

# WESTERN LEGAL HISTORY

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# CONTENTS

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Death in the Colorado Coal Country: Homicide and Social Instability in Las Animas County, 1880-1920 <i>Clare V. McKanna, Jr.</i>	163
Frontier Land Litigation in Colonial New Mexico: A Determinant of Spanish Custom and Law <i>Malcolm Ebright</i>	199
The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation <i>Ellen D. Katz</i>	227
California's "Anti-Okie" Law: An Interpretive Biography <i>Nancy J. Taniguchi</i>	273
Book Reviews	291
Articles of Related Interest	307
Memberships and Contributions	313

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*Cover Photograph:* In this issue, Ellen Katz examines organized opposition to the Geary Act, which required all Chinese laborers living in the late-nineteenth-century United States to register with the federal government. (Photograph by Arnold Genthe, Collection of The Oakland Museum of California, Gift of Anonymous Donor in memory of Paul Gerson)



Saloons like this one in Douglas (c. 1890) were the setting for a volatile mix of alcohol, firearms, and members of different ethnic groups. (Colorado Historical Society)

# DEATH IN THE COLORADO COAL COUNTRY: HOMICIDE AND SOCIAL INSTABILITY IN LAS ANIMAS COUNTY, 1880-1920

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CLARE V. MCKANNA, JR.

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The *Trinidad Chronicle-News* headline read as follows: "DESPOILER OF HOME RIDDLED WITH 4 CHARGES OF BUCKSHOT."<sup>1</sup> It was a fairly typical representation of homicide reporting in Colorado's Las Animas County in 1908. In this particular case, Charles M. Moore's wife was about to run off with Abe Cohn. After discovering her intentions, Moore picked up his shotgun, loaded it, waited in the darkness at the Trinidad train station, and then shot Cohn to death.<sup>2</sup> A jury found Moore not guilty. Juries seldom convicted men or women for "protecting" their families.

This and similar cases point contemporary scholars to a largely unexplored area of western legal history and lend themselves to an investigation of homicide in western counties.<sup>3</sup>

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Clare V. McKanna, Jr., lectures on Native American and Latin American history at San Diego State University. He wishes to thank Roger Cunniff, of San Diego State University, and Ralph Vigil, of the University of Nebraska at Lincoln, for their suggestions, and extends special appreciation to John Wunder, who guided this project from its inception.

<sup>1</sup>August 12, 1908.

<sup>2</sup>*Trinidad Chronicle-News*, August 12, 13, 1908.

<sup>3</sup>Patricia Nelson Limerick's *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987) has sparked an ongoing debate about interpreting western history. It should be noted that Limerick barely touches on the topic of violence in her new western history, except where it involves minorities. See also Larry McMurtry's essay "How the West Was Won or Lost," *New Republic* 203 (October 22, 1990), 32-37; and Richard White, "It's Your Misfortune and None of My Own": *A New History of the American West* (Norman, 1991).

How violent was southeastern Colorado? and, from the data available, can we conclude that residents of Las Animas County developed a regional culture of violence?<sup>4</sup> An examination of the Colorado coal country may provide insights into the levels of violence in the American West.

In Las Animas County, the development of a regional culture of violence resulted in high homicide rates. Among the reasons for this were the coal mining itself, with its bitter strikes, the coercive nature of company towns, the rapid population growth, the heavy consumption of alcohol, the propensity to carry concealed handguns, the mixing of widely disparate ethnic groups, and the general tendency to accept violence. The rate of indictments for homicide was much higher in Las Animas County than in eastern urban centers, such as Boston, Philadelphia, and New York, while the rate of convictions was low.<sup>5</sup>

Homicide in Las Animas County tended to be a male crime (96 percent of all indictments). The homicide indictment data in Table 1 reflects an ethnic variety that includes a cross-section of nineteenth-century society in the rural county. Thirty-seven percent of those indicted were whites,<sup>6</sup> followed by Hispanics and Italians, with 32 and 26 percent respectively.<sup>7</sup> The significant number of Italian and Hispanic defendants enables us to examine their treatment within the county's criminal-justice system. This study relies on statistical data collected

<sup>4</sup>For a discussion of this theory, see Raymond D. Gastil, *Cultural Regions of the United States* (Seattle, 1975), 97-116 [hereafter cited as Gastil, *Cultural Regions*].

<sup>5</sup>Since eastern cities were quite different from those in the West, this is not to suggest that they provide an accurate comparison. For examples of research on crime in eastern urban areas, see Marvin E. Wolfgang, *Patterns in Criminal Homicide* (Philadelphia, 1958) [hereafter cited as Wolfgang, *Patterns in Criminal Homicide*]; Eric H. Monkkonen, *The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1885* (Cambridge, 1975); Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York, 1980); Roger Lane, *Violent Death in the City: Suicide, Accident, and Murder in 19th Century Philadelphia* (Cambridge, 1979) [hereafter cited as Lane, *Violent Death in the City*]; idem, *Roots of Violence in Black Philadelphia, 1860-1900* (Cambridge, 1986); and Robert Ted Gurr, ed., *Violence in America: The History of Crime* (Newbury Park, Calif., 1989), vol. 1 [hereafter cited as Gurr, *Violence in America*].

<sup>6</sup>The term "white" in this study refers to anyone with Euro-American origins other than Italian, Greek, or East European heritage. It particularly applies to those whites who arrived in Las Animas County during the period 1870-90.

<sup>7</sup>"Hispanic" is used in this study since it is difficult to determine whether defendants were recent migrants from Mexico, or whether they lived their entire lives in New Mexico or Colorado as Spanish Americans. Although there is recent preference for "Latino," Hispanic has the advantage of being gender neutral.

TABLE 1  
HOMICIDE INDICTMENTS  
LAS ANIMAS COUNTY, 1880-1920

Ethnic	N=	%
White	105	37%
Hispanic	90	32
African American	11	4
Italian	74	26
Greek	2	1
Total	282	100

Source: Las Animas County, *Registers of Criminal Action*, 1880-1920.

from the Las Animas County Coroner's Inquests, Registers of Criminal Action, and newspapers.<sup>8</sup>

Trinidad, the county seat of Las Animas County, is situated in the narrow valley of the Purgatorie River on a mile-high plateau in southeastern Colorado, about twenty miles north of the New Mexico border. Hispanics from New Mexico established a permanent settlement there around 1860.<sup>9</sup> Within a decade whites also began to settle along the Purgatoire (often called the "Picketwire"). Coal mining and the Atchison, Topeka and Santa Fe Railroad, built through Trinidad in 1878, provided employment for many Hispanics and whites. By the 1880s, Trinidad had gained a reputation for being a wide-open town with numerous saloons and gambling parlors that attracted a variety of misfits. Gamblers, cowboys, ranchers, and some notorious characters were among the visitors, including Pat Garrett, Charles Goodnight, William "Billy the Kid" Bonney, Wyatt Earp, and Bat Masterson. After one particular shooting in 1882, newspapers labeled the town "Turbulent Trinidad."<sup>10</sup> To deal with the lawlessness, town officials invited Bat Masterson and his brother Jim to serve as town marshals. Their

<sup>8</sup>The indictment data consist of 282 cases during the period 1880-1920. See *Registers of Criminal Action, 1880-1920*, Las Animas County Courthouse, Trinidad.

<sup>9</sup>Luis Baca, "The Guadalupita Colony of Trinidad," *Colorado Magazine* 21 (January 1944), 22-27 [hereafter cited as Baca, "Guadalupita Colony"], and Morris F. Taylor, *A Sketch of Early Days on the Purgatory* (Trinidad, 1959), 35-37.

<sup>10</sup>Richard Patterson, *Historical Atlas of the Outlaw West* (Boulder, 1985), 48 [hereafter cited as Patterson, *Historical Atlas*]; and Ralph C. Taylor, *Colorado South of the Border* (Denver, 1963), 472-82 [hereafter cited as Taylor, *Colorado*].

efforts, however, had little effect. In 1883 Bat Masterson failed to gain reelection as marshal and quickly left Trinidad, never to return.<sup>11</sup>

Located strategically in a valley ideal for a railroad route, Trinidad became the economic center of Las Animas County and played a vital role in regional politics. Within two decades its population had twice doubled, growing from a sleepy town of 2,226 in 1880 to a dynamic economic center with a population of 10,000 by 1910. The railroad and the development of coal mining provided the impetus for this rapid growth, which also affected smaller mining towns in Las Animas County such as Aguilar, Cokedale, Primero, Segundo, Sopris, Starkville, Ludlow, and Forbes.

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### ETHNIC MIGRATION

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In 1861, Felipe Baca and Hilario Madrid led a group of New Mexican settlers from Mora County into the Purgatorie Valley. The Madrid, Vigil, and Valdez families decided to settle further westward, and today small towns along the Picketwire still bear their names.<sup>12</sup> The 1900 census revealed that 10,222 Coloradans claimed their heritage from New Mexico; most of them lived in Las Animas County.<sup>13</sup> A significant number of whites from eastern regions also began to move into the valley, and by the 1880s were challenging the county's Hispanic hegemony. Although Hispanics soon became a minority, they could still muster enough votes to influence various political offices. Members of the Vigil, Barela, and Tafoya families served in a variety of local elective offices, including those of judge and sheriff.<sup>14</sup>

The first contingent of African Americans, recruited by the Colorado Coal & Iron Company to work as strikebreakers, arrived from Chattanooga, Tennessee, in 1884. As elsewhere in the United States, in Colorado they faced discrimination and segregation in company housing and within the mines. Some

<sup>11</sup>Patterson, *Historical Atlas*, supra note 10 at 49; and Taylor, *Colorado*, supra note 10 at 478-82.

<sup>12</sup>Richard L. Nostrand, *The Hispano Homeland* (Norman, 1992), 117, 143; Baca, "Guadalupe Colony," supra note 9 at 24-25; and A.W. McHendrie, "Trinidad and Its Environs," *Colorado Magazine* 6 (September 1929), 166-68.

<sup>13</sup>Sarah Deutsch, *No Separate Refuge: Culture, Class, and Gender on an Anglo-Hispanic Frontier in the American Southwest, 1880-1940* (New York, 1987), 35 [hereafter cited as Deutsch, *No Separate Refuge*].

<sup>14</sup>*Ibid.*, 101-3; and Carl Abbott, *Colorado: A History of the Centennial State* (Boulder, 1976), 46-47.

company-town managers refused to hire them.<sup>15</sup> Although never very numerous, African Americans were represented in several of the Las Animas County mining communities as well as in Trinidad.

With the intensification of coal production, company officials began to hire agents to recruit immigrants from European countries, particularly Greece and Italy. Italians first went to Las Animas County in the 1880s. Originally it was northern Italians who emigrated to the United States, but by 1890 southern Italy, including Sicily, had become the main region of emigration. Italians from rural southern Italy predominated in this migration, which jumped from a little over half a million during the period 1891-1900 to more than two million during the first decade of the twentieth century.<sup>16</sup> Their reasons for leaving were mainly related to agriculture, and included insufficient rainfall, deforestation, and poor topsoil, particularly in southern Italy.<sup>17</sup> The population growth in Italy increased faster than food production during the last three decades of the nineteenth century, and many Italians, already living on the margins of society, were on the verge of starvation. Some of them began to move to the United States.<sup>18</sup>

Volcanic eruptions, floods, pestilence, and other disasters further pressured Italians to leave their homeland for a new start, and emigration to the United States increased, especially between 1896 and 1914.<sup>19</sup> Jobs were the main attraction; industrialization in the United States ensured employment and higher wages. Although most Italian immigrants moved to the cities, a number of them ended up in the coal-mining towns of West Virginia and Colorado. Many sent money home to pay transportation expenses for their relatives.<sup>20</sup>

Some of the new immigrants from southern Italy were recruited by the coal-mining companies to work in the coal mines of Huerfano and Las Animas counties, in southern Colorado. In 1900 the Las Animas County census listed at least 1,625 residents who had been born in Italy; a decade later 5,289

<sup>15</sup>Eric Margolis, "Western Coal Mining as a Way of Life: An Oral History of the Colorado Coal Miners to 1914," *Journal of the West* 24 (July 1985), 37-39 [hereafter cited as Margolis, "Western Coal Mining"].

<sup>16</sup>Richard D. Alba, *Italian Americans: Into the Twilight of Ethnicity* (Englewood Cliffs, 1985), 21.

<sup>17</sup>*Ibid.* at 25.

<sup>18</sup>*Ibid.* at 52-54.

<sup>19</sup>Luciano J. Iorizzo and Salvatore Mondello, *The Italian-Americans* (New York, 1971), 40-48.

<sup>20</sup>*Ibid.* at 47-50.

residents could be identified as Italian.<sup>21</sup> American coal-company operators often hired Italian, Greek, and East European immigrants to break strikes. Consequently, tensions between Italians and native whites and Hispanics surfaced early and continued to create problems, particularly during labor disputes. For example, in the early 1890s native whites lynched Italians in Gunnison and Denver. In 1895 a mob of miners killed six Italians in the southern Colorado coal fields, and less than a decade later a mob hanged four Italians in Walsenburg, Huerfano County, about forty miles north of Trinidad.<sup>22</sup>

Greece suffered from agricultural problems similar to those in Italy, and with the failure of the currant crop on the Peloponnesian peninsula in the 1880s Greek farm laborers began to migrate in large numbers.<sup>23</sup> In the 1890s thousands of Greeks joined Italians in an exodus from the Mediterranean, and during the first decade of the twentieth century 167,579 Greeks reached the United States. Throughout the period, many of them migrated to the intermountain West, with Idaho, Montana, Wyoming, Nevada, Utah, and Colorado as their destinations.<sup>24</sup> Although not particularly numerous in Las Animas County, Greek workers played an important role in labor organization in the coal mines.<sup>25</sup> One of them, Louis Tikas, served as an organizer for the United Mine Workers during the 1913 coal miners' strike, and in 1914 acted as director of the Ludlow tent camp.<sup>26</sup>

Coal companies increased their recruiting, particularly after 1900, and hundreds of Italians and Greeks arrived in response to the need for strikebreakers during the 1903 strike. Company policy of replacing one ethnic group with another was a deliber-

<sup>21</sup>Bureau of the Census, *Twelfth Census of the United States, 1900* (Washington, 1901), 1: 740; *Thirteenth Census of the United States, 1910* (Washington, 1913), 2: 222; and Jerre Mangione and Ben Morreale, *La Storia: Five Centuries of the Italian American Experience* (New York, 1992), 187. By 1910 Colorado had a population of about forty thousand Italians.

<sup>22</sup>Andrew F. Rolle, *The Immigrant Upraised: Italian Adventurers and Colonists in an Expanding America* (Norman, 1968), 174-75.

<sup>23</sup>Evangelos C. Vlachos, *The Assimilation of Greeks in the United States* (Athens, 1968), 57.

<sup>24</sup>See Louis James Cononelos, *In Search of Gold Paved Streets: Greek Immigrant Labor in the Far West, 1900-1920* (New York, 1989), 139-85 [hereafter cited as Cononelos, *In Search of Gold Paved Streets*].

<sup>25</sup>The 1910 census of Las Animas County lists 163 persons born in Greece. See Bureau of the Census, *Thirteenth Census, 1910*, 2: 222. On the Greek role in labor organizations in mining in the West, see particularly Cononelos, *In Search of Gold Paved Streets*, supra note 24 at 196-211.

<sup>26</sup>See Zeese Papanikolas, *Buried Unsung: Louis Tikas and the Ludlow Massacre* (Lincoln, 1991) [hereafter cited as Papanikolas, *Buried Unsung*].



ate attempt to keep mine workers divided and to hinder union organization.<sup>27</sup> By 1913 twenty-one different European ethnic groups, as well as Asians, Hispanics, and African Americans, could be found living in company towns and laboring in the Las Animas County coal mines.<sup>28</sup>

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### COMPANY TOWNS

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Some of Las Animas County's towns predated the coal-mining boom, while others were created when John D. Rockefeller's Colorado Fuel & Iron Company purchased thousands of acres in the county. As soon as a coal-mining company gained rights to the land, it quickly established control over those towns that were central to their mining operations. The typical Hispanic village with its plaza soon disappeared, replaced by a company town laid out on a grid pattern with no central square,<sup>29</sup> and lacking the casual, warm ambience of Hispanic settlements. Company managers evicted most of the inhabitants (by then labeled squatters), and developed towns operated by mining officials, controlled by company guards, and backed by county political power. Within a decade Colorado Fuel & Iron virtually controlled Las Animas County politics by dominating the courts and the county sheriff's and coroner's offices.<sup>30</sup>

From Matewan, West Virginia, to Ludlow, Colorado, the coal-mining industry became notorious for its rough handling of labor. Its methods are perhaps best represented by the concept of the company town, created to provide housing close to the mines and to develop a mechanism to control labor. The company towns of Berwind, Forbes, Delagua, Hastings, Tabasco, and Ludlow dotted the rugged canyons of northern Las Animas County. With the exception of Hastings (constructed by the Victor-American Fuel Company in 1893), all of them were established after 1900, the main boom period of the coal-

<sup>27</sup>Margolis, "Western Coal Mining," supra note 15 at 42-44.

<sup>28</sup>See Eugene S. Gaddis, "Gaddis Exhibit," *The Colorado Coal Miners' Strike, in Industrial Relations: Final Report and Testimony* (Washington, 1916), 9: 8905-6 [hereafter cited as Gaddis, *Final Report*]. The list includes such ethnic origins as English, Scottish, Welsh, Irish, German, Swedish, Bohemian, French, Croatian, Russian, and Serbian.

<sup>29</sup>Deutsch, *No Separate Refuge*, supra note 13 at 87-90.

