign black children to classes for the mentally retarded. In 1983 the *American Lawyer*, referring to a number of his ground-breaking decisions, selected him as the "Best Trial Judge in the Ninth Circuit."

Deeply committed to speeding the disposition of cases, he developed the Early Neutral Evaluation Program, which led the Center for Public Resources to give him its award for Alternative Dispute Resolution.

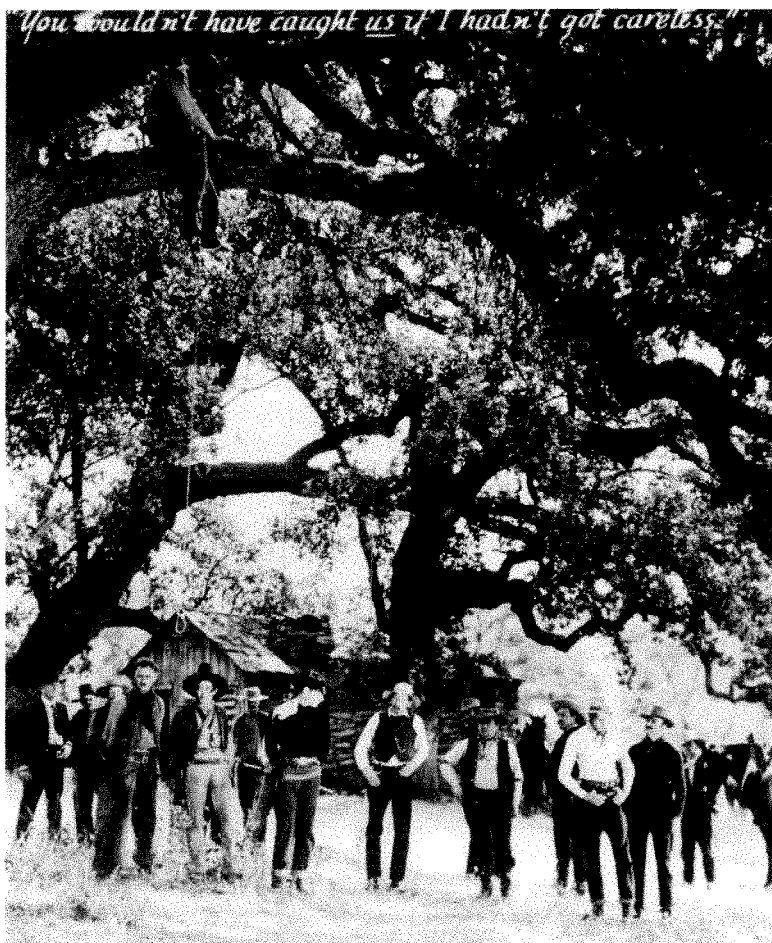
He traveled the world with delegations of judges and trial attorneys, demonstrating U.S. trial and appellate procedures.

His contributions were recognized most recently in 1991, when the Stanford Law School presented him with its annual Alumni/ae Award of Merit.

With all of his efforts relating to the present and future of the judiciary, Robert Peckham still found time to be concerned with the history of the law, its judges, and its institutions. In 1977 he was the principal founder of the U.S. Court for the Northern District of California Historical Society, and served as its chairman until he was succeeded by Chief Judge Thelton Henderson. He also served on the Board of Directors of the Ninth Judicial Circuit Historical Society.

Upon reflection, it seems as if all of Robert Peckham's experiences prepared him for serving as a judge, and in his years on the bench this most talented and caring man fulfilled all of his promise. He left us much too soon, but the legacy survives of his abiding faith in human rights and his dedication to the improvement in the administration of justice everywhere.

Gerald D. Marcus
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Owen Wister's novel *The Virginian*, in which a lynching figured prominently, was first made into a motion picture starring Gary Cooper in 1929. (Margaret Herrick Library, Academy of Motion Picture Arts and Sciences)

APOTHEOSIS OF THE LYNCHING: THE POLITICAL USES OF SYMBOLIC VIOLENCE

RICHARD SLOTKIN

The period from 1890 to 1915 that white American historians have dubbed the Progressive Era has also been termed the nadir of African-American history. In that period, the United States took definitive steps toward economic and political modernization and began the dialectical contest between corporate consolidation and liberal reform that was to dominate twentieth-century politics. At the same time, African Americans in the South were systematically being deprived of their civil and economic rights, subjected to the humiliating restrictions of Jim Crow, and terrorized by white lynch mobs sanctioned by local authority and tolerated by the national government.¹

In his study *Lynch-Law*, published in 1904, the sociologist James Cutler found that nearly two thousand blacks had been lynched in the United States between 1882 and 1903—an average of just under two per week for twenty years.² A recent work on the black response to white violence concludes that “In the United States after 1900, lynchings continued as weekly phe-

Richard Slotkin is Olin Professor and director of American Studies at Wesleyan University. This article is adapted from his book *Gunfighter Nation: The Myth of the Frontier in Twentieth Century America*, published by Atheneum in 1992.

¹Rayford W. Logan, *The Betrayal of the Negro, From Rutherford B. Hayes to Woodrow Wilson* (New York, 1965), chs. 5, 14.

²James E. Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* [1904; reprint, New York, 1969] [hereafter cited as Cutler, *Lynch-Law*], 171, 181, asserts that the number of lynchings increased steadily between 1882 and 1892, when the violence peaked, then declined somewhat between 1892 and 1903. Nonetheless, the number of lynchings in 1903 was still double that in 1882.

nomena, and mob assaults, comparable to European pogroms, against Black communities became commonplace occurrences in both the North and the South." The act of lynching itself became even more atrocious toward the turn of the century: besides being shot or hanged, victims were routinely subjected to torture, including having their eyes gouged or being castrated, flayed alive, or burned to death.³

The paradox in the association of progressivism and lynching is more apparent than real. Although Republicans rhetorically rebuked the Southern custom, Republican Progressives like Cutler, Theodore Roosevelt, and Henry Cabot Lodge refused to press for federal anti-lynching legislation, and often expressed sympathetic "understanding" for the motives of the mobs.⁴

Progressives were ambivalent toward the Southern practice of lynching because of a major tenet of their ideology, or "progressive vigilantism": the belief that, in a modern corporate state, with a population divided along semi-permanent lines of race and culture, it was necessary for an Anglo-Saxon managerial elite to assert its right to govern against the claims of the democratic masses; and that, confronted with the recalcitrance of discontented farmers or laborers, that elite was entitled to protect its standing and property by the use of private, that is, unofficial or extra-legal, force.

Although progressive vigilantism is clearly an ideology of class privilege, it has nonetheless become an acceptable part of

³Ibid., 1-2, 152-53, 160-65; Herbert Shapiro, *White Violence and Black Response from Reconstruction to Montgomery* (Amherst, 1989), 93, 145, ch. 4 [hereafter cited as Shapiro, *White Violence*]. In the period spanned by Dixon's major novels, race riots occurred in Wilmington (1898), New York (1900), Atlanta (1906), and Springfield, Illinois (1908).

⁴Cutler, *Lynch-Law*, supra note 2 at 1-2, 6-9, 11, 91, 152-53, 160-65, 268-70. As president, Roosevelt declared that "the greatest existing cause of lynching is the perpetration, especially by black men, of the hideous crime of rape—the most abominable in all the category of crimes, even worse than murder." In fact, accusation of rape figured in less than 20 percent of the lynchings during the period covered by Cutler's study. Though he opposed mob lynching, Roosevelt urged that punishment "follow immediately upon the heels of the offense," which, in the context of Southern juridical practice, amounted to an apology for summary justice or "legal lynching." See Cutler, *Lynch-Law*, supra note 2 at 138, 145-46, 153; Shapiro, *White Violence*, supra note 3 at 105-107; I. A. Newby, *Jim Crow's Defense: Anti-Negro Thought in America, 1900-1930* (Baton Rouge, 1965), ch. 5 [hereafter cited as Newby, *Jim Crow's Defense*]; Thomas G. Dyer, *Theodore Roosevelt and the Idea of Race* (Baton Rouge, 1980), 110-17. The emotions that underlay this response were more openly articulated by a columnist for *Harper's Weekly*, in his editorial on the lynching of Sam Hose in 1899, though horrified at the black man's public torture and death, E. S. Martin found that the account of his alleged rape of a white child "fills the mind with horror, and makes one feel that any means that is effectual to prevent such crimes is justified." Idem, "This Busy World," *Harper's Weekly*, May 13, 1899.

American popular myth and political ideology. For most of the century, popular novels, movies, and television programs have offered versions of the vigilante as the embodiment of American virtue and power—the gunfighter, the hard-boiled detective, Dirty Harry, Charles Bronson in *Death Wish*. We see signs of its persistence in the successful propaganda of the National Rifle Association and the massive gun purchases across the United States, and in the public celebrity of such people as Oliver North, whose breaches of the law were hailed by National Security Council Chairman Robert MacFarlane as having “preserved the . . . manhood” of the American government.⁵

Two works—Owen Wister’s *The Virginian* (1902) and Thomas Dixon’s *The Clansman* (1905)—defined and popularized progressive vigilantism, and made it part and parcel of the myth and ideology of mass culture. These best-selling novels were widely imitated, reproduced in versions for the stage, and translated into the new medium of motion pictures. Wister’s novel became the prototype for the Western film genre, and Dixon’s provided the script for D.W. Griffith’s film *The Birth of a Nation*, which established motion pictures as the century’s preeminent popular art form.⁶

Both novels drew their ideology and their evocative symbolism from a new “Progressive” revision of the traditional myth of the Frontier, which linked America’s economic and political progress to westward expansion. This revised myth was most clearly articulated by Theodore Roosevelt in his multivolume history, *The Winning of the West*, published between 1885 and 1894. Roosevelt saw the West as a Social Darwinist testing ground in which different kinds and qualities of men struggled for dominance. He drew a fundamental distinction between those races and classes that lacked the capacity for civilization, or modernization—the “savage” or “effeminate” nonwhite races, the “crackers” or white trash—and those that had the virile gifts of conquest, mastery, and management of more advanced stages of development. The fate of the American Indians provided a paradigm for those races or classes unable to compete with the Anglo-Teutonic whites: as civilization advanced, the defeated races or classes were either exterminated, “removed” to distant reservations on waste land, or subjugated to the more masterful. It followed that the principle that government must always be “by consent of the governed” did not apply equally to all peoples. Roosevelt, in arguing for American

⁵*Newsweek*, July 20, 1987, 12-20.

⁶Owen Wister, *The Virginian: A Horseman of the Plains* (New York, 1902); Thomas Dixon, Jr., *The Clansman: An Historical Romance of the Ku Klux Klan* (New York, 1905).

seizure of the Philippines in 1898, said that it made no more sense to acknowledge a Filipino's right to self-government than to allow Indians to rule their reservations or to reclaim the American West.⁷

But what was true between civilized and savage nations might also be true between different classes of citizens. The identification of class differences with racial gifts or qualifications, based on Social Darwinist premises, was an integral part of Progressive ideology. Within the industrializing United States were large classes bent on resistance to the advance of corporate industrialism—many of them racially or ethnically different from the native-born white majority. E.L. Godkin, writing in *The Nation* of the railroad strikes of 1877, described the workers as people who "carry in their very blood, ideas which may make 'universal suffrage' dangerous to the survival of 'civilization.'" When such metropolitan savages rose up against order, suggested the ideological paradigm of frontier warfare, they should be treated like Indians, not citizens: barriers should be erected to the enfranchisement, the free speech of their agitators should be curtailed, and in the last resort they should be compelled to obedience by armed force. (Godkin himself thought coercion should be enforced by the regular army as the legally constituted agent of the whole people.)⁸

Progressive vigilantism carries this rationale of coercion one step further: it identifies "the People" with a particular class, defined as "decent"—which may be, locally at least, a minority; and it licenses that class in the *private* use of extraordinary or extralegal violence to enforce its will. Both Cutler's sociology and Roosevelt's historiography held that a predilection for lynch law was a distinguishing trait of the Anglo-Saxon or Teutonic races, closely related to their passion for liberty, tribal solidarity, and self-government, and that this racial propensity was reinforced, and given distinctively American attributes, by the frontier experience.⁹

"Vigilantism" has been used to describe a variety of local movements that have in common the use of extra-legal force by an organization of citizens to suppress "criminal" threats to the civil peace or prosperity of a community. Vigilante-like

⁷Theodore Roosevelt, "The Strenuous Life," *The Works of Theodore Roosevelt* (New York, 1926) [hereafter cited as Roosevelt, *Works*], 12: 3, 6-8, 11, 19; "Expansion and Peace," *ibid.*, 28-29, 35-36; *idem*, *Winning of the West* (New York, 1907), 3: 145.

⁸"The Late Riots," *The Nation*, August 2, 1877, 631: 68-70.

⁹Cutler's figures indicate that 25 percent of lynchings took place outside the South, predominantly in the western states, where range wars and labor disputes in the mountain mining regions were marked by vigilante-style violence.

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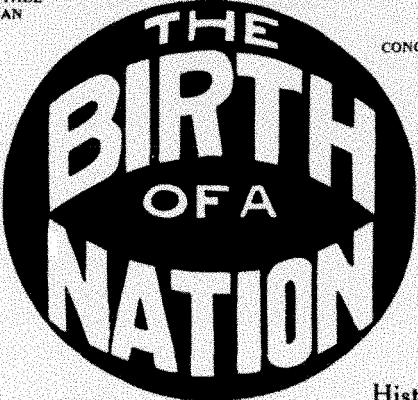
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Thomas Dixon, Jr.'s *The Clansman* was the basis for D.W. Griffith's enormously popular film *The Birth of a Nation*, first shown in 1915. (Margaret Herrick Library, Academy of Motion Picture Arts and Sciences)

elements characterized some revolutionary movements and political insurrections of the Colonial period, but the classic vigilante movements occurred in new settlements, where law enforcement was absent or weak—first in the frontier settlements of the Ohio and Mississippi valleys, later in the mining camps and cattle towns of the Far West.¹⁰

The San Francisco Vigilance Committee of 1856 represented a more modern and metropolitan type of vigilantism. Despite its western location, it was a distinctly urban movement, directed against a corrupt political “ring” of elected and appointed officials, whose criminal practices were similar to those of political machines in eastern cities. After 1865, as industrial and agrarian social conflicts increased, the ideological justification of vigilantism was transformed from the assertion of a natural and democratic right to violence to an assertion of class and racial privilege. Thus Hubert Howe Bancroft argued that, under conditions of modern social conflict, “the question [is] no longer whether it [is] right for the people [i.e., the respectable classes] to take law into their own hands . . . but whether the virtuous and orderly element in the community should have any existence at all.”¹¹

Wister’s *The Virginian* is based on the so-called Johnson County War, which lasted from 1886 to 1892, between large and small ranchers in Wyoming. Like Bancroft, Wister uses this case of frontier vigilantism to make a larger argument for the use of extra-legal force by the “best classes” against the under-classes of urban and industrial society. Although its actions and rhetoric followed classic vigilante models, the Johnson County War was less like a classic Western vigilante campaign—such as the Montana movement of 1863-65—than like contemporaneous industrial conflict—for instance, the farmer-railroad battles in central California in the mid-1880s, or the Homestead Steel and Coeur d’Alene mining strikes of 1892.

The big ranches of southern and eastern Wyoming were established in the 1880s by bankers and industrialists from the eastern states and Europe with absentee owners who approached the cattle business like captains of industry. They combined forces in the Wyoming Stock-Growers’ Association, through which they sought to control the region’s cattle busi-

¹⁰The vigilante phenomenon seems to have been peculiar to “settler states”: political communities established on the periphery of a colonizing “metropolis,” in which the forms and powers of government were initially tenuous.

¹¹Hubert Howe Bancroft, *Popular Tribunals* (San Francisco, 1887). See also Thomas Dimmesdale’s widely read account, *The Vigilantes of Montana* (Virginia City, Mont., 1866), which gave the term a new currency after the Civil War.

ness and state politics.¹² Small ranchers dominated the county politics of hilly, north-central Wyoming. Many of them (particularly their leaders) were former employees of the large ranchers who had managed to save enough of their meager pay to buy their own homesteads and set up as rivals to their former bosses.¹³ The natural rivalry between large and small ranchers was exacerbated after 1884 by hard times in the range-cattle industry. The terrible winter of 1886-87, coupled with bad range management, decimated the great herds. Rather than blame their own faulty operations, the managers of the Stock-Growers' Association accused the small ranchers of rustling, and sponsored anti-rustling legislation as a device for regulating their rivals out of business.¹⁴ The latter responded by entering the electoral lists as grangers and populists, took control of individual towns and counties, and eventually united with the Democrats to contest control of the legislature with the Republicans, who favored the Stock-Growers' Association.

The response of the association was to act outside the framework of law and electoral politics, through a campaign of private violence. Between 1884 and 1892, Wyoming Stock-Growers' Association cowboys lynched key figures in the illicit cattle trade as well as leaders of the Johnson County ranchers. The "war" reached a crisis in 1892, when a majority faction of the association hired what its newspaper called an army of "Texas gunslingers," augmented them with their own armed cowboys, and invaded Johnson County with the intention of

¹²Gene M. Gressley, *Bankers and Cattlemen* (New York, 1966), 278-81 [hereafter cited as Gressley, *Bankers and Cattlemen*]; Jack L. Weston, *The Real American Cowboy* (New York, 1985), chs. 3, 4 [hereafter cited as Weston, *Real American Cowboy*].

¹³The desire to gain land often figured prominently, with "chuck-wagon" issues and wage disputes, in labor-management conflicts on the range, and was a major factor in two large strikes by cowboys, in the Texas Panhandle in 1883 and in Wyoming in 1884 and 1886. Jack Flagg, a leader of the 1884 strike, later figured as a leader of the "rustlers" in the Johnson County War. He may have been the model for Trampas, the villain of *The Virginian*, who agitates the cowboy-workmen under the hero's management, and the leader of the rustlers. Weston, *Real American Cowboy*, supra note 12, chs. 2-4; Gressley, *Bankers and Cattlemen*, supra note 12 at 123-24, notes that Flagg's leadership of the strike was marked by an intelligent understanding of the cattle business: he timed the strike to coincide with what was to be the biggest annual roundup in Wyoming history.

¹⁴For a full history of these events, see Helena Huntington Smith, *The War on Powder River: The History of an Insurrection* (Lincoln, 1966); T. A. Larson, *History of Wyoming* (Lincoln, 1965), 272-73; Asa Shinn Mercer, *The Banditti of the Plains, or The Cattlemen's Invasion of Wyoming in 1892, the Crowning Infamy of the Ages* (Norman, 1954), xxiii, 1-2, 29 [hereafter cited as Mercer, *Banditti of the Plains*].

"exterminating" the rustlers and "deporting" their elected officials.¹⁵

The association's war in Johnson County was a vigilante campaign in a distinctly modern sense.¹⁶ The statewide campaign was aimed at establishing the association's dominance in Wyoming politics, and in that way begs comparison with the activities of the Klan in the South. But the specific tactics used more closely resemble those employed to break the Coeur d'Alene and Homestead Steel strikes in that same summer of 1892. At Homestead, Andrew Carnegie's corporation paid the Pinkerton agency to hire a private army of detectives and strike-breakers, who attempted to drive the strikers out of the factories and to arrest their leaders. The invasion of Johnson County was characterized by similarly deliberate planning: the use of spies, the recruitment of hired guns (cowboys rather than detectives), the development of a "dead list."¹⁷ The Wyoming Stock-Growers' Association's army was well equipped, and special trains were arranged to transport it. Telegraph companies gave tacit approval for the cutting of their lines to isolate the "rustlers," and provide cover for sympathetic state officials who did not wish to be summoned for aid by Johnson County officials. The Republican state government provided some arms, a mustering place, and a guarantee that the National Guard would not be used in Johnson County.

As in the Homestead affair, this large-scale use of a private armed force ended in defeat. Vigilantes and detectives had broken the Coeur d'Alene strike, but at Homestead the Pinkerton force was defeated by a strikers' militia. In the end, however, corporate power reversed the two tactical defeats: the steel strike was broken by the National Guard and federal courts, and the Wyoming vigilantes were let off by a Republican judiciary.

Ten years afterward, when similar struggles were still occurring in the range-cattle regions, Wister wrote the Wyoming

¹⁵The association's newspaper urged its army to "WIPE THEM OUT," invoking the language of the Indian wars. Larson, *History of Wyoming*, supra note 14 at 271, 276; Mercer, *Banditti of the Plains*, supra note 14 at xviii-xxxii, 33, 35-36, 47-48; G. Edward White, *The Eastern Establishment and the Western Experience: The West of Frederic Remington, Theodore Roosevelt, and Owen Wister* (New Haven, 1968), 128-31 [hereafter cited as White, *Eastern Establishment*].

¹⁶Compare Robert M. Utley, *High Noon in Lincoln: Violence on the Western Frontier* (Albuquerque, 1987), chs. 2, 3, 5, 15; Richard Brown, *Strain of Violence* (London, 1975), chs. 1, 4, 6 [hereafter cited as Brown, *Strain of Violence*].

¹⁷Wister's friend Major Wolcott used the same expression when offering his "nominations" for the "dead list." On Homestead, see Leon Wolff, *Lockout: The Story of the Homestead Strike of 1892* (New York, 1965); David P. Demarest, Jr., "The River Ran Red": *Homestead 1892* (Pittsburgh, 1992).

Stock-Growers' Association's side of the affair into American literary mythology. Like his friends Roosevelt and Frederick Remington, Wister was a wealthy, well-born easterner who went West (in 1885) to escape a metropolitan career and live the strenuous life. Like Roosevelt, he feared that the elite of the Atlantic coast was doomed to "vanish from the face of the earth" because (unlike the English peerage) "We're no type, no race," but merely "a collection of revolutionary scions of English families and immigrants arrived yesterday from Cork and Bremen." Wister hoped the nascent aristocracy of the great cattle ranches might provide the "permanent pattern" for a new American racial type.¹⁸ When reality proved disappointing, he transferred the vision to the world of fiction. The hero of *The Virginian*, in Wister's words, is a uniquely "American genius": a poor cowboy with latent gifts for mastery, selected from among the Anglo-Saxon "democracy" by the Darwinian processes of the Frontier, trained by the western experience to become a captain of industry, to command the men and resources of a modern society, and to become the progenitor of a new racial type.¹⁹

The cattle range is represented as a Social Darwinian laboratory, perfect for testing hypotheses about human nature. The lawlessness and opportunities for gain offered by the Frontier are invitations to all sorts of ambition, both industrious and criminal. But to succeed at anything in the West you must be extremely good at it, and success is the only measure of personal or moral value. As Wister's hero tells his beloved, the liberal schoolmarm Molly Wood, "Equality is a great big bluff, and it's easy called."²⁰

Wister elaborates this suggestion into a new political doc-

¹⁸Ben Merchant Vorpahl, *My Dear Wister: The Frederic Remington-Owen Wister Letters* (Palo Alto, 1972), 19-20; White, *Eastern Establishment*, supra note 15 at chs. 3, 6.

¹⁹White, *Eastern Establishment*, supra note 15 at 139-40, 143-44; Philip Durham, Introduction to Wister, *The Virginian: A Horseman of the Plains* (1902; reprint, Boston, 1968), viii-x [hereafter cited as Wister, *The Virginian*]; Richard Slotkin, *The Fatal Environment: The Myth of the Frontier in the Age of Industrialization, 1800-1890* (New York, 1985), 306-308.

²⁰Wister, *The Virginian*, supra note 19 at 243, 240, 256. "Now back east yu can be middling and get along. But if you try a thing in this Western country, you've got to do it well. . . . Failure is a sort of treason to the brotherhood, and forfeits pity." The Virginian takes nature's standard as his own when he says that the only equality he recognizes is being "equal to the situation." "I look around and I see folks movin' up or down, winners and losers everywhere. All luck, of course. But since folks can be that different in their luck, where's your equality? No, seh! Call your failure luck or call it laziness, . . . yu'll come out the same old trail of inequality. . . . [A] man has got to prove himself my equal before I'll believe him." Ibid. at 90.

trine in the opening paragraph of the crucial section called "The Game and the Nation":

There can be no doubt of this:—All America is divided into two classes,—the quality and the equality. The latter will always recognize the former when mistaken for it. Both will be with us until our women bear nothing but kings.

It was through the Declaration of Independence that we acknowledged the *eternal inequality* of man. For by it we abolished a cut-and-dried aristocracy . . . [and] decreed that every man should hence have liberty to find his own level. By this very decree we acknowledged and gave freedom to true aristocracy, saying "Let the best man win, whoever he is." Let the best man win! That is America's word. That is true democracy. And true democracy and true aristocracy are one and the same thing. If anybody cannot see this, so much the worse for his eyesight.²¹

Democracy is not a value in itself, but the means whereby a naturally qualified ruling class can make its way to the top. Once in place, this neo-aristocracy is entitled to command and to maintain itself by force. When the rustlers find protection from a government elected by the "equality," the Virginian (acting as the agent of an association of big ranchers and "decent people") leads a systematic campaign of lynching against them. The *democratic* critique of this practice is voiced by Molly. She argues with Judge Henry that lynching rustlers is a barbarous and anarchic act, like the lynching of Negroes in the South. Judge Henry distinguishes the Virginian's act from Southern lynchings by noting the difference of manner: the Southerners torture their victims and make a public display of them, violating propriety by inviting women and children; the vigilantes simply hang their rustlers, and do it in private.²² This proves that the lynchers are men of good character. Molly responds that the Virginian's noble character alone cannot be sufficient justification for his assuming the privilege to punish and kill outside the forms of law.

The judge answers by reverting to first principles. He offers a further revision of the Declaration of Independence, which develops the consequences of the "quality/equality" distinction. The fundamental principle of the Declaration is its idea that the law is merely the expression of the will of "the peo-

²¹Ibid. at 93.

²²Ibid. at 261-62.

ple," and that when government becomes corrupt it is the right of the people to remake it through revolutionary action. In punishing the rustlers, the Virginian acts in the name of the people, who (through him) take back the power that once they gave the state.²³

Judge Henry's argument works only if we accept a radical revision of the Jeffersonian concept of "the people." The government of Wyoming has not been imposed by a foreign power or a distant bureaucracy, but is elected. The people attempting to take back the power are not the whole or even a majority of the electorate, but a minority of the "quality" acting as if they were "the people"—or the only people who ought to count, politically. This potential flaw in the argument is evaded by a shift of ground, in which the judge asserts that in effect the state is still in a frontier condition, in which savage war conditions pertain: "We are in a very bad way, and we are trying to make that way a little better until civilization can reach us. At present we lie beyond its pale."²⁴

Wister's primary concern (expressed through Judge Henry) is not with the preservation of democratic legislative and judicial forms, but, rather, with the establishment and protecting of "civilization"—tasks that can be performed only by the races and classes who possess the proper "gifts." As the judge sees it, the South already enjoys the benefits of a system of government that privileges the "decent" (i.e. "white") classes at the expense of the "dangerous classes" (the blacks). Rustlers sitting on Wyoming juries can turn rustlers free, but blacks cannot sit on Southern juries, and therefore "The South has never claimed that the law would let [a Negro] go." The judge does not object that all-white juries might (and did) act as judicial lynch mobs, treating accusation as tantamount guilt. That exercise of privilege and discrimination is exactly what is necessary whenever a civilization is threatened by its dangerous classes.