<sup>30</sup>On the coal company's attempt to control county coroners, see "Doyle Exhibit No. 2," in *Final Report*, supra note 28 at 8: 7344-47; and George S. McGovern and Leonard F. Guttridge, *The Great Coalfield War* (Boston, 1972), 28-34 [hereafter cited as McGovern and Guttridge, *Great Coalfield War*].

mining industry in Colorado. A similar pattern occurred in southern Las Animas County with the development of Primero, Segundo, Valdez, Sopris, Cokedale, Starkville, and Morley. Only Morley, Sopris, and Starkville predated 1900, with Colorado Fuel & Iron establishing Primero and Segundo in 1902.<sup>31</sup>

Anyone approaching a company town quickly realized that it belonged to the company. "Private Property—Keep Out" signs and a gate impressed all visitors. According to one observer, "Armed guards, employed by the coal company and deputized by the sheriff of the county, watched over the gates and kept order in the camp."<sup>32</sup> The first camps suffered from poor construction, inadequate sanitary conditions, poor water quality, and crowded living quarters. In many ways the towns resembled the twentieth-century migrant-worker camps that were constructed throughout the Midwest, Florida, Texas, and California to house Mexican agricultural workers. Coal miners and their families were virtually packed into the small buildings.

In 1901, Colorado Fuel & Iron organized a "sociological department" to improve housing and living conditions in the camps. Despite a decade of work, town life improved little. Eugene S. Gaddis, the department's superintendent, found as many as eight persons crowded into one small room designed to house only one or two, and complained that "Many of the miners' families [were] living in hovels, box-car shacks, and adobe sheds . . . not fit for the habitation of human beings."<sup>33</sup> Conditions within some of the camps were distressing. Gaddis reported that a "cesspool within a few feet of the company store" had been allowed to overflow across the road for over a year without any attempt to alleviate the unhealthy conditions. Seepage water from the mines also contaminated the water supply of three camps. In 1912-13 company-town physicians reported 151 cases of typhoid. Gaddis concluded that medical treatment for the camps in Las Animas County was inadequate.<sup>34</sup> One author suggests that "the company had unlimited resources with which to improve conditions, but chose

<sup>31</sup>James B. Allen, *The Company Town in the American West* (Norman, 1966), 156-60.

<sup>32</sup>Barron B. Beshoar, *Out of the Depths: The Story of John R. Lawson, a Labor Leader* (Denver, 1980), 2. Beshoar's father practiced medicine in and around the camps at the time. As a young boy, Barron Beshoar often accompanied his father on trips to the company towns.

<sup>33</sup>Gaddis, *Final Report*, supra note 28 at 9: 8910. In his role as superintendent, Gaddis gained first-hand knowledge by visiting virtually every camp in the coal-mining district.

<sup>34</sup>Ibid. at 8912.

not to do so."<sup>35</sup> Management determined to increase its profits while maintaining control of labor.

Company towns varied in size, ranging from 362 in Forbes to 1,441 in Sopris. Averaging 54.8 and 45.2 percent respectively for males and females over the four-decade period, the gender ratio in Las Animas County was not especially skewed toward males.<sup>36</sup> However, population within each camp displayed an ethnic diversity that changed from camp to camp. Most included a mix of Hispanics, Italians, Greeks, East Europeans, and, in a few of the camps, African Americans. Company policy, reflecting national social trends, segregated blacks and Hispanics, usually relegating them to the least appealing housing, reserving the better structures for white workers.<sup>37</sup> An ethnic breakdown of the population indicates that Italians, with 25.5 percent, were the largest ethnic group, followed by Hispanics, with 21 percent (Table 2). The East Europeans comprised four different groups (Bohemians, 2 percent; Austrians, 6 percent; Hungarians, 1 percent; and Slavs, 4 percent). The isolation of the company towns prevented effective union organizing and also created a strong worker dependency on company-owned stores and saloons.

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### COMPANY SALOONS

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Virtually every company town boasted a company-owned saloon that served as a social gathering place for the coal miners. Hispanics, Italians, Greeks, and East Europeans who lived and worked together in mines such as Berwind, Segundo, Primero, Forbes, and Ludlow usually drank together. Saloons were not confined to the company towns; Trinidad, the commercial and political seat of county government, supported thirty-seven bars in 1907, and still maintained thirty-five of them less than a decade later. Aguilar, another non-company town, with a population of fourteen hundred, supported ten saloons. The saloons provided the social center for virtually all Las Animas County's communities, but those under company jurisdiction proved to be particularly disreputable.

Gaddis complained bitterly about the saloons in or near company towns. In 1908 he counted eighty-two saloons on property owned by John D. Rockefeller, and perceived them to be the

<sup>35</sup>H. Lee Scamehorn, *Mill & Mine: The CF&I in the Twentieth Century* (Lincoln, 1992), 86 [hereafter cited as Scamehorn, *Mill & Mine*].

<sup>36</sup>Bureau of the Census, *Fourteenth Census of the United States, 1920* (Washington, 1922), 3: 136.

<sup>37</sup>Margolis, "Western Coal Mining," *supra* note 15 at 41.

TABLE 2  
COMPANY TOWN POPULATION

Ethnicity	%
White	26%
Hispanic	21
Italian	25.5
Greek	5.6
African American	4
East European	13
Other	4.9

Source: Eugene S. Gaddis, "Gaddis Exhibit," in *Industrial Relations: Final Report and Testimony* (Washington, 1916), 8:8905-6.

single most disruptive aspect of company-town life.<sup>38</sup> In 1913 there were eighteen of them in Sopris (population one thousand), while other company towns show similar numbers (Table 3). In the same year, Segundo, also with a population of one thousand, had twenty-four saloons, or one saloon for every forty-two inhabitants.<sup>39</sup>

The number of saloons was not all that concerned Gaddis. The nature of some of these establishments created a good deal of controversy and yet, as he complained, the saloon offered the "only one place of public resort." Because of the miserable living conditions in company towns, miners needed some sort of diversion and, with no recreational facilities, soon made the saloon their social focus. Gaddis commented bitterly: "There are many of our men living in shacks and dugouts almost without light or heat and where there is no place for them to spend their spare time except at the saloon."<sup>40</sup> He recommended de-

<sup>38</sup>Gaddis, *Final Report*, supra note 28 at 9: 8913. Gaddis, an ordained minister, greatly disapproved of alcohol and its effects on family life. Las Animas County was not the only region filled with disreputable saloons. The coal counties of Lacawanna, Luzerne, and Schuylkill, Pennsylvania, suffered similar problems. See Peter Roberts, *Anthracite Coal Communities: A Study of the Demography, the Social, Educational and Moral Life of the Anthracite Regions* (New York, 1904), 222-43.

<sup>39</sup>By 1915 Segundo's population had declined to 600, yet it still supported fourteen saloons within the company town, a rate of 43 inhabitants per saloon. See also Robert E. Popham, "The History of the Tavern," in *Research Advances in Alcohol and Drug Problems*, ed. Yedy Israel et al. (New York, 1978), 4:281-95; and Mark E. Lender and James K. Martin, *Drinking in America* (New York, 1982), 102-33, and 205-6.

<sup>40</sup>Gaddis, *Final Report*, supra note 28 at 9: 8914-15.

TABLE 3  
SALOONS ON OR NEAR COMPANY TOWNS  
LAS ANIMAS COUNTY, 1913

Company Town	Population	N=
Berwind	650	2
Delagua	1,024	2
El Moro	579	3
Hastings	753	3
Segundo	1,000	24
Sopris	1,000	18
Starkville	1,400	12
Weston	646	5
Engle	668	5

Sources: Eugene S. Gaddis, "Gaddis Exhibit," in *Industrial Relations: Final Report and Testimony* (Washington, 1916), 8:8915-17; *Trinidad City and Las Animas County Directory, 1907* (Salt Lake City, 1907), 284-87; and *Trinidad City and Las Animas County Directory, 1915-1916* (Salt Lake City, 1916), 315-17.

veloping a "social settlement house" or some recreational facility that served soft drinks to allow the miners to enjoy their time off without having to visit saloons. He noted that "a number of Italians play a ball game in the camp, and the losers of the game buy a bucket of beer."<sup>41</sup>

Miners spent as much as 30 percent of their wages in the saloons and gambling halls within the company towns. In a recent study, H. Lee Scamehorn concludes that "saloons, gambling halls, and houses of prostitution robbed employees of their earnings."<sup>42</sup> Bartenders violated liquor laws by serving minors, opening their bars illegally on Sundays, and staying open after state-mandated closing times. Gaddis found youngsters "not more than 16 years drinking liquor" in some of these establishments.<sup>43</sup> Naturally, the saloons were patronized by members of the various ethnic groups in the towns, many of whom carried guns. In Las Animas County homicides were frequently committed by perpetrators "under the influence," and, with mining communities supporting at least eighty-four saloons in 1907 and eighty-one in 1915, it is not surprising that the level of violence was high.

<sup>41</sup>Ibid. at 8927.

<sup>42</sup>Scamehorn, *Mill & Mine*, supra note 35 at 85.

<sup>43</sup>Gaddis, *Final Report*, supra note 28 at 9: 8919.

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COMPANY POLICE

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The Colorado Fuel & Iron Company provided its own law enforcement within company towns by appointing town marshals, who doubled as deputy sheriffs. This practice indicates the political persuasion of the Las Animas County sheriff and his close relationship with company administrators and county officials.<sup>44</sup> Armed guards or town marshals controlled access to and from the company towns and watched closely for union organizers. Barron Beshoar, whose father was a camp doctor at the time, recalled that

Intruders and malcontents were ferreted out by an intricate espionage system and treated by heavily-armed guards to the kangaroo, the coal district term for a professional beating. Along with the kangaroo went the dread sentence of "Down the canon." And to go "down the canon" meant blacklisting and starvation—or exile.<sup>45</sup>

Scamehorn claims that "marshals also handled disturbances, and they discouraged crimes and unwanted disturbances. Acts of violence were rare in the compact communities."<sup>46</sup> However, he is mistaken. Beshoar notes that "men could get as drunk as they pleased in the company saloon . . . and brawl with fists or knives without undue interference from the camp marshal or his deputies."<sup>47</sup> He might have added guns to his list of weapons. The homicide data verify this observation.

Company police operated more to keep unwanted people out than to control behavior within the company towns. During periods of labor unrest, the company brought in "professional" police contracted from the Baldwin-Felts agency. They provided what they called "operatives," or "labor spies," to infiltrate the coal camps to find out who among the workers supported unionization attempts.<sup>48</sup> These people were noted for

<sup>44</sup>The Las Animas County sheriff consistently sided with the company in all matters, particularly when labor organizers tried to enter the county. See Scamehorn, *Mill & Mine*, supra note 35 at 80-90; and "Farr Exhibit," in Gaddis, *Final Report*, supra note 28 at 9: 7304-8.

<sup>45</sup>Beshoar, *Out of the Depths*, supra note 32 at 2.

<sup>46</sup>Scamehorn, *Mill & Mine*, supra note 35 at 90.

<sup>47</sup>Beshoar, *Out of the Depths*, supra note 32 at 2.

<sup>48</sup>For a discussion of their methods, see Winthrop D. Lane, "The Labor Spy in West Virginia," *The Survey* 47 (October 22, 1921), 110-12, and idem, "West Virginia: The Civil War in Its Coal Fields," *The Survey* 47 (October 29, 1921), 177-83.



The Colorado Iron & Fuel Company's use of "special deputies" and Baldwin-Felts "operatives" to oppose strikers contributed to the violence in Las Animas County. (Colorado Historical Society, c. 1913)

their violence in breaking up strikes, and for their use of weapons. Neither the locals nor those from Baldwin-Felts who acted as town marshals had much experience in police work, if any. Usually they were chosen for their ability to use weapons. Company police were involved in nine homicides between 1906 and 1915 relating to the "enforcement" of camp rules, but excluding strike-related shootings.<sup>49</sup>

Virtually all the police-related homicides involved guns and alcohol. Seven of the victims (77.7 percent) had been drinking before the shootings (the condition of two is unknown). All seven of the shootings occurred either within, or just outside, saloons. At least three of the marshals had also been drinking, while the condition of four is unknown.<sup>50</sup> Alcohol played an important role in the behavior of coal miners and company police. Apparently coal-mine operators, county authorities, and miners alike accepted this high level of violence with little, if any, complaint. During union organizing attempts and strikes, violence levels increased.

In Trinidad and the surrounding mining towns, mine acci-

<sup>49</sup>Police shootings were not limited to company towns. Trinidad and Aguilar also experienced a significant number of police homicides, with eleven and four killings respectively.

<sup>50</sup>See Colorado, Las Animas County, *Coroner's Inquests, 1906-1915*, Trinidad City Library, Trinidad.

dents occurred regularly, injuring and killing thousands of coal miners. An explosion at the Primero mine on January 31, 1910, killed seventy-five men;<sup>51</sup> another at Delagua the same year killed twenty-three Hispanic miners. On June 19, 1912, twelve men trapped in a mine by an explosion suffocated. During the period 1910-13, at least 618 men lost their lives in mining accidents.<sup>52</sup> On April 27, 1917, an explosion rocked the Hastings mine near Ludlow. According to one reminiscence, "The Hastings explosion was Colorado's worst mine disaster. One hundred twenty-one miners lost their lives in a gas explosion touched off by the mine inspector! Twenty-one matches and an open safety lamp were found next to the inspector's body."<sup>53</sup>

This particular disaster indicates the lack of safety regulations and the failure to enforce them that plagued the coal-mining industry, not only in Colorado but throughout the United States. Equally significant is that the coal companies neither received nor accepted blame for accidents. As one observer noted, "Not a single coroner's jury in Huerfano or Las Animas County has for many, many years passed the slightest criticism upon a mine owner, no matter how terrible and shocking was the carelessness which caused explosions in which hundreds of lives were snuffed out."<sup>54</sup>

The daily danger involved in coal mining, the callousness of coal-mine operators, and the collusion between the companies and county officials may have created a tendency for Las Animas County's citizens to accept violence as a norm. Although explosions were spectacular, the constant exposure to dangerous machinery and unsafe working conditions inured the miners to disaster. Coroners' inquests list numerous accidents, many of them deadly, that became an everyday occurrence in the southeastern Colorado coal mining camps. Las Animas County proved to be a dangerous place for many—especially during strikes.

<sup>51</sup>See Colorado, Las Animas County, *Coroner's Inquests*, February 1, 1910.

<sup>52</sup>Margolis, "Western Coal Mining," *supra* note 15 at 13-14 and 25; and James Whiteside, *Regulating Danger: The Struggle for Mine Safety in the Rocky Mountain Coal Industry* (Lincoln, 1990), 74-75, 132-33. Another explosion rocked the Cokedale mine on February 9, 1911. Colorado miners suffered 1,708 casualties between 1884 and 1912, and an additional 1,307 deaths between 1913 and 1933, most of which occurred before 1924.

<sup>53</sup>Victor Bazanella claimed that "the fire boss was drunk all the time. . . . They were drunk when they went in." See Margolis, "Western Coal Mining," *supra* note 15 at 25. Actually, most victims died from other mine-related accidents such as cave-ins, exposure to dangerous equipment, or being run over by coal cars, but explosions were more dramatic and focused attention on the mines.

<sup>54</sup>"Doyle Exhibit," Gaddis, *Final Report*, *supra* note 28 at 7: 7345. See also Deutsch, *No Separate Refuge*, *supra* note 13 at 89; and Papanikolas, *Buried Unsung*, *supra* note 26 at 37.



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THE LUDLOW MASSACRE, 1914

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Throughout the first three decades of the twentieth century, mining-company management held the upper hand in disputes with labor; when they did have difficulty, they could always count on local and state authorities to tip the balance of power in their favor. This pattern is quite apparent in the coal miners' strike against the Colorado Fuel & Iron Company in Las Animas County during 1913-14. Armed men and violence often accompanied strikes, but there is a critical distinction to be made about the dynamics of a strike. One observer has noted that "The very presence of the police or troops at a struck plant carried with it the implication that the strikers were lawbreakers. It signified that strikers were the enemies of public order, for quite obviously, the police had not been summoned to protect them, but company property *from* them."<sup>55</sup> Provocation by either side could create a situation that might quickly escalate into major violence.

Expecting a strike in 1913, Colorado Fuel & Iron officials contracted with the Baldwin-Felts agency to deal with labor's attempts to organize. The coal company, with the aid of Baldwin-Felts employees, used approximately 348 men to deal with a United Mine Workers attempt to unionize Las Animas County miners. To sanctify the company's actions, the county sheriff, J. S. Grisham, placed these men on a special deputy list, thereby authorizing them to operate within county jurisdiction as well as on company property.<sup>56</sup>

Some of the special deputies brought with them reputations for using guns to suppress strikes. The names of Albert C. Felts, Walter Belk, and George W. Belcher appear as "special deputies" on the Las Animas County sheriff's roles. All were known as Baldwin-Felts gunmen. On August 16, 1913, in one of the most notorious shootings in Trinidad's history, Belk and Belcher provoked and then assassinated Gerald Lippiatt, a union organizer, on a crowded Trinidad street in front of numerous

<sup>55</sup>H. M. Gitelman, "Perspectives on American Industrial Violence," *Business History Review* 47 (Spring 1973), 17.

<sup>56</sup>See "Doyle Exhibit," Gaddis, *Final Report*, supra note 28 at 8: 7345. It was common for county officials to side with business interests throughout the United States, viewing mining as an economic issue and caring little for miners' concerns, legitimate or otherwise, particularly those of recently arrived immigrants who did not share their cultural heritage. Baldwin-Felts had the reputation of recruiting enough men to do the job. In 1912 it put "some 2,500 Baldwin-Felts men" into Kanawha County, West Virginia, to suppress a strike. See Edward Levinson, *I Break Strikes!: The Technique of Pearl L. Bergoff* (New York, 1935), 151 [hereafter cited as Levinson, *I Break Strikes!*].

witnesses. The victim suffered seven bullet wounds.<sup>57</sup> County officials punished neither assailant. Three months later, on November 20, miners returned the favor by gunning down Belcher at Main and Commercial Streets in downtown Trinidad.<sup>58</sup> Seven years later, Albert C. Felts, a Baldwin-Felts director who was known for his gun play, was killed during a coal-mining strike by the chief of police in Matewan, West Virginia.<sup>59</sup> With men who were little better than hired killers acting as deputies, it is small wonder that violence quickly ensued during the strike of 1913-14.

On September 23, 1913, United Mine Worker organizers and coal miners met in Trinidad and called for a strike. With the aid of the Baldwin-Felts agency, Colorado Fuel & Iron quickly evicted all workers from its towns. Mine owners calculated that this tactic, which created hardship for workers and their families, would quickly break the miners' spirit. It failed, and only increased the desperate nature of the management-versus-labor struggle. Hundreds of shootings occurred at Segundo, Primero, Forbes, and Ludlow. Baldwin-Felts gunmen, led by Belk, operated the "Death Special," an armored car equipped with a machine gun, and fired into the Forbes tent camp, killing one man and wounding two children. Housed in tents because they had been evicted from company property, the miners and their families were virtually unprotected from such attacks.<sup>60</sup> A series of similar incidents brought calls from the

<sup>57</sup>See Colorado, Las Animas County, *Coroner's Inquest*, August 17, 1913. The Baldwin-Felts operatives were notorious for shooting people. While discussing the strike-breaking methods of the Bergoff and Pinkerton agencies, one writer suggested that "the blue ribbon for wanton killings, went, however, to the Baldwin-Felts organization." See Levinson, *I Break Strikes!*, supra note 56 at 151.

<sup>58</sup>Colorado, Las Animas County, *Coroner's Inquests*, November 21, 1913.

<sup>59</sup>See Papanikolas, *Buried Unsung*, supra note 26 at 69; and Margolis, "Western Coal Mining," supra note 15 at 72-73. The 1987 film *Matewan* provides a poignant and somewhat biased portrayal of union attempts to organize in Mingo County, West Virginia, during which the police chief, Sid Hatfield, and the mayor met the Baldwin-Felts "detectives" on Matewan's streets. The ensuing gun battle ended with the deaths of seven detectives, two miners, the mayor, and a boy bystander. The shootout catapulted "two-gun" Hatfield into instant folk-hero status, but less than a year later Baldwin-Felts operatives caught him unarmed and shot him fifteen times. The gunmen went unpunished. See Virgil C. Jones, *The Hatfields and the McCoys* (Chapel Hill, 1948), 233-45; Lon Savage, *Thunder in the Mountains: The West Virginia Mine War, 1920-21* (Pittsburgh, 1990), 3-23; Altina L. Waller, *Feud: Hatfields, McCoys, and Social Change in Appalachia, 1860-1900* (Chapel Hill, 1988), 244-46; and John L. Spivak, *A Man in His Time* (New York, 1967), 89-93.

<sup>60</sup>See Colorado, Las Animas County, *Coroner's Inquests*, October 18, 1913; and Margolis, "Western Coal Mining," supra note 15 at 77-79.

coal-company managers for "protection" from violent strikers. Governor Elias Ammons quickly ordered the Colorado National Guard into Huerfano and Las Animas counties with orders that "every man in the strike zone must be disarmed and all saloons closed."<sup>61</sup> Captain Philip Van Cise of Company K gave orders to his men: "If you have to shoot, shoot to kill. Don't shoot over their heads. Don't waste any ammunition."<sup>62</sup>

Despite these orders and the hostility toward union organizers harbored by Adjutant-General John Chase, the miners and the National Guard experienced few violent incidents during the first few months of the strike, but as the stalemate continued many of the guardsmen asked to be relieved of their duty to return to their jobs and homes.<sup>63</sup> Some of these requests were honored by the commander, and the guardsmen were replaced by recruits, mainly from the ranks of the coal-company guards idled by the presence of the militia. Within a short period at least seventy-five mine guards were recruited into the National Guard. One observer noted that "When the strikers recognized the hated mine guards in the militia and saw the friendliness between officials of the coal companies and officers of the Guard, they decided that the militia would be used against them."<sup>64</sup> This turn of events changed the relationship between the miners and the National Guard. Troop A, stationed at Ludlow, "was composed wholly of mine guards" and other mine-company employees. Lieutenant Karl Linderfelt commanded the unit and pursued the strikers aggressively. Nicknamed "Monte," he disliked the strikers and swore that he would "get" union organizer Louis Tikas. His superior, Major P. J. Hamrock, attempted to keep order, while Linderfelt tried to "force disorder."<sup>65</sup>

Although the presence of national guardsmen in Las Animas County reduced the number of incidents between the strike-breakers and the strikers, the uneasy truce could not last. By altering the character of the National Guard units in the field, particularly at Ludlow, and by favoring the mine operators, the

<sup>61</sup>*Denver Post*, October 28, 1913. Neither order was effectively implemented by the National Guard.

<sup>62</sup>*Ibid.*

<sup>63</sup>For a discussion of Chase's attitude and tactics against union sympathizers, see John Fitch, "Law and Order: The Issue in Colorado," *The Survey* 33 (December 5, 1914), 255-56 [hereafter cited as Fitch, "Law and Order"].

<sup>64</sup>*Ibid.* at 256; and Testimony of Lieutenant Karl E. Linderfelt, in Gaddis, *Final Report*, 7: 6877-79. Before the militia call-up, Linderfelt had worked as a "special deputy" and coal-company guard. He had been employed in coal-mining operations for twenty-one years. See *ibid.* at 7: 6866-71.

<sup>65</sup>Fitch, "Law and Order," *supra* note 63 at 257.

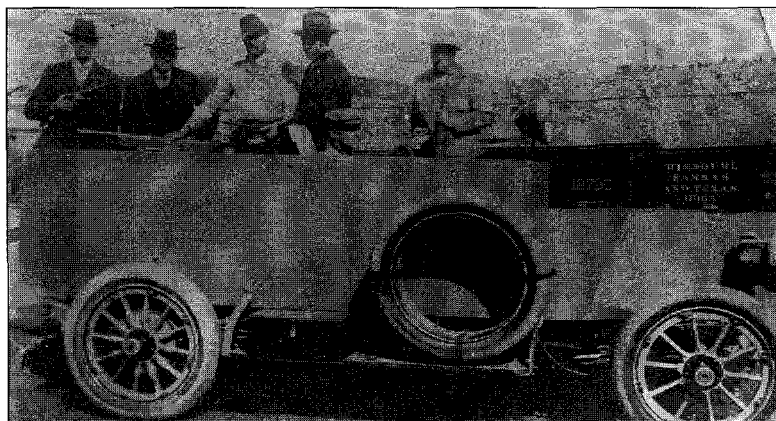
governor only increased the animosity between the two opposing groups. In March 1914, National Guard units of Troop A entered the Forbes miners' camp (many workers had gone to Trinidad) and destroyed tents and personal property. Some national guardsmen threatened to burn the entire camp but decided against it, possibly because of the presence of witnesses.<sup>66</sup> On April 20, 1914, the Colorado militia provoked an incident at the Ludlow miners' tent camp. After detonating three bombs as a signal, the militia, who surrounded the camp, fired into the tent settlement. Whether the troops actually fired first is unknown, but they fired into the tent camp all day.<sup>67</sup> Linderfelt was among the aggressors. By nightfall twenty-one bodies were found scattered about the fire-blackened tent camp, including those of Tikas and eleven women and children.<sup>68</sup> It was a catastrophe.

Miners reacted quickly to the Ludlow massacre. John R. Lawson and other United Mine Worker organizers tried to prevent violence, but were unsuccessful. Enraged by the atrocity, approximately two thousand armed miners launched attacks on several mine properties in Las Animas County. The offensive came at Forbes, Delagua, and Tabasco—coal camps near Ludlow. A virtual state of war engulfed Las Animas County. Caught by surprise and besieged by coal-company and miner supporters, Governor Ammons failed to act. On April 25, five hundred women marched on the Denver Capitol demanding

<sup>66</sup>Margolis, "Western Coal Mining," *supra* note 15 at 89.

<sup>67</sup>*Ibid.* at 91; *Trinidad Chronicle-News*, April 20, 21, 1914. Linderfelt claimed that the bombs were not a signal for an attack, but an "alarm by me, that I made for the purpose of warning the Cedar Hill detachment that they needed help at Ludlow." Linderfelt testimony in Gaddis, *Final Report*, *supra* note 28 at 7: 6891. Fitch theorized that the incident occurred because the polarization of the two opposing forces at Ludlow virtually called for some sort of fight. He questioned a National Guard officer who claimed that "the old mine guard element, led by . . . Linderfelt, was always in trouble with the [Ludlow] colonists." Fitch concluded that "the strikers heard these [three] bombs and thought that they had been already fired upon by some new kind of gun." See *idem*, "Law and Order," *supra* note 63 at 257.

<sup>68</sup>*Trinidad Chronicle-News*, April 21, 23, 1914. The Las Animas County coroner conducted inquests on the bodies and concluded that Louis Tikas suffered three bullet wounds—all in the back—and had his head severely beaten with a rifle wielded by Linderfelt. Most of the women and children died during the fire that swept the camp. They were hiding from gunfire in a small underground dugout where they suffocated. Dr. Aca Harvey, one observer at Ludlow, noticed several national guardsmen standing by the tents. At the coroner's inquest, he was asked what became of the tents. He replied, "It looked as though they [the National Guard] were pouring coal oil on them." After hearing several corroborating witnesses, the authorities determined that the National Guard had indeed set the fire. See Gaddis, *Final Report*, *supra* note 28 at 8: 7363-73.



A scene in the Ludlow tent camp after the assault by the Colorado militia on April 20, 1914. (Colorado Historical Society)

action. When a temporary truce failed, Ammons, under tremendous pressure from the demonstrating women, finally requested federal troops to restore order.<sup>69</sup> The arrival of federal troops brought an end to the shooting, and the consequent investigations brought John D. Rockefeller, Jr., and Colorado Fuel & Iron under national scrutiny. Yet, despite the deaths of fifty-nine persons, Las Animas County remained a mine owner's domain and a violent place.

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### WEAPONS

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Until recently, little research has been done on the use of weapons during homicides in the West. Roger Lane found that during the period 1839-1901, 25 percent of the defendants used guns to commit homicides in Philadelphia<sup>70</sup>; however, recent

<sup>69</sup>*Denver Post*, April 25, 26, 27, 29, 1914; and *New York Times*, April 26, 27, and 28, 1914. See particularly the headline from the April 25, 1914, edition of the *Denver Post*: "500 WOMEN STORM CAPITOL, CORNER SQUIRMING GOVERNOR, AND DEMAND STRIKE WAR END. Undaunted by a driving rain storm, the women picketed the capitol demanding to see the governor."

<sup>70</sup>Lane, *Violent Death in the City*, supra note 5 at 62 and 79. For an assessment of contemporary homicide handgun use in Philadelphia and Washington, D.C., see also Wolfgang, *Patterns in Criminal Homicide*, supra note 5 at 84-85; and Margaret A. Zahn, "Homicide in the Twentieth Century," in *History and Crime: Implications for Criminal Justice Policy*, ed. James A. Inciardi and Charles E. Faupel (Beverly Hills, 1980), 122-23. Zahn found that in Washington, D.C., firearm use in homicides increased from 36 percent to 83 percent between 1957 and 1974.

research in seven California counties during the period 1850-1900 has revealed handgun homicide rates that averaged 50 percent.<sup>71</sup> Similar patterns have been discovered in Las Animas County, where 68 percent of the defendants indicted for murder chose handguns (Figure 1). Handgun homicides were commonplace in various Colorado mining towns.

Many men in Trinidad and other towns carried concealed weapons, and this could lead to trouble. For example, in February 1903, Joseph Mathews and William Pickett, two coal miners, began a quarrel in Moran's Saloon in Rugby. Both drew revolvers and began shooting. Pickett fell to the floor, fatally wounded.<sup>72</sup> In April of that same year, Aldridge Clifton got into a shootout with Tillman Thomas in a saloon in Bowen, and lost.<sup>73</sup> On January 14, 1908, Walter P. Hendricks shot David Lowry to death after being fired upon with a shotgun. A jury found Hendricks not guilty.<sup>74</sup> In March of that same year, one Edward James entered a saloon in Bowen and demanded a beer, telling the bartender to "be quick about it." After being served, he complained there was "too much foam on his beer." There was a brief, heated argument, both men drew their revolvers, and John Russik, the bartender, shot James to death.<sup>75</sup> In September, late one evening, Casmiro Casares and Gus DiGregorio began to quarrel in a saloon in Morley. They went out to the street, drew their revolvers, and began firing. Casares fell, mortally wounded.<sup>76</sup> The jury found DiGregorio not guilty. Numerous other cases indicate that both protagonists in such fights were armed.<sup>77</sup>

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### INDICTMENTS AND CONVICTION RATES

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During the period under study, officials in Las Animas County filed 282 homicide indictments or informations. Then, as today, murder was usually perpetrated by males; they made up 96 percent of those accused of homicide. These crimes often occurred in saloons between people who knew each other,

<sup>71</sup>See Clare V. McKanna, Jr., "The Unbalanced Scales of Justice: Homicide and Ethnicity in California, 1850-1900," MS.

<sup>72</sup>*Trinidad Chronicle-News*, February 23, 1903.

<sup>73</sup>See Colorado, Las Animas County, *Coroner's Inquests*, April 12, 1903.

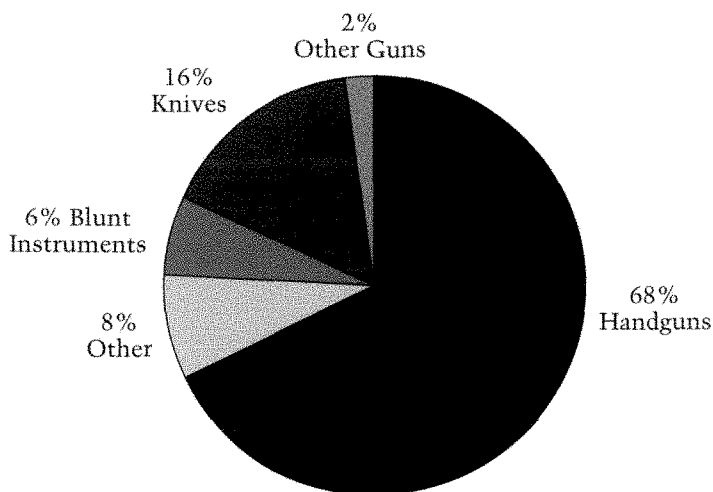
<sup>74</sup>*Trinidad Chronicle-News*, January 14, 1908.

<sup>75</sup>*Ibid.*, March 15, 1908.

<sup>76</sup>*Ibid.*, September 12, 1908.

<sup>77</sup>For similar cases, see *ibid.*, September 23 and November 26, 1912, April 28, 1913, and February 9, 1917.

FIGURE 1  
WEAPON USE—ALL ETHNIC GROUPS  
LAS ANIMAS COUNTY, 1880-1920



Source: Las Animas County, *Coroner's Inquests*, 1880-1920.

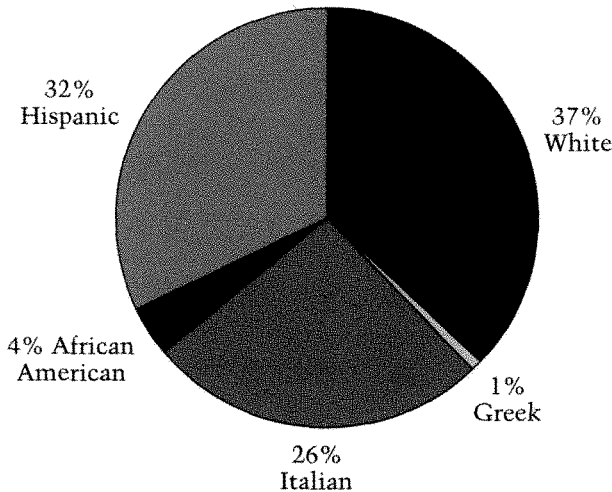
since alcohol had a way of loosening their inhibitions.<sup>78</sup> Whites composed the largest group of indictments, with 37 percent, followed by Hispanics, Italians, African Americans, and Greeks, with 32, 26, 4, and 1 percent respectively (Figure 2).

Surprisingly, the conviction rates for the three largest ethnic groups (white, Hispanic, and Italian) show little variance. Guilty verdict rates were virtually even, with white, Hispanic, and Italian rates of 30, 31, and 26 percent respectively (Figure 3). Italians had the highest not-guilty rate, with 38 percent, while Hispanics had the highest dismissal rate, with 42 percent. Considering previous research dealing with ethnic minorities in other regions in the West, these figures are quite remarkable, particularly for Italian defendants.<sup>79</sup> Possibly the

<sup>78</sup>McGovern and Guttridge, *The Great Coalfield War*, supra note 30 at 27.

<sup>79</sup>Recent research in Arizona, California, and Nebraska has resulted in quite different results. Native-American and African-American rates averaged 80 percent, compared with about 40 percent for whites. See Clare V. McKanna, Jr., "Life Hangs in the Balance: The U.S. Supreme Court's Review of *Ex Parte Gon-Shay-Ee*," *Western Legal History* 3 (Summer/Fall 1990), 197-211; idem, "Treatment of Indian Murderers in California, 1850-1900," paper presented at

FIGURE 2  
HOMICIDE INDICTMENTS BY RACE/ETHNICITY  
LAS ANIMAS COUNTY, 1880-1920



Source: Las Animas County, *Registers of Criminal Action*, 1880-1920.

Hispanic totals can be explained by Hispanics' high representation within the total population, particularly in Trinidad.

The data strongly suggest that juries were fair in their treatment of ethnic defendants. The high dismissal rates (Figure 3) may indicate the inability to find witnesses who would testify. This particularly applies to Italian vendetta cases, yet Hispanics had a higher dismissal rate, with 42 percent. With homicides so often taking place in saloons, it is possible that witnesses would not testify against a defendant as much as for him. After all, anyone could get involved in fights, since so many men carried handguns and were inclined to use them.