In the traditional terminology of the frontier myth, the coming of "civilization" and the establishment of a legally constituted government were regarded as virtually synonymous. Wister distinguishes "civilization" from "government" by arguing that certain forms of democracy produce a degenerate form of politics: one in which mongrels and failures, the "equality," are enabled to assert against the "quality" their claims for power and a redistribution of wealth. The crucial battle of the progressive frontier is therefore not simply the struggle between white republican and red savage, but the struggle between "true aris-

²³Ibid. at 265.

²⁴Ibid.

ocracy" and false democracy, with "manhood" and "civilization" as the ultimate stakes.

Wister's Southern counterpart, Thomas Dixon, Jr., was able to defend Southern lynching in terms appropriate to *The Virginian's* ethical scheme. In *The Clansman*, he uses the events of the Reconstruction as James Fenimore Cooper used the colonial Indian wars: as a "historical" scene in which we can see the origins of present-day conflicts of power and value. Dixon's myth of Reconstruction specifically addresses the issues of the Jim Crow era in the South, during which blacks were legally disenfranchised and subjugated to a regime of segregation and economic subjection. Dixon's novels provide a historical mythology for this new regime by dramatizing the processes through which whites of different classes and parties come to understand the primacy of racial distinction, and reject the ideals of egalitarian democracy.²⁵

Dixon represents black Reconstruction as both a historical aberration and as a model of the fate that might befall civilization should egalitarian principles triumph. Although the specific referent is historical, he suggests that Reconstruction exhibits the defects of agrarian democracy and socialist systems (the kind advocated by turn-of-the-century radicals), and that in order to save themselves Americans must choose between the values of "Democracy" and the safety of "Civilization."²⁶

His ideology is fully articulated in a conversation between

²⁵Thomas Dixon, Jr., *The Clansman: An Historical Roman of the Ku Klux Klan* (reprint; Lexington, 1970), 290-92 [hereafter cited as Dixon, *The Clansman*]; C. Vann Woodward, *Tom Watson: Agrarian Rebel* (London, 1963), chs. 13, 18, 20; idem, *The Strange Career of Jim Crow* (New York, 1957), chs. 1-2; Newby, *Jim Crow's Defense*, supra note 4 at chs. 4-6; Lawrence Friedman, *The White Savage: Racial Fantasies in the Postbellum South* (Englewood Cliffs, 1970), 66-76. Thomas Nelson Page, *The Negro: The Southerner's Problem* (New York, 1904), esp. 92-119, and ch. 5 on disfranchisement, argues for a restoration of control by the educated elite—a principle with which the Progressives Roosevelt and Cutler agreed. See, e.g., Cutler, *Lynch-Law*, supra note 2 at v, 153, 191-92, 200-206, 224-26, 264-65. Dixon's conflation of an "old" and a "new" South has a historiographical counterpart in the work of Ulrich Bonnell Phillips; see Daniel Joseph Singal, "Ulrich B. Phillips: The Old South as the New," *Journal of American History* 43:4 (1977), 871-91.

²⁶Dixon's portrayal of the "democratic revolution" made by a degraded lower class draws on the literature of Reconstruction, and on *Caesar's Column* (Chicago, 1891), the popular dystopian fantasy by the Populist writer and politician Ignatius Donnelly. In Donnelly's novel the degradation of the working classes by the tyranny of capital transforms the people into a race of brutes; when democratic revolution comes, it takes the form of a war of extermination that destroys civilization. "Caesar's Column" is the pile of corpses produced by the war of extermination launched by Donnelly's racially brutalized proletarian leader, Caesar Lombrose. Dixon gives the name "August Caesar" to the black leader, whose rape of a white woman will precipitate the Klan's race war.

the radical Stoneman and the Southern leader, Dr. Cameron. Stoneman asserts the primacy of democratic ideology: "Manhood suffrage is the one eternal thing fixed in the nature of Democracy. . . . The Negro must be protected by the ballot. . . . The humblest man must have the opportunity to rise. The real issue is Democracy." Cameron replies, "The issue, sir, is Civilisation! Not whether the Negro shall be protected, but whether society is worth saving from barbarism." The doctor condemns blacks as a "leprous" race, whose touch is defiling, a "creature . . . half-child, half-animal"; a "senile" race, like the Chinese in Roosevelt's "Strenuous Life," whose capacity for natural evaluation has been exhausted. On the other hand, the white race is still in mid-career, and its youth suggests the nature of its mission. "There is a moral force at the bottom of every living race of man," says Cameron, and that of the Anglo-Saxon is to rule and command. The proof of this, he continues, in words that invoke Roosevelt's version of the frontier myth, is to be found in the struggles through which we achieved the winning of the West:

This Republic is great, not by reason of the amount of dirt we possess, the size of our census roll, or our voting register—we are great because of the genius of the race of pioneer white freemen who settled this continent, dared the might of kings, and made a wilderness the home of Freedom. Our future depends on the purity of this racial stock. The grant of the ballot to these millions of semi-savages and the riot of debauchery which has followed are crimes against human progress.²⁷

Though they are domesticated within metropolitan society, the blacks remain savages, according to Dixon, and the stake of battle with them is exactly that of "savage war" between the white man and the Indian. Since no mixing of the races is possible without moral "pollution" and the degradation of the white race's "progressive" gifts, in savage war one race or the other must either be exterminated or utterly subjugated. Rape threatens the integrity of the white race directly. To punish that crime and to deter repeat offenses, the best representatives of Anglo-Saxon virtue are once again permitted to use whatever instruments of violence they may need to achieve their ends. The rising of the Ku Klux Klan is presented as a literal recrudescence of an ancient race consciousness, with "the Fiery Cross of old Scotland's Hills" as the "ancient symbol of an

²⁷Dixon, *The Clansman*, supra note 25 at 290-92.

unconquered race" lighting the Klan's ride to redemptive vengeance—first to a lynching, next to the overthrow of the carpet-bagger government, and then to the resubjugation of the South's savage and dangerous class.²⁸

The popularity of Wister's and Dixon's works undoubtedly contributed to the national tolerance of lynching. But the most significant and enduring function of such myths of vigilantism and extraordinary violence was to sanction the ordinary violence of oppression and injustice—of brutalities casual or systematic, of the dispossession, exclusion, segregation, insulting, humiliation, and disenfranchisement of targeted groups. Exaggerations of mythic violence prepared the public to accept greater license in the use of force and violence against any "aliens" or "dissidents" whose role could be likened to that of "savages" or "rustlers." While blacks were the objects of this sort of murderous violence between 1890 and 1925, other members of minority groups were similarly treated: Italians, Jews, Asians, union organizers, and others were the victims of lynch mobs, race riots, or Klan activity. In 1914 former President Theodore Roosevelt formed an association whose aim was to drive the corrupting presence of German culture from schools and concert halls, and to push for American intervention against the Kaiser. Roosevelt—who had been rejected for membership in the Dakota vigilantes in the 1880s because he was too hot-headed—named his organization "The Vigilantes." The Red Scares of 1919-21 produced a few lynchings, but, more significantly, a wholesale breach of constitutional restraints by government officials occurred—a species of endorsed vigilantism.²⁹

²⁸Ibid. at 326. Dixon differs somewhat from Wister in his insistence on the common bond that links all whites (of whatever class or culture) against all blacks; Wister is far more interested in making distinctions among different classes of whites. But it is vital to note that Dixon depicts the political organization of the Klan as a combination of Old South paternalism and the Progressive ideal of "management by the best." The movement is led by the best class of whites, to whom the best of the poor whites defer. Thus the Klan revolution, like Wister's vigilantism, is an uprising of the quality rather than the "equality."

²⁹On President Wilson's suppression of domestic radicalism and toleration of vigilantism and lynching, see Sidney Bell, *Righteous Conquest: Woodrow Wilson and the Evolution of the New Diplomacy* (Port Washington, N.Y., 1972), ch. 3; Melvin Dubofsky, *We Shall Be All: A History of the IWW* (New York, 1969), 385-96; Brown, *Strain of Violence*, supra note 16 at 126-28. Although Roosevelt and his school of Progressives would have repudiated the connection, one historian has concluded that after 1920 "The Klan became the ideal of progressivism for hundreds of thousands of middle class Protestant Southwesterners," because it targeted the new "immoral" and "criminal" classes of the cities, and the ethnic groups that either constituted these classes or serviced its vices. Quoted in James R. Green, *Grass-Roots Socialism: Radical Movements in the Southwest, 1895-1943* (Baton Rouge, 1978), 402.

As president, Roosevelt tolerated the establishment of Jim Crow in the South, and actively furthered the movement to restrict immigration and access to citizenship on a "racial" basis. The rationale for exclusion was most persuasively set out by John Commons, the Progressive social scientist who pioneered the study of American labor history, in a study prepared for Roosevelt's immigration commission in 1908. Commons asserted that inborn and immutable racial characteristics determined the aptitude of different peoples for the exercise of democratic liberty; that the new immigrants from Eastern and Southern Europe and from Asia lacked this aptitude; and that, under modern industrial conditions, these new races inevitably joined native-born Negroes and the lowest class of whites in forming a permanent American underclass.³⁰ Commons feared that the United States might be evolving into "a class oligarchy or a race oligarchy" like the one that already existed in the South. He compared the corruption and political upheavals of urban political machines to the malfeasance and disorder of black Reconstruction, and found that common to both was the attempt to base a democratic government on the racially unfit. If the Southern example held, he claimed, society would have no practical choice but to "despotize [its] institutions in order to control these dissident elements."³¹

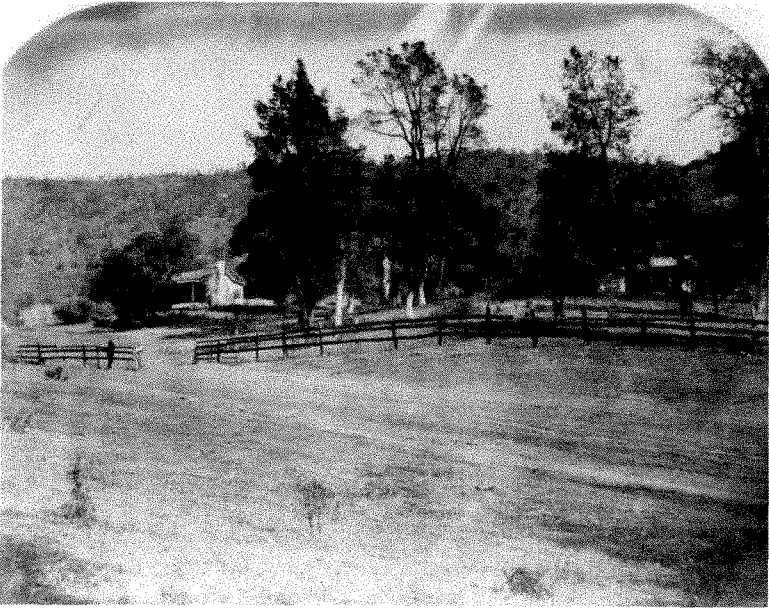
In a column written when Ross Perot was at the top of the polls, George Will attributed his mysterious popularity to Owen Wister. "The values they were reading into [Perot] were first vivified in 'The Virginian,' which invented the cowboy of popular imagination, and . . . defined . . . the West as a repository of American yearnings and regrets," he wrote. But Perot (in Will's portrait) embodies more than the Virginian's proof that the West is the land for "rebirth and regeneration," for "second chances" at success. According to Will, the former candidate answers "the American hankering . . . for someone who will lay down the law. . . . Today the electorate's mood regarding politicians can be put in words familiar to readers of pulp Westerns: 'String 'em up!'"³²

That line serves to remind us that such words were once spoken in earnest, and that the rage that motivates, and the ideology that licenses, the use of extraordinary violence against those perceived as "aliens" or "dangerous classes" is still an active constituent of American culture.

³⁰John R. Commons, *Races and Immigrants in America* (1908; reprint, New York, 1920), vii-xv, xvii, 6-7, 182.

³¹*Ibid.* at 1-5, 8-13.

³²George F. Will, "The Barefoot Billionaire," *Newsweek*, June 1, 1992.



The Frémont ranch house (left of center) on the Mariposa Land Grant, n.d. (Mariposa Museum and History Center)

JOHN C. FRÉMONT, MARIPOSA, AND THE COLLISION OF MEXICAN AND AMERICAN LAW

LEWIS GROSSMAN

When in 1848 the United States acquired California from Mexico by the Treaty of Guadalupe-Hidalgo, the Americans promised that the private-property rights of the Mexicans would be "inviolably respected."¹ By this guarantee, the United States bound itself to absorb a vast system of Spanish and Mexican land grants based on a conception of land ownership radically different from the American notion of precisely defined, carefully documented, and intensively developed estates.

By the time that the United States took possession of California, Spanish and Mexican officials had made approximately 750 land grants to individuals—grants totalling between thirteen and fourteen million acres.² Individual grants were as large as eleven square leagues, or about forty-nine thousand acres.³

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¹Treaty With the Republic of Mexico, February 2, 1848, article 8, 9 Stat. 922 [hereafter cited as Treaty With the Republic of Mexico].

²Paul Wallace Gates, "Adjudication of Spanish-Mexican Land Claims in California," *Huntington Library Quarterly* 21 (1958), 213, 215 [hereafter cited as Gates, "Adjudication of Spanish-Mexican Land Claims"].

³Section 12 of the Mexican Colonization Law of 1824 stated that no one person would be allowed to obtain more than one square league of irrigable land, four square leagues of land "dependent on the seasons," and six square leagues of land for raising cattle. Decree of August 18, 1824, respecting colonizations, Section 12, in John Arnold Rockwell, *A Compilation of Spanish and Mexican Law* (New York, 1851), 454 [hereafter cited as Rockwell, *Spanish and Mexican Law*].

The vast majority of them had been made in the 1830s and 1840s by Mexican governors of California. The ten square leagues that John C. Frémont acquired constituted a grant made in 1844.

In order to determine the status of each of the Spanish and Mexican land grants, on March 3, 1851, Congress passed "An Act to ascertain and settle the private Land Claims in the State of California."⁴ This law established a commission, consisting of three commissioners appointed by the president, before which every person claiming land under a Spanish or Mexican grant was required to appear in order to defend his or her claim against the United States. Either the claimant or the United States could appeal an unfavorable decision to the United States District Court, and then to the United States Supreme Court. All claims that were finally rejected, as well as claims that were not presented to the commissioners within two years of the act's passage, would become part of the public domain of the United States.

Congress listed a number of criteria by which the commission and courts should evaluate the validity of the grants: "[T]he commissioners herein-provided for, and the District and Supreme courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."⁵

Of all the proposed versions of the law, the one that passed was the least favorable to the claimants, and thus most favorable to the new American settlers in California, who desired the land themselves.⁶ It compelled all grantees, even those with long-standing and indisputably valid claims, to defend their grants against the United States government, potentially all the way to the Supreme Court on the other side of the continent.

Nevertheless, the criteria by which the tribunals were to evaluate the claims were not weighted against the claimants. The Treaty of Guadalupe-Hidalgo guaranteed the security of Mexican private-property rights in the United States' newly acquired territories.⁷ The law of nations—the unwritten, cus-

⁴An Act to ascertain and settle the private Land Claims in the State of California, ch. 16, 9 Stat. 631 (1851) [hereafter cited as 1851 Land Claims Act].

⁵*Ibid.*

⁶See note 39 *infra*.

⁷The treaty stated that "Mexicans now established in [American territories acquired from Mexico by the treaty] . . . shall be free to continue where they

tomary law that regulates relationships between countries—similarly protected the rights of private-property holders in the defeated nation.

Neither source of law, however, resolved which claimants had valid property interests in the first place. In order to make this determination, the commissioners and judges were compelled to turn to the other criteria enumerated by the Land Claims Act of 1851: "the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States."⁸

The act thus generated a critical tension between written law, on the one hand, and equity, usage, and custom, on the other. This tension would define the legal history of the Mexican land claims in California. The essential weakness of the 1851 act was its failure to provide more detailed guidance to the commissioners and judges on how to apply these often conflicting legal notions. Whether a decision was made for or against a claimant often depended entirely on which of these criteria were emphasized.

The tension had two facets, one cultural and the other temporal. The cultural aspect was rooted in the distinct difference between American and Spanish-Mexican approaches to land titles, land grants, and land use in the New World. The statutes regulating the United States' allocation of its public lands to private citizens through preemption rights required careful surveys, accurate descriptions, and full records of all the proceedings.⁹ When disputes arose concerning title to public lands in the United States, judges resolved them by turning to these

now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please." Art. 8. It also promised, "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." Art. 8. The treaty also stated that Mexicans in the territories who chose to become American citizens would, while they were waiting, "be maintained in the free enjoyment of their . . . property." Art. 9. Treaty With the Republic of Mexico, *supra* note 1.

⁸The Supreme Court decisions to which the statute refers are primarily those arising under an 1824 act concerning French and Spanish land claims in Arkansas and Missouri and those arising under later laws extending the 1824 act to Florida, Louisiana, Alabama, and Mississippi. See text accompanying notes 42-47 *infra*.

⁹See, e.g., An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights, ch. 16, 5 Stat. 453 (1841); An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes, ch. 145, 10 Stat. 244 (1853).

statutes and to prior court decisions interpreting and applying them.

Similarly detailed Spanish and Mexican laws had regulated the distribution of land grants in California.¹⁰ During the Mexican era, when most of the grants were made, the Colonization Law of 1824 and the Regulations of 1828 governed the process in all of its particulars.¹¹ These laws delineated the precise procedure the governor and the grantee were required to observe in order to complete a valid land grant.

The Regulations of 1828 required a private person soliciting land to address a petition to the territorial governor. The petition was to state the petitioner's name, nationality, and profession and to describe, by means of a map (a *diseño*), the land requested. The governor, either himself or through consultation with the local municipal authority (the *alcalde*), was then to determine whether the petitioner and the land satisfied the various requirements of the Colonization Law of 1824, including requirements that the land be vacant and that the petitioner be a person of good standing in the community. If the governor were satisfied that the requirements were met, he could then issue the grant (the *concedo*). The grant was to designate the time within which the grantee was bound to cultivate or occupy the land. This period was typically one year.

The grant was not definitely valid until it received approval from the territorial deputation or the departmental assembly, to whom the governor was required to send the documents. If the deputation or assembly failed to approve the grant, the governor could appeal its decision to the supreme government at Mexico City. If the grant were approved, the governor was to sign and deliver to the grantee a formal document to serve as the title. Finally, the colonist, having fulfilled the grant's cultivation and occupation requirements, could go to the *alcalde* to receive final delivery of possession of the land, in a public ceremony. The Regulations required that a record (*expediente*) of all the petitions and grants be preserved in the government archives.¹²

Although the Mexican statutes were as clear and detailed as American public land laws, written law did not play the same role in the Mexican legal system as it did in the American one. Spanish and Mexican officials generally did not treat written

¹⁰See R. Aviña, *Spanish and Mexican Land Grants in California* (Salem, N.H., 1976).

¹¹Colonization law of 1824, *supra* note 3; General rules and regulations for the colonization of territories of the republic—Mexico, November 21, 1828 [hereafter cited as Regulations of 1828] (Rockwell, *Spanish and Mexican Law*, *supra* note 3 at 453).

¹²Colonization Law of 1824, and Regulations of 1828, *supra* note 11.

law with the same degree of sanctity that their American counterparts did, instead relying heavily on customary law, a largely unwritten body of principles derived from ethical and practical considerations and from prior responses to similar problems. One scholar explains how Spanish and Mexican authorities applied customary law to the granting of land in California: "Customary law was made up, not only of the decisions of *alcaldes* and governors in litigation, but also of the acts of these officials in response to petitions for land. Customary law was the totality of what was actually done in response to a conflict or a petition, not what was supposed to be done. Sometimes the laws and customs coincided and there was no conflict between the two. But many times there was a conflict, often because the local authorities did not know about the law in question."¹³

The most striking aspect of the use of customary law in Spanish and Mexican jurisprudence was the manner in which custom could trump written law when a conflict between them occurred. According to a nineteenth-century authority on Spanish law, "Legitimate custom acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said that there may be custom without law, in opposition to law, and according to law."¹⁴

The Spanish and Mexican authorities in California had never rigorously observed the regulations governing the land-grant procedures. As noted by William Carey Jones, an attorney who prepared a report on the Mexican land grants for the Department of the Interior, "the law of custom, with the acquiescence of the highest authorities, overcame . . . the written law."¹⁵ The historian Hubert Howe Bancroft also recognized this fact, albeit from a typically Anglo-American view:

In few if any cases were all these formalities complied with, for lands were plentiful and cheap, and the people and authorities indolent and careless of details. . . . Sometimes there was no *diseño* . . . no approval of the assembly. . . . There was usually no formal act of juridical possession, often no survey, and never a careful or accurate one. Boundaries were very vaguely described, if at all. . . . There was no definitely prescribed

¹³Malcolm Ebright, Introduction, in *Spanish and Mexican Land Grants and the Law* 5 (1989).

¹⁴Escriche's *Derecho Español*, quoted in *Slidell v. Grandjean*, 111 U.S. 412, 421 (1884).

¹⁵William Carey Jones, *Report on the Subject of Land Titles in California* (1850), 38 [hereafter cited as Jones, *Report on Land Titles*].

form for grants, nor was there any uniformity of conditions, which were sometimes omitted. Notwithstanding the apparent irregularities and imperfections of land tenure, . . . it seems clear that under Mexican law and usage the grants were practically held as valid.¹⁶

When the 1851 Land Claims Act decreed that the commissioners and the courts, in determining the validity of the claims, should be guided by "the laws, usages, and customs of the government from which the claim is derived," it required them to perform a task that most were ill prepared to perform. The problem transcended their lack of knowledge of the Spanish language and their limited exposure to the civil-law tradition. Trained in the definite and precise field of Anglo-American property law, they found it exceedingly difficult to overlook clear violations of written statutes and to approve grants in accordance with Mexican customary law. Moreover, they were entrenched in a positivistic legal tradition in which a spontaneously evolving custom could never abrogate the clear word of the sovereign.¹⁷ They found it much easier, and much

¹⁶Hubert Howe Bancroft, *History of California* (San Francisco, 1888), 532-33 [hereafter cited as Bancroft, *History of California*].

¹⁷Custom has been a source of law in the United States since the birth of the country. The most obvious field in which custom creates law is international law. The Supreme Court long ago explicitly recognized that customary "[i]nternational law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Moreover, custom has played a vital role in the development of the common law since the dawn of English legal history. See Theodore F.T. Plucknett, *A Concise History of the Common Law* (New York, 1956), 307-314. Indeed, Blackstone defined the common law as an aggregate of "1. General customs . . . 2. Particular customs . . . [and] 3. Certain particular laws; which by custom are adapted and used by some particular courts." William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1768) 1:67. When the United States absorbed and adapted the English common law, it maintained the notion that custom and usage could identify and create contract and property rights. As recently as 1992, the U.S. Court of Appeals for the District of Columbia Circuit held that "property interests . . . may be created or reinforced through uniform custom and practice." *Nixon v. United States*, no. 92-5021, slip op. at 13 (D.C. Cir., November 17, 1992).

Custom has a noteworthy place in regard to gold in California's history, for the state's 1851 Civil Practice Act contained the provision that "in actions respecting 'Mining Claims,' . . . customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action." Civil Practice Act of April 29, 1851, §621. The qualifying clause in this provision is critical, however; while Americans could countenance the formation of law through custom, they could not, with their positivistic, Austinian outlook, imagine custom's abrogating written law. On rare occasions, nineteenth-century American jurists permitted customary rules to trump the common law. See, e.g., *Ghen v. Rich*, 8 Fed. 159, 162 (D. Mass. 1881). Never, however, did they allow custom or usage to void positive

more familiar, simply to cite a section from the Colonization Laws than to research and apply the customary law on the matter.¹⁸

American judges' disapproval of Mexican customary law was probably symptomatic of the general distaste that nineteenth-century Americans had for both Mexican culture and the Mexican "race." Leonard Pitt has brilliantly described the contemptuous ideas Anglo-Americans had about the Latin-American culture and people they encountered in California.¹⁹ Of the litany of disparaging adjectives that Americans routinely hurled at Mexicans—"thieving," "cowardly," and "lascivious" among them—the most common was "indolent."²⁰ It is therefore not surprising that some American judges, as well as the historian Bancroft, viewed the priority of custom over written law in Mexico not as a facet of an alternative legal system, but rather as "the lax administration of her laws" and "careless[ness] of details."²¹

The Mexican land-grant system was also characterized by strikingly imprecise borders. Neither the Spanish nor the Mexican government had ever made an official survey of California. Grants were often described in vague terms and by reference to obscure or impermanent landmarks, such as piles of stones or clumps of cactus. Sometimes the governors conveyed a certain amount of land at an unspecified location somewhere within a much broader area. It was to one of these "floating grants" that Frémont laid claim.

If the Mexican authorities were almost nonchalant in their demarcation of land in California, it was because there was

statutes. This approach persists today. The District of Columbia Circuit, in the decision cited above, found that custom and usage controlled only in the absence of "directly controlling constitutional, statutory or common law requirements." *Nixon v. United States* at 15.

¹⁸As noted, the 1851 Land Claims Act also directed that adjudicators be guided by "the principles of equity." The inclusion of equity among the guides to decision worked, with Mexican usages and customs, to free the commission and the courts from adherence to strict legal construction of the Mexican laws and grants. In other words, it indicated that the tribunals were not required to invalidate Spanish and Mexican grants when all the technical requirements were not met, if it seemed fair to excuse the requirements. In the context of the Mexican land-grant disputes, the concept of equity largely merged in the decision makers' minds with Mexican usages and customs, and rarely took on independent significance.

¹⁹Leonard Pitt, *The Decline of the Californios* (Berkeley and Los Angeles, 1970), 14-18 [hereafter cited as Pitt, *Decline of the Californios*].

²⁰*Ibid.*

²¹*Frémont v. United States*, 58 U.S. (17 How.) 542, 576 [Campbell, J., dissenting] [hereafter cited as *Frémont v. United States*]; Bancroft, *History of California*, *supra* note 16 at 532-33.

simply no reason to be meticulous and precise. Land was abundant and cheap and there were few settlers seeking to tame it. Immigrant American farmers accused the Californios of using the land uneconomically, of "wasting rich pasture land for unchecked herds."²² The Mexicans, however, who lacked the American urge to strive, to conquer, and to accumulate, responded that they were quite satisfied with their comfortable and relaxed existence.²³ They consequently found no need to bicker over boundaries.