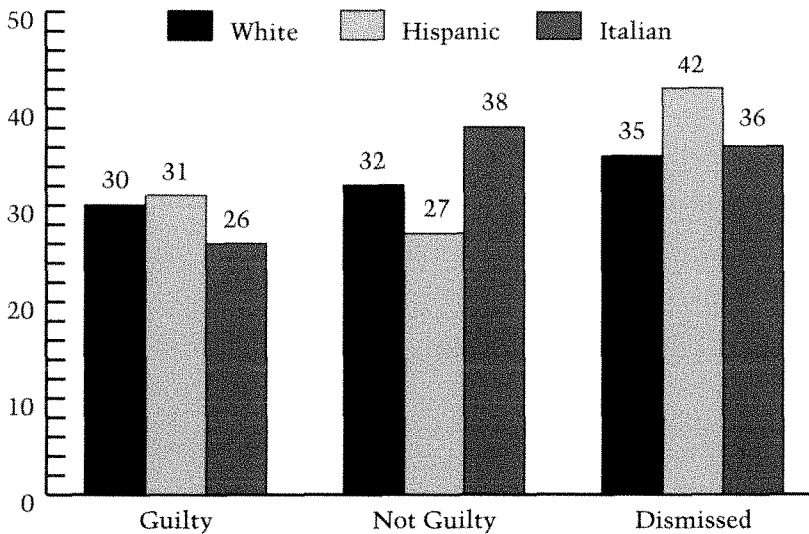
The conviction rates are even more remarkable when compared with interethnic killings. With 32, 30.5, 22, and 18 percent respectively, whites, Italians, Hispanics, and African Americans all killed outside their ethnic group at a high rate (Table 4). It is, however, important to add the relatively high interethnic homicide rate among all groups reflects the social

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the annual meeting of the Western Social Science Association, Reno, April 1986; and idem, "The Treatment of Indian Murderers in San Diego," *Journal of San Diego History* 36 (Winter 1990), 65-77.



FIGURE 3  
HOMICIDE VERDICTS BY RACE/ETHNICITY  
LAS ANIMAS COUNTY, 1880-1920



Source: Las Animas County, *Registers of Criminal Action*, 1880-1920.

mixing in saloons and the growth of violence. Trial verdicts for interethnic killings in Arizona, California, and Nebraska during a similar period ended with quite different results.<sup>80</sup> An examination of Las Animas County conviction rates involving interethnic killings reveals a significant decline in convictions (down from 27 to 15 percent) for Hispanics accused of killing individuals from other ethnic groups. On the other hand, Italian defendants had a 21 percent increase in dismissals. White defendants experienced a slight increase in both conviction and dismissal rates. Once again, juries were not inclined to convict defendants unless the circumstances were exceptional. Certainly fights in saloons were not considered heinous, merely unfortunate. Some jurors must have looked at the defendant and reasoned "There, but for the grace of God, stand I." Their verdict? Not guilty.

<sup>80</sup>See Clare V. McKanna, Jr., "Red on White: Inter-Racial Homicides in Arizona and California, 1880-1912," paper presented at the Western History Conference, Austin, October 1991. Native Americans who killed Anglos had very high conviction rates and death sentences.

TABLE 4  
INTERETHNIC KILLINGS  
BY ETHNIC GROUP

Ethnic	%	N=
White	32%	14
Hispanic	22	18
African American	18	2
Italian	30.5	22

Source: Las Animas County, *Registers of Criminal Action*, 1880-1920.

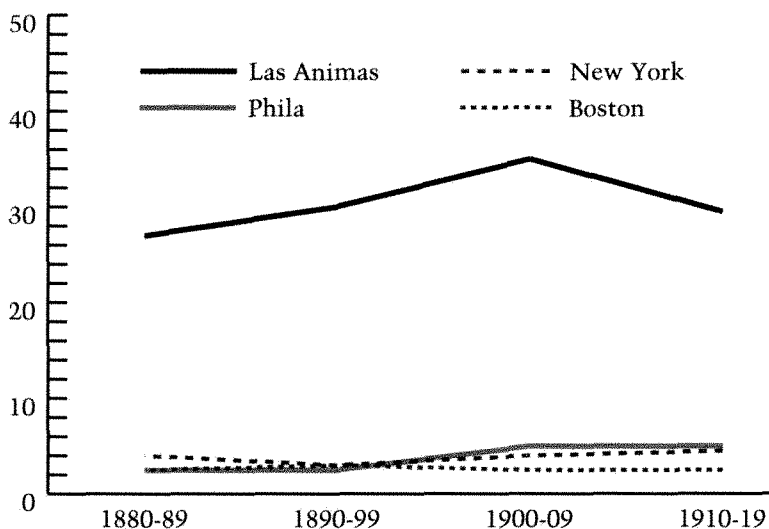
The homicide indictment rates per 100,000 population (Figure 4) for Las Animas County were dramatically higher than those in Philadelphia, New York, and Boston for similar periods.<sup>81</sup> Homicide indictment rates in Las Animas County began with a rate of 26 per 100,000 in 1880-89, increased to 35 for the period 1900-09, then dropped slightly to 28.6 during the last decade studied here.<sup>82</sup> Philadelphia's homicide indictment rates per 100,000 population averaged 2.5 during 1881-1901; New York City's homicide (not indictment) rates stayed between 3 and 4 for the same period; and Boston's homicide rates hovered between 2 and 3.<sup>83</sup> A similar comparison of indictment data in seven California counties reveals rates per 100,000 averaging 25 in Calaveras and Tuolumne counties, and around 11 in Sacramento, San Joaquin, San Luis Obispo, Santa Barbara, and San

<sup>81</sup>See Eric Monkkonen, "Diverging Homicide Rates: England and the United States, 1850-1875," in Gurr, *Violence in America*, supra note 5 at 86-87 [hereafter cited as Monkkonen, "Diverging Homicide Rates"]; Roger Lane, "On the Social Meaning of Homicide Trends in America," *ibid.* at 66; and Neil Alan Weiner and Margaret A. Zahn, "Violent Arrests in the City: The Philadelphia Story, 1857-1980," *ibid.* at 108 and 113.

<sup>82</sup>These figures, however, do not include the homicides that occurred during the 1913-14 coal-miners' strike that concluded with the Ludlow Massacre. With the Colorado National Guard, Baldwin-Felts company guards, and heavily armed strikers, Las Animas County resembled a war zone. The homicide (not indictment) rate for that one-year period (September 1913-September 1914) skyrocketed to 226 per 100,000. See Colorado, Las Animas County, *Coroner's Inquests*, 1913-14.

<sup>83</sup>The national average for homicide rates from 1900 to 1920 increased from 2.6 to 8 (the national rates may reflect higher levels of southern and western violence). See Harriett C. Brearley, *Homicide in the United States* (Montclair, N.J., 1969), 15-16; Lane, *Violent Death in the City*, supra note 5 at 60; Monkkonen, "Diverging Homicide Rates," supra note 81 at 84-88; Theodore N. Ferdinand, "The Criminal Patterns of Boston since 1849," *American Journal of Sociology* 63 (July 1967), 84-99; and Nancy H. Allen, *Homicide: Perspective and Prevention* (New York, 1980), 120-39.

FIGURE 4  
HOMICIDE INDICTMENT RATES  
PER 100,000 POPULATION



Sources: Roger Lane, *Violent Death in the City: Suicide, Accident and Murder in 19th Century Philadelphia* (Cambridge, 1979); Eric H. Monkkonen, "Diverging Homicide Rates: England and the United States, 1850-1875," in *Violence in America: The History of Crime*, ed. Robert Ted Gurr (Newbury Park, Calif., 1898), 80-101; Roger Lane, "On the Social Meaning of Homicide Trends in America," *ibid.* at 55-79; Theodore N. Ferdinand, "The Criminal Patterns of Boston Since 1849," *American Journal of Sociology* 63 (July 1967), 84-99.

Diego counties for the period 1880-1900.<sup>84</sup> Thus homicide indictment rates in Las Animas County indicate a much higher level of violence in the American West. An analysis of several case studies may be helpful in explaining why these rates were so high.

<sup>84</sup>These five last counties started with rates as high as 72 to 125 per 100,000 (none below 20) in the 1850s, but declined by the 1890s, a pattern that fits the U-curve of criminality. See Clare V. McKanna, Jr., "The Violent West," paper presented at the Missouri Valley History Conference, Omaha, March 1992. The South also has a long tradition of high homicide rates. In a study of a region on the border of Kentucky and Tennessee, one researcher found that homicide rates averaged 51 per 100,000 for a similar time period. See William Lynwood Montell, *Killings: Folk Justice in the Upper South* (Lexington, 1986), 164 [hereafter cited as Montell, *Killings: Folk Justice*].

## ITALIAN HOMICIDES

A brief discussion of the vendetta or blood feud may help illuminate the social dynamics of this Mediterranean phenomenon, which appeared in Las Animas County during the period under study.<sup>85</sup> Usually a vendetta attack came in a well-planned ambush like the one involving Ignacio Disalvo the night of July 17, 1911, on a lonely county road near Aguilar in the northern part of Las Animas County. At least two people were involved, using two shotguns and a .32 caliber revolver to gain their revenge. Sheriff's deputies investigated the crime scene, discovered "where the weeds had been flattened out," and theorized that two men had lain in ambush.<sup>86</sup> The sheriff arrested Dominic Pistone, a former business partner of the victim, charging him with murder. A young boy saw a man "carrying a shotgun" go into the Pistone residence soon after the crime had been committed. Other evidence included shoe prints that matched the shoes worn by Pistone, and the accused admitted owning a twelve-gauge shotgun. However, authorities noticed that several sixteen-gauge shotgun shell casings had been found at the scene of the crime, and the coroner discovered a .32 caliber bullet in the victim's body. Locked in jail, Pistone was "apparently unperturbed over the suspicions that [had been] directed toward him."<sup>87</sup> This lack of concern was commonly displayed by those undertaking vendettas in the Mediterranean. They believed that their killings were sanctified by their moral or social code, and that they had fulfilled an obligation to their clan or family—nothing more, nothing less.<sup>88</sup>

Although indicted, Pistone had little to fear from the Las Animas County criminal-justice system. Charges of murder were dismissed. However, seven years later, almost to the day, Antonio Lapreto killed Pistone in Aguilar to resolve the feud

<sup>85</sup>Webster's *New World Dictionary* defines a vendetta as "a feud in which the relatives of a murdered or wronged person seek vengeance on the murderer or wrongdoer or on members of that person's family." The vendetta is a complex subject, with feuds sometimes continuing for years or even decades. See Stephen Wilson, *Feuding, Conflict and Banditry in Nineteenth-Century Corsica* (Cambridge, Mass., 1988) [hereafter cited as Wilson, *Feuding, Conflict and Banditry*]; Jacob Black-Michaud, *Cohesive Force: Feud in the Mediterranean and the Middle East* (Oxford, 1975); and Christopher Boehm, *Blood Revenge: The Anthropology of Feuding in Montenegro and other Tribal Societies* (Lawrence, 1984) [hereafter cited as Boehm, *Blood Revenge*].

<sup>86</sup>*Trinidad Chronicle-News*, July 18, 1911.

<sup>87</sup>*Ibid.*, July 19, 1911.

<sup>88</sup>See Wilson, *Feuding, Conflict and Banditry in Corsica*, *supra* note 85 at 190-203.

that had been carried on by the victim against Disalvo.<sup>89</sup> In a similar case in 1899, the county attorney indicted Guiseppe Maniscala for the murder of Bartolo Sylvestri. Charges against Maniscala were eventually dropped. Seven years later, Vincenzo Provenzo shot Maniscala in his own home. Charges against Provenzo were also dropped. As might have been expected, a little over seven years later "persons unknown" with shotguns ambushed and assassinated Provenzo on a country road between Hastings and Aguilar.<sup>90</sup>

Testimony at the coroner's inquest helps to explain the difficulty in finding Provenzo's killer. Provenzo left his home on horseback to visit Hastings. On his return trip, someone in ambush fired a shotgun into his face and upper torso at point-blank range, blew him off his horse, and then fired several shots into his body as he lay on the road.<sup>91</sup> The perpetrator did not bother to pick up the shell casings, suggesting that there was nothing to fear from the legal authorities. Friends of Provenzo noted that he always carried a pistol on his person. The exchange between Coroner J. T. Bradley and Louie Buono reveals the reluctance to implicate anyone: "Q: Do you know why . . . he carried a pistol all the time? A: Because he was afraid, he wanted to protect himself. Q: Who was he afraid of? A: I don't know."<sup>92</sup> In a similar exchange with Domenico Lucci, the coroner asked: "Do you know who it was that killed Vincenzo Provenzo? A: No sir, I don't know. Q: Do you know if he has any enemies? A: Not any."<sup>93</sup> The coroner's efforts proved fruitless. No one would provide information on possible suspects.

That the ambush and the reluctance of witnesses to testify in court complicated the Las Animas County criminal-justice system's attempts to deal with such killings is reflected in the statistics. Of the twenty-one homicides that display characteristics of a vendetta, 14 percent were found guilty and 9 percent not guilty, while 28 percent were dismissed and 48 percent never reached the indictment stage (Table 5).

Not all Italian homicides involved vendettas. As suggested

<sup>89</sup>*Trinidad Chronicle-News*, July 22, 1918; and Colorado, Las Animas County, *Coroner's Inquests*, July 22, 1918.

<sup>90</sup>See Colorado, Las Animas County, *Coroner's Inquests*, May 9, 1899, November 17, 1907, August 24, 1915; and *Trinidad Chronicle-News*, November 21, 1907, August 24, 1915.

<sup>91</sup>Colorado, Las Animas County, *Coroner's Inquests*, August 26, 1915, p. 17. Doctor G. W. Robinson testified that "Whoever did the shooting must have been shooting upward, the wound on the side was caused when the man fell off the horse, or after he was on the ground." *Ibid.* at 2.

<sup>92</sup>*Ibid.* at 25-26.

<sup>93</sup>*Ibid.* at 9.

TABLE 5  
VENDETTA HOMICIDES  
LAS ANIMAS COUNTY

Results	N=	%
Guilty	3	14%
Not Guilty	2	9
Dismissed	6	28
Unindicted	10	48

Source: Las Animas County, *Coroner's Inquests*, 1880-1920.

earlier, all ethnic groups were prone to become involved in interethnic killings (Table 4). In Las Animas County during the period, Italians killed thirty-one individuals (24 percent) from another ethnic group. Juries convicted 38 percent of the Italian defendants who killed white victims (thirteen), while they reached similar verdicts in 22 percent of the Hispanic victim cases. On the other hand, juries found only 7.6 percent of the Italian defendants not guilty in cases involving white victims and 55.6 percent of those Italian cases involving Hispanic victims. Prosecutors, however, dismissed 53 percent of the Italian defendants who killed white victims and 22 percent of those cases involving Hispanic victims. Juries do not seem to have shown any particular bias against Italian defendants except in those cases involving white victims; considering the jury composition, that should not be surprising.

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#### HISPANIC HOMICIDES

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As we have said, alcohol was often a factor in these killings. For example, Juan Montoya, returning home late one afternoon after drinking in a Segundo saloon all day, quarrelled with his wife and finally clubbed her in the head. The case is unusual because he was sixty-seven and his wife seventy years old, whereas most homicides were between younger men. A jury found Montoya guilty.<sup>94</sup>

Besides the saloons, the brothels on Trinidad's west end could be dangerous. On March 5, 1902, police discovered the body of Lily Talamantes lying in one of these brothels in a pool of blood. She had been killed with a knife and axe. Although evidence suggested that her male companion, Cruz Talamantes,

<sup>94</sup>*Trinidad Chronicle-News*, March 2, 1909.

tez, may have committed the crime, the prosecutor refused to file charges.<sup>95</sup>

In 1916 a district attorney indicted José Avelino Vigil for the murder of Elias Moya in a wild shoot-out at a saloon in St. Thomas which left one person dead and three wounded. A jury, however, found him not guilty.<sup>96</sup> On September 8, 1917, Vigil entered a brothel and fatally shot Reylitas Dominges, "an inmate of a resort at 303 Santa Fe avenue."<sup>97</sup> He had been drinking before both shootings. This time a jury convicted him of murder in the first degree and the judge sentenced him to life in prison.<sup>98</sup>

Hispanic homicide cases sometimes involved love triangles. Manuel Gallegos and Jetruditas Duran lived together for some time in Hastings. When Duran left him for another man, Gallegos became angry. After trying unsuccessfully to convince her to return, he visited a saloon, and later that night (it was Christmas Eve) went to see her. After an argument, he pulled a .45 revolver and shot her. A jury found him not guilty.<sup>99</sup> In a similar case, Solomon Villegas suspected his wife of seeing another man. On the night of October 14, 1908, Villegas went to bed early. His wife told him she was going out in the yard to do some chores, but he insisted that she remain in bed. After a few minutes he heard something scratching at the screen. His wife claimed it was only mice, but Villegas reached under his pillow, cocked a .44 caliber revolver, approached the back door, and shot José Mondragon.<sup>100</sup> In this case the jury probably viewed the crime as "just deserts." The victim had "violated" the home of the defendant, as well as his wife. Juries seldom convicted defendants who killed other men in their wives' beds.

Hispanics killed outside their ethnic group at a higher rate (38 percent) than any other group. Guilty verdicts for Hispanic defendants were 31 and 20 percent for cases involving white and Italian victims, respectively. With 37 percent, guilty verdicts were higher for cases involving Hispanic victims. Not-guilty verdicts averaged 15 and 20 percent for the same ethnics, and the dismissal rates were over 54 percent for cases involving both ethnics as victims. Prosecutors refused to pursue, and

<sup>95</sup>Ibid., March 6, 1902.

<sup>96</sup>Ibid., December 18, 1916, March 24, 1917.

<sup>97</sup>Ibid., September 9, 1917.

<sup>98</sup>Colorado, Las Animas County, District Court, *People v. J. Avelino Vigil*, 132, Penitentiary Mittimus issued to Las Animas County Sheriff John J. Marty, September 24, 1917, Las Animas County Courthouse, Trinidad.

<sup>99</sup>*Trinidad Chronicle-News*, December 25, 1896.

<sup>100</sup>Ibid., October 15, 1908.

juries declined to convict, many defendants involved in homicides. The evidence supports the thesis that there was a culture of violence in Las Animas County.

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### WHITE HOMICIDES

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Trinidad had its share of sensational homicides. The *Trinidad Chronicle-News* reported the death of a leading Trinidad citizen: "The most awful tragedy that has ever occurred in the city of Trinidad was the killing of John H. Fox, ex-county treasurer . . . this afternoon at one-forty-five, the murderer being Joe Johnson, an ex-deputy sheriff."<sup>101</sup> Johnson had entered the U.S. Post Office, walked up behind Fox, drawn his revolver, shouted "You son-of-a bitch," and shot him as he stood reading a newspaper.<sup>102</sup> A crowd quickly gathered and began to shout "Hang him" and "Lynch him." Despite the presence of the sheriff, his deputies, and the Trinidad police force, all of whom were armed with rifles and shotguns, the crowd continued to grow and refused to disperse as ordered. The sheriff "informed the mob that the first man who stepped his foot upon the steps approaching the court house or jail would be given a dose of lead."<sup>103</sup> Apparently the crowd believed him and began to disperse. To be safe, the sheriff and five deputies transported their prisoner to Pueblo by train that night. A jury found Johnson guilty of first-degree murder and the judge sentenced him to death.

Another celebrated case, which occurred on Sunday, March 10, 1918, involved incest. W. Tom Barneycastle had been carrying on an incestuous relationship with his daughter Lizzie that had begun six years previously in Oklahoma. In 1914 Lizzie had given birth to a son by this relationship, and the family had kept the matter secret by claiming that the baby was Lizzie's elder sister's.<sup>104</sup> Lizzie subsequently married one Laymond D. Williams. Her father later wrote in a statement, "Now she struck a sucker that was crasey [sic] and has left me."<sup>105</sup> In revenge, he, his wife, and their twelve-year-old daughter plotted to kill Williams. The two females, disguised as male farm workers, approached the Williams ranch near Dalrose on Sun-

<sup>101</sup>Ibid., April 8, 1905.

<sup>102</sup>Ibid.

<sup>103</sup>Ibid.

<sup>104</sup>Colorado, Las Animas County, District Court, *People v. Barneycastle*, no. 8076, "Statement by W. Tom Barneycastle," 3, Las Animas County Courthouse.

<sup>105</sup>Ibid.



day night and shot him to death. A jury found all three Barney-castles guilty. Tom himself served only four years in prison before he escaped on October 6, 1922.<sup>106</sup>

However, most homicides were less dramatic and sometimes involved petty grievances. In the spring of 1906, Arthur Larmiseaux, aged fourteen, and two young friends were out hunting near Hastings. Jakimo Parlapiano, a sheepherder, tried to chase the boys away from his sheep, and eventually turned his dog on the three. Larmiseaux shot Parlapiano with a .22 caliber rifle. At the coroner's inquest Larmiseaux claimed that Parlapiano had threatened him with a revolver. Authorities found no weapon on the victim.<sup>107</sup> The jury found Larmiseaux guilty of manslaughter. In another case, two long-time friends, John Dietz and Arthur Wall, quarrelled on various occasions until Dietz decided to take action. He waited on a dark street in Delagua and attacked Wall with a club, killing him.<sup>108</sup> A jury found him guilty.

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### A REGIONAL CULTURE OF VIOLENCE

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In 1975 Gordon D. Gastil suggested that a regional culture of violence "would likely . . . be characterized by (1) more extreme subcultures of violence and/or larger percentage of the population involved in violence (with less limitation by class, age, or race); (2) lethal violence as a more important subtheme in the general culture of the region; and (3) weapons and knowledge of their use as an important part of the culture."<sup>109</sup>

As we have seen, the cultural groups in Las Animas County included Italians, Hispanics, Greeks, and a variety of East Europeans. Twenty-one vendetta cases (28 percent of all Italian homicides) verify that Italians brought with them the tradi-

<sup>106</sup>Colorado, State Prison Records, *Records of Convicts, 1850-1920*, W. T. Barneycastle, RG 83-267, Colorado State Archives, Denver.

<sup>107</sup>Colorado, Las Animas County, *Coroner's Inquests*, May 9, 1906.

<sup>108</sup>*Trinidad Chronicle-News*, January 31, 1908.

<sup>109</sup>Gastil, *Cultural Regions*, supra note 4 at 103. There are both supporters and critics of Gastil's thesis. See Colin Loftin and Robert H. Hill, "Regional Subculture and Homicide: An Examination of the Gastil-Hackney Thesis," *American Sociological Review* 39 (October 1974), 714-24; Steven F. Messner, "Regional and Racial Effects on the Urban Homicide Rate: The Subculture of Violence Revisited," *American Journal of Sociology* 88 (March 1983), 997-1007; Christopher G. Ellison, "An Eye for an Eye? A Note on the Southern Subculture of Violence Thesis," *Social Forces* 69 (June 1991), 1223-39 [hereafter cited as Ellison, "An Eye for an Eye?"]; and Donald J. Shoemaker and J. Sherwood Williams, "The Subculture of Violence and Ethnicity," *Journal of Criminal Justice* 15 (1987), 461-72.

tional blood feud to southeastern Colorado (Table 5). They exhibited this behavior in the form of homicides committed in isolated areas, some occurring as long as seven years after the "wrongs" committed by their victims. Pistone, Lapreto, Maniscalca, and Provenzo did not view their actions as homicide, but as getting even.

Lethal violence proved an "important subtheme" within the county in general, as exhibited by shootings in saloons and on the streets, as well as on isolated county roads. Homicides involving police, Baldwin-Felts operatives, deputy sheriffs, national guardsmen, miners, sheepherders, cattlemen, and others as perpetrators and victims provide strong evidence that a culture of violence existed in southeastern Colorado. Equally important was the existence of a strong gun-based culture. A fourteen-year-old youth shoots a sheepherder with a rifle, a town marshal kills a miner in an arrest attempt, two men walk into the streets for a shoot-out, two Baldwin-Felts operatives kill a union organizer in downtown Trinidad, and national guardsmen fire thousands of rifle and machine-gun bullets into a tent camp. Carried either concealed or openly, guns seemed to be everywhere, and in many cases proved to be the "equalizer" of western lore.

Gastil suggests that, historically, a variety of factors help to explain why certain regions have tended to exhibit this culture of violence. For example, "disorganized conditions such as those found on the frontier" have reflected high homicide rates. In recently settled regions, high mobility and relative anonymity are likely to "attract people with criminal tendencies" who may take advantage of the unstable frontier conditions.<sup>110</sup> Gastil also finds that juries in the South were not as likely to convict individuals for homicide as they were in the North: "Jury members were more likely to accept the reasons given as justifying the killing."<sup>111</sup> He notes that "the murder might have been committed for reasons they [the jurors] directly or indirectly approved,"<sup>112</sup> and the data confirm that juries were reluctant to convict defendants for committing homicides. With guilty verdicts averaging 29 percent for white, Hispanic, and Italian defendants (Figure 3), juries seemed to be saying that violent death was acceptable in Las Animas County.

High homicide indictment rates for all ethnic groups in Las Animas County support the regional-culture-of-violence thesis. Ethnicity—not race—was the crucial variable. The restrictive atmosphere of company towns, the regimentation within such

<sup>110</sup>Gastil, *Cultural Regions*, supra note 4 at 102.

<sup>111</sup>*Ibid.* at 105.

<sup>112</sup>*Ibid.*

enclaves, the prevalence of saloons, and the presence of a gun culture, when combined with disparate ethnic groups, helped to create a cultural environment that accepted violence. In many ways the theory neatly fits the data.

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## CONCLUSIONS

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Las Animas County, a region somewhat removed from the main arteries of transportation, developed in isolation from the rest of Colorado. As late as 1880, Trinidad was still a sleepy town of 2,226. Before the coal-mining boom the region surrounding the Purgatorie Valley had been pastoral, with cattle and sheep grazing on the mile-high plateau, and it is possible that the Texas cattlemen had left their imprint on the area.<sup>113</sup> Certainly the evidence suggests that the people who eventually moved into the valley either arrived heavily armed or soon purchased handguns for protection or other purposes. As Bat Masterson observed, "Always remember that a six-shooter is made to kill the other fellow with and for no other reason on earth."<sup>114</sup> In Trinidad, carrying a handgun became commonplace, and a weapon was almost always worn concealed.

With the coal-mining industry came rapid population growth and increased social instability. Previously, the county had had a mix of Hispanics and whites, but this changed quickly during the first decade of the twentieth century. Italians, Greeks, Eastern Europeans, African Americans, and more Hispanics swelled the ranks of the miners, increasing the county's population from 21,842 in 1900 to 33,643 a decade later.<sup>115</sup> All of them lived in close proximity within the company towns, and considerable hostility and mistrust existed among the various ethnic groups.

The company towns themselves were fenced off in isolation, and run by the company manager and his appointed (not elected) town marshals. This method of operating the towns created a siege mentality among the miners, who never knew whether their neighbor was a fellow worker or a company spy.<sup>116</sup> The threat of being fired must have added to the insta-

<sup>113</sup>Ibid. at 251.

<sup>114</sup>Quoted in Bill O'Neal, *Encyclopedia of Western Gun-Fighters* (Norman, 1979), vii. It is interesting to note that Masterson seldom became involved in gunfights and is recorded as having killed "only" three men. See *ibid.* at 219-22, and Richard O'Connor, *Bat Masterson* (Garden City, 1957), 176-92.

<sup>115</sup>See Bureau of the Census, *Twelfth Census, 1900*, 1: 740, and *Thirteenth Census, 1910*, 2: 222.

<sup>116</sup>See Margolis, "Western Coal Mining," *supra* note 15 at 68-69; and Fitch, "Law and Order," *supra* note 63 at 246-48.

bility, particularly among those miners contemplating joining the union. The company towns lacked any stabilizing social force.

The bitter nature of the coal-mining strikes contributed to a social climate that seemed to condone violent behavior. By hiring special deputies and Baldwin-Felts operatives, Colorado Iron & Fuel virtually ensured that any strike would result in violence. After the assassination of union organizer Gerald Lippiatt by Baldwin-Felts operatives on the streets of Trinidad on August 16, 1913, no miner had to be reminded who the enemy was and what methods it would employ to break the strike. The machine-gunning of the Forbes tent camp later that year provided yet another example of the Baldwin-Felts' *modus operandi*.<sup>117</sup> Although the miners must bear some blame for the violence, by hiring these "goons" the coal companies only added to the violence that soon engulfed Las Animas County. Not only did the Colorado National Guard side with the company, but the guardsmen were replaced by company and Baldwin-Felts men. After the Ludlow massacre in 1914, virtual open warfare erupted in the mining camps throughout the county for several weeks.<sup>118</sup>

In the county's volatile ethnic mix, no single group predominated, therefore no group controlled the criminal-justice system. This is apparent in the low homicide conviction rates for the three largest ethnic groups, Hispanics, whites, and Italians (Figure 3). One might expect low conviction rates for Hispanics, since they presented an important block of votes, held many elective offices, and had strong roots in Trinidad. But low conviction rates for Italians suggests that juries were not inclined to send men to prison for committing homicide, regardless of their ethnic origin. Unless the circumstances of a homicide were particularly heinous, juries apparently found no good reason to convict someone for a saloon shooting over a petty grievance.

With the adverse conditions in the mining camps came the need for a release of tensions, but the saloons themselves—often the only place for socializing—were often the scene of tension among the miners. There were eighty-two of them within or near company towns,<sup>119</sup> and the customary heavy drinking led to fights that frequently ended with shootings. Company marshals provided virtually no deterrence to such fights and sometimes became involved in shootings them-

<sup>117</sup>See Edward Levinson, *I Break Strikes!*, supra note 56 at 151-57; and Fitch, "Law and Order," supra note 63 at 254-57.

<sup>118</sup>Fitch, "Law and Order," supra note 63 at 255-57.

<sup>119</sup>See Gaddis, *Final Report*, supra note 28 at 9: 8913-15.

selves. Many of the homicides occurred within or just outside the saloons. Handguns were plentiful and cheap, and the statistics indicate that they were used in 68 percent of the homicides (Figure 3). In many cases both victim and perpetrator were armed, and in a few there were gunfights between the two parties.<sup>120</sup>

Cultural heritage also played a role in the high level of violence, when Italian immigrants brought with them the concept of the vendetta. Often there were no witnesses in vendetta killings, which usually involved an ambush in a lonely place.<sup>121</sup> Moreover, most witnesses would have been reluctant to testify for fear of being drawn into the feud. This explains the relatively low conviction rates for Italian defendants in vendetta cases (Table 5). Twenty-eight percent of the vendetta cases ended in dismissal, while only 14 percent resulted in convictions. Forty-eight percent of the cases ended with no indictments (Table 5).

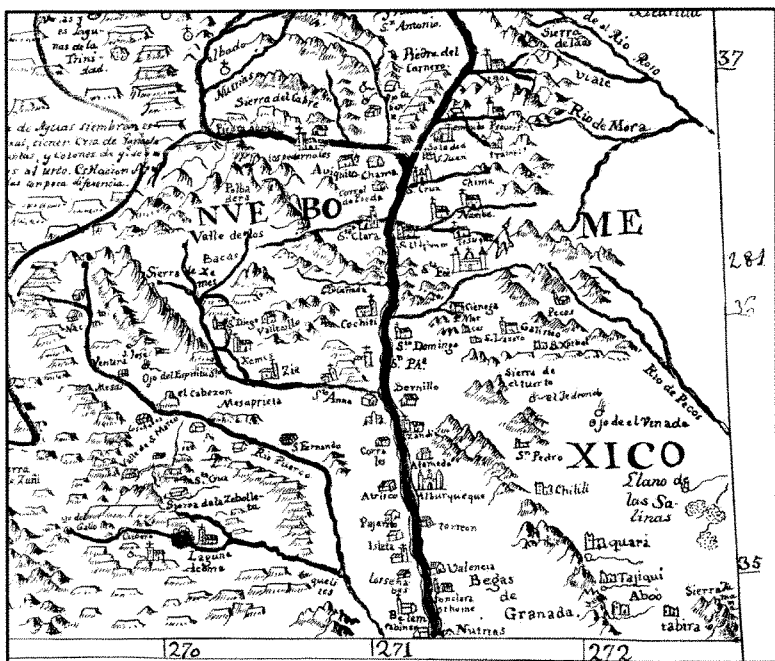
The general tendency to accept high levels of violence suggests that a culture of violence did exist in Las Animas County. This is apparent in the attitudes of grand juries and prosecutors. Conviction rates for all ethnic groups in the county were low.<sup>122</sup> Moreover, whether a homicide occurred in a small company town or in Trinidad, juries applied a liberal interpretation of justice to virtually all men accused of homicides committed in saloons.<sup>123</sup> In effect, the small towns throughout the isolated county appeared to be virtually outside the law when homicide was the issue.

<sup>120</sup>See, for example, the homicides reported in the *Trinidad Chronicle-News*, September 23 and November 26, 1912, April 28, 1913, and February 9, 1917.

<sup>121</sup>See Wilson, *Feuding, Conflict and Banditry*, supra note 85 at 17-60; and Boehm, *Blood Revenge*, supra note 85 at 106-7.

<sup>122</sup>For conviction-rate comparisons, see Lane, *Violent Death in the City*, supra note 5 at 68-69. For examples of sanctioned violence, see Montell, *Killings: Folk Justice*, supra note 84; and Ellison, "An Eye for an Eye?," supra note 110 at 1223-39. Although his sample is small and he selected that region *because* it was violent, Montell documents society's approval of killings that were not considered murder, as in vendettas. He also reveals high homicide rates (40 per 100,000) during a similar time period.

<sup>123</sup>The one exception—higher conviction rates for African Americans (63 percent)—probably reflects racial prejudice and the absence of blacks on the juries. See Colorado, Las Animas County, *Registers of Criminal Action, 1880-1920*.



Map drawn by Miera y Pacheco, c. 1776, showing the Rio Grande River Valley, New Mexico

# FRONTIER LAND LITIGATION IN COLONIAL NEW MEXICO: A DETERMINANT OF SPANISH CUSTOM AND LAW

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MALCOLM EBRIGHT

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Litigation over land and water rights in the West has often turned on questions of Spanish or Mexican law. Yet there has been no systematic method of determining what that law is, other than through the testimony of expert witnesses, and the courts have frequently ignored what accurate evidence of Hispanic law has come before them.<sup>1</sup> Recently, however, a number of books and articles have been published describing Hispanic law, particularly as it pertained to the frontier provinces of California and New Mexico, and some of these publications have been cited with approval by the courts.<sup>2</sup> In

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<sup>1</sup>See Peter L. Reich, "Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850," *Washington Law Review* 69 (October 1994), 869 [hereafter cited as Reich, "Mission Revival Jurisprudence"], for an excellent analysis of cases in California, New Mexico, and Texas determining the water rights of Hispanic municipalities. Reich demonstrates that when these states' courts created the historically erroneous Pueblo Rights Doctrine, they intentionally ignored historical and legal evidence that the "doctrine" never existed under Hispanic law.