As noted above, there was a chronological as well as a cultural aspect to the tension between written law and custom. The temporal aspect is rooted in the fact that, in 1848, one dramatic moment in California history—its cession to the United States by the signing of the Treaty of Guadalupe-Hidalgo on February 2—was immediately preceded by another—John Marshall's discovery of gold at Sutter's mill on January 24.

After the discovery of gold, an enormous wave of land-hungry settlers poured into the new American territory. These new arrivals, wanting their own property to cultivate or mine, found it unjust that so few grantees should possess so much suddenly valuable territory, much of it unimproved and unoccupied. Moreover, the new Californians, accustomed as they were to the American approach of careful surveys and exact boundaries, bristled at the vagueness of the ranchos' borders. This indeterminacy made it impossible for them to know which land in the vicinity of the grants was public land available for settlement and which land was private property belonging to the grantees.

The conflict between law and custom was thus complicated by the fact that Mexican customs, developed over years of slow growth and minimal pressure on resources, seemed anachronistic after the discovery of gold, the huge influx of people, and the consequent rise in land values. The enormous, vaguely defined, and procedurally imperfect grants were much less troublesome when land in California was not so valuable and highly sought-after. It is possible, if not likely, that the Mexicans' approach to land grants and land use would have radically changed in the years after the discovery of gold, if they had retained the territory.

The law of nations dictated that private citizens in California should have the same property rights under their new rulers that they would have had if they had continued to live under their former sovereign.²⁴ The Treaty of Guadalupe-Hidalgo and

²²Pitt, *Decline of the Californios*, supra note 19 at 87.

²³*Ibid.* at 12.

²⁴Emmerich de Vattel, *The Law of Nations; Or Principles of the Law of Nature*, trans J. Chitty (Philadelphia, 1852), 3: ch. 8, §200.

the 1851 Land Claims Act seemed, in fact, to embrace this principle.²⁵ But the task of donning the mantle of the Mexican authorities proved to be an extraordinarily challenging (and often distasteful) one for American judges. Not only did they have to apply a system of law that included notions of custom in radical conflict with their own legal philosophy, but they also had to imagine how that legal system would have responded to changes that occurred in California after the Americans assumed power.

THE MARIPOSA GRANT AND JOHN C. FRÉMONT

The controversy surrounding John C. Frémont's Mariposa grant epitomizes the tensions inherent in the scheme that the United States devised to settle the ownership of the Spanish and Mexican land grants in California. The grant was obviously procedurally flawed; there was no *diseño*, no survey, no assembly approval, no definite grant from the governor to serve as a title, and no delivery of judicial possession. Moreover, the conditions of occupation and improvement remained unfulfilled for years after the initial conveyance. The borders were completely indeterminate, for Mariposa was a "floating grant"—a grant whose total area and general location were indicated but whose precise boundaries were not specified.

To add to the controversy, Mariposa was one of the few Mexican grants with substantial mineral wealth and one of only three located on the gold-rich "mother lode."²⁶ In the 1850s it was considered "one of the most valuable tracts of land, for its size, in the world."²⁷ The publicity surrounding the Mariposa grant led many Americans, according to Bancroft, "to picture the whole extent of California as a succession of gold mines,"²⁸ and consequently increased their distaste for the entire Mexi-

²⁵In the Senate debates on the 1851 Land Claims Act, the senators seemed generally to accept the principle that "Under the operation of the principle of the law of nations and the stipulations of the treaty, [the Government of the United States] acquired only what was the domain of the ceding Government." *Congressional Globe*, 31st Cong., 2d sess., 372 (statement of Sen. Berrien). "All that we have stipulated for [in the treaty] is, that the rights which they have acquired under the Mexican government should be preserved to them by the United States." *Ibid.* at 375.

²⁶Paul Wallace Gates, "The Frémont-Jones Scramble for California Land Claims," *Southern California Quarterly* 56 (1974), 13, 24 n.33.

²⁷John Bigelow, *The Life and Public Services of John Charles Frémont* (New York and Cincinnati, 1856), 379 [hereafter cited as Bigelow, *John Charles Frémont*].

²⁸Bancroft, *History of California*, *supra* note 16 at 535.

can land-grant system, with its apparently carefree distribution of enormous plots of priceless land to a privileged few people.

The area long known as "Las Mariposas" was about 120 miles east of San Francisco, in a mountainous area west of what is now Yosemite National Park, along the banks of the Agua Fria and Mariposas rivers. Until the end of California's Mexican era and the invasion of thousands of rapacious gold seekers, this sublimely beautiful region remained the unspoiled domain of the Chauchiles Indians.²⁹ In the words of the editor of the *California Courier*,

There the waters are as bright as moonbeams, and come down from the mountain springs as cool as the sheeted snow. Pine trees, six or eight feet through, run up as straight as an arrow, two hundred to the sky, and the wide-spreading oak will shelter a whole tribe under its branches. Although the hills are covered with heavy snows, the temperature of the valleys is as mild as those of Switzerland, and the streams are full of salmon, and the crimson clover fills the whole air with a sweet perfume.³⁰

In 1844 Manuel Micheltorrena, the Mexican governor and commandant-general of the department of the Californias, granted Juan Alvarado, his predecessor, ten square leagues, or almost seventy square miles, of land in the Mariposas valley. In his petition, Alvarado did not specify the precise borders of the land he was requesting, because "the difficulty of being a wilderness country on the confines of the wild Indians" made it impossible to prepare an adequate survey and map.³¹ Without the benefit of a *diseño*, Micheltorrena granted Alvarado "ten square leagues within the limits of the Snow Mountain, and the rivers known by the names of the Chanchilles, of the

²⁹The Chauchiles Indians were known alternately as the Cauchiles, Chauchila, Chauchili, Chaushila, or Chaushilha. The name and its variations were apparently used to designate both a Yokuts tribe and a division or group of the Miwok Indians living in the region of the Chowchilla (or Chanchilles) River. See A.L. Kroeber, *Handbook of the Indians of California* (1925; reprint, St. Clair Shores, Mich., 1972), 43, 484-85.

After the annexation of California, Americans began to confiscate the lands of the Indians of the region. A few groups of Sierra Miwok were removed to the Fresno area, but most remained in rancherias scattered throughout the foothills of the Sierra Nevada. William C. Sturtevant, ed., *Handbook of North American Indians*, vol. 8, *California*, ed. Robert Heizer (Washington, 1978), 401.

³⁰Quoted in Bigelow, *John Charles Frémont*, supra note 27 at 381.

³¹Petition from Juan Alvarado to Governor Michael Micheltorrena (February 23, 1844), reprinted in *Frémont v. United States*, 58 U.S. (17 How.) 542, 544 (1854).



Juan Alvarado was the original grantee of Mariposa, but never fulfilled the conditions to perfect the grant. (California State Library)

Merced and the San Joaquin."³² The area embraced by these exterior boundaries contained nearly one hundred square leagues.

Micheltorrena made the grant subject to the approval of the departmental assembly and to a number of conditions, which included the following:

2. [The grantee] shall enjoy the same freely and without hindrance, destining it to such use or cultivation as may most suit him; but he shall build a house within a year, and it shall be inhabited.

³²Grant of the Mariposas from Micheltorrena to Alvarado (February 29, 1844), reprinted in *Frémont v. United States*, 58 U.S. at 545-46.

3. He shall solicit, from the proper magistrate, the judicial possession of the same, by virtue of this patent, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks.

4. The tract of land granted is ten sitios de ganado mayor (ten square leagues), . . . The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper uses.

5. Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced by another.³³

Because of the dangers posed by the Chauchiles, Alvarado never even set eyes on the tract, let alone settled it. According to Alvarado's later testimony, in 1844 Micheltorrena agreed to establish a military post near the land in order to take it from the Indians by force. The Indians forced the soldiers to flee the post. Alvarado further testified that in 1845 he, himself, organized the cavalry to take the Mariposas, but that he abandoned this plan in order to devote his attention to the imminent war against the United States.³⁴

Alvarado thus never occupied the land. He never solicited judicial possession from the *alcalde*, who, consequently, never had the land surveyed. The assembly never approved the grant, since the governor could not submit it without a *diseño*. In short, Alvarado did not fulfill any of the conditions required to perfect the grant by the Mexican colonization laws and by the terms of the grant itself.

In 1847 Frémont, who, in his own words, "had always intended to make my home in the country,"³⁵ decided to purchase a plot for the purpose. By that time Frémont, who would later be a presidential candidate and serve as a major general and commander in the Union Army in the Civil War, was already something of a celebrity. He had conducted three acclaimed explorations of the Far West for the American government. During his third expedition, war with Mexico had broken out, and Frémont, who was then a captain in the army, had helped to conquer California. Commodore Robert Stockton, the ranking United States officer in California, had promoted him

³³Ibid.

³⁴*United States v. Frémont*, Hoffman's Land Cases at 20, 21 (N.D. Cal. 1853) [hereafter cited as *United States v. Frémont*].

³⁵Frémont to Jacob R. Snyder (December 11, 1849), reprinted in Bigelow, *John Charles Frémont*, supra note 27 at 392.



John Charles Frémont, c. 1850 (Library of Congress)

to lieutenant colonel, and then to governor of California. When General Stephen Kearny challenged Stockton's supreme authority, Frémont had chosen to side with Stockton. The federal government had then officially confirmed Kearny's authority, and Frémont had been arrested and ordered to Washington to face a court martial.³⁶

Before he left, Frémont picked out a lot in the hills behind San Francisco, overlooking the bay, where he intended to build

³⁶In 1848 Frémont was found guilty of mutiny, disobedience, and conduct prejudicial to military discipline. President Polk canceled the punishment, but Frémont, bitter, resigned his commission.

a house and cultivate a farm. He gave three thousand dollars to his friend Thomas Larkin, the American consul at Monterey, and asked him to purchase it for him. However, Larkin was so impressed with the site that he decided to buy it himself, and used the sum Frémont had left to buy the Mariposa estate for him, instead. On February 10, 1847, Alvarado executed a general warranty deed for the property to Frémont.

At the time, Mariposa was an isolated and apparently worthless tract patrolled by Indians.³⁷ Frémont was outraged by Larkin's betrayal, and consulted his father-in-law, Senator Thomas Hart Benton of Missouri, about instituting a lawsuit. In the meantime, he apparently employed an agent to cultivate and inhabit the estate, but the Indians drove the agent away three times in the spring and summer of 1847. Frémont made no other effort to survey, occupy, or cultivate his new property for the next two years.

Soon after the signing of the Treaty of Guadalupe-Hidalgo, Frémont learned that gold had been discovered on the Mariposa estate. Larkin's duplicity suddenly turned out to be an extraordinary stroke of luck. Frémont halted his plans to annul the purchase and in 1849 settled on the land, where he began to develop mines. Unfortunately, some two or three thousand miners had the same idea. By the end of the year they were swarming over Mariposa, either disregarding Frémont's claim, or gambling that they were establishing themselves outside what would eventually be the official boundaries of his floating grant. Frémont did not disturb them, at least for the time being. He remarked:

They have worked [the mines] freely; no one has ever offered them the slightest impediment, nor have I myself, ever expressed to anyone or entertained an intention of interfering with the free working of the mines in that place [Mariposa]. . . . I have always supposed that at some future time the validity of the claim would be settled by the proper courts. I am satisfied to await that decision . . . and in the meantime to leave the gold, as it is now, free to all who have the industry to collect it.³⁸

California was admitted to the Union on September 9, 1850. The next day, Frémont and William Gwin presented their cre-

³⁷Frémont passed through the Mariposas on his third expedition in 1845. On the night he was encamped there, the Chauchiles killed six men from another party encamped nearby.

³⁸Frémont to Snyder [December 11, 1849], *supra* note 35.

dentials as the state's first senators. The two senators' terms were to be staggered, and Frémont had drawn the lot for the short term, which would last only until the end of 1851. In the twenty-one days until the end of the session, he introduced a number of bills concerning his state, including his own version of the Land Claims Act.³⁹ When the session ended, he went back to California, where he caught a fever that prevented him from returning to Washington for the next session. In 1851 he ran for the Senate again, supported by the antislavery Free State Party, but the pro-slavery forces succeeded in defeating him. He retired to Mariposa and dedicated himself to developing the estate.

FRÉMONT'S CLAIM IN THE DISTRICT COURT

On January 21, 1852, Frémont filed his claim before the board of land commissioners in San Francisco. On December 27, the board confirmed the claim. In September 1853, United States Attorney General Caleb Cushing informed the commissioners that the government would appeal their decision to the United States District Court for the Northern District of California. On January 7, 1854, Judge Ogden Hoffman of the district court reversed the commissioners' decision, rejecting Frémont's claim.⁴⁰

District Attorney S.W. Inge, arguing the case for the government, maintained that the claim was invalid because its boundaries were so vague that the grant was never segregated from the public domain, and asserted that Alvarado had failed to perfect his title by fulfilling the grant's condition that "he shall build a house within a year, and it shall be inhabited."⁴¹

³⁹The Land Claims Act that finally passed was sponsored by Frémont's co-senator from California, William Gwin. Frémont offered a bill that permitted claimants to appeal adverse decisions, but not the United States. When Senator Foote, from Mississippi, accused Frémont of acting to protect his interest in Mariposa, Frémont demanded a retraction, and a small scuffle ensued. Senator Thomas Hart Benton, Frémont's father-in-law, offered his own bill, which provided for easy confirmation of most claims by a recorder of land titles and the adjudication of only suspicious grants in court. In order to demonstrate Frémont's, and his own, disinterestedness, Benton provided in his bill that all judicial decisions in favor of the claimant would be conclusive against the United States except for a decision in favor of Frémont. *Cong. Globe*, 31st Cong., 2d sess., 1851, 633.

⁴⁰*United States v. Frémont*, supra note 34 at 20.

⁴¹*Ibid.* at 23. Among the attorneys representing Frémont was William Carey Jones, his brother-in-law, who had, in 1850, written the already-mentioned Report on the Subject of Land Titles in California. In it, he declared that the claims were "mostly perfect titles . . . and those which are not perfect . . . have the same equity as those which are perfect." *Idem, report on Land Titles*, supra note 15.

In his opinion, Hoffman retreated from the challenge of interpreting and applying Mexican "laws, usages, and customs" himself. Instead, he relied almost entirely on another, more familiar criterion enumerated by Congress in the 1851 Land Claims Act, namely, "the decisions of the Supreme Court of the United States."⁴² This provision referred primarily to the Court's decisions arising under an 1824 act regulating the settlement of French and Spanish-derived private claims in Missouri and Arkansas, and subsequent laws that extended the act's provisions to Louisiana, Florida, and parts of Alabama and Mississippi.⁴³

The 1824 act differed from that of 1851 in that it did not require all claimants to test their claims. Instead, it compelled only those had not yet perfected their titles when the United States assumed sovereignty to establish the validity of their claims. Furthermore, it did not create a board of commissioners, but assigned all the cases to the district court, with an appeal to the Supreme Court.⁴⁴

Despite these distinctions, however, the cases that arose under the 1824 act were similar enough to the California disputes for the precedential value of the older Supreme Court decisions to be apparent. The grants in the Southeast, particularly the Spanish ones, were similar to the Spanish and Mexican grants in California, and the Court had evaluated these claims using essentially the same criteria as those listed by the 1851 act.⁴⁵

Unfortunately for the claimants, the Supreme Court had been no better equipped to evaluate Spanish customary law regarding grants in Louisiana or Florida than it was regarding claims in California. In its first opinion applying the 1824 act,

⁴²1851 Land Claims Act, *supra* note 4.

⁴³Act of May 26, 1824, ch. 173, 4 Stat. 54 [Missouri and Arkansas Land Claims] [hereafter cited as 1824 Land Claims Act]; Act of May 23, 1828, ch. 70, 4 Stat. 284 (Florida); Act of June 17, 1844, ch. 95, 5 Stat. 676 (Louisiana, Mississippi, Alabama).

⁴⁴1824 Land Claims Act, *supra* note 43 at §§ 1, 2.

⁴⁵It is not clear that the 1824 act actually required the courts to consider the usages and customs of the government under which the grant had originated. The statute instructs them to "settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived." 1824 Land Claims Act, *supra* note 43 at § 2. The statute referred to the "laws, usages, and customs of the government under which the [claim] originated," in a different section and a different context. *Ibid.* at § 1. Nonetheless, in the first case in which it considered a claim under the 1824 act, the Supreme Court held that it was bound to consider customs and usage, as well as written law. *United States v. Arredondo*, 31 U.S. (6 Pet.) 689, 714 (1832) [hereafter cited as *United States v. Arredondo*].

the Court stated that it was "bound to notice and respect general customs and usage, as the law of the land, equally with the written law," and indicated that it would, in accordance with custom, confirm grants despite violations of Spanish written law.⁴⁶ As time passed, however, the Court became quite stringent. Although it made frequent references to its obligation to consider Spanish customs, it rejected many claims for their vague boundaries or for the claimants' failure to fulfill conditions of occupation and development, even though the Spanish government customarily did not void the grants for these reasons.

For example, in *Heirs of Don Carlos de Vilemont v. United States*, two former aides to the governor and a former judge "before whose eyes probably thousands of such claims have passed" had testified about the customs and practices of the land-grant system. They stated that "these conditions [of inhabitation and improvement] were mere matters of form and mechanically inserted," and that "no land was ever forfeited under the Spanish government on account of a non-compliance with these conditions."⁴⁷ Nevertheless, the Supreme Court rejected the Arkansas claim at issue, because De Vilemont did not settle and develop the land within the time designated by the grant. The Court rejected his excuse that Indian hostilities prevented him from doing so. It simply stated, "[I]t was undoubtedly necessary, that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations."⁴⁸

In the Frémont case, Hoffman relied almost entirely on these Supreme Court decisions, accepting unquestioningly their disregard of customary law. He cited *De Vilemont* for the principle that a claim should be rejected "notwithstanding the evidence of the uniform usage of the Spanish authorities."⁴⁹ Hoffman was either unable or unwilling to adopt the perspective of a Mexican authority in evaluating the Mariposa grant. Perhaps he felt that Mexican customary law was no longer appropriate, given the changes that had occurred since the grant was made. More likely, he may simply have felt more comfortable using the familiar tools of Supreme Court precedent and written law.

Hoffman did not hold that the vagueness of the borders nullified the grant. He agreed that, under prior decisions of the

⁴⁶*United States v. Arredondo*, supra note 45 at 714.

⁴⁷*Heirs of Don Carlos de Vilemont v. United States*, 54 U.S. (13 How.) 261, 262 (1851).

⁴⁸*Ibid.* at 266.

⁴⁹*United States v. Frémont*, supra note 34 at 26.

Supreme Court, the grant would be void for uncertainty if there were no indication as to which ten square leagues Micheltorrena intended to convey. However, he continued, "From the testimony taken, it appears that within the general limits mentioned in the grant a smaller tract, situated on the Mariposas creek, is well known, and seems to have been understood to be the tract granted to Alvarado."⁵⁰ Citing several Supreme Court precedents, he held that description of the tract was specific enough to make the grant valid.

Hoffman's reasons for finding the Mariposa grant invalid were based on Alvarado's failure to fulfill the inhabitation condition contained in the grant.⁵¹ Relying entirely on Supreme Court decisions based on the 1824 act, the judge declared that "the cases of Glen [*sic*], of De Villemont [*sic*] and of Boisdoré, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart."⁵² These cases all invalidated grants based on the grantees' failure to satisfy conditions of settlement and improvement. *De Vilemont* and *Boisdoré* both held that the presence of Indian hostilities was no excuse if the danger existed to substantially the same degree when the claimant requested the grant in the first place. In Hoffman's eyes, these cases were so similar to Frémont's that they controlled the decision.

In view of the fact that the 1851 Land Claims Act could have led Hoffman into strange and exciting intellectual territory, *United States v. Frémont* was a strikingly ordinary opinion.⁵³

FRÉMONT'S CLAIM IN THE SUPREME COURT

Frémont appealed the district court's decision to the Supreme Court of the United States. As at the district court, his potent legal team was led by his brother-in-law, William Carey Jones, whose law firm was building a fortune representing California land claimants. Attorney General Cushing himself argued the case for the government.

⁵⁰*Ibid.* at 22.

⁵¹Grant of the Mariposas, *supra* note 32.

⁵²*United States v. Frémont*, *supra* note 34 at 27. Cases referred to are *Glen et al. v. United States*, 54 U.S. (13 How.) 250 (1851); *Heirs of Don Carlos de Vilemont v. United States*, 54 U.S. (13 How.) 261 (1851); *United States v. Boisdoré*, 52 U.S. (11 How.) 63 (1850).

⁵³For an insightful and comprehensive discussion and analysis of Hoffman's treatment of the Mexican land grants, as well as his jurisprudence generally, see Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891* (Lincoln, Neb., 1991) [hereafter cited as Fritz, *Federal Justice in California*].

Frémont had some reason to be optimistic. The Supreme Court had heard only one previous California land-claims case, and had unanimously found for the claimant.⁵⁴ The justices seemed likely to be well disposed toward Frémont, who had served the country bravely during his western expeditions and the Mexican War. Furthermore, it appeared that he would benefit from his inextricable association with his powerful father-in-law, Thomas Hart Benton. The former senator from Missouri was by then serving his only term as a representative, and was, in his own words, on the "kindest possible terms" with all the justices of the Supreme Court.⁵⁵ He and Roger Taney, the chief justice at the time, had been close friends since they had battled together to prevent the rechartering of the second Bank of the United States in the early 1830s.⁵⁶

Yet Frémont had cause to worry. The very notion of the abrogation of written law by custom was foreign to American jurisprudence.⁵⁷ Furthermore, the Court was occupied largely by Jacksonian Democrats,⁵⁸ a breed characterized generally by hostility to the "aristocracy," opposition to large landholding, suspicion of public largesse, and revulsion to all things Mexican (except Mexican territory).⁵⁹ An orthodox Jacksonian him-

⁵⁴*United States v. Ritchie*, 58 U.S. (17 How.) 525 (1854).

⁵⁵Thomas Hart Benton, *Historical and Legal Examination of . . . the Dred Scott Case* (New York, 1857), quoted in W.N. Chambers, *Old Bullion Benton; Senator From the New West: Thomas Hart Benton, 1782-1852* (New York, 1956), 434 [hereafter cited as Chambers, *Old Bullion Benton*].

⁵⁶In the early 1830s, Taney was first attorney general and then secretary of the treasury, under President Andrew Jackson. During the struggle against the bank, he and Benton, who was then a senator, worked together closely and corresponded frequently. They acquired a great deal of mutual fondness and respect. In 1834, when Taney temporarily retired to private life in Baltimore, Benton made the principal speech at a banquet held in his honor. When Benton was reelected for a fourth term in 1838, Taney rejoiced, declaring that he "should almost of despaired of the Republic" had his friend lost. Quoted in Bernard C. Steiner, *Life of Roger Brooke Taney, Chief Justice of the United States Supreme Court* (1922; reprint, Westport, Conn., 1970), 251. See generally Chambers, *Old Bullion Benton*, *supra* note 54; Carl Brent Swisher, *Roger B. Taney* (Hamden, Conn., 1935); Elbert B. Smith, *Magnificent Missourian: The Life of Thomas Hart Benton* (New York, 1958).

⁵⁷See note 20 *supra*.

⁵⁸Taney was a Maryland Democrat appointed by Jackson, Wayne a Georgia Democrat (Jackson), Catron a Tennessee Democrat (Van Buren), Campbell an Alabama Democrat (Pierce), and Daniel a Virginia Democrat (Van Buren). Grier was a Pennsylvania Democrat (Polk), and Nelson a New York Democrat (Tyler). Curtis was a Massachusetts Whig (Fillmore). McLean (Jackson) was an Ohio Democrat who soon joined the new Republican Party. (Frémont was a Democrat until 1856, when he became the first Republican candidate for the United States Presidency.)

⁵⁹See generally Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, 1945) [hereafter cited as Schlesinger, *Age of Jackson*]; Marvin Meyers, *The Jacksonian*

self, Taney had long stressed the necessity "to guard against the unnecessary accumulation of power over . . . property in any hands,"⁶⁰ and many of his Democratic brethren on the Court doubtless agreed with him. Moreover, in the celebrated *Charles River Bridge Case*, Taney had held that public grants should be narrowly construed.⁶¹ The chief justice, with other current members of the Court, had also written or joined in many of the opinions invalidating Spanish grants under the 1824 Land Claims Act.

The justices, particularly the five who were Southern Democrats (and who all owned or had once owned slaves), may by 1854 have become irritated by the antislavery stance of Frémont and Benton.⁶² The same group of justices would, three years later, produce the notorious pro-slavery decision in *Dred Scott v. Sanford*, with only two complete dissents.⁶³ The jurists' racist attitudes also called into question their ability and willingness to adopt the legal outlook of a people, the Mexicans, widely viewed by Americans as a "thieving, cowardly, dancing, lewd people, and generally indolent and faithless."⁶⁴

Nonetheless, the Court, in 1854, held for Frémont.⁶⁵ Taney

Persuasion (Stanford, 1957); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990).

⁶⁰Taney's report on the removal of the deposits from the second Bank of the United States, *Register of Debates*, 23d Cong., 1st Sess., Appendix 68 (1834), quoted in Schlesinger, *Age of Jackson*, supra note 59 at 105.

⁶¹In the *Charles River Bridge Case*, the recipients of a legislative grant to build and operate a toll bridge argued that they had received a monopoly by implication. Taney disagreed, holding that public grants should be strictly construed in favor of the public and that nothing should pass by implication. 36 U.S. (11 Pet.) 420 (1837).

⁶²During his brief term as a senator in 1850, Frémont had demonstrated his opposition to slavery by a number of votes, including one in favor of a bill to abolish the slave trade in the District of Columbia. Bigelow, *John Charles Frémont*, supra note 27 at 418. By the time he ran for reelection in 1851, he had become thoroughly identified with anti-slavery policies, and pro-slavery forces mobilized to defeat him. *Ibid.* at 428.

Benton, who began his career as a slaveholder fully in favor of the institution, was, by the early 1850s, increasingly opposed to slavery and its extension to the territories. In 1854, just months before the Supreme Court decided the *Frémont* case, he delivered a widely discussed speech in the House condemning the Kansas-Nebraska Bill. The speech subjected him to bitter attacks from Southern congressmen and the pro-slavery press. Chambers, *Old Bullion Benton*, supra note 54 at 400-404.

⁶³60 U.S. (19 How.) 393 (1857) (denying that any black person could be a citizen of the United States and holding that Congress did not have the power to prohibit slavery in the territories).