<sup>2</sup>Daniel Tyler, "The Spanish Colonial Legacy and the Role of Hispanic Custom in Defining New Mexico Land and Water Rights," *Colonial Latin American Historical Review* 4 (Spring 1995), 149-65 [hereafter cited as Tyler, "Spanish Colonial Legacy"]; idem, "Underground Water in Hispanic New Mexico: A Brief Analysis of Laws, Customs, and Disputes," *New Mexico Historical*

addition, reports rendered by expert witnesses, especially in New Mexico water-rights adjudications, have added to our knowledge of Spanish and Mexican law.<sup>3</sup>

Legal historians describing Spanish and Mexican law in the Southwest borderlands have been divided, some emphasizing Spanish legal codes as the source and test of how Hispanic legal disputes were decided,<sup>4</sup> and some believing that custom—

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*Review* 66 (July 1991), 287-301 [hereafter cited as Tyler, "Underground Water"]; idem, *The Mythical Pueblo Rights Doctrine: Water Administration in Hispanic New Mexico* (El Paso, 1990) [hereafter cited as Tyler, *Mythical Pueblo Rights*]; and idem, "Ejido Lands in New Mexico," in *Spanish and Mexican Land Grants and the Law*, ed. Malcolm Ebright (Manhattan, Kans., 1989) [hereafter cited as Tyler, "Ejido Lands"]; William Taylor, "Land and Water Rights in the Viceroyalty of New Spain," *New Mexico Historical Review* 50 (July 1975), 189; David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987) [hereafter cited as Langum, *Law and Community*]; Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History from 1550-1850* (Tucson, 1984) [hereafter cited as Meyer, *Water in the Hispanic Southwest*]; Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* (Albuquerque, 1994) [hereafter cited as Ebright, *Land Grants and Lawsuits*]; Charles Cutter, "Community and the Law in Northern New Spain," *The Americas* 50 (April 1994), 467-80; idem, "Judicial Punishment in Colonial New Mexico," *Western Legal History* 8 (Winter/Spring 1995), 114-29. *State of New Mexico ex rel. Martinez v. City of Las Vegas*, 880 P. 2d. 868 (Ct. App. 1994), cites Tyler (*Mythical Pueblo Rights*), Meyer (*Water in the Hispanic Southwest*), and Ebright (*Land Grants and Lawsuits*), among others.

<sup>3</sup>John O. Baxter, *Spanish Irrigation in Taos Valley* (Santa Fe, 1990) [hereafter cited as Baxter, *Spanish Irrigation in Taos Valley*]; idem, *Spanish Irrigation in the Pojoaque and Tesuque Valleys During the Eighteenth and Early Nineteenth Centuries* (Santa Fe, 1984) [hereafter cited as Baxter, *Spanish Irrigation in Pojoaque and Tesuque Valleys*]. Daniel Tyler, "Land and Water Tenure in New Mexico: 1821-1846" (unpublished report on file in *New Mexico v. Aamodt*, no. 6639, D.N.M. 1979) [hereafter cited as Tyler, "Land and Water Tenure"]; Michael C. Meyer and Susan M. Deeds, "Land, Water, and Equity in Spanish Colonial and Mexican Law: Historical Evidence for the Court in the Case of the State of New Mexico vs. R. Lee Aamodt, et al." (unpublished report on file in *New Mexico v. Aamodt*, no. 6639, D.N.M. 1979); Iris H. W. Engstrand, "Historical Analysis of the Development of the California Pueblo Water Right Doctrine," and idem, "Water Rights of Municipalities under the Governments of Spain and Mexico" (unpublished reports prepared for *Martinez v. Las Vegas*); and Hans W. Baade, "The 'Pueblo Water Rights' of the City of Las Vegas, New Mexico" (unpublished report prepared for *Martinez v. Las Vegas*).

<sup>4</sup>Hans W. Baade, "The Historical Background of Texas Water Law: A Tribute to Jack Pope," *St. Mary's Law Journal* 18 (1986), 30-47; G. Emlen Hall, "Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest," *Thirty-Sixth Annual Rocky Mountain Mineral Law Institute* (New York, 1991); idem, *Four Leagues of Pecos: A Legal History of the Pecos Grant, 1800-1933* (Albuquerque, 1984), 8-14; idem, comments at the Western History Association session on "Land Grant Studies in New Mexico: New Directions," at which an earlier draft



especially as defined in lawsuits and governmental communications—bears the seeds of an understanding of Hispanic law.<sup>5</sup> These views are not mutually exclusive, for there is a substantial overlap between custom and the codes. Indeed, the earliest and very important codification of Spanish law, *Las Siete Partidas*, contains several laws devoted to custom.<sup>6</sup>

As generally defined in *Las Siete Partidas*, custom is the usage of the people, continuing for at least ten years and recognized by judicial decisions.<sup>7</sup> Customary law can serve to interpret codified law, and in some situations even annul it, but most rules of customary law follow generally accepted principles of codified law.<sup>8</sup> Nevertheless, it is essential to review Hispanic judicial decisions in order to arrive at their underlying principles, for many errors made by U.S. courts in interpreting Hispanic law in New Mexico have arisen from a disregard for customary law and a blind application of codified law or commentaries on codified law. Courts have often reached erroneous results because they did not try to understand conditions in the

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of this paper was presented on October 21, 1994, in Albuquerque; Joseph W. McKnight, "Law Books on the Hispanic Frontier," in *Spanish and Mexican Land Grants and the Law*, ed. Malcolm Ebright (Manhattan, Kans., 1989), 74-84 [hereafter cited as Ebright, *Spanish and Mexican Land Grants*].

<sup>5</sup>Langum, *Law and Community*, supra note 2; Tyler, *Mythical Pueblo Rights*, supra note 2, "Underground Water," supra note 2 at 287-301, "Land and Water Tenure," supra note 3, "Ejido Lands," supra note 2, and "Spanish Colonial Legacy," supra note 2; Baxter, *Spanish Irrigation in Taos Valley*, supra note 3, and idem, *Spanish Irrigation in Pojoaque and Tesuque Valleys*, supra note 3. Cutter, Engstrand, and Meyer rely on both custom and the codes in discussions of Hispanic law (see supra, notes 2 and 3).

<sup>6</sup>*Las Siete Partidas* (Madrid, 1829), *Partida 1, título 2* [hereafter cited as *Las Siete Partidas*]. The importance of custom in the system of the *partidas* legal code is evident from its place near the beginning, between king-made law and laws concerning the Catholic faith. For a recent article on the history of *Las Siete Partidas* in a volume dealing with contributions to the law (as well as to poetry, history, and astronomy) of the Spanish monarch Alfonso *el Sabio* (the Wise or Learned), who ruled from 1252 to 1284, see Jerry R. Craddock, "The Legislative Works of Alfonso el Sabio," in *Emperor of Culture: Alfonso X the Learned of Castile and His Thirteenth-Century Renaissance*, ed. Robert I. Burns, S.J. (Philadelphia, 1990), 182-97. According to Craddock, *Las Siete Partidas* is still followed today by courts in Spain. Studies of the meaning and effect of *Las Siete Partidas*, particularly its application in the Americas, are still burgeoning. See, for example, Victor Frankl, "Hernán Cortés y la tradición de *Las Siete Partidas*," *Revista de Historia de América* 53-54 (Junio-Diciembre de 1962), 9-74, and Anthony Pagden, trans. and ed., *Hernán Cortés: Letters from Mexico* (New Haven and London, 1986), xvii-xx, 451, n. 9.

<sup>7</sup>*Las Siete Partidas*, supra note 6 at *Partida 1, título 2, ley 5*, *Quien puede poner costumbre; é en que manera* (Who can establish custom and how).

<sup>8</sup>*Ibid.* at *Partida 1, título 2, ley 6*, *Que fuerza ha la costumbre para valer* (What force a valid custom has).

province, and therefore could not decide issues of Hispanic law as judges in Hispanic New Mexico would have done.<sup>9</sup>

There were almost no trained lawyers in New Mexico before the American occupation of 1846, and lawsuits were generally handled by the protagonists themselves. Sometimes a non-lawyer would represent the parties to litigation, giving them advice and drafting their documents; or Pueblo Indians involved in lawsuits might be represented by the Protector de Indios, who was appointed to protect indigenous rights.<sup>10</sup> Before a case reached the governor, attempts to reach a settlement were often made through informal oral proceedings before the local *alcalde*. If this failed and the governor were asked to decide a dispute, the case began with a petition from the complaining party. It would then proceed with statements from each side and reports by the *alcalde*, and sometimes depositions from third parties. Since law books were scarce in frontier New Mexico, the final decision was almost always based upon general principles rather than on specific laws. Among all the cases reviewed for this article, none was found in which a specific law was cited as the basis for the decision. Thus it becomes necessary to analyze the facts of each case, together with the historical background, to arrive at the reasons for the decisions. This is the type of analysis used under a customary-law approach.<sup>11</sup>

Many scholars now agree about the importance of custom as a component of Hispanic law in northern New Spain.<sup>12</sup> Legal

<sup>9</sup>Examples of U.S. court decisions that erroneously failed to take customary law into account are: *U.S. v. Sandoval*, 167 U.S. 278 (1897) (rejecting the common lands of the San Miguel del Bado community land grant); *Griego v. United States*, New Mexico Land Grants-Private Land Claims [hereafter cited as NMLG-PLC], roll 50, case 173, frames 268-70 (1898) (rejecting the Embudo land grant because the grant document submitted was a copy made by an *alcalde*); *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64 (applying the discredited pueblo water-rights doctrine to the Las Vegas community land grant).

<sup>10</sup>For a thorough description of the activities of this official in New Mexico, see Charles R. Cutter, *The Protector de Indios in Colonial New Mexico* (Albuquerque, 1986). The office of *protector de Indios* was vacant from 1717 to 1810, but *alcaldes* like Felipe Tafoya (Spanish Archives of New Mexico, ser. I [hereafter cited as SANM I], no. 1351 and 1354) and Bartolome Fernandez (SANM I, no. 1352) sometimes acted as advocates for the pueblos during this period. *Ibid.*, 75-77, 109.

<sup>11</sup>The absence of citations to Hispanic statutes is typical of the decisions of governors of New Mexico under Spain and Mexico, though litigants themselves sometimes cited law codes, including *Las Siete Partidas*. Tyler, "Land and Water Tenure," *supra* note 3 at 32-36.

<sup>12</sup>Tyler, "Spanish Colonial Legacy," *supra* note 2 at 149-65. Richard E. Greenleaf, "Land and Water in Mexico and New Mexico: 1700-1821," *New Mexico Historical Review* 47 (April 1972), 86 ("archival investigators often suspect that

decisions such as those studied here provide a means of sharpening the definition of custom. The thesis of this article is that legal decisions taken as a whole (together with official governmental communications) are the best index of Spanish law in New Mexico, and that the principles used by the governors as criteria for deciding those cases provided the framework for the customary legal system there. This theory also applies to other provinces of northern New Spain, like California<sup>13</sup> and Texas,<sup>14</sup> where law books and trained lawyers were also scarce, and has implications for current adjudications of land and water rights where the nature of Spanish and Mexican law is at issue.

The approach suggested here also has a solid basis in civil-law jurisprudence. Legal decisions that are generally accepted can acquire the force of precedent under a civil-law system and act as indices of custom.<sup>15</sup> They provide richer precedents than the statutes alone because they embody a choice between competing facts, and thus fill the gaps contained in the statutes' broad principles.<sup>16</sup> Law on the New Mexican frontier was built on concrete facts, the nitty-gritty of who did what to whom and where, not on abstract principles conceived by Roman scholars or Spanish jurists. These decisions tell us not only about the character and policies of the governors who made them, but also about Spanish law in New Mexico.

The lawsuits decided by New Mexico's governors ran the gamut from minor criminal matters, domestic disputes, and voluminous estate proceedings to major land and water disputes, some of which were appealed all the way to the *audien-*

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it was Spanish custom that conditioned legal practice in remote areas of the empire"; Marc Simmons, *Spanish Government in New Mexico* (Albuquerque, 1968), 176 ("by and large, judgement of the *alcaldes* . . . conformed to the prevailing customs of the country").

<sup>13</sup>Langum, *Law and Community*, supra note 2 at 30-55; idem, "The Legal System of Spanish California: A Preliminary Study," *Western Legal History* 7 (Winter/Spring 1994), 6-10 [hereafter cited as Langum, "Legal System of Spanish California"].

<sup>14</sup>For discussions of Hispanic law in Texas, see Donald E. Chipman, *Spanish Texas, 1519-1821* (Austin, 1992), 250-54, and Andrés Tijerina, *Tejanos and Texas under the Mexican Flag, 1821-1836* (College Station, Tex., 1994), 65-78.

<sup>15</sup>Jean-Louis Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec," in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, ed. Joseph Dainow (Baton Rouge, 1974) [hereafter cited as Dainow, *Role of Judicial Decisions*]; Francis Deák, "The Place of the 'Case' in the Common and Civil Law," *Tulane Law Review* 8, 337-57 [hereafter cited as "Place of the 'Case'"].

<sup>16</sup>A. N. Yiannopoulos, "Jurisprudence and Doctrine as Sources of Law in Louisiana and in France," in Dainow, *Role of Judicial Decisions*, supra note 15 at 77.

*cia* in Guadalajara or Mexico City. Generally, it is only when a litigant reached the *audiencia* level that the courts cited specific laws as the basis for their decisions.<sup>17</sup> When Tomás Vélez Cachupín became governor in 1749, his predecessor, Joaquín Codallos y Rabal, prepared an inventory of the criminal lawsuits and other archives turned over to the new government. The cases included: disobedience of a government order, murder, kidnapping a married woman, infliction of wounds, use of offensive or indecent language, quarreling between man and wife, insulting a woman by word of mouth, irreverence and lack of respect toward a priest, gambling, being a vagrant, failing to pursue Indians who had stolen some horses, and concubinage with a *mulatta* spinster.<sup>18</sup> During his first five-year term, Governor Vélez Cachupín was called upon to decide a similarly wide range of cases: theft of cows, idolatry, a misunderstanding, assault and battery, a *partido* contract, debt, gambling, a dowry, witchcraft, boundary disputes, and other land-related matters.<sup>19</sup> These disputes reveal a world in which one's reputation was as important as one's property rights, yet where ownership of land was often the measure of one's worth and the basis for subsistence within a community.

This article examines the land-related lawsuits decided by governors Vélez Cachupín and Pedro Fermín de Mendinueta between 1750 and 1778.<sup>20</sup> The cases fall into eight categories: arguments over the use of common lands, quarrels about title to land, quarrels about easements, boundary disputes, settlement of estates, partition of land, the right of first refusal, and disputes involving Indian land rights, but I will concentrate on disputes over the use of common lands, over title to land, and over Pueblo Indian land rights.<sup>21</sup> The lawsuits cut across all

<sup>17</sup>Decision of the *audiencia* of Guadalajara re sale of Santa Ana Pueblo lands to Spaniards, citing the *Recopilación*, Guadalajara, March/April 1818. Spanish Archives of New Mexico, ser. II [hereafter cited as SANM II], no. 2715.

<sup>18</sup>Inventory of archives turned over to Governor Tomás Vélez Cachupín. SANM I, no. 1258.

<sup>19</sup>Inventory of lawsuits decided and land grants made by Vélez Cachupín from April 1749 through 1754. SANM II, no. 525.

<sup>20</sup>Tomás Vélez Cachupín served two terms as governor of New Mexico, 1749-54 and 1762-67 (Francisco Antonio Marin de Valle, Mateo Antonio de Mendoza, and Manuel del Portillo y Urrisola acted as governors from 1754 through 1762). Pedro Fermín de Mendinueta was governor from 1767 to 1778, holding office for two consecutive terms.

<sup>21</sup>The lawsuits reviewed, listed by SANM no., are as follows: 29, *Alameda v. Joseph Montaña* (1750); 31, *Julián Rael de Aguilar v. Melchora Sandoval* (1751); 51, *Heirs of the Alameda grant v. Pedro Barela* (1778); 111, *San Fernando v. Atrisco* (1759); 362, *Pedro Yturbieta v. Joseph Marcelo Gallegos* (1765); 368, *Children of Cristobal Gallegos v. Juan Roque Gallegos* (1770); 460, *Antonio*

levels of society, and the social class of the litigants almost always had an effect on the outcome.<sup>22</sup> Although the cases do not deal directly with water rights, many of them mention *acequias* and irrigation, and indirectly tell us much about Hispanic water law.

While Vélez Cachupín and Mendinueta generally followed the same legal principles, they sometimes took different approaches and reached different results in similar cases. Thus it is often necessary to read between the lines to determine what is really going on in these lawsuits.<sup>23</sup> Vélez Cachupín was among the most legalistic and precise of all New Mexico governors in his handling of litigation, and both men generally tried to follow the correct procedures. Mendinueta was less strict, sometimes putting up with unfair procedures such as siding with a corrupt *alcade* without a proper hearing.<sup>24</sup> Vélez Cachupín tended to deal more directly with individuals involved in the lawsuits he decided, and was often familiar with the facts of the dispute. Instead of leaving everything to the *alcade* to decide, he frequently based his decision on a personal inspection of the land in question, providing a detailed decision crafted in precise legal language, and following it up to be sure its provisions had been carried out.

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*Joseph López v. Miguel Tenorio* (1772); 541, *Cristobal Mestas v. Ventura Mestas* (1752); 557, *Antonio Baca v. Joaquín Mestas* (1762); 558, *Sebastian Martín v. Manuel Martín* (1763); 571, *Miguel Montoya v. Juan Pablo Martín* (1776); 573, *Juan Bautista Montaña v. Antonio Baca* (1776); 592, *Marcial Martín Sanjil v. Marcial Martín* (1771); 643, *José Antonio Naranjo v. Diego Torres* (1752); 687, *Juan Joseph Pacheco v. Sebastian Martín* (1753); 691, *San Lorenzo v. El Paso* (1765); 696, *José Pacheco v. Juan Alarid* (1771); 783, *María Romero v. María Antonia Villalpando* (1766); 786, *María Rosalia Romero v. Pablo Salazar* (1768); 1050, *Manuel Valerio v. Lazaro de Atienza* (1753); 1079, *Nicolas Ortiz Niño Ladrón de Guevara v. Juan Estevan García de Noriega* (1751); 1122, *Ventura Mestas v. Antonio Mestas* (1766); 1348, *San Felipe Pueblo v. Heirs of Cristobal Baca* (March 21, 1753); 1349, *Santa Ana Pueblo v. Quiteria Contreras* (1763); 1351, *San Ildefonso v. Lujan* (1766); 1352, *Cochiti v. Miguel Romero* (1765).