⁶⁴*National Intelligencer*, April 1846, quoted in Pitt, *Decline of the Californios*, supra note 19 at 16.

⁶⁵*Frémont v. United States*, supra note 21 at 542.

himself wrote the majority opinion, joined by justices Samuel Nelson, Benjamin Curtis, Robert Grier, James Wayne, and John McLean. Justices John Catron and John Campbell wrote separate dissents. Justice Peter Daniel was absent, but said later that he would have dissented.⁶⁶

Taney's opinion was markedly more complex and thoughtful than Hoffman's had been. In affirming the grant, he considered all the bases of decision listed by the 1851 Land Claims Act. He constructed his opinion carefully, for he recognized that the case was "not only important to the claimant and the public," but that "many claims to land in California depend[ed] upon the same principles, and [would], in effect, be decided by the judgment of the court in this case."⁶⁷

In *Frémont v. United States*, Taney displayed a surprising willingness to depart from the standard Anglo-American approach to property, characterized by strict construction of laws and instruments, untempered by equity. In this, he differed strikingly from Hoffman and from the dissenters in the *Frémont* case itself. Taney's decision hinged on his critical recognition that "in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities."⁶⁸

This was unaccustomed ground for an American judge. He was not only taking notice of foreign law, but also taking notice of the unwritten customs of the officials in the government that drafted the law.⁶⁹ Taney recognized that "it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised

⁶⁶Paul Wallace Gates, "Pre-Henry George Land Warfare in California," *California Historical Quarterly* 46 (1967), 121, 124 [hereafter cited as Gates, "Land Warfare"].

⁶⁷*Frémont v. United States*, supra note 21 at 552.

⁶⁸*Ibid.* at 561-62.

⁶⁹Under the classic view, foreign law was a fact to be pleaded and proved as any other fact. The federal courts, however, adopted an exception to this principle, abandoning the proof requirement for foreign law in force in an area before its accession by the United States. Federal courts could instead notice such foreign law. See Arthur Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law," *Michigan Law Review* 65 (1967), 615, 652.

under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities."⁷⁰

In order to find that the grant vested Alvarado with an immediate interest in the land that the United States was bound to enforce, the chief justice first found it necessary to distinguish from Frémont's case the 1824 Land Act cases cited by Hoffman and the Supreme Court dissenters. Taney distinguished the grants in *Boisdoré*, *Glenn*, and *De Vilemont* from the Mariposa grant by observing that in those cases the Spanish government made the concessions not as rewards for service, but to promote the settlement and improvement of its territory. Consequently, the grantees in Florida and Louisiana were given no title to the land until they fulfilled the requirements of the grants.⁷¹ These requirements were therefore conditions precedent.

In relation to the Mexican statutes and regulations, Alvarado and Frémont should have been in a position no different from that of the Spanish grantees in the Southeast. The 1824 Colonization Law did not provide for grants in exchange for patriotic services.⁷² According to the 1828 Regulations, if the grantee "does not comply [with the conditions], the grant of land shall *remain* void."⁷³ Nonetheless, the words of the Mariposa grant itself clearly indicated that, in light of his patriotic service, Alvarado was immediately to receive the land "in fee," subject only to conditions subsequent.⁷⁴ Taney disregarded the Regulations and turned to the "forms and usages of the Mexican law" as manifested in the grant instrument.⁷⁵ The Mariposa grant, he observed, "was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee."⁷⁶ Alvarado thus had a vested title in the tract even before he fulfilled any of the requirements.

Although he relied on Mexican usages in this section of the

⁷⁰*Frémont v. United States*, supra note 21 at 557.

⁷¹*Ibid.* at 554-56.

⁷²Section 8 of the 1824 Colonization Law declares that in the distribution of lands, preference should be given to people who have rendered "private merit and services" to the country. 1824 Colonization Law, supra note 3. The law does not, however, state that petitioners will receive land *in exchange* for their patriotic services. Rather, it suggests only that their services will be a factor in favor of their petitions.

⁷³Regulations of 1828, supra note 11 (emphasis added).

⁷⁴Grant of the Mariposas, supra note 32.

⁷⁵*Frémont v. United States*, supra note 21 at 557.

⁷⁶*Ibid.* at 558.

opinion, Taney revealed, by his technical discussion of conditions precedent and subsequent, that to some degree he was still a prisoner of traditional modes of legal analysis. The chief justice overlooked the most cogent reason for finding that *Boisdoré*, *Glenn*, and *De Vilemont* did not control Frémont's case—namely, that the Supreme Court failed to apply Spanish customary law properly when it rejected the claims in these earlier cases. The pressure of *stare decisis* and the habit of close analysis of written law, however, led him to draw the fine distinctions he did.

Taney completely neglected to consider custom when he rejected Cushing's argument that the description of the tract was too vague to pass an interest to Alvarado. Jones's argument on behalf of Frémont noted the customary tolerance of such vagueness by the Mexican authorities, but Taney chose to ignore this point in his opinion.⁷⁷ Nor did he defeat the argument by affirming Hoffman's finding that there was a particular tract well known as "The Mariposas," located within the wider area indicated by the grant. Instead, he cited *Rutherford v. Greene's Heirs*, an eighteenth-century Supreme Court case concerning a grant by the state of North Carolina.⁷⁸ He cited this case for the principle that a grant of a stated amount of unspecified land within a certain territory gave the grantee an immediate vested interest in that quantity of land, an interest that became particularized after a survey of the grant was made.⁷⁹

When he addressed Alvarado's failure to satisfy the conditions contained in the grant, however, Taney most strikingly demonstrated his willingness to approach the case from the perspective of Mexican customary law. He analyzed whether Alvarado's failure to inhabit the tract, to acquire judicial possession, to have the land surveyed, and to gain approval from the assembly forfeited his right to the land and revested title in the government. Instead of strictly construing the requirements

⁷⁷According to the summary of the attorneys' arguments printed before the opinion, Jones argued, "The laws under which this grant was made did not contemplate surveys or exactness in the definition of the tracts solicited or granted, but only a delineation—necessarily rude, since there was no scientific person in the whole country to make it—of the locality where the quantity was to be granted." *Ibid.* at 548-49.

⁷⁸15 U.S. (2 Wheat.) 196 (1817). The grant, to General Nathaniel Greene, was one of many made by state legislatures to officers and soldiers who served in the Revolutionary War, as a reward for their patriotic services.

⁷⁹Taney conveniently overlooked his own holding in *United States v. King* that "it has been settled, by repeated decisions in this court . . . that if the description was vague and indefinite . . . and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice." 44 U.S. (3 How.) 773, 787.

of the grant and the colonization laws, Taney considered Mexican "practice and usages" and recognized the Mexican authorities' "discretionary power" to dispense with such requirements.⁸⁰

The chief justice recognized that because of the limited number of settlers during California's Mexican era, the authorities did not bother to annul grants by strictly enforcing the conditions contained in the statutes and in the grants themselves. "The chief object of these grants was to colonize and settle the vacant lands But the public had no interest in forfeiting them [to the government] . . . unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements."⁸¹

Taney next examined whether there was an "unreasonable delay or want of effort" by Alvarado in fulfilling the conditions, which would indicate that he had abandoned his claim. Rather than citing cases that rejected Indian hostilities as an excuse, Taney argued that the Mexican authorities would almost certainly have excused Alvarado's nonperformance of the conditions under the difficult circumstances he confronted. He noted that Governor Micheltorrena dispensed with the regulation requiring Alvarado to file a *diseño* with his petition because Indian aggressions made it impossible to prepare such a map.⁸² Taney reasoned that the same problem, as well as the increasing political and military unrest in California, would also have led the Mexican authorities to excuse Alvarado's failure to possess and inhabit the land, to have it surveyed, and to obtain approval from the departmental assembly.

The chief justice did not fully embrace the Mexican approach to customary law. He falsely persuaded himself that his opinion was an exercise in statutory construction rather than statutory abrogation.⁸³ Justice Stephen Field would later explicitly recognize that, in Spanish jurisprudence, "Legitimate custom acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law

⁸⁰*Frémont v. United States*, supra note 21 at 561.

⁸¹*Ibid.*

⁸²The second section of the Regulations of 1828 clearly requires the person soliciting land to include a map with his petition. Regulations of 1828, supra note 11. Nevertheless, as Taney observes, Micheltorrena excused this requirement. "[A]s the governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision, in this respect, was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant." *Ibid.* at 562.

⁸³See quoted text accompanying notes 68 and 70 supra.

which may be opposed to it."⁸⁴ Taney applied this principle, yet failed directly to acknowledge its existence.⁸⁵

Nonetheless, the unorthodoxy of Taney's approach, with his emphasis on custom and usage, is obvious when his opinion is contrasted with Catron's dissent. Catron did not trouble himself with unwritten legal sources, or even with the words of the grant itself. His dissent is, instead, a series of dispositive citations to "binding" sections of the Colonization Law of 1824 and the Regulations of 1828 and to supposedly controlling Supreme Court precedents.

Catron maintained that occupation of the land was, by law, an absolute condition to gaining title. "The consideration for the grant was a performance of its leading conditions on the part of the grantee; the principal condition being, the inhabitation of the land, in the manner and within the time prescribed."⁸⁶ He noted that the eleventh section of the Regulations of 1828 required the governor to "designate to the new colonists a proportionate time within which he [*sic*] shall be bound to cultivate or occupy the land; 'it being understood that if he does not comply, the grant of the land shall remain void.'"⁸⁷ He also observed that "by the 12th rule, the grantee was required to prove before the municipal authority that he had cultivated or occupied . . . ' in order that he might consolidate and secure his right of ownership, and have power to dispose freely of the land.'"⁸⁸ Failing even to consider customs and usages, he declared simply that to affirm the Mariposa claim despite Alvarado's failure to inhabit it "would be to subvert the manifest design of the colonization laws of Mexico."⁸⁹

Catron bolstered his argument with numerous citations to Supreme Court cases arising out of the 1824 Land Claims Act. He himself had written the opinion in some of the more prominent ones, including *United States v. Boisdoré*, *Glenn et al. v.*

⁸⁴*Slidell v. Grandjean*, 111 U.S. 412, 421 (1883) (quoting Escriche's *Derecho Español*).

⁸⁵Justice Daniel, on the other hand, fully understood the implications of Taney's approach. He did not sit for the Frémont case, but in a bitter dissent in a later case affirming a Mexican land grant, he wrote, "An attempt is made . . . to escape from the authority and effect of [Mexican] public laws by setting up a practice in violation of them, and, from the proof of this practice, to establish a different code or system by which the former, regularly adopted and promulgated, and never directly repealed, has been abrogated and disannulled." *Arguello et. al. v. United States*, 59 U.S. (18 How.) 551 (1855) (Daniel, J., dissenting).

⁸⁶*Frémont v. United States*, supra note 21 at 567 (Catron dissenting).

⁸⁷*Ibid.*

⁸⁸*Ibid.*

⁸⁹*Ibid.* at 569.

United States, and *Heirs of Don Carlos de Vilemont v. United States*.⁹⁰ In his dissent, he asserted that those cases conclusively established that a Spanish concession was void if the conditions of inhabitation and cultivation were the consideration for the title and were not performed within the designated time.⁹¹ He also stated that those cases settled the point that Indian hostilities were not a valid excuse for nonperformance of the conditions if the danger existed when the grant was made.

By simply citing precedents, Catron, like Hoffman before him, avoided the difficult issues inherent in the controversy over the Mariposa grant. In addressing the question of the vague boundaries, he once again turned to the letter of the law, stating conclusively: "I understand the Mexican law as not to allow any such undefined floating claims. It is impossible to recognize them under the act of 1824. . . . [S]o far from it, the Mexican colonization laws contained more positive provisions, to the end of granting distinct and known tracts of land to colonists, than did any Spanish laws."⁹²

Catron was evaluating the land-grant system from the perspective of post-gold rush American California in 1854, rather than pre-gold rush Mexican California in 1844. His dissent illustrates the temporal aspect of the tension between Mexican and American land law. In his view, strictly enforcing the Mexican statutes was imperative, in light of the huge number of settlers flowing into the state, "cultivating the valleys and the best lands." In such circumstances, "Ruin . . . lurks in a floating claim." The settlers, who had expended "much of labor and money . . . on the faith that a preference-right was a safe title, and exempt from floating Mexican concessions," could lose their homes, their farms, and (in the case of Mariposa) their mines, if claimants were now able to locate grants on their lands.⁹³

In view of the explosive development of California, Catron

⁹⁰See note 52 *supra*.

⁹¹Catron rejected the notion that patriotic services, rather than settlement, were Alvarado's consideration for the Mariposa grant. He correctly observed that the colonization laws did not enable the governor to make such grants in reward for patriotic services. *Frémont v. United States*, *supra* note 21 at 567 [Catron dissenting].

⁹²*Ibid.* at 571.

⁹³*Ibid.* at 572-73. By an act of 1852, public lands in California were made subject to preemption. That is, each settler could purchase up to 160 acres of land at \$1.25 an acre from the United States Government. An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes, ch. 145, sec. 6, 10 Stat. 244, 246 (1853). These are the settlers to whom Catron refers. Exasperated by the obstacles posed by the enormous, floating, unconfirmed Mexican grants, they settled upon unenclosed and uncultivated lands without much regard for the claims.

believed that "[t]o hold that the Mexican government designed to leave in force for an indefinite length of time large undefined concessions, that might be surveyed at the election of the claimant at any time and at any place, to the hindrance of colonization and to the destruction of other interests, is an idea too extravagant to be seriously entertained."⁹⁴

Catron had a point, although he did not really understand it himself. Despite his assertion, the Mexican government, in the calm, ranching days of pre-gold rush California, did, indeed, permit such floating grants. But was it fair to assume that the Mexicans would have continued to allow such lax administration of the land-grant system if they had maintained power into the years of gold and mass immigration? Perhaps not. Congress's inclusion of Mexican "usages and customs" in the 1851 Land Claims Act may have been a fair-minded thing to do, but, because of the swiftly changing conditions of California in the early 1850s, it presented the judges with an almost impossible task.⁹⁵

Catron circumvented the issue of customary law by simply not acknowledging it. Campbell, who wrote the other dissent in *Frémont v. United States*, approached the problem differently. He admitted the existence of Mexican customs that varied from the written laws. Nevertheless, he attacked the notion that he was bound to follow Mexican customs and usages, misreading (or ignoring) the clear language of the 1851 Land Claims Act.

The non-fulfillment of these conditions, it was competent to Mexico to overlook or to forgive. It is probable that, in the lax administration of her laws, in the distant province of California, all investigation would have been avoided, if the cession to the United States had not been made. It is equally within the power of congress to remit the consequences attaching to the omissions, and to concede as a grace what, in [Mexican] California, might have been yielded from indolence or indulgence. But congress has chosen to deal with the subject of titles in California, upon principles of law.⁹⁶

⁹⁴*Frémont v. United States*, supra note 21 at 571 (Catron dissenting).

⁹⁵Catron apparently was also bothered by the very size and value of Frémont's grant. He complained that "We are here called on to award a patent for a floating claim of fifty thousand arpens of land in the gold region in California." *Ibid.* at 572. Both the large size of the tract and the fact it contained gold were legally irrelevant, but they seemed to rankle Catron.

⁹⁶*Ibid.* at 576 (Campbell dissenting).

By "law," Campbell meant "the laws of colonization of Mexico" and "the decisions of this court in analogous cases." The former, with the grant itself, specifically required a "plan or design to indicate the place of location . . . [a] survey, delivery of judicial possession, [and] occupancy, or improvement."⁹⁷ The latter, according to Campbell, "control this case, and I do not feel at liberty to depart from . . . their clear and manifest import."⁹⁸ He thus dissented from Taney's opinion using the same conventional, written legal tools employed by Hoffman and Catron to hold against Frémont.

It is difficult to conclude exactly why the Supreme Court confirmed Frémont's claim. In his interpretive history of California, Howard Dewitt contends that "[t]he recognition of John C. Frémont's Rancho Mariposa . . . was more the result of Frémont's place in California history than of judicial judgment on the legality of the land. . . . It was not coincidental that Frémont's land claim was approved a few months before he began to campaign as the first Republican candidate for the Presidency."⁹⁹ In a similar vein, Christian Fritz, in his study of Ogden Hoffman's court, assigns substantial significance to the fact that "[i]n all of the first three California land-grant cases to be decided by the Supreme Court, the claimants were Americans. . . . [I]t might well have been easier to accept Americans who favored and fought for the American possession of California as beneficiaries of the act of 1851."¹⁰⁰

These theories are not entirely persuasive. As noted earlier, the Court was packed with Southern Democrats who probably despised Frémont's emerging anti-slavery politics and thus were in no mood to grant him favors. Moreover, even if they did choose to reward Frémont, the justices could not have failed to realize that their decision would also determine the fate of other, less celebrated, and darker-skinned claimants. Taney recognized in the first paragraph of his opinion that "[m]any claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case."¹⁰¹ Indeed, the *Frémont* decision led to the confirmation of numerous imperfect claims belonging to individuals more obscure than Frémont, including many Mexicans. Another possible explanation for the decision is one that was advanced by critics of the Court at the time—that the justices

⁹⁷Ibid. at 573.

⁹⁸Ibid. at 576.

⁹⁹Howard Dewitt, *Readings in California Civilization: Interpretative Issues* (Dubuque, 1979), 137.

¹⁰⁰Fritz, *Federal Justice in California*, supra note 53 at 152.

¹⁰¹*Frémont v. United States*, supra note 21 at 552.

were wealthy men acting in the interests of monopolists and speculators.¹⁰² Some modern commentators agree. Paul Wallace Gates suggests, "[T]he fact that there was a conservative judiciary not at all unfriendly to large land-holdings brought it about from the very beginning that the claims were determined on the basis of equity . . . [which] opened wide the opportunity for confirmation."¹⁰³

Although the "conservatism" of some of the justices may partially explain the *Frémont* decision, this interpretation is too simplistic. While many legal historians in recent years have shown how nineteenth-century judges manipulated the law to serve the interests of a wealthy elite,¹⁰⁴ there is no reason to assume that that is what occurred in this case. After all, many of the justices were old Jacksonians hostile to the "aristocracy." Those in the majority may genuinely have felt themselves bound by the Treaty of Guadalupe-Hidalgo and the law of nations to confirm grants to the same degree that Mexican authorities would have confirmed them. Stephen Field, who was consistently pro-claimant both as a judge on the California Supreme Court and, later, as a justice on the United States Supreme Court, expressed such feelings:

I assumed at the outset that the obligations of the treaty with Mexico were to be respected and enforced. This treaty had stipulated for the protection of all rights of property of the citizens of the ceded country; and that stipulation embraced inchoate and equitable rights, as well as those which were perfect . . . [T]he rhetoric which denounced the grants as enormous monopolies or princedoms might have a just influence when urged to those who had a right to give or refuse; but as the United States had bound itself by a treaty . . . the court had no discretion to enlarge or contract such grants to suit its own sense of propriety or to defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected.¹⁰⁵

¹⁰²Stephen J. Field, who joined the Supreme Court in 1863 and validated many claims, recalled that the Court was subjected to such criticisms in response to the California land-grant decisions. Idem, *Personal Reminiscences of Early Days in California* (1893; reprint, New York, 1968), 126 [hereafter cited as Field, *Personal Reminiscences*].

¹⁰³Gates, "Adjudication of Spanish-Mexican Land Claims," *supra* note 2 at 226.

¹⁰⁴See, e.g., Morton Horwitz, *The Transformation of American Law* (Cambridge, Mass., 1977).

¹⁰⁵Field, *Personal Reminiscences*, *supra* note 102 at 123.

By acknowledging the role of unwritten usage and custom, the Court demonstrated more respect for Mexican law than it would have by simply enforcing Mexican statutes and regulations.

THE IMPACT AND LEGACY OF THE FRÉMONT DECISION

When the Court, for whatever reason, finally confirmed Frémont's grant, the decision affected many people other than Frémont himself. *Frémont v. United States* was, in the words of Paul Wallace Gates, "an overwhelming precedent."¹⁰⁶ It led the commissioners and, especially, Judge Hoffman to interpret the Mexican colonization laws extremely loosely and to confirm grants even when there were glaring failures by the claimants to satisfy express requirements and conditions. The case "stood out in [Hoffman's] mind like a great landmark and until it was modified or reversed he insisted on abiding by it."¹⁰⁷

Only when information emerged concerning the fraudulent basis of many of the claims did the tide began to turn. Almost everyone, including, apparently, the Supreme Court justices, developed a skeptical attitude toward the claims. Moreover, the new attorney general, Jeremiah Sullivan Black, selected the talented Edwin M. Stanton to serve as the government's principal attorney in the California land-claim cases, and the claimants' skillful lawyers finally faced some real competition. The *Frémont* decision lost much of its precedent-making significance, and the Court began to subject the claims to much stricter standards.¹⁰⁸ After Stephen Field joined the bench in 1863, however, the case regained much of its lost favor and again began to guide decisions.

The *Frémont* decision plunged Mariposa itself into turmoil. Catron's warnings about the dangers floating grants posed to settlers turned out to be prescient. In accordance with the Supreme Court ruling, Frémont arranged to have his tract officially surveyed under the direction of the United States surveyor-general for California in July 1855. According to an official report on the Mariposa estate prepared by a United States commissioner, he at first requested a long strip in the valley on both banks of the Merced River. The surveyor refused, inform-

¹⁰⁶Gates, "Land Warfare," *supra* note 66 at 125.

¹⁰⁷*Ibid.* at 126. See also Fritz, *Federal Justice in California*, *supra* note 53 at 153-55.

¹⁰⁸Paul Wallace Gates, "The California Land Act of 1851," *California Historical Quarterly* 50 (1971), 395, 404; Fritz, *Federal Justice in California*, *supra* note 53 at 155-79.



By 1854, the influx of goldminers had turned Mariposa into a bustling town. (California State Library)

ing him that the grant had to be in a compact form. The report relates what followed: "[I]nstead of taking a compact area of grazing land and worthless mountain, [Frémont] swung his grant round and covered the valuable Pine Tree and Josephine mines . . . besides a number of others which had been in the undisputed possession of miners, who had long been familiar with Frémont, and had never heard the least intimation from him that he would in any event lay claim to their works."¹⁰⁹

On February 16, 1856, upon presentation of the survey to the General Land Office in Washington, Frémont received an official patent for the Mariposa estate.

This document, signed by the president, did not settle matters for the hundreds of squatters who had invested thousands of dollars to mine their plots in the Mariposa, and who were now told that Frémont owned their land. They continued to

¹⁰⁹J.R. Browne, *The Mariposa Estate, Its Past, Present, and Future* (New York, 1868), 6. Frémont's defenders have maintained that he, personally, had nothing to do with the conduct of the survey. One author suggests that Frémont's agents managed to influence the survey without his knowledge. Newell D. Chamberlain, *The Call of Gold, True Tales on the Gold Road to Yosemite* (North Tarrytown, N. Y., 1936), 62. The surveyor general of California, Colonel Jack Hays, approved the survey. It is worth noting that in 1852, Hays himself, along with several partners, had bought a grant from Vincente Peralta at the future site of Oakland. Hays's new land was, like Mariposa, largely occupied by squatters. H.M. Henderson, *Colonel Jack Hays, Texas Ranger* (San Antonio, 1954), 101-102; J.K. Greer, *Colonel Jack Hays* (College Station, Tex., 1987), 284.

jump his claims and trespass on his property. In 1858 a small army of miners tried to capture the Pine Tree Mine and threatened to burn down his house whether or not his wife, Jessie, chose to leave it. The disturbance ended only when the state marshal arrived with five hundred armed men.

The miners were not motivated only by a sense of having been treated unjustly and by disdain for the Supreme Court's decision. They also believed they had the law on their side, for Mexican grants did not convey precious mineral rights with the rights to the surface, but, rather, reserved them to the government. Since the nation owned all mineral rights, the Mexican government had permitted individuals to enter the lands of others to search for mines. Anybody who discovered a mine in this manner acquired the right to work it, paying the owner for damage to the surface and the government a percentage of what he extracted.¹¹⁰

The Court in *Frémont* had explicitly avoided addressing the issue of mineral rights, leaving it to the state courts to settle.¹¹¹ In two cases pitting Frémont against miners who refused to relinquish their claims to parts of his Mariposa estate, the California Supreme Court, in opinions written by Chief Justice Stephen Field, upheld Frémont's rights to the precious metals on his tract.

In *Biddle Boggs v. Merced Mining Company*, Field rejected the company's argument that the public possessed an unlimited general license to extract the minerals, which were now owned either by California or by the United States. He did not settle the question of whether the state or the nation owned the minerals, but argued that, regardless of who owned the minerals, an individual could not enter the property of another to mine them: "There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or if existing, that he wishes to extract and remove it."¹¹²

In *Frémont v. Flower* (decided with *Moore v. Smaw*), Field

¹¹⁰Report of Hon. Thomas Ewing, Secretary of the Interior, December 3, 1849, extracted in Rockwell, *Spanish and Mexican Law*, supra note 3 at 410-415.

¹¹¹"[W]hether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the act of 1851." *Frémont v. United States*, supra note 21 at 565.

¹¹²*Biddle Boggs v. Merced Mining Company*, 14 Cal. 279, 379 (1859). Biddle Boggs had leased from Frémont the mine that the Merced Mining Company claimed.

went a step further. He held that upon the cession of California to the United States, the ownership of the gold and silver in that territory had passed from the Mexican nation to the United States. He then ruled that, even though Mexican grants had passed no interest in valuable minerals to grantees, an American patent for a Mexican grant conveyed the mineral rights as well as the surface rights to the claimant: "[T]he supposition that as the Act of March 3, 1851, provides for the recognition and confirmation of the rights acquired by the grants from Mexico, the patents were only intended as evidence on the part of the United States of such recognition and confirmation. . . is not justified. . . . There is nothing in the act restricting the operation of the patents . . . to the interests acquired by claimants from the former government."¹¹³

Field thus overlooked Congress's intention neither to diminish nor to enlarge the rights of Mexican grantees by the 1851 Land Claims Act.¹¹⁴ In general, he acknowledged that claimants possessed precisely the same rights that they would have enjoyed under the Mexican government.¹¹⁵ When it came to the issue of mineral rights, however, this principle apparently could not overcome Field's devotion to the conflicting principle that a landowner had absolute dominion over his private property.

Frémont thus emerged from this legal maze in 1861, possessing full rights to an estate to which he quite easily could have been deemed to possess no rights at all.¹¹⁶ It is difficult to declare some judges in this saga to be "right" and others to be "wrong." The Supreme Court justices who confirmed Frémont's claim seemed committed to honoring their duty to up-

¹¹³*Moore v. Smaw, Frémont v. Flower*, 17 Cal. 199, 223-24 (1861).

¹¹⁴During the debates over the act, a number of congressmen voiced their understanding that the law was meant to guarantee the claimants precisely those rights they would have continued to enjoy under the Mexican government, no more and no less. For example, Senator Clay asserted, "We are bound to secure to them, by the treaty made with Mexico, exactly that property to which they are entitled by the laws of the country . . . under which that property has been held. . . . If the intention is not expressed in the laws, in the customs, or in the usages of the Government from which the claims are derived, upon what foundation of justice or propriety shall we introduce a new rule and enlarge the rights of claimants in that country . . . to the prejudice of the hundred thousand Americans who have gone there [?]." *Cong. Globe*, 31st Cong., 2d Sess. (1851), 390.

¹¹⁵Field later stated that "the court had no discretion to enlarge or contract such grants to suit its own sense of propriety." *Idem, Personal Reminiscences*, supra note 102 at 123.

¹¹⁶Frémont soon developed financial troubles and, by a complicated series of transactions, lost his interest in Mariposa by 1863.

hold the Treaty of Guadalupe-Hidalgo and the law of nations, even if it meant entering the unfamiliar world of Mexican customary law. Hoffman and the dissenting justices on the Supreme Court, on the other hand, were unwilling, if not unable, to apply Mexican customary law, but this unwillingness may have stemmed from their justified sense that the manner in which the Mexicans operated was now terribly anachronistic. The 1851 Land Claims Act ultimately proved itself to be a poorly drawn statute, for it exacerbated, rather than controlled, the confusion that inevitably resulted when Mexican and American law collided during a time of dramatic change.

GEORGE BOURQUIN: A MONTANA JUDGE'S STAND AGAINST GOVERNMENT DESPOTISM

ARNON GUTFELD

During the tumultuous years in the United States of the First World War and the Red Scare, George Bourquin, a highly unusual and courageous judge, presided over the federal district court in the District of Montana. It was a time of mass hysteria. Many Americans viewed the war as a moral crusade against the Huns, while others, especially in government and business, considered it a convenient opportunity to crush progressive reforms. As dreams of the new world order symbolized by President Woodrow Wilson's Fourteen Points soured and the Bolshevik Revolution threatened to spread across Europe, numerous Americans doubted the ability of their system to withstand the waves of change sweeping Western civilization. Many retreated to the simple, time-tried faith of Americanism and reacted violently to any ideology they deemed foreign, socialist, anarchist, or unAmerican. Out of fear and concern for their country and its values, or spurred on by individual and class interests, Americans participated in an orgy of patriotism.¹

Among the states in which such feelings ran rampant was Montana. An outstanding example of a colonial economy in the American West, it was ruled by the giant Anaconda Copper Mining Company. This, in turn, made it a focus for labor

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¹See Allen Churchill, *Over Here! Informal Re-creation of the Home Front in World War I* (New York, 1968), and David Kennedy, *Over Here, The First World War and American Society* (New York, 1980).



The Anaconda Copper Mining Company was a focus of unionism and radical movements during the Red Scare in Montana. (Montana Historical Society)

unionism and radical movements. In addition, while it was a center of opposition to the war because of its large percentage of foreign-born residents—especially Irish and Germans—more Montanans per capita served in the armed forces than did citizens of any other state.²

Real and perceived threats from within the country, coupled with fears that an external menace would subvert the nation, spurred the federal government to embark on a moral crusade that resulted in massive repression. Uniformity of thought, together with “loyalty” to the United States, became the yardstick of good citizenship. The courts became a vehicle for the suppression of dissent, collaborating in efforts to remove the “other” from the nation’s boundaries and to preserve the purity

²See K. Ross Toole, *Twentieth Century Montana: A State of Extremes* (Norman, Okla., 1972); Arnon Gutfeld, *Montana’s Agony: Years of War and Hysteria 1917-1921* (Gainesville, Fla., 1979) [hereafter cited as Gutfeld, *Years of War*]; David Emmons, *The Butte Irish: Class and Ethnicity in an American Mining Town 1875-1925* (Champaign, Ill., 1990); Burton K. Wheeler with Paul F. Healy, *Yankee From the West* (Garden City, N.Y., 1962) [hereafter cited as Wheeler, *Yankee From the West*]; Vernon H. Jensen, *Heritage of Conflict: Labor Relations in the Non-Ferrous Metals Industry up to 1930* (Ithaca, N.Y., 1950); Melvin Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* (Chicago, 1969).

of the American way of life. Dissenters served as scapegoats, in an atmosphere George Bourquin likened to periods when patriotism descends to fanaticism. To the judge, the era's excesses were as reprehensible as "the fires of St. Bartholomew, the tortures of the inquisition, the fires of Smithfield, the scaffolds of Salem."³

At the time, most courts in the United States ignored individual rights guaranteed by the Constitution.⁴ Few judges or elected officials proved able or willing to risk their positions in defense of individual liberties. Bourquin was one of those few.

A JUDGE WITHOUT A DOUBT

George Bourquin was born on June 24, 1863, near Tidioute, in Warren County, Pennsylvania. After attending public school he taught for a year, and then, at the age of eighteen, left for Aspen, Colorado. There he spent three years working as a cowboy, miner, and smelterman. In June 1884, he went to Butte, Montana, where he found employment in the silver mills in what was then a rapidly growing mining town. Later, he worked as a hoisting engineer at various Butte mines. In 1888 he ran unsuccessfully for the office of clerk and recorder of Silver Bow (Butte) County. In 1890 President Benjamin Harrison appointed him receiver of public money in the United States Land Office at Helena, Montana, a position he held for four years.

Bourquin began to study law in 1889, and was admitted to the Montana bar in 1894. In 1904 he was elected judge of the State District Court for Silver Bow County, and that same year President William H. Taft appointed him United States district judge for Montana. In 1912 he served as chairman of the Republican state convention.⁵

His contemporaries described Bourquin as vain, arrogant, and irascible, but merciful and just. Handsome and distinguished

³*Ex Parte Starr*, 263 F. 146 (D. Mont. 1920).

⁴Numerous studies support this point; see especially Horace C. Peterson and Gilbert C. Fite, *Opponents of War 1917-1918* (Madison, 1957); William Preston, *Aliens and Dissenters: Federal Suppression of the Radicals 1903-1933* (Cambridge, Mass., 1963); Zechariah Chafee, *Free Speech in the United States* (Cambridge, Mass., 1941); Donald Johnson, *The Challenge to American Freedoms* (Lexington, Ky., 1963); Paul L. Murphy, *World War I and the Origins of Civil Liberties in the United States* (New York, 1979); Robert K. Murray, *Red Scare* (Minneapolis, 1955); and Stanley Coben, *A. Mitchell Palmer: Politician* (New York, 1963).

⁵*Montana Standard*, January 6, 1959; Tom Stout, ed., *Montana: Its Story and Biography: A History of Aboriginal and Territorial Montana and Three Decades of Statehood* (New York, 1921), 2: 1270.



Judge George Bourquin (Courtesy Marilyn M. Bourquin and Dennis M. Bourquin)

in appearance, he was an imposing figure in personality as well as stature, and was famous for his oratory. As a judge, he demanded thorough preparation from the lawyers who appeared before him. After Bourquin's death, Burton K. Wheeler, the longtime U.S. senator from Montana who was known as "Bolshevik Burt" when he served as federal district attorney, recalled Bourquin as having been "a model of judicial integrity," adding that the judge "was what some of us used to call a slave driver." Nevertheless, despite his often heavy schedule, said Wheeler, Bourquin's decisions and instructions to juries were "given careful consideration. Litigants knew that his judgments were humane, righteous and according to law."⁶

Bourquin was evidently an austere person, with no intimate friends. When he dined, he asked the waitress to turn up the other chairs around his table so that no one would join him. However, he had a fine sense of humor. According to Wheeler, "Once when a defendant charged with a minor liquor violation had been tried before him without a jury and the time came for the court to render judgment, Bourquin said, 'The court finds

⁶*Montana Standard*, January 6, 1959. See also note 10 infra.

you not guilty, but don't do it again.'"⁷ One of Bourquin's favorite statements was: "This court may be wrong, but not in doubt." Wheeler recalled the judge's virtually ordering him to take a vacation, saying, "'You're nervous and irritable and the court is getting irritable and we might have a blow-up. . . . I'm going away to the mountains for a rest and you should certainly do the same.'"⁸

The prose in Bourquin's decisions was often colorful, displaying an independence and a strong belief in the rights of the individual vis-a-vis the government, as well as a broad knowledge of history, political science, and the law. The judge was known as an extremely hard worker. In 1931, for example, he sat by designation in federal district court in Trenton, New Jersey, and cleared the calendar there, doing a year's work in two months.⁹ In 1934 he resigned from the federal bench, after twenty-two years of service, to run (unsuccessfully) for the U.S. Senate in Montana against the Democratic incumbent, none other than Wheeler. During the campaign, Bourquin made a grave political mistake when he called the Fort Peck dam a "mud pond." Montana farmers, badly needing New Deal assistance, voted solidly against him. He died in 1958, in Wilkes-Barre, Pennsylvania.¹⁰

One of Bourquin's decisions during the First World War led the federal government to enact some repressive legislation. In the 1918 *Ves Hall* case, a Montanan from Ashland was accused of insulting President Woodrow Wilson and defending Germany's right to sink American ships. Bourquin, in a directed verdict, acquitted Hall of violating the National Espionage Act of 1917, ruling that the act required proof of intent to interfere with the military.¹¹ In his view, no such proof had been presented. From the time the United States entered the war in April 1917, district attorneys throughout the country had benefitted from the act's loose interpretations, which made it easier to suppress dissent and secure convictions. Bourquin, however, was not convinced that "saloon arguments and kitchen talk" were covered by the act, especially, as he put it, considering that Hall's comments were made in a town of sixty people, sixty miles from the nearest railroad, with "none of the armies and navies within hundreds of miles." The judge argued

⁷Ibid.

⁸Wheeler, *Yankee From the West*, supra note 2 at 108.

⁹*New York Times*, November 17, 1958.

¹⁰Wheeler, *Yankee From the West*, supra note 2 at 106-109, 112-13, 136-39, 152-61, 194-95, 306; Federal District Judge Russell Smith, interview with author, June 30, 1967; E.C. Mulroney, interview with author, July 13, 1967.

¹¹Act of June 15, 1917, 40 Stat. 217.

by analogy that if "A shot at B with a .22 pistol from a distance of three miles, A could not be convicted of attempted murder." The decision produced a furor and led to the enactment, by a special session of the Montana legislature, of the Montana Sedition Law of 1918. Congress then copied that act word for word in the National Sedition Act of 1918. Initiated by the Justice Department, it was expressly stated to be in direct response to Bourquin's decision.¹²

In another case regarding individual rights, in 1918 a Montanan named E. V. Starr refused to kiss the flag because he was afraid it was "a piece of cotton" that might be covered with "microbes." He was sentenced to not less than ten and not more than twenty years of hard labor, as well as to a five-hundred-dollar fine. Bourquin claimed that Starr was "more sinned against than sinner." It was clear to the judge that the accused was "in the hands of those too common mobs, bent upon vindicating its peculiar standard of patriotism." He called the act of forcing someone to kiss the flag "a spectacle for the pity as well as the laughter of gods and men," and declared the charge to be so "frivolous" that a nominal fine "would serve every end of justice."¹³ In effect, by refusing to accept the flag as a symbol of patriotism, he rejected the possibility of its desecration.

Another weapon the government used in its battle against dissenters and radicals was deportation. When evidence against an alleged radical, a member of the Industrial Workers of the World, had been obtained by breaking into his home without a warrant, Bourquin criticized the tendency of those who executed the criminal laws "to obtain convictions [by] unlawful seizures." He concluded that such activities could not be sanctioned by the courts, and rebuked the government for not heeding the Fifth Amendment's prohibition of the seizure of private books and papers, noting that such a seizure would, in effect, compel a person to testify against himself. He argued that the government had no right to disregard principles that were "secured . . . only after years of struggle"¹⁴—a perspective that contrasted sharply with that of most of the courts participating in the mass deportations at the time.¹⁵

¹²*United States v. Hall*, 248 F. 150-54 (D. Mont. 1918); Arnon Gutfield, "The Ves Hall Case, Judge Bourquin and the Sedition Act of 1918," *Pacific Historical Review* 38(1968) 163-78; idem, *Years of War*, supra note 2 at 37-48; Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court and Free Speech* (New York, 1987), 27-36.

¹³*Ex parte Starr*, 263 F. 145-47 (D. Mont. 1920).

¹⁴*United States v. Premises in Butte*, 246 F. 187 (D. Mont. 1917).

¹⁵In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Supreme Court held that Congress could delegate decisions about deportation exclusively to executive officers, without

A DISPLAY OF LEGAL HERMENEUTICS

In *United States v. Metzdorf*,¹⁶ another case from the war, William Metzdorf was indicted for violation of a congressional act that provided for the punishment of persons who threatened the life of the president of the United States.¹⁷ Bourquin manipulated the case so that it would be a showcase for individual rights, basing his decision both on a strict interpretation of states' rights and on a creative (though sometimes puzzling) interpretation of English grammar. Before he argued these legal points, however, he pleaded for serving justice when "there is a disposition no more surprising in its character than in the quarter of its origin, if not to deny those accused of violation of war legislation, more especially the Espionage law, any counsel, at least to restrict them to the lesser members of the bar, and in addition, to virtually deny bail; and also to set the seal of judicial condemnation upon this infringement of constitutional rights."¹⁸

Bourquin suggested that no less than a government conspiracy to withhold justice from all those accused of violations of the Espionage Act was the subtext of the case. He claimed that the origin of the conspiracy did not surprise him, yet he added no further details. That such events could take place appeared to him to be a sign of the judicial climate of the times. He responded to the defendant's inability to obtain counsel by appointing two of the most prestigious lawyers in Montana. Before someone could be tried in Bourquin's court for a possible violation of another's civil rights (in this case Metzdorf was

judicial intervention. Thereafter, in a series of laws culminating in the sweeping Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874, Congress allowed immigration authorities virtually unlimited discretion to deport aliens, and the federal courts generally deferred. They held, for example, that "the constitutional power to exclude to deport does not depend upon whether the alien is or is not a criminal, or the advocacy of lawless ideas." *Lopez v. Howe*, 259 F. 401, 405 (2 Cir. 1919), *dismissed for want of jurisdiction*, 254 U.S. 613 (1920) [denying writ of habeas corpus sought to halt the deportation of an anarchist who believed in peaceful change].

The following studies dramatically illustrate the point: Harvard I. Bevis, "The Deportation of Aliens," *University of Pennsylvania Law Review* 68 (January 1920); Michael Belknap, "The Mechanics of Repression, J. Edgar Hoover, The Bureau of Investigation and the Radicals 1917-1925," *Crime and Social Justice* 7 (1977); June Perry Clark, *Deportations of Aliens from the United States to Europe* (New York, 1963); and Harold Josephson, "The Dynamics of Repression, New York During the Red Scare," *Mid America* 59 (1977).

¹⁶252 F. 933 (D. Mont. 1918).

¹⁷Act of Feb. 14, 1917, ch. 64, 39 Stat. 919.

¹⁸252 F. 935 (D. Mont. 1918).

accused of just such a crime, having allegedly threatened to harm President Wilson), the defendant's own civil rights had to be strictly protected.

Bourquin's first argument concerned the preeminence of states' rights vis-a-vis the federal government in cases in which the president had been threatened in his "private character." Why Bourquin construed Metzdorf's threat—"If I got hold of President Wilson, I would shoot him"—as being made against the president in his capacity as a private citizen is unclear. However, the judge concluded that because the threat was not against the public persona of the president, the violation could fall only under the jurisdiction of the state. He thus undermined the government's claim. Furthermore, he maintained that the rights of both the defendant and the state had been violated, since Metzdorf had been tried under a federal statute that overstepped the limited powers of the national government. The personal safety of private citizens, Bourquin noted, "is an inherent right predating the constitution . . . and is of the power of the states to ensure to every one within their borders."¹⁹

Bourquin expounded his view of the relationship between the states and the federal government:

Before the federal constitution and the Union of the States, the rights and duties of our people were [1], inherent, as affirmed by the Declaration of Independence and [2] created by the laws of the states. All power to protect the people was vested in the states. Later, the states adopted the constitution and perfected the union, thus ceding part of their powers to the federal government, reserving to themselves all not ceded.

Therefore, he concluded, the United States had only the sovereignty and the powers willingly ceded to it. "All others are the states', and to be exercised by them alone." He argued that personal security was an inherent right that antedated the Constitution and still belonged to the jurisdiction of the states.²⁰

Bourquin based his second argument on his comprehension and manipulation of the logic and grammar of the English language. He argued, in effect, that the charge against Metzdorf would also be defective at the state level: "After a trip to the moon I will kill you" was not a threat, because the contingency upon which the execution of the threat was based was impossi-

¹⁹Ibid. at 935-36.

²⁰Ibid. at 936.

ble. "After a trip to Butte I will kill you is a threat, for contrary reason."²¹ Bourquin implied that Metzdorf's threat was based upon an impossible contingency, and, as such, was no threat at all. Though Bourquin's reasoning was defective—Metzdorf's threat was actually framed in the second (unreal or improbable) condition, which does have possible future realization—the judge did not hesitate to use states' rights and national rights, as well as grammar and language, to protect an individual's right to free expression, even when what the defendant had said was abhorrent to him.

In a related case, though ostensibly issuing only a writ of habeas corpus for the plaintiff in *Ex parte Beck*,²² Bourquin actively sought to do more to ensure that constitutional guidelines and the separation of powers in the American system of government were preserved. He ruled that under the Selective Service Act, the draft tribunal had no right to charge John Beck, a non-declarant, with desertion, and to have him court-martialed in a military proceeding.

Bourquin found that the tribunal had exceeded its authority by deciding that Beck had not offered sufficient proof of his alien status. An alien, the judge pointed out, was not entitled to an exemption by the draft tribunal, but did not qualify for the draft under United States law. Draft tribunals had neither the power to grant exemptions to people not within their jurisdiction, nor to determine their non-alien status.²³ Thus it was not that the tribunal had refused to exempt Beck as an alien; it had usurped the power of the courts when it arbitrarily decided that Beck's alien status was in question.²⁴ Bourquin relied on a holding by Chief Justice John Marshall that had established the invalidity of such a tribunal when it overstepped its jurisdiction.²⁵

In *Wise v. Withers*, Marshall had ruled that one Wise, a justice of the peace in the District of Columbia, was exempt from military duty. Wise had previously been court-martialed and fined but had refused to pay the fine; Marshall found that the court-martial tribunal had no jurisdiction over him since federal law exempted all United States officers from military duty. Bourquin considered Beck's case to be stronger.²⁶ The judge was at his constitutional best when he reviewed the argument of the army respondent, Major Roote. Roote contended that if he

²¹Ibid. at 938.

²²245 F. 967 (D. Mont. 1917).

²³Ibid. at 971.

²⁴Ibid. at 969.

²⁵Ibid. at 970.

²⁶Ibid. at 972, relying on *Wise v. Withers*, 3 Cranch [7 U.S.] 331 (1806).



During the First World War, immigrants like these German-born Montanans were often the victims of attacks and repression sparked by the time's misplaced patriotic fervor. (Montana Historical Society)

honored the court's decision he would be disobeying his commanding officer, the president, who ordered him, through the Selective Service Act, to imprison all deserters. Bourquin wrote:

Respondent suggests, somewhat significantly, the court is bound to say, that his superior officers order him to hold petitioner, and that to disobey may subject him to punishment, even that of death; that, if this court grants *habeas corpus* ordering him to release petitioner, respondent will be very embarrassed, in that obedience to either will be disobedience to the other. It is not understood that the orders to respondent are other than general, to imprison all deserters. It is not understood [that] any order to respondent even hints to him to disobey a decree of any court of the United States—a decree that within its jurisdiction is the law of the land, therein to be held inviolate, to be executed and obeyed by military and civilians alike, so long as it is unreversed. Respondent's commander in chief, the President, is required by law and duty to uphold and execute as the law of the land any such

decree until reversed. All law requires him to do so; and no law, military or civil, permits him not to do so. That he will not do so, but, on the contrary, will unlawfully order respondent to resist the decree and writ is unthinkable. Any such order and punishment of respondent for that disobedience of it, to which the law would constrain him, would be arrogance and tyranny, equal, to put it mildly, to Prussia's worst.²⁷

Indirectly, Bourquin denoted the concept of executive privilege, an idea still ambiguous today. The president, as commander-in-chief, is not above the law, and must obey it like anyone else. Once again, the judge denied the potential tyranny of the federal government in favor of the constitutional guarantees of habeas corpus.

"PUBLIC, HUMANE, AND JUST ADMINISTRATION"

Forever watchful of governmental excess, Bourquin also granted a petition of citizenship previously denied a Norwegian immigrant who, during the First World War, had claimed alien status.²⁸ Lasse A. Siem claimed exemption from the draft because of physical unfitness, the burden of dependents, and alien status. Siem was examined and rejected by the armed forces as physically unfit. Throughout the war, he worked as a copper miner, toiling in an industry vital to the war effort. This, according to the judge, was praiseworthy. Unlike others, Siem "did not hide nor take to the woods." Writing in 1922, Bourquin further noted that, "as the war and its emotions recede, it should be recognized that a great number of native born secured statutory or strategic exemptions to escape active service and secured positions in a department with a 'military tinge' and no or little 'military hazard.'" After the war, he continued, these same men assumed positions of leadership in civilian life based on the "strength of their military record." Bourquin found Siem's service neither less valuable nor less hazardous. "No one condemns them. Why condemn him. Why demand more of the alien, who yet owes this country little, than of them, who now owe it much, everything."²⁹ He called on the U.S. naturalization officer to recognize that Siem fulfilled the requirements of "good, moral character," and had an "attach-

²⁷245 F. 972-73 (D. Mont. 1917).

²⁸*In re Siem*, 284 F. 868 (D. Mont. 1922).

²⁹*Ibid.* at 872.

ment to the Constitution." The judge concluded that it was "peculiar logic to hold otherwise."³⁰

Bourquin believed that, in the *Siem* case, "it was the government that violated both law and morals." The government's contention that Siem's insistence on the right of exemption demonstrated his unfitness for citizenship "savors much of the tyrant's bitter complaint that his victims refused to die quietly and disturbed his sleep by their indecent wails of agony."³¹ The judge praised Siem's claim for exemption from military service. He was a citizen of Norway, a neutral country, and his first obligation was to his native land. Siem claimed that he was attached to, and had affection for, the U.S. Constitution. Bourquin ruled that "between affection and duty, everywhere, in all circumstances, law and good morals dictate choice of duty." Thus Siem's conduct before declaring his intention to become a citizen demonstrated that he was a principled person worthy of becoming a U.S. citizen. For Siem to have acted differently would have been contrary to the law of nations. It was not reasonable to infer that Congress intended to compel or persuade aliens to violate their allegiances, or to offend their native lands. "The inference does violence to the relations between nations, and it must be rejected especially since the law of nations is part of our law."³² Bourquin also objected to the criteria that the naturalization examiner employed to determine whether an applicant was worthy of citizenship. An alien, for example, could be refused citizenship because he could not pass an examination in constitutional law that "90 per cent of the native-born would 'flunk,'" and that "might well drive the presiding judge to the books."³³

Bourquin claimed that the "distinguishing and supreme obligation of citizenry and its permanent allegiance is military service." Using history, he traced the origins of this obligation to the feudal system, "wherein the vassal makes oath of fealty to his lord and serves him in war, as a consideration and payment for the land and protection that he receives from his lord." This applied fully to the alien once he was admitted to citizenship, but not before.³⁴ Bourquin concluded with a ques-

³⁰*Ibid.* at 872-73.

³¹*Ibid.* at 872.

³²*Ibid.* at 869. Bourquin cited *Hilton v. Guyot*, 159 U.S. 163, and Emmerich de Vattel, *The Law of Nations* (New York, 1863), 294-98 [hereafter cited as Vattel, *Law of Nations*].

³³284 F. 870 (D. Mont. 1922).

³⁴*Ibid.* at 869. Bourquin cited Vattel, *Law of Nations*, *supra* note 32 at 294; *Luria v. United States*, 231 U.S. 9 (1913); *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918); and two annotated case reporters.

tion that did not necessitate an answer: "If the government confiscates the services of mules admitted not to be its own, in a court of law, the owner may recover the reasonable value thereof, not being limited to compensation the government may assume to pay; and if government confiscates the services of men admitted not its citizens, can they likewise recover?"³⁵

Judging by Bourquin's analysis of the *Siem* case, there is little doubt as to how he would have ruled in the hypothetical situation he put forth. He clearly expressed an anti-imperialist stance by insisting there were other nations in the world besides the United States that had values and sensitivities, and that encouraged the loyalty of their citizens. By being loyal to Norway, Siem had done nothing to forfeit his right to become an American citizen.

After a long series of decisions in which Bourquin repeatedly chastised the government for violating the rights of radicals and aliens, the Department of Labor should not have been surprised by Bourquin's refusal to deport Nicholas Radivoeff. Radivoeff, a "radical" alien, was secretary of the Butte Branch of the IWW.³⁶ Bourquin believed that Radivoeff's rights had been violated, even though he conceded that pamphlets bought from the defendant contained "I.W.W. and communist philosophy" and had passages that seemingly approved of sabotage. Few judges at the time were concerned with the rights of communists, "Wobblies," and aliens.³⁷

Bourquin would not allow the government to disregard due process of law when its deportation procedures ignored the basic rights of a person who happened to be an alien. He found that Radivoeff had been denied a fair hearing, that the warrant for his arrest was not based on any probable cause, that the alien was made to be a witness against himself, and that the hearings were quasi-secret rather than open. In addition, the evidence presented was not within the scope of the warrant issued and Radivoeff had not been given time to secure counsel. The government refused to produce a former inspector whose statements were admitted into evidence. The government demanded to know what the defense hoped to prove by cross-examining the inspector, and required a commitment from the accused to cover costs of producing the inspector at the trial. In effect, the Department of Labor demanded that the alien prove himself innocent in advance.³⁸ Nothing could have

³⁵284 F. 873 (D. Mont. 1922). See *Tempel v. United States*, 248 U.S. 121, 129 (1918).

³⁶*Ex parte Radivoeff*, 278 F. 227 (D. Mont. 1922).

³⁷See note 15 *supra*.

³⁸278 F. 227-28 (D. Mont. 1922).

been more antithetical to Bourquin's approach in interpreting the Constitution when individual civil rights were at issue.