<sup>22</sup>In one case, Mendinueta jailed petitioners complaining about an *alcade* without responding to their complaint, calling some of them mixed-blood (*color quebrado*). SANM II, no. 635.

<sup>23</sup>Susan Kellogg finds a similar problem in her study of seventy-three lawsuits between Spaniards and Nahua Indians from 1536 to 1700 ("Legal pleading and petitions, like other texts, require careful interpretation. One cannot assume that they offer accurate statements of fact"), *Law and the Transformation of Aztec Culture, 1500-1700* (Norman, 1995), 38.

<sup>24</sup>SANM II, no. 635.

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USE OF COMMON LANDS

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Lawsuits involving the use of common lands illustrate these points, especially the protracted and bitter dispute between the residents of El Paso (then in New Mexico) and the Suma Indians of San Lorenzo, over the Indians' common woodlands (*montes*). These lands were adjacent to lands granted to the Indians in 1764 by Vélez Cachupín, who convinced the Sumas to settle there partly on the promise of protection they would receive from "the pious, just [and] sovereign laws of his majesty."<sup>25</sup> But these common woodlands had been used by El Paso residents for gathering firewood, *vigas* (logs used for roof beams) and *latillas* (saplings laid herringbone fashion above them), and willows for diversion dams, and the El Pasoans still claimed the right to get wood and to graze their animals on the lands of the Indians. In addition to grazing on the Indians' commons, Spanish shepherds followed the sixteenth-century Castilian practice of setting fires to destroy trees and underbrush in order to produce better grazing lands. Although the El Pasoans had their own common lands, they preferred using those of the Indians because they were closer and less exposed to attack by Apache raiders.<sup>26</sup>

*Teniente alcalde* José Sobrado y Horcacitas had been granting permission to get cartloads of wood from the Indians' land to some El Paso residents on the condition that they bring a cartload for the *alcalde*, although the El Paso residents argued that all of them had customarily taken wood from the lands of the Indians.<sup>27</sup> This dispute had intensified primarily because Hor-

<sup>25</sup>The Christianized Suma Indians had been living at Senecu, Isleta, and Socorro, and totaled ninety-three individuals in twenty-seven families. The so-called heathen Sumas, living nearby on *rancherías* and numbering about forty families, also joined the settlement. Decree of Vélez Cachupín, El Paso, October 18, 1764. SANM I, no. 1350. The ground was prepared for the grant of one league of land to the Sumas at San Lorenzo by a 1751 decree providing for grants of one league of land to other Indians in the El Paso area, which was a reversal of a 1692 decision leaving Indian lands in the hands of the Franciscans. W. H. Timmons, *El Paso: A Borderlands History* (El Paso, 1990), 36-37 [hereafter cited as Timmons, *El Paso*].

<sup>26</sup>Declaration of Antonio Maese, Presidio del Paso del Rio del Norte, August 22, 1765. SANM I, no. 691. For background on intentional burning of the *montes* in Spain, see David E. Vassberg, "The Spanish Background: Problems Concerning Ownership, Usurpations, and Defense of Common Lands in 16th Century Castile," in Ebright, *Spanish and Mexican Land Grants*, supra note 4 at 17.

<sup>27</sup>Petition of El Paso *vecinos* to *alcalde* Pedro de la Fuente, El Paso, August 1765. SANM I, no. 691. The appeal to Vélez Cachupín occurred after the matter was litigated before de la Fuente, *alcalde* and captain of the El Paso presidio. For more on de la Fuente during this period, see James McDaniel, trans. and



Drawing by Glen Strock

cacitas had angered both sides with his selective permissions for wood-gathering. He angered the Indians by allowing Spaniards in, and he angered the Spaniards whom he did not

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ed., "Diary of Pedro José de la Fuente, Captain of the Presidio of El Paso del Norte," *Southwestern Historical Quarterly* 60 (October 1956), 26-81, and 83 (January 1980), 259-78. In his diary, de la Fuente refers to his lieutenant *alcalde* as Horcacitas, so I have followed that usage here.

allow in because they would not bribe him with free cartloads of wood. Horcacitas, who had already shown his prejudice toward the Indians when he left out some of the richest land in his measurement of the Sumas' league of agricultural land, was accused by the El Pasoans of trying to be the "arbiter of the woods."<sup>28</sup>

Since Vélez Cachupín had convinced the Suma Indians to settle at San Lorenzo because of promised legal protection, he could hardly do less than provide that protection when called upon. He ordered the El Paso residents not to enter the lands of the Indians either for grazing their sheep or cutting wood, and to cease building fires on the *montes*. Instead, the El Pasoans were told to plant trees and willows on their lands and to use their own common lands for wood-gathering, even if they had to go in armed groups to protect one another from Apache raids. The governor chastised Horcacitas for granting permission for wood-cutting and told him not to permit it in the future. Finally, Vélez Cachupín imposed fines of up to forty pesos or two months in jail, and confiscation of carts and oxen, on anyone found cutting trees on the Indians' common lands, all fines to be used to purchase agricultural tools for the Suma Indians.<sup>29</sup>

Typically, the governor was pragmatic in this decision, providing practical solutions to the problems presented. He was familiar with the situation on the ground because a year earlier he had heard the complaints of the Sumas, convinced them to settle at San Lorenzo, examined the land, and set boundary markers. This was different from the usual case that might be resolved simply by citing a law in the *Recopilación* prohibiting Spanish encroachment on Indian lands. Vélez Cachupín decided the case like any conflict between two Spanish land grants: once the title and boundaries of the Indian lands were determined, El Paso residents were prohibited from using those lands.<sup>30</sup>

<sup>28</sup>"*Arbitro de los Montes*," Juan Antonio García Noriega, José Manuel Telles Jirón, and Francisco García Carabajal to *alcalde* Pedro de la Fuente. El Paso, August 1765. SANM I, no. 691. Vélez Cachupín had already had dealings with *teniente alcalde* Horcacitas when he tried to get him to organize the Indians and other residents of the El Paso area to dig a new *acequia* to alleviate the problem of flooding. This was after two years of frustration with a project proposed in 1762 to construct a dam at El Paso capable of withstanding the annual floods of the Rio Grande. The dam was to be funded by a tax on the owners of vineyards in the area, but they refused to supply either funds or labor. Pinart Collection, PE 51:1 and 51:2, Bancroft Library; Timmons, *El Paso*, supra note 25 at 41 n. 31.

<sup>29</sup>Decree of Vélez Cachupín, Santa Fe, October 30, 1765. SANM I, no. 691.

<sup>30</sup>This situation was different from that contemplated in these laws because the Suma Indians had been resettled in an existing Spanish community and given



In another case Vélez Cachupín decided, involving Spanish encroachment upon the common lands of a Spanish community, the governor again ruled in favor of community common lands. In 1750 seven grantees of the Alameda grant complained that José Montaña had grazed his sheep on their common lands, built corrals and a log cabin about a league from the mission of Sandia, and obstructed their *acequia*. Asked why he did not leave, Montaña responded that Father Hernandez, the priest at Sandia, had told him not to.<sup>31</sup> Vélez Cachupín lost no time in ordering Montaña to depart with his sheep within three days, to pay a fine of one hundred pesos, and to destroy the corrals and other structures he had built. Failure to do any of these things would result in one month in jail for Montaña. The governor charged Father Hernandez "not to meddle, obstruct, or interrupt the course of justice."<sup>32</sup>

Vélez Cachupín's decision protecting the integrity of these common lands was consistent with his overall land policy. Montaña was not living on the Alameda grant as a member of that land-grant community or taking the risks that entailed, so he was not entitled to use the grant's common lands. Four years later, however, Montaña joined the grantees of the San Fernando grant and was given a house lot, a field of one hundred by three hundred *varas* for planting, and the right to use their common lands. To the extent that Montaña was encouraged by the loss of his case against Alameda to obtain legitimate common land use-rights through his allotment in another community grant, Vélez Cachupín's decision was of help in fostering frontier land-grant settlements.<sup>33</sup>

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their own agricultural lands, but were sharing the *montes* with the Spanish residents of San Lorenzo. In 1765 there were 62 Sumas and 202 Spaniards living at San Lorenzo. Timmons, *El Paso*, supra note 25 at 42-43. Laws protecting Indian lands from Spanish encroachment in the *Recopilación* are: 4-12-12 and 6-3-20 (Spanish ranches not to be located near Indian communities), and 4-7-1 (Spanish communities not to be established where Indians' rights would be prejudiced). A royal *cedula* issued on September 17, 1692, also gave Indians the right of first refusal (right to meet the price of a proposed sale and purchase land adjacent to the pueblo), Richard Konetzke, ed., *Colección de documentos para la historia de la formación Social de Hispanoamérica 1493-1810* (Madrid, 1962), 3:25-26 (cited in William B. Taylor, "Colonial Land and Water Rights of New Mexico Indian Pueblos," *New Mexico Historical Review* 50 [July 1975], 20-21).

<sup>31</sup>Petition of Alejandro Gonzales, Andrés Martín, Salvador Martínez, Julián Rael, J. W. Gonzales, Joseph Gonzales, and Juan Gaspar Gonzales to Vélez Cachupín. SANM I, no. 29.

<sup>32</sup>"No se entrometa a embarazar ni perturbar el curso de la justicia." Decree of Vélez Cachupín, Santa Fe, January 23, 1750. SANM I, no. 29.

<sup>33</sup>Act of Possession by *alcalde* Antonio Baca, San Fernando, March 11, 1754. SANM I, no. 688.

The governor could have cited *Las Siete Partidas* for the principle that a nonresident of a community owning common lands could make use of those lands only if the residents agreed,<sup>34</sup> but it seems that no one in New Mexico had a copy of *Las Siete Partidas*,<sup>35</sup> and the principle was so well known and so well grounded in equity and government policy that to cite such a law was unnecessary and might have cast doubt on the finality of Vélez Cachupín's decision. Montaña had to leave, even if he had the priest on his side, and to base the order on a complicated law might have given him an opening through which to counterattack. Gaps in codified laws could become loopholes to be manipulated by a powerful litigant able to afford the expense of protracted litigation.<sup>36</sup>

Vélez Cachupín also protected the commons of the San Fernando grant in 1766, when those grantees complained to him about encroachment on their common lands by flocks of sheep owned by Atrisco residents. Vélez Cachupín ordered the Atrisco settlers to stay away from the San Fernando commons unless they had permission, because those lands were for the exclusive use of the San Fernando settlers. The governor was explicit about the fine to be imposed (thirty pesos for each occurrence), the manner in which it was to be collected (the lieutenant *alcalde* was to seize a sufficient number of sheep to cover the fine), and how it was to be applied (the *alcalde* was to use the proceeds for the construction of a church at San Fernando).<sup>37</sup>

A few years later however, Governor Mendinueta was not as protective of the San Fernando common lands. In 1768 the Atrisco settlers again claimed land near San Fernando. This time they asked for, and received, a grant west of the San Fernando grant. Mendinueta also made a grazing grant to Luis Jaramillo west of the San Fernando grant, over the settlers' strenuous objections. It is not clear whether any of these grants actually

<sup>34</sup>*Las Siete Partidas*, supra note 6 at Partida 3, título 28, ley 9, *Quales son las cosas propriamente del comun de cada Ciudad, o Villa, de que cada uno puede usar* (What things are the common property of every city and town, which everyone has a right to use). This law alone is explained by nine footnotes in Latin that are three times longer than the law itself. The longest note is a gloss on the part of the law that declares common property to be owned equally by rich and poor members of the community.

<sup>35</sup>Eleanor B. Adams and France V. Scholes, "Books in New Mexico, 1598-1680," *New Mexico Historical Review* 7 (July 1942), 232; Joseph W. McKnight, "Law Books on the Hispanic Frontier," in Ebright, *Spanish and Mexican Land Grants*, supra note 4 at 74-84.

<sup>36</sup>Deák, "Place of the 'Case,'" supra note 15 at 344-45.

<sup>37</sup>Decree of Vélez Cachupín, Santa Fe, July 17, 1766. SANMI, no. 111.

encroached on their common lands, but it is evident that Mendinueta made grants surrounding San Fernando that the San Fernando settlers felt were prejudicial. The new grantees did not occupy the lands by settlement, which would have benefited San Fernando, but merely put their livestock on these unfenced tracts, to the detriment of San Fernando. Vélez Cachupín did not allow such grants.<sup>38</sup>

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### TITLE TO LAND

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In 1765 Pedro Iturbietta and Joseph Marcelo Gallegos fought over a small cornfield (sixty by fifty *varas*) on the Belén grant and, according to Gallegos almost came to blows. Gallegos claimed to have purchased the land from Joseph Quintana four years earlier, but had no deed to prove it. Iturbietta claimed that the land belonged to his mother, Juana Teresa Romero, one of the original grantees of the Belén grant. Lacking deeds, each party presented affidavits from Belén settlers regarding the use of the land in order to establish their ownership. The affidavits supporting Gallegos stated that Quintana had plowed and planted the tract, which "had not been measured [allotted] because it was one the side of the *acequia madre* [where] everyone farms land in common."<sup>39</sup> This was the nub of the problem, because without measured allotments and written documents, ownership of the land depended on use, a difficult matter to prove through oral testimony.

Gallegos claimed to have purchased the land for fifteen pesos to compensate Quintana for the plowing, and to have spent three years adding manure to the soil, because it needed extensive reclamation before it was capable of growing a crop. The soil was apparently too moist and/or alkaline, causing the grass

<sup>38</sup>Vélez Cachupín rejected Felipe Tafoya's petition for a grant in the vicinity of San Fernando, telling *alcalde* Tafoya that if he needed grazing land for his flocks of sheep he should join one of the existing settlements along the Rio Puerco like San Fernando or San Gabriel de las Nutrias. Then he could use the common lands of those grants, but would have to risk his life in one of those communities on the Navajo frontier. Soon after Vélez Cachupín left office, Tafoya received his own private grazing grant from Governor Mendinueta. New Mexico Land Grants-Surveyor General [hereafter cited as NMLG-SG], roll 22, report 99, frame 1362. For more on this grant, see Richard Salazar, "The Felipe Tafoya Grant: A Grazing Grant in West Central New Mexico," (Guadalupita, N.M., 1994).

<sup>39</sup>"No se ha echado cordel en (de) esta banda de la [a]sequia madre si no que todos labran tierras en mancomun," Statement of Juan Torres and Nicolás Torres, Belén, May 31, 1765. SANM I, no. 362. A *vara* is approximately thirty-three inches.

to become brown, a disease known as *chacaqüiste*.<sup>40</sup> Just as Gallegos was finally plowing the land, Iturbietta appeared on the scene "with a bandana tied around his waist," together with his brother and a friend, and told Gallegos and his helper in a loud voice to stop plowing or "they would break their heads." Gallegos relented, not from cowardice, he said, but out of the desire to have the matter resolved before the *alcalde*. *Alcalde* Miguel Lucero appointed Juan Francisco Baca to take statements from everyone who had any knowledge about the matter.<sup>41</sup>

Iturbietta and the witnesses favorable to him reiterated his claim that the field belonged to Iturbietta's mother, Juana Teresa Romero, who at one time had plowed and planted it. It transpired that Iturbietta had inherited a house near the tract in question and wanted to farm land as close as possible to where he lived. After reviewing all the affidavits, Lucero decided in favor of Iturbietta, but the defendant's victory was short-lived. Gallegos appealed to Governor Vélez Cachupín.<sup>42</sup>

The governor reversed the *alcalde's* decision, deciding that Iturbietta had not presented enough evidence to oust Gallegos from the land. Vélez Cachupín stressed the fact that none of the witnesses had contradicted Quintana's statement that he had sold the land to Gallegos, so he preferred to leave Gallegos in possession until the case was determined at a full hearing. The governor seemed convinced that the plaintiff's use of land by adding manure to cure the *chacaqüiste* problem, added to the one year during which Quintana used the land, was sufficient to meet the possession requirement.<sup>43</sup>

This lawsuit tells us about the difficulties of residents of large private grants in establishing title to their land, and, specifically, about the precarious nature of *genízaro* land tenure at mid-century. It also helps explain the long crusade by the

<sup>40</sup>*Chacaqüiste* (in New Mexico spelled *chaqüiste*), a disease causing certain grasses to turn yellowish-brown. Rubén Cobos, *A Dictionary of New Mexico and Southern Colorado Spanish* (Santa Fe, 1983), 42 and in Mexico, *chahuistle*, a disease of grasses caused by too much moisture. Francisco J. Santamaría, *Diccionario de Mejicanismos* (Mexico City, 1978), 455.

<sup>41</sup>"con el paño amarrado a la cintura," "nos [h]aviamos de quebrar las cabezas." Petition of Joseph Marcelo Gallegos, SANM I, no. 362.

<sup>42</sup>Before receiving his inheritance, Iturbietta had farmed a field one quarter of a league away. Petition of Joseph Marcelo Gallegos, SANM I, no. 362. A league is 2.63 miles, the distance travelled on horseback over flat terrain at a normal gait in an hour. Fray Angélico Chávez and Ted J. Warner, *The Dominguez-Escalante Journal* (Provo, Utah, 1976), 4, n. 17. [hereafter cited as Chávez and Warner, *Journal*].

<sup>43</sup>Order of Vélez Cachupín, SANM I, no. 362.