Bourquin had no doubt that the IWW member in question advocated the destruction of property, but he regarded the proceedings against Radivoeff as being unfair and prejudiced, a basic denial of due process of law. Not only were general principles of law violated, he maintained, but so were the Labor Department's rules—rules that became law as far as the government and the alien were concerned.³⁹ Referring to one of his earlier rulings, he noted that "the vast power of the Secretary of Labor, judicial in its nature, [is] capable of infinite abuse and tyranny, little restrained by the Constitution, procedure, publicity, responsibilities and traditions that hedge about the court, and little controlled, save by his honor and conscience."⁴⁰ Bourquin admonished the Department of Labor to administer the law "not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved,"⁴¹ to the end, he added, "that trials result in justice, with what is of only lesser importance, an appearance of justice."⁴²

Bourquin would not stand for a situation in which "the frequent great injustice in deportation proceedings in part has been incited by a theory that obsessed the department that it is enough to accuse the alien to justify deportation."⁴³ The government did not need to prove the alien guilty. It acted as if it were the alien's responsibility to prove himself innocent.⁴⁴ Bourquin concluded that deportation proceedings had to be fair and had to be supported by substantial evidence. Otherwise, he noted, the proceedings became evil and dangerous. It was the role of the courts to guarantee "public, humane and just administration of the law."⁴⁵

THE JUDGE RESTRAINS THE SECRETARY'S EXCESSES

Not all deportation cases involved alleged radicals. Any group of outsiders was fair game. In an earlier decision about

³⁹*Ibid.* at 229.

⁴⁰*Ibid.*, quoting *In re Tam Chung*, 223 F. 802 (D. Mont. 1915) [hereafter cited as *Tam Chung*].

⁴¹278 F. 229 (D. Mont. 1922), quoting *Kwack Jan Fat v. White*, 253 U.S. 454 (1920).

⁴²278 F. 229 (D. Mont. 1922).

⁴³*Ibid.* at 230.

⁴⁴*Ibid.*

⁴⁵*Ibid.* at 231.

the deportation of a Chinese student, Bourquin had recorded his fears about the extraordinary powers vested in the secretary of labor in such matters. Tam Chung, who lived with his uncle in Butte and occasionally helped around the family restaurant in return for food and lodging, had been found working without a permit. He was ordered to be deported. There was evidence that the seventeen-year-old had been instructed daily by a tutor, who described him as a "diligent student of good behavior."⁴⁶

In beginning his ruling, Bourquin had a few skeptical comments to offer:

Perhaps Congress could have broken our plighted faith and treaty law stipulating the Chinese students should loaf in their leisure and not labor for a living—could have placed Chinese students who here turn to honest labor for a livelihood on the plane of panders and prostitutes so far as deportation is concerned; but, happily, not having done so, it needs no argument to demonstrate that the Secretary of Labor cannot—that it is not given to him to violate the national promise, repudiate the treaty, and convert it into a mere scrap of paper.⁴⁷

Under the rules of the Chinese Exclusion Act of 1888, the United States had agreed that Chinese students had rights, privileges, immunities, and exemptions accorded to the citizens and subjects of a most favored nation. Tam Chung was to be deported under the rules adopted by the secretary of labor, pursuant to the act.⁴⁸ However, that official could not, through those rules, "violate the national promise." The only limits to the secretary's vast powers in deportation matters were his honor and his conscience. In this particular case, Bourquin believed the secretary had exceeded those limits.⁴⁹

The judge provided a long list of precedents supporting his ruling, concluding forthrightly:

That in the face thereof like executive deportations continue, to put it mildly is amazing, though not incomprehensible to students of history. And how many poor and friendless Chinese, unable to contest executive orders in the courts, have been so deported in defiance of our treaty, is at least food for disquieting thought.⁵⁰

⁴⁶*Tam Chung*, supra note 40 at 802.

⁴⁷*Ibid.*

⁴⁸Chinese Exclusion Act, ch. 1015, 25 Stat. 478.

⁴⁹*Tam Chung*, supra note 40 at 802.

⁵⁰*Ibid.* at 803.

Once again, Bourquin chastised the executive branch, both for its disregard of agreements concluded with foreign powers, and for its disregard of the civil rights of an individual. In numerous deportation cases between 1917 and 1922, his hopes for enlightened treatment of aliens did not materialize. An extreme example of governmental abuse of the process of deportation arose in *Ex Parte Jackson*,⁵¹ a case tried in his court.

In that case, Bourquin's decision in favor of the petitioner revealed his abilities as an avid defender of the Constitution, historian, reader of texts, and Puritan interpreter of the social contract. John Jackson had petitioned the court for a writ of habeas corpus to protest the decision to deport him from the United States. A member of the IWW, he had agitated about the working places, conditions, and wages of miners in Montana. The union had discussed the possibility of a strike. Bourquin found that the government had been guilty of an illegal search and seizure, and had ignored due process by proceeding against the petitioner without a warrant and by means of an unlawful raid. Jackson was held for deportation because he was allegedly "found advocating or teaching the unlawful destruction of private property" and at the time of entry was "a person likely to become a public charge."⁵²

In an ironic reversal, Bourquin found that when Jackson was arrested

There was no disorder save that of the raiders. These, mainly uniformed and armed, overawed, intimidated, and forcibly entered, broke, and destroyed property, searched persons, effects, and papers, arrested persons, seized papers and documents, cursed, insulted, beat, dispersed, and bayoneted union members by order of the commanding officer. They likewise entered petitioner's adjacent living apartment, insulted his wife, searched his person and effects, arrested him, and seized his papers and documents, and in general, in a populous and orderly city, perpetrated a reign of terror, violence, and crime against citizen and alien alike, and whose only offence seems to have been peaceable insistence upon and exercise of a clear legal right.⁵³

The judge found that the state was guilty of the crimes attributed to Jackson. Because he could find no evidence to support the government's case (the IWW pamphlets calling for

⁵¹263 F. 110 (D. Mont. 1920).

⁵²*Ibid.* at 111.

⁵³*Ibid.* at 112-13.

armed insurrection and resistance to government were found not in the petitioner's home, but in a general meeting place), he declared the "deportation proceedings . . . unfair and invalid in that they are based upon evidence and procedure that violate the search and seizure and due process clauses of the Constitution."⁵⁴

As a civil libertarian, Bourquin was unable to sanction a deportation in which "the government . . . at bar freely discloses its own wrong by which it seized the evidence. The law and courts no more sanction such evidence than such methods, and no more approve either than the thumbscrew and the rack."⁵⁵ The judge gave an impassioned speech in defense of civil liberties, recalling the actions and rhetoric of the nation's founders as living safeguards against the excesses of government: "The Declaration of Independence, the writings of the fathers, the Revolution, the Constitution, and the Union, all were inspired to overthrow and prevent . . . governmental despotism. They are yet living, vital, and potential forces to those ends, to safeguard all domiciled in the country, alien as well as citizen."⁵⁶

In these decisions, Bourquin revealed some of his characteristic wealth of knowledge, invoking historical memory in order to safeguard his contemporaries' civil rights: "For in emergency, real or assumed, tyrants in all ages have found excuse for their [civil liberties'] destruction. Without them, democracy perishes, autocracy reigns, and the innocent suffer with the guilty."⁵⁷ Using historical analogy to explain the excesses of mob behavior, he declared the hysteria and hatred of "superpatriots" to be "the reactions of all great wars, [which] in due time run their course. In his Constitutional History of England," he continued, "Freeman describes much the same following the Napoleonic wars, viz. that in England those who ventured to raise their voice to reform corrupt politics and oppressive government, or to improve conditions for the working class, were bitterly denounced as pro-French, charged and tried for treason, popular clamor and violence directed against them and the bar intimidated from defending them. How history doth repeat itself!"⁵⁸

⁵⁴Ibid.

⁵⁵Ibid. at 113.

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸Ibid. at 114. Pursuant to the stipulation of counsel for the respective parties, the appeal of *Ex Parte Jackson* was dismissed in the case of *Andrews, Inspector of Immigration et al. v. Jackson*, 267 F. 1022 (9 Cir. 1920). Of all the decisions by Bourquin discussed in this article, *Jackson* was the only one in which a formal appeal appeared in *Shepard's Citations*. The history to which Bourquin

Though Bourquin clearly defended democracy and its privileges, viewing the courts as the last bastion of liberty in his country, his attitude toward the masses was as dark as that of his Puritan precursors. He feared the cowardice, viciousness, and anti-democratic tendencies of the "mob": "Assuming petitioner is of the so-called 'Reds' and of the evil practice charged against him, he and his kind are less a danger to America than are those who indorse or use the methods that brought him to deportation. These latter are the mob and the spirit of violence and intolerance incarnate, the most alarming manifestation in America today."⁵⁹ The judge viewed the judiciary as an institution that should protect the common man from his own frailties—and executive government represented the common frailties of man on a grand scale.

At a time when state and national government officials were consolidating their power on the premise that national security demanded increased deference to central authority, Bourquin was outspoken in his opposition. To him, it was an outrage that judges refused to second-guess the wishes of an inflamed citizenry, made manifest through the repressive acts of government officials. His Jeffersonian suspicion of such authority helped him realize that big government was capable of grand excess; thus, judges had to protect the citizenry from the very forces created to keep them from acting as an organized herd. Bourquin's ironic mixture of distrust in his fellow beings, in all their social manifestations, coupled with his enduring faith in the Constitution, motivated him to be a Puritan civil-libertarian in the most trying of times.

refers is Edward A. Freeman, *The Growth of the English Constitution From the Earliest Times* (London, 1872).

⁵⁹263 F. 111 (D. Mont. 1920). In 1919 Zechariah Chafee, in great understatement, wrote, "Never in the history of our country since the Alien and Sedition Acts of 1798 has the meaning of free speech been the subject of such sharp controversy as today." See his "Freedom of Speech in War Time," *Harvard Law Review* 32 (1919), 932; see also Jonathan Prude, "Portrait of a Civil Libertarian: The Faith and Fear of Zechariah Chafee Jr.," *Journal of American History* 60 (1973), 633-56. In his classic *Free Speech in the United States*, Chafee quoted almost a page from Bourquin's *Jackson* decision, imploring in a footnote that "the entire decision . . . be read." Chafee was quite familiar with Bourquin's work and, in relation to the *Ves Hall* decision, emphasized that Bourquin refused to let the jury pass on evidence such as "kitchen gossip and saloon debate." He also quoted extensively from the decision in the *Starr* case.

STATUTORY CHANGES AND ETHNICITY IN SEX CRIMES IN FOUR CALIFORNIA COUNTIES, 1880-1920

LINDA S. PARKER

In Victorian America, newspaper accounts, preliminary testimonies, and trial documents faithfully reflected the prevailing attitude toward sex crimes. The words used to describe these offenses were chosen with such sensitivity that they often evaded the subject. News editors, muzzled by liberal interpretation of strict obscenity laws, preferred vague column headings such as "criminal attack" or "criminal assault" to the more direct "rape," "assault to rape," or "incest." Writing about "criminal attacks," journalists used the term "grave" or "graver charge" to imply rape. That which could not be directly referred to was all the more attractive to readers. Although the press trod carefully, it often sensationalized the crimes, charging that "unspeakable atrocities" or "outrages" had been committed against sex-crime victims. Journalists spared no expletives in describing alleged attackers as "fiends," "villains," and "depraved creatures."¹

Other crimes against the person usually involved such obvious physical evidence as dead bodies, visible injuries, or stolen property, while the prosecution of sex offenses was often limited to the victim's story, sometimes supported by character witnesses or medical evidence. More so than today, disputants encountered the stigmas resulting from their association with such cases. A victim's reputation suffered, regardless of the case's outcome, because society valued feminine sexual purity so highly. On the other hand, defendants were vulnerable to

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¹Words and phrases are from the *San Diego Union*, 1885-1900.

outraged newsreporters and court officials; they could be—and occasionally were—convicted solely on the word of their accuser. In several rape cases, defense attorneys requested the following jury instruction (request denied in all cases) to protect their clients: "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and the courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding.² A milder, though still prejudicial, instruction that the acuser's testimony should be viewed with caution because rape was easy to charge but hard to defend against was routinely given in rape cases.

Members of ethnic minority groups, relatively unfamiliar with Anglo cultural norms and the English language, appear to have been vulnerable when accused of sex crimes. Further investigation provides evidence of this bias, and also shows the effects of the great changes in legal and public perception toward sex offenses. This article will examine some of these effects and how they related to the processing of minority defendants.

The study is based upon two hundred and fifty-six sex-crime cases filed in the superior court in San Diego, San Luis Obispo, Tuolumne, and Calaveras counties from 1880 to 1920.³ Most attention was given to the judicial treatment of defendants from different ethnic groups; general trends of crime charges, convictions and punishments; and the relationship of statutory changes defining sex crimes to patterns of alleged misconduct.⁴

²*People v. Rhyne*, case no. 325, April 1, 1898, *Transcript on Appeal from the Superior Court of San Luis Obispo County*, 21. Also in *People v. Linkler*, case no. 18591, September 30, 1912, San Diego County Superior Court.

³County Superior Court General Registers and case files, Folsom and San Quentin prison registers, prison case files, and pardon files at California State Archives, Sacramento. Forty-four percent of the 256 cases in this study occurred in San Diego County between 1910 and 1920.

⁴Comparatively few researchers have undertaken historical studies of sex crimes, although some works examine the philosophical and historical background of rape. See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York, 1975); Roy Porter, "Rape—Does It Have a Historical Meaning?" in *Rape*, ed. Sylvana Tomaselli and Roy Porter (New York, 1986). See also Edward Shorter, "On Writing the History of Rape," *Signs: Journal of Women in Culture and Society* 3(1977), 471-82, and Heidi I. Hartmann and Ellen Ross, "Comment on 'Writing the History of Rape,'" *ibid.* 4 (1978), 931-35. A notable study using court records is Barbara Linderman's "'To Ravish and Carnally Know': Rape in Eighteenth-Century Massachusetts," *ibid.* 10 (1984), 63-82 [hereafter cited as Linderman, "To Ravish and Carnally Know"]. Other historical studies with short sections on sex crimes include Theodore N.

The crimes of rape, assault with intent to commit rape (hereafter referred to as "assault to rape"), lewd and lascivious acts upon the body of a child under fourteen (hereafter referred to as "lewd and lascivious acts"), seduction, and incest were included in the study.⁵

The period studied coincides with the creation of the major body of laws that now define sex crimes. By 1880 California had already designated incest, assault to rape, and rape as felonies. Considerable change in public and legal definitions occurred over the next four decades as the government stepped in to replace weakening social and religious influences to combat what many perceived as declining sexual mores. The migration of large numbers of single, young, wage-earning females to the cities, sensational news stories exposing child prostitution ("white slavery"), and the rapid spread of venereal disease (for which there was no safe cure) sparked public concern for the safety and morals of adolescent girls. Powerful forces moved to raise the "age of consent," the minimum age at which a girl could legally consent to sexual intercourse. According to one scholar, by 1895 "all but eleven of the forty-eight states and territories [had] raised the age of consent from a median of 10 years of age to a median of age 14." In California women's groups, politicians, and physicians further spearheaded reform efforts that, in 1913, resulted in raising the age of consent to eighteen.⁶

National reformers also wished to defend older victims. Their Victorian ideals of sexual and social purity served as a foundation for a rash of seduction laws aimed at protecting women over the age of consent who had been "ruined" and deserted by their former lovers.

Ferdinand, "The Criminal Patterns of Boston since 1849," *American Journal of Sociology* 73 (1967), 91-92 [hereafter cited as Ferdinand, "Criminal Patterns of Boston"]; Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (Chapel Hill, 1981), 207-208 [hereafter cited as Friedman and Percival, *Roots of Justice*]; Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, Conn., 1986), 163-67; and Lyle Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* (Urbana, 1980), 71-107.

⁵No historical studies of sex crimes in California have used court and prison records as their major source. Some studies such as Friedman and Percival's *Roots of Justice* (supra note 4) use the documents extensively but have only brief sections on sex crimes.

⁶Constance A. Nathanson, *Dangerous Passage: The Social Control of Sexuality in Women's Adolescence* (Philadelphia, 1991) 119-41.

SEDUCTION

The seduction laws, added to the California Penal Code in 1889, provided punishment for "Every person who, under the promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character."⁷ Analogous to the statutory-rape laws, the seduction laws provided women over the age of consent who in most such cases were pregnant and who had behaved within "acceptable" social norms with a legal recourse to obtain financial support or force a marriage. Because many of the stronger cases were settled by the marriage of defendants and victims before the filing of charges, seductions had the lowest conviction rate (39 percent) of all sex crimes. Seduction defendants were younger (with an average age of twenty-six) and victims were older (twenty-four) than in other sex crimes. In one case a twenty-two-year-old Portuguese man in San Luis Obispo County, after a trial culminating in a hung jury, pleaded guilty to seducing his forty-one-year-old companion. He received a choice of fifty days in the county jail or a one-hundred-dollar fine.⁸ Seductions may have been more seriously regarded in rural San Luis Obispo County than in the more urbanized San Diego County. Prosecutors filed charges for eight seductions in San Luis Obispo County, which had less than half the population of San Diego County. The latter had seven of the cases and a lower conviction rate.⁹

Corroboration of the accuser was not required, and a defendant could be convicted on her word alone. As in forcible-rape trials, defendants often tried to attack the victims' claims of prior chastity. The state had to prove such claims. Evidence showing a woman's good reputation in the community could be introduced in court to satisfy this requirement. In a case tried in San Luis Obispo County, the defense characterized the pregnant victim as a "chippy" who had been involved with other men. However, the prosecution's evidence (which included credible character witnesses and a copy of a marriage license) brought about a conviction and a sentence of one year in the county jail.¹⁰

⁷Stats. 1889, ch. 15, sec. 1, formerly sec. 268, *California Penal Code* (repealed 1984).

⁸*People v. Chaviel*, case no. 470, February 9, 1897, San Luis Obispo County Superior Court.

⁹No seduction cases were reported in Tuolumne and Calaveras counties. The conviction rate for San Diego was 14.3 percent and for San Luis Obispo 50 percent.

¹⁰*People v. Godwin*, case no. 496, August 16, 1897, San Luis Obispo County Superior Court.

LEWD AND LASCIVIOUS ACTS

In an effort to protect children from sexual abuse, the California legislature enacted laws against lewd and lascivious acts in 1901. The statute provided a mandatory prison term for "Any person who shall wilfully and lewdly commit any lewd or lascivious act . . . upon or with the body, or any member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or such child." Lawmakers intended to include certain acts not already specified in the penal code (i.e., rape, assault to rape, incest, and so on) under the statute.¹¹

Of the twenty-five lewd-and-lascivious cases in the period studied, all but two occurred in San Diego County. As in forcible rapes and assaults to rape, most cases were charged soon after the alleged incident. Defendants were older (with an average age of forty-four) and victims expectedly younger (eight) than in the other sex crimes. The conviction rate was high (71 percent), with few charge reductions.

Ten other cases involving victims of ten or under were charged as other sex offenses—eight as forcible rape and two as assault to rape. All but one were charged after 1901. Although statutory definitions that distinguished lewd and lascivious acts from other sex crimes were clear enough, confusing testimony from child victims sometimes left court officials unsure of the evidence. After reviewing a case in 1919, a probation officer wrote of a recently convicted rapist, "We are of the opinion that the charge against this defendant might more properly have been made as 'lewd and lascivious conduct' rather than rape." He added, "The case rests entirely upon the testimony of the eleven year-old step daughter of the defendant."¹²

INCEST

Enacted in 1872, the incest laws provided a mandatory prison term for "persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other."¹³ The degrees of kinship thought to be too close were those "between parents and

¹¹Lewd and lascivious acts, enacted Stats. 1901, ch. 204, p. 630, sec. 1, *California Penal Code*.

¹²*People v. McMullen*, case no. 31364, July 15, 1919, San Diego County Superior Court.

¹³Incest, *California Penal Code*, sec. 285.

children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews."¹⁴

The ten incest cases studied here involved defendants (with an average age of forty-five) who were accused of improper relations with their daughters or nieces. Cases were most often brought to the authorities' attention when the victims became pregnant. Six of the ten defendants received convictions with no charge reductions, and prison sentences of between five and ten years. Most such cases occurred in rural counties.

An additional twelve defendants (eleven from San Diego County) whose victims were daughters, stepdaughters or nieces were charged with other sex crimes. Most often these were rape informations, which allowed prosecutors to increase the maximum penalty. The twelve charges consisted of three forcible rapes, seven statutory rapes, and two lewd and lascivious cases. Only three of the twenty-two cases involving persons who were related occurred among members of minority groups.

ASSAULT TO RAPE AND RAPE

Unlike most other sex-offense statutes, the law on assault to rape remained unchanged throughout this period. Enacted in 1872, it mandated a prison term for "Every person who assaults another with the intent to commit rape, the infamous crime against nature, mayhem, robbery or grand larceny."¹⁵ The forty-six defendants found in the study were disproportionately Anglo and from rural counties. Although the conviction rate of 63 percent was fairly high, over one-third of the convictions were reduced to simple assault.

From 1880 to 1920 the increase in rape cases (forcible and statutory) far exceeded the population increase in the four counties. This coincided with amendments to the statutory-rape law that raised the age of consent three times over a span of twenty-five years. The number of rapes charged in superior court (Figure 1) increased dramatically after the legislature raised the age of consent from ten to fourteen years in 1889, from fourteen to sixteen in 1897, and from sixteen to eighteen in 1913.¹⁶ The incidence rate per one hundred thousand of population tripled after the first change in the statutory-rape law and almost doubled with each subsequent law change.

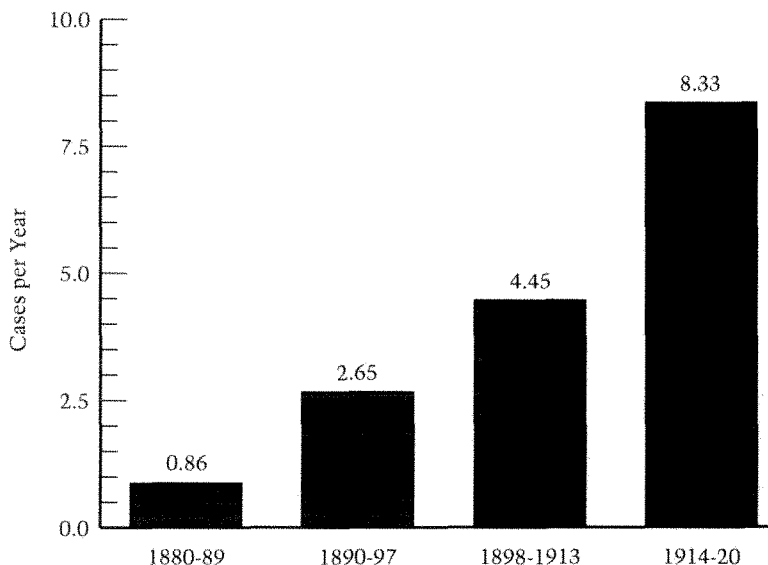
Notably, both statutory and forcible rapes increased. Factors

¹⁴*California Civil Code*, sec. 59.

¹⁵Assault to rape, *California Penal Code*, sec. 220.

¹⁶*California Penal Code*, sec. 261.

FIGURE 1
OCCURRENCE OF RAPE CHARGES AND CHANGES IN RAPE LAWS,*
ANNUAL CASES PER 100,000 POPULATION,** N = 157



*In 1889 the California legislature raised the age of consent for statutory rape from ten to fourteen years. In 1897 the age was lifted from fourteen to sixteen years and again in 1913 from sixteen to eighteen years.

**Based on U.S. Census data. Average population for each county was estimated for the irregular time spans by straight-line interpolation between the ten-year census intervals.

other than law revisions, such as changing ways of life and economic expansion, may have contributed to this rise.¹⁷ Theodore Ferdinand's study of arrest rates in Boston from 1849 to 1951 indicates that arrests for forcible rapes declined in war-time and usually fell during depressions, while increasing in prosperous times. Ferdinand speculates that the overall increase in forcible rapes was also linked to the introduction of the automobile and the increase of middle-class women who were more likely to report rapes.¹⁸

¹⁷Occurrence and arrest rates would, of course, be higher than the number of rape cases filed in superior court. Many rapes were unreported—as they are today—and numerous alleged assailants were arrested but released before charges were actually filed against them.

¹⁸Ferdinand, "Criminal Patterns of Boston," *supra* note 4 at 91. Linderman, however, determines that economic cycles and war did not affect rape prosecution rates. See *idem*, "To Ravish and Carnally Know," *supra* note 4 at 73-75.

For the purpose of this study, statutory rapes were defined as those rapes in which the victim was below the age of consent and in which no force, threats, or drugs was or were specified in the informations. The term "statutory rape" does not appear in the case files until 1910. The concept and occurrence of the crime changed considerably throughout the period. No offenses were charged until 1889, when the age of consent was raised to fourteen. Over the next twenty-four years, the cases showed up in superior court with increasing frequency. Statutory rapes were legally considered as serious as forcible rapes, but judges hesitated to punish accordingly. Convicts were sentenced less severely, with many getting the five-year minimum.¹⁹ When legislators raised the age of consent to eighteen in 1913, they also reduced the penalty for statutory rape. The revised statutes further distinguished the crime from forcible rapes by allowing juries the option to recommend county jail when the victim was over sixteen. By 1920 the vast majority of rape cases were statutory.

Court officials sometimes doubted the stories of statutory-rape victims. After 1905 probation reports to the judge exerted great influence in determining whether a convict would go to prison or receive probation. These reports usually sympathized with the defendant and stated his case without having to follow courtroom rules of evidence. After extolling the offender's previously good reputation, work history, or military record, the reports invariably attacked the victim's credibility:

She is apparently a girl of loose morals and was a ward of the juvenile court of Los Angeles County.²⁰

She was not 14 years of age and had the reputation in her neighborhood of being a girl of loose morals. . . . The promptings of sex, and the folly of youth, played an important part in this affair.²¹

. . . she is evidently dull, more or less feeble minded.²²

¹⁹At the time prison sentences for forcible rapes averaged 15.1 years and statutory rapes 10.5 years.

²⁰*People v. Szarsinski*, case no. 30383, January 20, 1919, San Diego County Superior Court.

²¹*People v. Conklin*, case no. 30513, February 11, 1919, San Diego County Superior Court.

²²*People v. Warriner*, case no. 28258, October 30, 1917, San Diego County Superior Court.

A few alleged forcible-rape victims also encountered doubts about their credibility. A probation officer took up the cause of a twenty-two-year-old who was accused of forcible rape but was convicted for the lesser crime of assault to rape: "He came here in January off the farm, unacquainted with the ways of some of our city girls, and has been the victim, I believe, of an experienced enticer of boys. It is rumored that the girl was at Pacific Beach and invited a certain young man there to accompany her on a tour similar to the one with Smith."²³

Punishment in the conviction of sex crimes varied according to the nature of the offense and the circumstances surrounding the case.²⁴ A judge in an outraged community sentenced a European immigrant to thirty years for his intimate relations with a five-year-old and her resulting infection with venereal disease.²⁵ A twenty-eight-year-old Mexican, whom the press described as "a son of the notorious Chavez who was a lieutenant of Vasquez, the bandit who terrorized California many years ago," received forty years for beating and forcibly raping an elderly Anglo woman.²⁶ However, by 1915 average sentences had decreased (Figure 2), largely because of lighter sentencing for statutory rapes. By then many statutory-rape convicts received probation or county jail terms.²⁷

REPRESENTATION FROM DIFFERENT ETHNIC GROUPS

Anglos, Asians, African Americans and foreign-born white defendants were underrepresented in sex-crimes cases in pro-

²³*People v. Smith*, case no. 20027, September 16, 1913, San Diego County Superior Court.

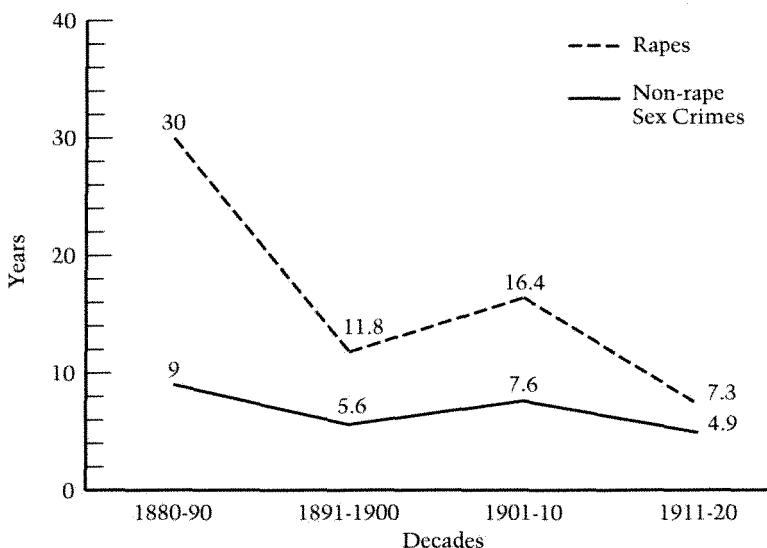
²⁴Until 1913 the penalty for conviction of rape was five years or more in prison. An amendment in 1913 changed the possible sentence to a maximum prison sentence of fifty years. It also provided that for statutory rape committed on a female between sixteen and eighteen years old, the offender could be sentenced to the county jail for a maximum term of one year. Until 1923 the jury determined whether a defendant would be sentenced to county jail or prison. *California Penal Code*, sec. 264. The range of penalties allowable under the law for other sex crimes were: for attempted rape, one to fourteen years in prison; for lewd and lascivious acts, one year to life in prison; for incest, ten years or less in prison; for seduction, up to five years in prison and/or a fine of up to five thousand dollars.

²⁵*People v. Bianchino*, case no. 2186, 2189, March 8, 1906, April 4, 1906, Tuolumne County Superior Court; *People v. Bianchino*, 5 Cal. App. 633 (1907).

²⁶*San Diego Union*, July 19, September 8, September 12, 1893.

²⁷Friedman and Percival indicate that in Alameda County between 1870 and 1910, forcible-rape convicts averaged twenty-two years and statutory-rape offenders received a median of ten years. *Idem*, *Roots of Justice*, supra note 4 at 207.

FIGURE 2
AVERAGE PRISON SENTENCES FOR CONVICTION OF SEX CRIMES,
1880-1920



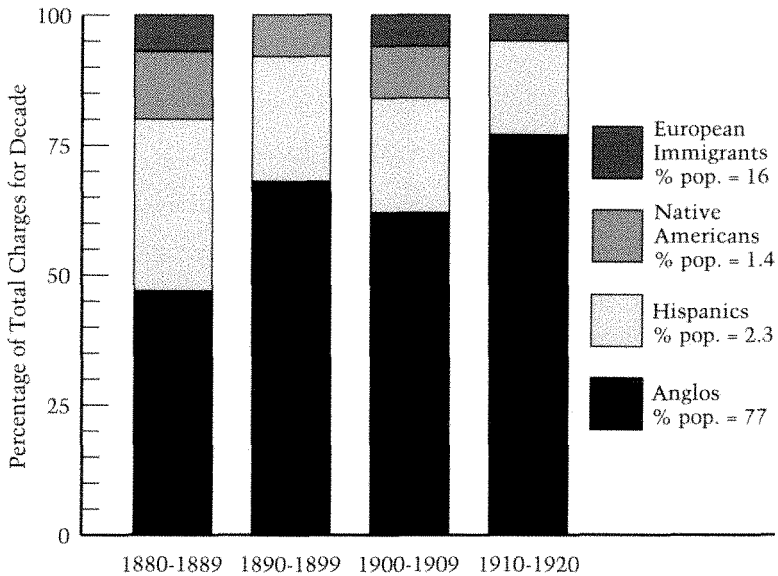
portion to their percentage of the population (Figure 3).²⁸ The Anglo percentage of defendants, although smaller than the population, increased throughout the period. The growing number of Anglo rapes in San Diego County between 1905 and 1920 accounts for most of the gain. None of the defendants or victims included either Chinese or Japanese. A substantial Chinese population, including a few women, was present in the area, particularly in San Diego County before 1910, while numbers of Japanese arrived after that year. According to the 1890 U.S. Census, African Americans constituted 41 percent of prisoners incarcerated nationwide (mostly in the South) for rape. However, only one case in the California counties studied involved African Americans, whose population in the area at the time averaged about 1 percent.²⁹

Native-American and Hispanic defendants were overrepresented compared with their percentage of the population. One

²⁸Nineteen foreign-born whites spoke only their native language or limited English. However, most foreign-born whites as defined by the U.S. Census were Americanized and had a fair knowledge of English.

²⁹A San Diego County jury convicted the defendant of forcibly raping a black victim in 1919: *People v. Brown*, case no. 30816, April 6, 1919, San Diego County Superior Court. Bureau of the Census, *Compendium of the Eleventh Census: 1890, Part 2* (Washington, 1894), 193.

FIGURE 3
ETHNICITY OF DEFENDANTS CHARGED WITH SEX CRIMES IN
SUPERIOR COURT FOR EACH DECADE 1880-1920, N = 229



of the reasons for this was the U.S. Census underestimation of population for both groups.³⁰ The proportion of Hispanics was increased by a number of nonresident Mexicans in San Diego County whom the census takers did not include. Although these migrants probably added a few cases, they did not appear in official population counts. Census estimates of the Native-American population were probably low. Native Americans, particularly of mixed descent, were often considered Anglo or Hispanic if they lived away from reservations and identified with either group.³¹

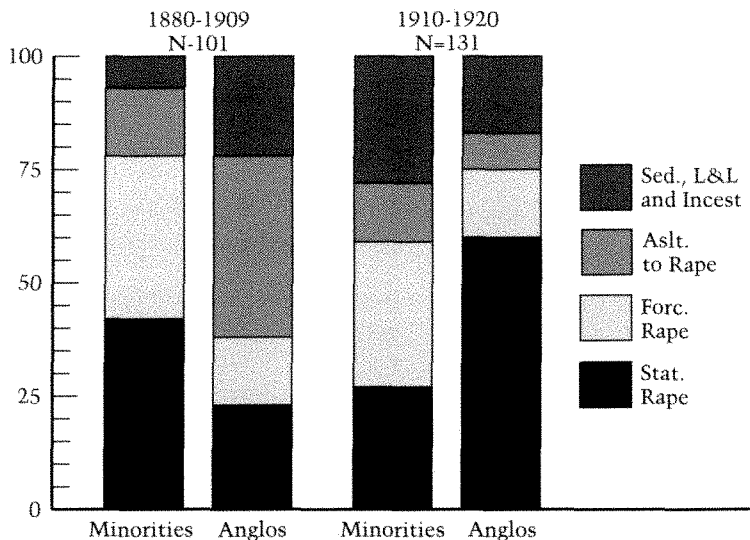
PREJUDICE AGAINST MINORITY GROUPS

Difficulties encountered by defendants who were members of minorities emerges most clearly in the processing patterns of forcible rapes and assaults to rape. Over the forty-year period under consideration, such defendants were charged with forci-

³⁰Bureau of the Census, *1910 Census, vol. 2: Population* (Washington, 1913).

³¹The lack of Native-American defendants in the last decade of the study can be traced to increasing federal jurisdiction over crimes committed on the reservations.

FIGURE 4
PROPORTIONS OF SUPERIOR COURT SEX-CRIME CASE CATEGORIES
FOR 1880-1909 AND 1910-20

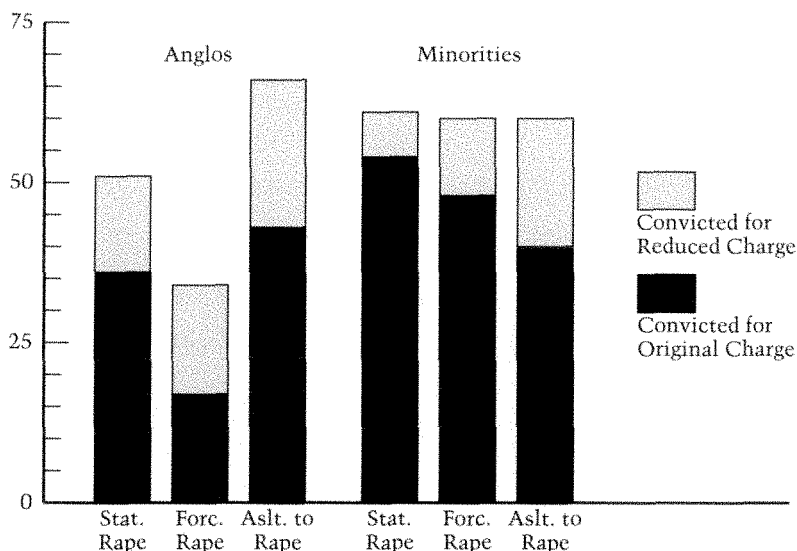


ble rape—the most serious offense—considerably more often than Anglos and convicted at twice the Anglo rate (figures 4 and 5). Courts, on the other hand, more often charged Anglos with assault to rape and convicted them at a higher rate. The large number of forcible-rape convictions led judges to sentence sex offenders from minority groups harshly. Although they composed only 30 percent of all sex-crime defendants, they received ten of the fifteen longest prison sentences (Figure 6).

Possibly the superior court received only the most severe of a large pool of cases involving minority defendants, lesser cases being processed in the lower courts. This was most likely because of the courts' reluctance to prosecute cases with minority accusers, who were usually the victims of minority defendants. The Anglo public generally perceived Hispanic, immigrant, and Native-American women as less virtuous than Anglo women, a situation that would have led district attorneys to doubt those victims' abilities to convince all-male and predominantly Anglo juries.³² In addition, the criminal-justice system and the

³²Sexual mores that differed from American standards proved costly to members of minority groups living in the United States during the nineteenth century. John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (New York, 1988), 85 [hereafter cited as Emilio and Freedman, *Intimate Matters*]. See also Doris Weatherford, *Foreign and Female*:

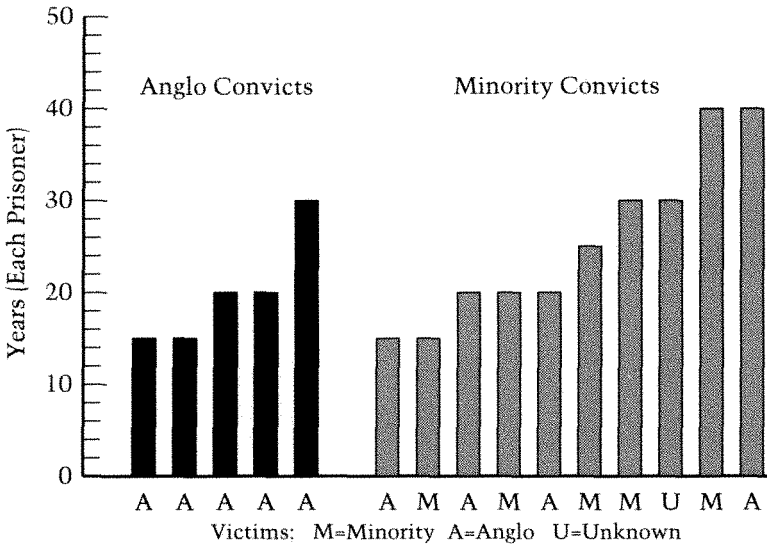
FIGURE 5
RAPE CONVICTION RATES AND CHARGE REDUCTIONS FOR
ANGLOS AND MINORITIES, 1880-1920 (PERCENTAGE)



public may not have been as concerned about enforcing social controls upon minority groups. Many lesser offenses would thus probably have been settled in the lower courts, while many women from minority groups would probably not have reported other offenses to an apathetic police force.

While this filtering effect, if it existed, would account for some disparities, several things suggest that bias crept into the assessment of evidence in preliminary hearings and led to exaggerated charges. Court documents reveal that minority defendants suffered cultural and linguistic disadvantages in their ability to contest sex-crime accusations. As a result, they found themselves more likely than Anglos to be charged with, and convicted of, forcible rape and to receive a long prison sentence. The pattern of more rape charges and harsher sentences is more pronounced when minority defendants faced Anglo victims compared with the reverse (Figure 7). Most striking are the higher charge and conviction rates of Anglo defendants for assault to rape, particularly in the rural counties (figures 4 and 5). It seems likely that some of these lesser crimes might have

FIGURE 6
FIFTEEN LONGEST INDIVIDUAL PRISON SENTENCES AND
ETHNICITY OF ACCUSER

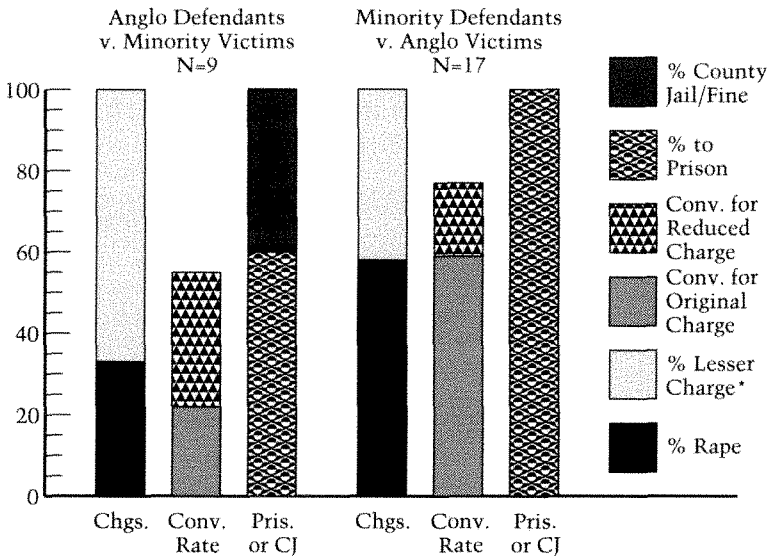


been charged as forcible rape if the defendants had been members of minority groups.

In cases with minority defendants, the reputation of the accused was at least as important as that of the victim. This becomes apparent when documents show that most victims facing minority defendants were also minorities. However, Hispanic, Native-American and immigrant European women generally made less than ideal prosecution witnesses. They were sometimes unaware of Anglo sexual standards, usually spoke poor English, and often conformed to standards that suggested promiscuity. In court documents and newspaper reports, minority women who were prosecution witnesses do not appear to have been as persuasive as Anglo victims. Contrary to the harsh treatment minority defendants received, however, was the added measure of justice these victims gained. As a group minority women pressed more serious charges and obtained a higher conviction rate than their Anglo counterparts. The "favorable" treatment received by minority victims is best explained by minority defendants who, for various reasons, including a reputation for violence, a lack of English skills, and damaging press reports, could not present a viable defense.

The disproportionate number of forcible rapes was borne

FIGURE 7
ANGLOS V. MINORITIES IN SUPERIOR COURTS IN FOUR
CALIFORNIA COUNTIES, 1880-1920



*The lesser charges consisted of assault to rape and lewd and lascivious acts.

entirely by Hispanic and Native-American defendants. It is not surprising that prosecutors and victims found it easier to allege "force and violence" against these defendants, since the Anglo public considered both groups to be prone to violence.³³ Noting the large number of arrests of Hispanics in Los Angeles County for violent crimes, a sociologist wrote in the 1930s, "They are victims of uninhibited emotions. They rank abnormally high in crimes of personal violence against each other. They have brought their customs with them relative to settling their own disputes. These methods which are sometimes honorable in an elementary culture level, are 'crimes' in our sophisticated civilization."³⁴ The Indian wars in the West lingered as a recent memory and convinced jurors that Native-American defendants could become violent. The conflicts also fed public fears of Native Americans as potential violators of women, fears that

³³Linda Parker, "Treatment of Ethnic Charged with Assault Related Crimes in Three California Counties, 1880-1910," *Southern California Quarterly* 74 (1992).

³⁴Emory S. Bogardus, *University of Southern California School of Research Studies Number Five: The Mexican in the United States* (Los Angeles, 1934), 53.

were further fueled by the dozens of movies between 1909 and 1915 featuring women or girls captured by Indians.³⁵

Although it usually attempted to treat sex crimes delicately, the press greatly damaged the reputations of some of the defendants. An 1893 report was entitled "Quaso the Indian Brute to Answer the Charge of Rape," and continued, "The examination of Jose Antonio Quaso, an ugly looking Indian accused of the crime of rape, was concluded . . . the defendant being held without bail."³⁶ Of another Native-American defendant, who later received twenty-five years, the press reported, "It is stated by those who knew him in Lower California, that he has a murder or two to his credit on the peninsula, and that he is a refugee from Mexican justice."³⁷ Between 1880 and 1904, the *San Diego Union's* reports of sex crimes concentrated mostly on minorities, who formed half the number of defendants in San Diego during that time. Such coverage might imply that cases involving minorities were the more heinous; however, information from preliminary testimonies does not seem to confirm this. It is more likely that minorities had fewer defenses against a press willing to exploit the sensational nature of sex crimes.

Between 1880 and 1920, the evolution of sex-crime laws altered what was probably a racially biased criminal processing pattern—the small number of forcible rapes charged against Anglos as compared with minorities (Figure 4). Although the pattern itself remained intact, the causative factors changed. During the first thirty years of the period, minority defendants incurred twice the proportion of forcible-rape charges as Anglos. The mysteriously large percentage of informations by Anglos on assault to rape suggests an outlet of lesser charges for incidents that would have been prosecuted as forcible rape if the defendants had been from minority groups. After 1910 the urbanization and militarization of San Diego County, the continued rise of the "age of consent," and the reduction of statutory-rape penalties changed the pattern of crime charges between Anglos and minorities. In the last decade (Figure 4), statutory rapes, which by that time were often punished with county jail terms, provided another outlet of lesser crime charges for Anglo defendants faced with potential forcible rapes. During both periods, prosecutors charged minorities with forcible rape twice as often as they charged Anglos. In the first thirty years, court officials moved potential Anglo forcible

³⁵Raymond William Stedman, *Shadows of the Indian: Stereotypes in American Culture* (Norman, 1982), 110.

³⁶*San Diego Union*, August 14, 1893.

³⁷*Ibid.*, June 13, 1903.

rapes into the category of assault to rape, and in the last ten years placed them with statutory rapes, which by then carried reduced penalties.

Prosecutors maintained a better chance of convicting minority defendants than Anglos for rapes (Figure 5). Members of minorities suffered higher conviction rates, particularly for forcible rape, and fewer charge reductions. The higher conviction rate of Anglos for assault to rape was probably bolstered by stronger cases that would have been charged as rape if the defendant had been a minority.

The likelihood that Anglos were better at negotiating for reduced charges is implied by the greater proportion of Anglo charge reductions (Figure 5) and by newspaper accounts that reported such negotiations for Anglo defendants. Regarding a man facing a charge of "criminal assault," the *San Diego Union* reported, "Strong influence is at work to save the young man, who is represented to be an unsophisticated country lad, from a term in the penitentiary. If the District Attorney will consent to the fine, as meeting the ends of justice, the intention is that relatives will pay it, and Sinclair will be compelled to go to work and earn the cash to pay back the money."³⁸ Although minority defendants received the bulk of San Diego County news coverage, the newspaper noted no similar transactions for these defendants.

California laws that barred court testimony of certain non-whites against Anglos remained in effect until the 1870s.³⁹ Although these statutes were repealed, their supporters retained influence at least until the turn of the century. In seventeen cases, a minority defendant faced an Anglo accuser; the reverse was true in nine cases. These revealed even greater disparities in the number of forcible rapes charged and harsher sentencing against minority defendants. Anglo victims pressed more rapes, gained more convictions for original charges, and sent all their convicted minority assailants to prison (Figure 7). The larger portion of rape convictions led to harsher sentencing for minority convicts (12.4 years) compared with Anglos (6.0 years). On the other hand, minority victims enjoyed little of the success against Anglo defendants that they experienced against minority defendants.

³⁸"Criminal assault" usually referred to rape but could also mean assault to rape or lewd and lascivious acts. *Ibid.*, August 17, 1904.

³⁹The laws were applied to Native Americans, Chinese, and African Americans, but not to Hispanics or European immigrants.

NATIVE-AMERICAN, EUROPEAN IMMIGRANT, AND HISPANIC DEFENDANTS

For the relatively small number of Native Americans and immigrant Europeans charged with sex crimes, the overall conviction rate for both groups—80 and 85 percent respectively—greatly exceeds that of either the Anglos or the Hispanics. Charges were filed in superior court more often when victim and defendant were from different ethnic groups, unlike the case of Anglos or Hispanics. Both groups contained slightly more victims than defendants. Neither Native Americans nor immigrant Europeans received probation, and no one in either group dropped out of the judicial system before going to trial or pleading guilty.⁴⁰

Minority defendants were comparatively poor. Preliminary testimonies, newspapers, and prison records indicate the higher socio-economic status of Anglo defendants. Sixty percent of Anglos whose occupations are known (N=72) worked as skilled tradesmen, small-business owners, or professionals, as opposed to unskilled laborers. The analogous figure (N=36) for minorities was 25 percent.

Native Americans, financially the poorest of the three minority groups, fared worst in dealing with the criminal-justice system.⁴¹ All twenty-two records involving either Native-American defendants or victims were cases of rape or assault to rape, and all but two occurred in San Diego County (Figure 8). Most of the crimes took place before 1910, in contrast with crimes involving other ethnic groups, the largest number of which occurred between 1910 and 1920. Eight of the ten Native-American defendants chose jury trials, perhaps because the prosecutors would not enter into favorable plea bargains with them. Anglo defendants were the least likely to choose a jury trial.⁴² Courts convicted 80 percent of the Native-American defendants and required only half the average time to prosecute them.⁴³ All eight were sentenced to prison and three died while

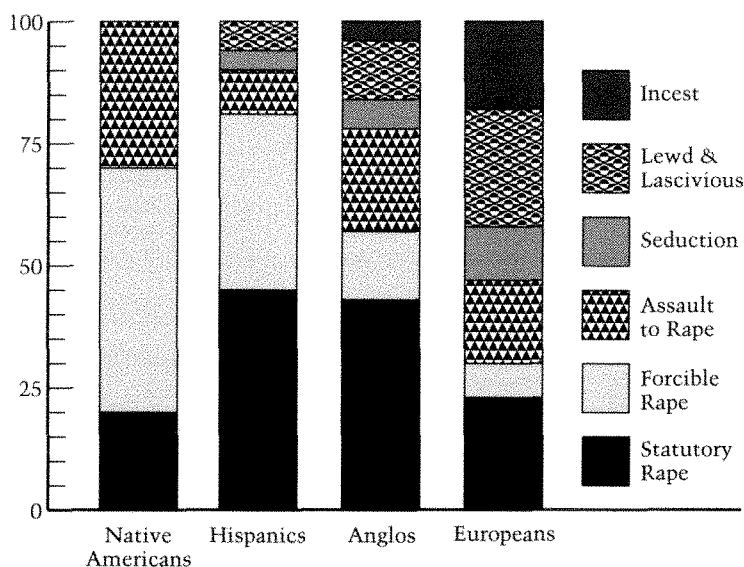
⁴⁰Before 1903 the judge did not have the option of placing a defendant on probation; *California Penal Code*, sec. 1203.

⁴¹The lower socio-economic status of Native Americans is assumed because of the larger number of such defendants who were unemployed or working at menial, unskilled jobs.

⁴²Forty-two percent of Anglos, 54 percent of non-English-speaking Europeans, and 57 percent of Hispanic defendants selected a jury trial.

⁴³Prosecution time has been calculated here as the length of time between the filing of the information in the Superior Court and the date of the verdict. It reflected travel time for witnesses, state laws, and, often, the resources available for the defendant to build his case. Conviction rates for all counties decreased slightly as prosecution times increased.

FIGURE 8
TYPE OF SUPERIOR COURT SEX-CRIME CASES V. DEFENDANT
ETHNICITY, 1880-1920, N = 256



incarcerated; the death rate of Native-American prisoners greatly exceeded that of prisoners from other ethnic groups.⁴⁴

More than other minorities, Native Americans appear to have been handicapped by their lack of English. One victim who spoke only an "Indian language" needed two interpreters in order to testify. One translated the victim's testimony into Spanish and another translated the Spanish into English. The court determined the testimony to be sufficiently clear and incriminating to hold the two codefendants (also Native Americans) for trial. Later, during trial, a local newspaper reported,

A noteworthy feature of the Rafino Serrano trial at the court house is the easy manner in which the Indian witnesses become confused and contradict themselves. They seem to have absolutely no conception of time or space, and one minute testify to something they had contradicted the minute before. Attorney Capps wore a long smile yesterday morning as the

⁴⁴About 6 percent of the Anglo and 15 percent of the Hispanic sex-crime prisoners died in prison. (Mortality data collected from San Quentin and Folsom prison registers.)

witnesses for the prosecution became confused on cross-examination, but the smile wore away when his own witnesses contradicted themselves under the cross-fire of Assistant District Attorney Andrews.⁴⁵

Because of the scarcity of knowledgeable interpreters, court officials often had to rely on a friend or relative of one of the disputants, thus creating a problem of possible bias.

Nineteen cases, all but one of which occurred after 1905, involved European immigrants who spoke limited English.⁴⁶ Most such defendants came from Italy or Austria and several from Germany, Russia, and France. Like the Native Americans, the newly arrived European defendants received more convictions and longer prison sentences than did native Anglos or Hispanics. The European defendants' average age of forty-one was high compared with thirty-four for all groups, and reflected a large proportion of lewd-and-lascivious and incest cases.

Prosecutors charged immigrant minorities with committing a high number of lewd-and-lascivious and incest offenses and a low number of rapes (Figure 8). Cultural differences regarding sexual mores may account for some of this. In addition, unusually high conviction rates and heavy sentencing for the few immigrants charged with rape may have served as a deterrent against that offense.

The definition of sexual mores was a problem that sometimes led to the filing of sex-crime charges. Among the different nationalities, cultural norms defining what constituted a "sex crime" seem to have varied more than cultural standards defining other crimes such as murder or assault. Within this diversity were some practices that were difficult to relate to Anglo-American values.⁴⁷ For example, a few immigrant couples, on arriving in California, discovered that their marriages violated state incest laws. In a San Luis Obispo superior court, a Portuguese man was charged with incest for marrying his niece. Both were Roman Catholic and had the permission of the parish priest. They were married aboard a United States

⁴⁵*People v. Cerrano*, case no. 12205, *People v. Jailles*, case no. 12206, June 2, 1903, San Diego County Superior Court; *San Diego Union*, June 17, 1903.

⁴⁶Recent Irish arrivals are included in this group. Although they spoke English, they encountered similar prejudice from Anglos on the road to assimilation as non-English-speaking immigrants.

⁴⁷Doris Weatherford states, "The Italians, for instance, were extremely conservative in sexual matters; the Irish were more liberal but still very far from liberated; the Poles generally were willing to tolerate deviation from the accepted moral code; and the French established a notorious reputation for illicit sex as a national pastime." *Idem*, *Foreign and Female*, supra note 32 at 36. See also Emilio and Freedman, *Intimate Matters*, supra note 32 at 85.

ship bound from San Francisco to Santa Cruz. Local officials, reluctant to prosecute, eventually dropped charges.⁴⁸

By far the largest number of minorities were Hispanic, with defendants numbering fifty and victims thirty-three. The disparity between victims and defendants involved interracial cases in which most victims were Anglo. Although Hispanic representation remained high, it declined throughout the period.

Court officials occasionally commented upon alleged differences between Hispanic sexual norms and those of Anglos. One attorney tried to use lower-class Hispanic cultural patterns as a defense to mitigate the penalty for his client, who was charged with statutory rape. The attorney introduced evidence at the sentencing hearing to show that young Hispanics frequently lived with each other before marrying. The judge sentenced the defendant to five years at San Quentin, the minimum sentence allowable under law. Later, in an effort to secure a pardon for the prisoner, the attorney petitioned the governor:

The person upon whose body the crime was committed is of Mexican parentage, as is also your petitioner. It is a matter of general information, that with these people puberty marks the age of consent to marriage, and to the sexual embrace; and further, that among the lower ranks, from whence these two people come, marriage is not thought to be necessary to cohabitation. . . . They were not violating any tenet of their education, but were simply doing as their parents before them had done, and as those around them, and with whom they were constantly associating, were doing.⁴⁹

In another case, a probation officer argued leniency for a recently convicted Mexican: "While Masqueda admits having committed the act as charged, it was undoubtedly because the girl forced herself upon him. Considering the Mexican's view of morality and the possibility of the girl's relation with other men we believe Masqueda is the victim in this case."⁵⁰ More often, however, probation officers showed little sympathy for

⁴⁸*People v. Bello*, case. no. 261, December 11, 1890, San Luis Obispo County Superior Court.

⁴⁹Francisco Gonzalez, file no. 6507, in Applications for Pardon, Historical Case Files, California State Archives, Sacramento; *People v. Gonzalez*, case no. 10914, March 1, 1899, San Diego County Superior Court.

⁵⁰*People v. Masqueda*, case no. 31842, October 20, 1919, San Diego County Superior Court.

convicts unfamiliar with Anglo sexual norms: "We doubt if the defendant would make good if given a trial on Probation although he seems to be quite repentant at this time. He does not seem to have an idea as to what American morals are. Probation is not recommended."⁵¹

Overall, Hispanic conviction rates, charge reductions, and sentencing for Hispanics appear to have been only slightly less favorable than those for Anglos. However, location seems to have been important. Hispanics suffered harsher treatment in the relatively urban San Diego County than in rural areas, particularly San Luis Obispo County. In the latter, Hispanic influence probably lingered from the Spanish and Mexican colonial periods.

The greater availability and quality of recent records has made possible an abundance of research on contemporary sex crimes. Although many customs, laws, and ideals have changed during the past century, several findings of some recent works are similar to those of this study: interracial rapes resulted in higher conviction rates than intraracial rapes; in the vast majority of sex-crime cases the defendant and the victim belonged to the same ethnic group; most other ethnic groups gave greater preference to jury trials than did Anglos, who apparently placed more trust in the plea process. Prosecutors sustained slightly lower conviction rates for rape around the turn of the century. Some current research has linked important evidential variables to the outcome of the cases. One study suggests that "black women, women who allegedly engaged in misconduct, women acquainted with the defendant and women who did not report the incident promptly were less likely to have their complaints come to trial and result in conviction," while another stresses the importance of an impartial eyewitness for obtaining guilty verdicts.⁵²

In her article "Rape as a Social Control," Janice Reynolds speculates that rape laws were a method of social control designed to force women to adhere to certain ideals representing a "correct" traditional female role. The laws punished women

⁵¹*People v. Padilla*, case no. 32265, January 19, 1920, San Diego County Superior Court.

⁵²Quoted from Gary D. LaFree, "Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing," *Social Forces* 58 (1980), 833; Lynda L. Holmstrom and Ann W. Burgess, *The Victim of Rape, Institutional Reactions* (New Brunswick, 1983), 237-49; Kenneth Polk, "Rape Reform and Criminal Justice Processing," *Crime and Delinquency* 31 (1985), 191; Joan Petersilia, "Racial Disparities in the Criminal Justice System: A Summary," *Crime and Delinquency* (1985), 15. Conviction rates are defined as the number of convictions obtained (regardless of charge reductions) divided by the number of charges filed.

who failed to follow this stereotype by freeing the defendants.⁵³ The present study seems to corroborate Reynolds's theory. Social control took the form of a flurry of new laws defining sexual misconduct and thus implying proper behavior for women. Especially in cases involving seduction or forcible rape, defense lawyers viciously attacked a victim's testimony about her relationship to the defendant, her prior chastity, her reputation in the community, attempting to show in any way possible that she had deviated from "virtue." The lower conviction rates suggest that victims convinced fewer juries (whose members, during the period studied, were all male) than they do today and that more defendants went free.

⁵³Janice M. Reynolds, "Rape as a Social Control," *Catalyst* 8 (1974), 63.

BOOK REVIEWS

A Germ of Goodness: The California State Prison System, 1851-1944, by Shelley Bookspan. Lincoln: University of Nebraska Press, 1991, 151 pp., illustrations, bibliography, index, \$35.00, cloth.

This detailed and interesting volume, the third in the University of Nebraska's series *Law in the American West*, traces the development of California's prisons from the first appropriation for construction in 1851 to sweeping reorganization and reform in 1944.

In her study, Shelley Bookspan examines penal philosophy and reform, showing how the nineteenth-century view of prisons as a form of exile changed to the twentieth-century view that prison should be a corrective institution designed to integrate convicts into society. This change in purpose is reflected in the title of the book, which comes from a nineteenth-century warden at San Quentin who observed that "every man has within him a germ of goodness."

Bookspan begins with the development of San Quentin, California's first prison. According to a popular account, the site was discovered accidentally when a prison ship overloaded with the state's earliest convicts drifted uncontrollably until it ran aground at Quentin Point. It was a bad beginning for an institution that was to be plagued by corruption, brutality, and ineptitude. The site was poor, construction was delayed, and the bidding process was probably rigged. In addition, the legislature balked at the cost, planning for no more than fifty prisoners even though three times as many were already in temporary quarters or on the prison ship. A brief experiment with private management of San Quentin ended in failure, having aroused controversy about the use of convict labor and allegations of capricious discipline. (For example, convicts were seen freely wandering the streets of San Francisco at the time.)

Circumstances at San Quentin—chiefly overcrowding, poor construction, and the absence of segregated facilities for first-timers and recidivists—led to pressure for a branch prison. Long planned and debated, it finally opened at Folsom in 1880. Unfortunately, it did not fulfill the desires of those who hoped for penal reform. Torture and shackles were common and those in solitary were often left endlessly in darkened cells. An even

more gruesome punishment was a kind of straitjacket that squeezed and immobilized its victims. Folsom was also involved in an extended dispute with the Natoma Water Company, which had deeded land for the prison in exchange for fifteen thousand dollars' worth of convict labor to build a canal and dam for the company's use. The agreed rate was fifty cents per convict per day.

Women prisoners were few in number and were virtually ignored throughout the nineteenth century, though their treatment was deplorable. One investigating committee found many of them crowded into a single room with poor sanitation, little light, and no heat. Conditions for women at San Quentin improved somewhat in the early years of this century, but only after unceasing pressure by the Women's Christian Temperance Union, women's clubs, and others.

In 1903 the California Prison Commission reported that "our two prisons are no credit to the State," labeling them "schools of vice and universities of crime." Eventually, San Quentin and Folsom were expanded to relieve overcrowding and to allow the classification and segregation of prisoners. Corporal punishment was abolished and moves were made toward vocational education and credits for good behavior.

One of the most important reforms was the establishment of minimum-security institutions conducive to rehabilitation, though these took decades to achieve. A brief experiment in the 1920s with an industrial farm for women ended when the building burned and the legislature declined to pay for restoration; a minimum-security institution for women at last opened near Tehachapi in 1933. A reformatory for men was also long in coming, despite frequent studies and several legislative authorizations. Prompted by brutality scandals but hampered by several false starts, a minimum-security facility for men opened at Chino in 1940.

The book's most useful feature is to remind us that today's penal institutions and issues have been of concern for more than a century. The cost and location of prisons, the use of convict labor, and the advisability of private management are perennial problems, as are overcrowding, drug use, indeterminate sentencing, good-time credits, and discipline.

A Germ of Goodness includes photographs that graphically illustrate the conditions in prison and an appendix that charts the inmate population and the number of cells at San Quentin and Folsom over the period studied. Notes, a selected bibliography, and an index are also provided.

John K. Hanft
San Francisco

Vigilante Victims: Montana's 1864 Hanging Spree, by R.E. Mather and F.E. Boswell. San Jose, California: History West Publishing Company, 1991, 205 pp., illustrations, maps, bibliography, index, \$19.95, cloth.

Nothing is quite so mesmerizing and shocking as the extralegal violence that humans can inflict on their fellow beings when they are convinced that their cause is righteous and justified. Vigilante justice fascinates us, in part because citizens like ourselves wield the terror, in part because the violence is so gruesome. *Vigilante Victims* responds to both of these fascinations by laying out the stories of the victims of vigilante actions that swept through frontier Montana mining communities in 1864.

The stories R.E. Mather and F.E. Boswell tell have been told many times before, but they have not been told in such detail, nor have the specifics of the victims' lives been laid out with as much attention to the circumstances of their purported crimes, their summary judgments, and their hangings. The stories are graphic and the authors omit little in their telling, from the pleas for mercy at the gallows to the victims' lurching deaths. This makes for riveting reading, even if the writers jarringly interweave flashback descriptions of the victims' biographies as they recount the deeds of their vigilante accusers and hangmen. The effect is nonetheless chilling: twenty-one men hanged by the vigilantes—many, the authors suggest, with little cause, and all without any genuine justice.

It is that justice, or the lack of it, that most grips us, even if the grisly details keep us reading. The questions raised in Walter Van Tilburg Clark's *The Oxbow Incident* are the ones we ponder and want answered. Is lynch law an aberration? Can it ever be considered justified, perhaps even just? Mather and Boswell's book does not help us out much on these questions, but, in fairness, such questions are not the point or purpose of their book, and to criticize them on that account would be another kind of injustice. The book's purpose and methodology, however, present problems.

The authors have scoured the record of historical accounts to piece together as complete a description of the victims as has been compiled. But while they have succeeded in their labors, they have also served up a mix of documented, undocumented, hearsay, and contrived dialogue sources that do disservice to historical method. Readers are given little or no evaluation of the authors' sources, and the notes provide little more guidance. Newspaper articles written fifty years after the events are given equal weight with contemporary descriptions, self-

serving justifications by participants, and anecdotal explanations of events.

However, the authors do address the issue of historical accuracy in a concluding chapter, "Twenty-One Questions." They argue that historians have too willingly accepted the proposition that vigilantes acted necessarily and with only public safety as their primary concern. The result, Mather and Boswell tell us, has been a gross distortion that has justified the unjustifiable. To prove their contentions, they raise legitimate questions about the extent of the highwaymen's activities in the mining camps, but they dismiss contemporary accounts of extensive lawlessness without a shred of documentation. They also wonder about the political allegiances of vigilantes and victims, noting that the victims were Democrats and their tormentors were Republicans. And they reel off a series of rhetorical questions about the vigilantes' motives that simply cannot be answered from the extant evidence. It is the kind of argumentation that often accompanies conspiracy theories and has no place in historical analysis. Readers are also told not to think too highly of Montana's pioneer civic leaders, such as Granville Stuart, who "married his Indian bride, [when] she was only twelve years old" (p. 173), although it is unclear what this has to do with the vigilantes. This neither enhances the authors' theories nor makes for good history.

What Mather and Boswell have written is a compilation of graphic stories about Montana's most famous vigilante episode, which entertains but leaves us unenlightened about those fascinatingly frightening events.

William L. Lang
Center for Columbia River History

Legal Fictions: Short Stories about Lawyers and the Law, edited by Jay Wishingrad. Woodstock, New York: Overlook Press, 1992, 408 pp., \$24.95, cloth.

Jay Wishingrad, a New York lawyer who specialized in entertainment law and intellectual property, died of leukemia in October 1991 at the age of forty-two. He could boast of many accomplishments, including his commentaries as a columnist for the *New York Law Journal*, his membership on the Board of Governors of the Law and Humanities Institute, and his professorship at Yeshiva University's Benjamin N. Cardozo School of Law. But he took most pride in his editorship of *Legal Fictions*, an anthology of thirty-five short stories from different countries and various time periods about the legal profession.

Wishingrad aimed his book at lawyers in need of a literary education rather than at litterateurs wanting to know more about the law. He included several classic pieces, such as Melville's "Bartleby the Scrivener" and Kafka's "Before the Law," as well as a fine selection of work by lesser-known authors. Among these are J.S. Marcus, Larry Brown, and Ward Just. The book is divided into five sections, the first three of which are concerned with the United States during specific periods: the present, 1900 to 1950, and 1850 to 1900. The fourth section is devoted to stories about law and humor, while the last contains writings from other countries about the law.

Wishingrad's divisions into time periods reveal to the reader how the legal profession has evolved over the years. For example, in two stories by Louis Auchincloss in different sections, "The Tender Offer" (1983) and "The Colonel's Foundation" (1955), the central characters and their dilemmas are similar, while their corporate milieus are quite different. These lawyers are unable to keep up in the cutthroat world of the legal and financial affairs in which other members of their law offices are thriving. The 1950s high-profile Wall Street law firm is a bastion of old American gentility, snobbishness, and class; the 1980s version suggests how money and increased economic competition have created law firms more concerned with bottom lines than with bloodlines.

The humor section is the weakest, perhaps because the focus is on absurd situations created by technical language, rather than on the strange real-life stories with which the law often has to deal. Still, Ian Frazier's laconic lawsuit on behalf of Wile E. Coyote against Acme for compensation relating to product liability is hilarious in concept.

The best stories work as literature because they are about human frailties in the face of unbending legalities, whether in terms of litigation, laws, or the practice of law as a profession itself. Thomas Wolfe's "Justice is Blind" is a brilliant example of all three, as the story centers on a lawyer explaining to an aggrieved client that their mutual concern must be with "the Law," which has nothing to do with "Justice." Ward Just's "About Boston" and Marian Thurm's "Still Life" reveal how a lawyer's professional and private lives impinge on one another through the career choices he or she makes. Other stories, such as Margaret Atwood's "Weight" and Madison Smart Bell's "Witness," illustrate the disruptive psychological effects violent criminal activities can have on lawyers who are connected to the victims.

Wishingrad offers no overriding theory of selection in his introduction. His reasons for his choices remain unstated, his criteria unknown. The section of fiction from other countries

indicates the haphazardness of his methodology. There are stories by writers from Chile, Czechoslovakia, England, Ireland, Poland, Sierra Leone, and South Africa, some of them by authors who have been dead for more than fifty years, some by writers still living. Other than somehow concerning the law, the stories have no connection. This brings up another problem: the authors in this section—indeed, in the whole book—are overwhelmingly white and male. Perhaps this is a reflection of the society from which the stories emerged; that many of the writers in the contemporary section are women suggests that this is so. Still, despite the inclusion of a clever story, "The Web of Circumstance," by Charles W. Chesnutt (an African American), this country's ethnic and racial diversity is under-represented.

Wishingrad concludes his introduction by stating that "neither literary nor legal theory is the concern here," and that the collection "is for reading." The high caliber of the stories he chose, their categorization, and their breadth of topics and concerns make his anthology eminently readable. One may quibble with his method of selection, but the stories speak for themselves.

Steven P. Horowitz
Coe College

Heller Ehrman White & McAuliffe: A Century of Service to Clients and Community, by Carole Hicke. San Francisco: privately published, 1991, 111 pp., illustrations, \$25.00, paper.

Among legal historians, law-firm histories have long enjoyed a mixed reputation. "Invariably written by a partner," they also are "inevitably celebratory," according to one historian. Nonetheless, they can provide important information not readily available elsewhere.

Carole Hicke's history of Heller, Ehrman, White & McAuliffe does celebrate the well-known San Francisco-based law firm, even though the author is not a partner. (She is, in fact, the oral historian for the Ninth Judicial Circuit Historical Society.) However, the volume is a model of what can be achieved within the limits of a commissioned work.

Heller Ehrman White & McAuliffe presents a largely chronological history of the firm from its beginnings in 1890 to the present, smoothly mixing the stories of the early partners with accounts of the firm's changing business. Sidebars provide more detailed biographies of significant figures as well as treatment

of other topics incidental to the main narrative. Accompanying the history is a generous selection of well-chosen pictures.

Overall, *Heller Ehrman* contains much valuable information, engagingly presented. The portraits of the eponymous partners and of several other early members of the firm will be helpful to other researchers, while Hicke's discussion of the evolving nature of the firm's business will be useful for scholars seeking to understand the development of law in San Francisco. In addition, the volume makes a strong and interesting case for the existence of a distinctive subculture at Heller Ehrman.

Not surprisingly, *Heller Ehrman* does not tackle questions about the relationships between the firm and the larger society. Given its role as a sponsored history, it would be unfair to expect it to do so. Nonetheless, the book helps illustrate some of those connections.

The diversity of religious backgrounds among the early partners stands out. As Hicke notes, Heller and Ehrman were Jewish, White was Protestant, and McAuliffe was a Catholic. During a period when the most prominent East Coast firms remained Protestant enclaves, this diversity is noteworthy, and indicates some of the differences between society in San Francisco and on the East Coast. *Heller Ehrman* also documents the close relationships among the firm's members and the elite of San Francisco, particularly for the first decades of the firm's existence. This documentation, in turn, suggests the value of investigating the relationships between the emergence of new elites and changing forms of law, an investigation that seems critical to understanding the evolution of today's major firms.

Attractively designed, the book is inviting and easy to read. However, a note on sources and an index would have strengthened the volume.

As an in-house history, *Heller Ehrman* sets a high standard, which other such volumes would do well to emulate. As a consequence, it makes an engaging and valuable contribution to the history of law in San Francisco.

Michael Griffith

United States District Court, Northern District of California

Idaho's Constitution: The Tie That Binds, by Dennis C. Colson. Moscow, Idaho: University of Idaho Press, 1991, 288 pp., index, \$24.95, cloth.

Idaho's constitution was drafted at a convention held without congressional authority in the summer of 1889 and ratified

overwhelmingly in a territorial election that fall. Its adoption paved the way for statehood the next year. Dennis Colson's book is a richly detailed and fascinating analysis of these events.

The book is broadly divided into twelve sections, the first of which includes a summary of Territory history and a brief overview of the politics in Idaho Territory in the late 1880s. It explains the organizational details of calling the convention, and contains biographical sketches of the more important delegates to it. The last section details the ratification of the constitution by the electorate of the Territory and the efforts to secure statehood for Idaho in Congress.

The middle sections of the book dissect the constitution itself and are organized topically, along the lines of the constitution, with each section exploring a major constitutional article or section. As his vehicle for this task, Colson relies heavily upon the verbatim record of the proceedings of the convention, published in 1912, to reconstruct the daily activities of the delegates through the process of writing and debating each of the major articles.

Colson offers the delegates' speeches to underscore the vitality of the arguments advanced and to illustrate the personalities involved. In an amusing example, he details the efforts of Peter Pefley, a delegate from Boise and a staunch advocate of the separation of church and state, in his attempts to eliminate the reference to "almighty God" from the preamble of the constitution, and to soften the provisions empowering the legislature to disenfranchise every Mormon from ever voting or holding state office. Pefley was unsuccessful in both efforts, and announced in protest that he would refuse to sign the document when it was finally approved. In retaliation, a delegate proposed that his pay be withheld until he signed. According to Colson, Pefley had the last word: "I do not ask for any pay, and I would not have it, and the gentleman can save his motion" (p. 158).

The author is a professor of law, and his observations clearly are made through the eyes of a lawyer. Most of his analysis concentrates on the legal sufficiency and constitutional structure of the arguments advanced, and his examination of the subsequent history of the provisions generally traces the interpretations contained in later court decisions. The legal flavor of his writing in no way detracts from the book, for, certainly in the area of constitutional interpretation, history and the law are inextricably intertwined.

As should be expected of a specialized text, the work is aimed at readers with more than a rudimentary knowledge of Idaho's early history and would be confusing for those unfamil-

iar with the general places and more significant issues of the times. The introductory chapters offer a brief summary of the territorial era, but the historical and political underpinnings are not explored in any detail. The addition of a few illustrative maps would be of enormous help, enabling the reader to keep track of the different sections, factions, and regional interests.

The defects in the book are few and are largely mechanical. The text of the constitution included in an appendix is the current version, with all modern amendments. It does not isolate the original text, as adopted in 1889, or identify the various amendments over the years. The index is sketchy and incomplete, omitting many important persons, events, and topics discussed at length in the text. (There are no index references to the anti-Mormon test-oath cases, for example.) The book is meticulously annotated with endnotes to each section, but suffers from the lack of a bibliography. Legal researchers will bemoan the absence of a table of cases and the failure to include any case citations in the index, or parallel references in the endnotes.

The most egregious defect is the type font chosen by the printer or publisher. For some reason, the entire book is set in a font more appropriate to footnotes, a minuscule type that quickly strains and tires all but the most energetic eye.

The defects, however, do not overwhelm the merits of Colson's work. The general reader will find the narrative lively and illuminating. The serious historian will appreciate the carefully documented scrutiny given to the constitutional convention and the personalities of the delegates who attended. The legal researcher will find the analysis of constitutional principles and of the development of the law thorough and well annotated. The book fills a void in Idaho's historical works that will be of considerable interest to many.

D. Duff McKee
Boise, Idaho

BRIEFLY NOTED

Montana Frontier Lawyer: A Memoir, by Lew L. Callaway; edited by Vivian A. Paladin. Helena, Mont.: SkyHouse Publishers, 1991, 258 pp., \$19.95, cloth.

On the morning of September 28, 1922, Llewellyn Link Callaway argued a case before the Montana Supreme Court. Having finished his argument, he met with the state's governor. By two that afternoon he was seated as chief justice, filling the vacancy

caused by his predecessor's death. A Republican, he was elected and reelected until 1934, when the New Deal landslide swept him out of office.

Regrettably, this memoir, written more than fifty years ago, ends with Callaway's appointment to the Montana Supreme Court, although he practiced law until 1943 (he died in 1951). Much of the volume recounts his career as a private practitioner, first in White Sulfur Springs and then in Virginia City, later as Madison County attorney, as mayor of Virginia City, and finally as judge of Montana's Fifth Judicial District. Interspersed with these accounts are the author's recollections of ranch life, political campaigns, and social activities in late-nineteenth- and early-twentieth-century Montana. Replete with anecdotes, the book is a primary source that historians will find useful and the general reader will find interesting.

Trails: Toward a New Western History, edited by Patricia Nelson Limerick, Clyde A. Milner III, and Charles E. Rankin. Lawrence, Kans.: University Press of Kansas, 1991, 295 pp., illustrations, \$12.95, paper.

For nearly a decade, historians of the American West have been reevaluating their field of study, in an attempt to replace the concept of "frontier" with approaches that are more inclusive of various ethnic and racial groups, of women, and, as the editors write, of "sympathy, grace, villainy, and despair as well as danger, courage, and heroism." Three of the essays were originally presented at a symposium held in conjunction with a traveling exhibition called "Trails through Time," from which twenty-two illustrations are included in the book. Four essays, published first in *Montana: The Magazine of Western History*, address the question "What is the 'New Western History'?" Three more essays (originally in the *Western Historical Quarterly*) examine the West from a global perspective.

Limerick's book examines the study of the history of the American West to date, defines the West anew, and indicates exemplary new approaches, which include studies in western legal history. These essays, whose goal is to develop a mature comprehension of the region that will account for its remarkable diversity, are an excellent measure of the current state of the history of the West.

The Oxford Companion to the Supreme Court of the United States, edited by Kermit L. Hall. New York and Oxford: Oxford University Press, 1992, 1032 pp., \$45.00, cloth.

Nearly three hundred contributors—among them lawyers, judges, scholars, and journalists—produced over a thousand articles for this major reference work. Intended to illuminate the way the Court performs its role as guardian and interpreter of the Constitution, it contains biographical sketches of justices as well as rejected nominees, articles on historically significant cases, and definitions of basic legal and constitutional terms and concepts. Also included are a description of the Court's daily operation as well as an account of its own history and the effect it has had on the nation's. The Court is examined as a symbol of American cultural values and as an institution that continues to affect Americans' daily lives.

The alphabetical arrangement of articles is augmented by a topical index and an index of cases. Each article is followed by the author's name; many include a brief bibliography of usually nontechnical titles readily available in public libraries. Appendices include the U.S. Constitution, nominations and succession of the justices, and court trivia and traditions. This admirable book will become a well-worn resource on the reference shelves of both the nonspecialist and the expert.

ARTICLES OF RELATED INTEREST

Below, we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

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Hall, Kermit L., "The Legal Culture of the Great Plains," *Great Plains Quarterly* 12 (Spring 1992), 86-98.

Hewitt, James W., "The Fatal Fall of Barrett Scott: Vigilantes on the Niobrara," *Great Plains Quarterly* 12 (Spring 1992), 107-20.

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Kornfeld, Itzhak E., "Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options," *Environmental Law* 23:1 (1993), 185-222.

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Compiled with the assistance of Helen Petersen.

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