Belén *genízaros* for their own land grant.<sup>44</sup> Although it is not clear whether Gallegos himself was *genízaro*, it appears that the land in question was unallotted land used primarily by *genízaros*. The Belén grant was a private grant made in 1740 to a group of individuals from the Torres, Salazar, Trujillo, and Romero families who constituted one large extended family through intermarriage. By 1746 Diego Torres had brought at least twenty *genízaros* to the area to help populate and defend the land grant, but settlement on the grant did not necessarily bring with it title to the land. The original Spanish settlers were allotted tracts of land on one side of the irrigation ditch, leaving the irrigable land on the other side of the *acequia* to be used in common by the *genízaros*. This meant that most residents would have difficulty proving title, since Diego Torres and his co-owners of the Belén grant claimed the entire grant themselves. They wanted the benefits of a *genízaro* presence for protection against Indian raids without giving any property rights to the *genízaros* in return.<sup>45</sup>

This illustrates the difficulties of an unwritten system of land titles. Most of the other land-title cases were decided by governors Mendinueta and Vélez Cachupín on the basis of written documents, but here Vélez Cachupín recognized ownership of land based on usage and oral evidence of a sale, even though the usage was primarily soil preparation. This was in accordance with the general principles found in the *Recopilación* and *Las Siete Partidas*, although without some independent evidence beyond the verbal testimony of witnesses, sorting out who owned the land was a daunting task.<sup>46</sup> Vélez Cachupín

<sup>44</sup>Genízaros were detribalized Plains Indians living in Spanish communities. When the Belén grant was first made in 1740 there may have already been a settlement of *genízaros* there, as claimed by Antonio Casados in a lawsuit during the tenure of Governor Codallos y Rabal. *Antonio Casados v. Diego Torres*, SANM I, no. 183; Will of Cristobal Torres, SANM I, no. 247. Carlos Lopopolo, *The New Mexico Chronicles: Belén* [n.d., n.p.], contains copies of the original Belén grant documents and useful genealogical information, but is not annotated.

<sup>45</sup>One of the Belén leaders was Diego Torres, whose father, Cristobal, had received a private grant north of Santa Cruz that he treated as a community grant by giving families who settled there allotments of house lots and farm tracts as well as rights to use the common lands. Cristobal's will provided that the grant be divided among the settlers who were living there, as well as those who might settle there in the future. Diego's dissatisfaction with the communal nature of his father's land grant helps explain why he petitioned for a private grant at Belén, and used *genízaros* to help him settle the grant. SANM I, no. 247.

<sup>46</sup>*Recopilación*, 4-12-1 (four-year possession requirement for private tracts within a community grant), *Las Siete Partidas*, supra note 6 at *Libro 3, título 29, ley 18* (ten-year possession sufficient to acquire ownership where property acquired in good faith as by purchase.)

showed that he did not consider the Belén grant to be owned solely by the original grantees, even though U.S. courts have generally treated these large quasi-community grants as private, leading to problems that are still with us today.<sup>47</sup>

In a case involving land in Bernalillo, Mendinueta reached a similar result based on witnesses' affidavits, again because of the lack of written documents. Cristobal Gallegos offered Juan Roque Gallegos land on which to build a house, as well as farming and grazing land, if Roque and his family would move to Bernalillo, help Cristobal defend his land against Apache attack, and act as his servants. Roque accepted, selling land he owned at Cañada de Cochiti and building three houses on the new land, two of sod and one of logs. After Cristobal's death, his widow recognized Roque's right to the land through a separate deed, but Cristobal's three children sought to set it aside on the ground that their father had wanted them to have the land.<sup>48</sup> The children told of a fight between Roque and Cristobal in which Cristobal was wounded in the head, leading Cristobal to tell Roque he did not want him living there any more. However, after several witnesses were examined on this point, it turned out that both Roque and Cristobal had apologized a few days after the altercation and had settled their differences.<sup>49</sup>

Mendinueta decided in favor of Roque Gallegos, based on the antiquity of his possession and on the fact that all the witnesses agreed on the essential points. Beyond this the governor was somewhat vague in his analysis, though Roque's continuous use of the land for up to thirty years seems to have carried great weight with Mendinueta.<sup>50</sup> The governor's decision followed the Spanish doctrine of prescription, allowing acquisition of title to property through possession even when there were no written documents. The period of possession varied, but if it lasted for thirty years those in possession acquired good title no matter how they acquired the property.<sup>51</sup>

<sup>47</sup>See, for example, *Rael v. Taylor*, 876 P.2d 1210 [concerns grazing and wood-gathering and other use rights of residents of a portion of the Sangre de Cristo grant, confirmed as a private grant in 1860].

<sup>48</sup>Statement of Juan Roque Gallegos, Bernalillo, June 30, 1770. SANM I, no. 368.

<sup>49</sup>Statements of Mariano, María Antonia, and Cristobal Gallegos, Jr., Santa Fe, May 21, 1770. SANM I, no. 368.

<sup>50</sup>Decision of Mendinueta, Santa Fe, July 4, 1770. SANM I, no. 368.

<sup>51</sup>*Las Siete Partidas*, supra note 6 at *Libro 3, título 29, ley 21*, provides for acquisition of title after thirty-year possession even if the property "had been stolen or obtained by violence or robbery." This is much broader than adverse possession in present-day New Mexico and other U.S. jurisdictions that require

Both Mendinueta in this case, and Vélez Cachupín in the previous one, relied on evidence of possession as a major factor in their decisions. In the Belén case, Joseph Marcelo Gallegos proved the four years of possession usually required for establishing title to allotments in community land grants, even though he did not have a deed. Governor Vélez Cachupín was breaking new ground establishing settler's rights to unallotted land, going beyond what the original grantees of the Belén grant had in mind when they invited *genízaros* and others to share the grant with them. In the Bernalillo case, Mendinueta also emphasized possession in recognizing an equitable right that conflicted with paper title.

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### CASES INVOLVING PUEBLO INDIAN LAND

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Two cases regarding purchases by Indian pueblos of Spanish lands raise several more interesting questions involving land and water rights. Both lawsuits were decided by Governor Vélez Cachupín, one in 1753 during his first term, the other in 1763 during his second term.

In the 1753 case, San Felipe Pueblo wanted to purchase a tract of land adjoining the pueblo at a place called Angostura to prevent the land from being sold to a third party. The land in question was owned by the heirs of Cristobal Baca, each of whom had begun to negotiate separately with the Indians based upon a supposed total value of the land of nine hundred pesos. This disorderly and potentially unfair situation was brought to the governor's attention by *alcalde* Juan Montes Vigil, who asked that appraisers be appointed to determine the value of the land for the purpose of the sale.<sup>52</sup> The governor agreed, because the "natives of the pueblo of San Felipe . . . cannot and ought not to make purchases or sales of real property [without government approval],"<sup>53</sup> although they could sell personal property without approval "according to the usages of the area."<sup>54</sup> He appointed Miguel Montoya of Atrisco and Geronimo Jaramillo from Los Corrales, "legal [minded] persons with knowledge of farming matters," as appraisers (*tasadores*). They

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good-faith acquisition of the property through a written document. 3 Am. Jur. 2d, 18-19.

<sup>52</sup>Petition of *alcalde* Juan Montes Vigil to Vélez Cachupín, March 1753. SANM I, no. 1348.

<sup>53</sup>"*naturales del Pueblo de San Phelipe . . . no pueden ni deven celebrar compras ni ventas de vienes raices.*"

<sup>54</sup>"*segun el uso de la tierra.*"



Drawing by Glen Strock

were to examine the land in question and determine its value.<sup>55</sup>

After the appraisers had viewed the land, together with its woodlands and water availability, they were questioned separately by *alcalde* Miguel Lucero. Each told the *alcalde* that the

<sup>55</sup>"*personas legales y de conocimiento en materias de campo.*" Order of Vélez Cachupín, Santa Fe, March 21, 1753. SANM I, no. 1348.



land was worth only six hundred pesos because there were no woodlands (*montes muy ningunos*) and water was scarce for irrigating the farmlands.<sup>56</sup> The appraisals and other papers were then forwarded to Vélez Cachupín, who confirmed the six hundred-peso appraisal and ordered the heirs of Cristobal Baca to execute a deed to the pueblo as a corporate body and to its members. The governor pointed out that San Felipe had a right to purchase the land to avoid its falling into someone else's hands, and because the pueblo was increasing in size and needed to enlarge its irrigated fields. He said that it was necessary to appraise the property to prevent the kinds of frauds that other Indians had suffered in the past, and that the procedure followed in this case should serve as an example for similar cases in the future.<sup>57</sup> Members of San Felipe Pueblo delivered property to the Baca heirs to make up the six-hundred-peso purchase price: two hundred ten head of sheep, five cows with calves, one cow without calf, one pot of lard at eight pesos, and two buckskins (*dos gamuzas*). The heirs, in turn, gave receipts and authorized one of their number to sign a deed to the pueblo.<sup>58</sup> The Indians were placed in formal possession of the land and told to erect landmarks at its boundaries.<sup>59</sup>

This case illustrates the procedure followed to protect the Indians when they proposed to buy land from Spaniards. Vélez Cachupín pointed out that the residents of San Felipe, like those in other pueblos, could easily be taken advantage of because they did all their calculations on their fingers, did not know how to count above one hundred, and, instead of using more precise measurements, measured and paid in heaps (*montones*). The governor justified the procedure he followed as being according to the usages of the region rather than any specific law,<sup>60</sup> but he was reversing a case of two decades earlier that prohibited land sales by Spaniards to Indians.<sup>61</sup> As he did with the Sumas of San Lorenzo and the *genízaros* of Belén, Vélez Cachupín was changing the rules regarding land ownership, each time in favor of a less powerful group than the Spanish elite.

<sup>56</sup>Appraisal of Geronimo Jaramillo, Los Algodones, March 26, 1753. SANM I, no. 1348.

<sup>57</sup>Decree of Vélez Cachupín, Santa Fe, March 29, 1753. SANM I, no. 1348.

<sup>58</sup>Deed for property purchased by San Felipe Pueblo, Santa Fe, April 24, 1753, Nicolas de Ortiz, Manuel Gallegos, et al. SANM I, no. 1348.

<sup>59</sup>Act of possession by *alcalde* Juan Vigil, April 7, 1753. SANM I, no. 1348.

<sup>60</sup>Decree of Vélez Cachupín, Santa Fe, March 29, 1753. SANM I, no. 1348.

<sup>61</sup>In 1734 Governor Cruzat y Góngora annulled a proposed sale of lands to Santa Ana Pueblo by Baltasar Romero on the ground that the royal laws did not allow it. SANM I, no. 1345.

Ten years later, Vélez Cachupín was called upon to preside over a similar Spaniard-to-Indian land purchase, this time by Santa Ana Pueblo. *Alcalde* Bernardo Miera y Pacheco, the famous cartographer, handled the proceedings, which involved a much larger tract, 4,340 *varas* in length.<sup>62</sup> The land had been acquired by Cristobal Martínez, known as El Cojo (the cripple), in four separate purchases consolidated into one substantial tract on the east side of the Rio Grande.<sup>63</sup> The *alcalde* directed each of the parties to appoint its own appraiser, rather than appointing them himself as Vélez Cachupín had in the San Felipe case.<sup>64</sup> The appraisers arrived at the relatively high value of three thousand pesos for the tract, because it consisted entirely of irrigable land.<sup>65</sup>

The pueblo was willing to pay this considerable sum, mostly in kind, because it badly needed irrigable land. The farmlands at its old village of Tamaya were on the Jemez River, which was largely dry in the summer months because of upstream diversions, and without more irrigable land the pueblo was unable to produce enough food to survive. Santa Ana had been purchasing tracts in the Ranchito area and had purchased an *ancón* from Antonio Baca, but was not able to irrigate it owing to problems encountered in digging the *acequia*.<sup>66</sup> Governor Cruzat y Góngora had annulled a proposed land purchase negotiated in 1734,<sup>67</sup> and now the pueblo's population had dwindled

<sup>62</sup>For more on Bernardo Miera y Pacheco, see Eleanor B. Adams and Fray Angélico Chávez, translators and annotators, *The Missions of New Mexico, 1776: A Description by Fray Francisco Atanasio Dominguez, with other Contemporary Documents* (Albuquerque, 1956), 160-61, and Chávez and Warner, *Journal*, supra note 42 at 4, n.9.

<sup>63</sup>For a summary of these purchases, which were the basis of the El Ranchito tract, see Ward Allen Minge, "The Pueblo of Santa Ana's El Ranchito Purchases, and the Adjudication of the Boundary with San Felipe" [hereafter cited as Minge, "El Ranchito Purchases"], files of Rothstein, Donatelli, Hughes, Dahlstrom and Cron, Attorneys for the Pueblo of Santa Ana, Santa Fe (reference courtesy Richard Hughes).

<sup>64</sup>Appointment of appraisers [Nobramiento de Abaluadores [*Evaluadores*]] by Miera y Pacheco, Santa Ana, July 6, 1763. SANM I, no. 1349.

<sup>65</sup>Appraisal (*evaluación*), Santa Ana, July 7, 1763. Bernardo de Miera y Pacheco, Juan Bautista Montaña, and Francisco Pablo de Salazar. SANM I, no. 1349.

<sup>66</sup>An *ancón* is the land encompassed by a bend in the river. Minge, "El Ranchito Purchases," supra note 63 at 4-5. For a good history of Santa Ana from the pueblo's point of view, see Laura Bayer with Floyd Montoya and the Pueblo of Santa Ana, *Santa Ana: The People, the Pueblo, and the History of Tamaya* (Albuquerque, 1994).

<sup>67</sup>Land purchase from Baltasar Romero annulled by Governor Cruzat y Góngora. SANM I, no. 1345.

to about four hundred.<sup>68</sup> That is why seventy-eight members of Santa Ana Pueblo were each willing to contribute an average of thirty-eight pesos in property to make up the purchase price. Most of the contributions were livestock (sheep and goats at two pesos, bulls and cows without calves at twenty pesos, cows with calves and oxen at twenty-five pesos, mules from thirty to forty-five pesos, and horses from fifteen to fifty pesos).<sup>69</sup>

It is apparent from these proceedings that individual members of the pueblo held tracts of farmland as private property and not in common, as previously thought,<sup>70</sup> for when *alcalde* Miera y Pacheco put the Indians in possession of their lands, he delivered the lands to the pueblo and to each individual in proportion to the amount paid by that person.<sup>71</sup>

In two other cases, this time involving Pueblo Indian common lands, Vélez Cachupín protected the commons of Santa Clara and San Ildefonso pueblos. In July 1763 the governor revoked a grant to Cristobal Tafoya and his heirs west of the Santa Clara Pueblo. The Tafoya grant had been conditioned on its being used solely for grazing, but the grantees were farming and diverting water upriver from Santa Clara and their cattle were damaging Indian fields. Accordingly, the governor revoked the grant and gave the Indians the land encompassed by the Spanish grant, as well as additional land along the Santa Clara River west of the pueblo to protect Indian fields and water rights.<sup>72</sup> The San Ildefonso case in 1766 involved Spanish encroachment on lands of that pueblo. Vélez Cachupín gave the pueblo the four square leagues it claimed, but based his decision on an advisory opinion he had requested from a judge in Chihuahua. The measurement of the five thousand *varas* the Indians claimed in each direction was halted when they

<sup>68</sup>Santa Ana's population was counted at 404 in 1760. Marc Simmons, "History of Pueblo Spanish Relations to 1821," in *Handbook of North American Indians*, ed. Alfonso Ortiz (Washington, D.C., 1979), 9: 185.

<sup>69</sup>Acknowledgment of payment (*Paga que hizieron*) by Miera y Pacheco, July 7, 1763. SANM I, no. 1349.

<sup>70</sup>G. Emlen Hall, "Land Litigation and the Idea of New Mexico Progress," in Ebright, *Spanish and Mexican Land Grants*, supra note 4 at 51, n. 12, citing *Recopilación*, 6-3-20.

<sup>71</sup>"a todo el comun de esta Republica, según más o menos cada uno entrego de paga por ellas." Report of *alcalde* Miera y Pacheco, Santa Ana, July 8, 1763. SANM I, no. 1349.

<sup>72</sup>The Cañada de Santa Clara grant was confirmed by the Court of Private Land Claims in 1894, but when finally surveyed in 1900, it was found to contain less than five hundred acres. NMLG-PLC, roll 34, case 17, frames 1396-1410, J. J. Bowden, "Private Land Claims in the Southwest," 6 vol. [L.L.M. thesis, Southern Methodist University, 1969] 3: 553-61.

reached Spanish settlement, and an additional amount of land was awarded to San Ildefonso in another direction where there was no conflict with Spanish settlement.<sup>73</sup> The compromise allowed the governor to give the pueblo the amount of land encompassed within four square leagues without having to evict any resident Spaniards. This solution to the ever-present problem of Spanish encroachment on Indian land was arrived at in much the same way as were water-rights disputes between the pueblos and the Spanish (i.e., available water was shared), and shows how flexibility was a hallmark of Spanish customary law.

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### CONCLUSION

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The decisions of governors Vélez Cachupín and Mendiñueta reveal New Mexico's legal system at the time as having a greater degree of formality in matters of procedure than in substantive law. The jurisdiction of the *alcaldes* and the governor to decide disputes, with occasional appeals to the *audiencia*, was clear. Not always clear, however, was when each had the authority and responsibility to act. Part of the problem lay in the dual nature of the offices of governor and *alcalde* under the Spanish system, for these officials acted in both judicial and legislative capacities, adding to the political pressure that could be brought to bear on them. The governors themselves had wide discretion as to whether to take a case directly or refer it to the *alcalde*. It should come as no surprise, then, that policy matters often entered into the decisions of these officials. This was in accord with the Spanish judicial tradition, in which jurisprudence was the primary means of asserting royal political power.<sup>74</sup> But, since governmental policies were themselves sometimes inconsistent, especially as regards Indian land and water rights, an understanding of the decisions in these lawsuits is essential to an understanding of Hispanic law.

It has been suggested that Spanish laws, and the policies be-

<sup>73</sup>SANMI I, no. 1351.

<sup>74</sup>Javier Malagón-Barcelo, "The Role of the Letrado in the Colonization of America," *The Americas* 18 (1961-62), 1-17; J. H. Parry, *The Spanish Theory of Empire in the Sixteenth Century* (Cambridge, England, 1940), 2. Constance Ann Carter, "Law and Society in Colonial Mexico: Audiencia Judges in Mexican Society from the Tello de Sandoval Visita General, 1543-1547" (Ph.D. diss., Columbia University, 1971), 9-10. In Mexico City, the *oidores* (judges) who sat on the *audiencia* (the highest court in the viceroyalty of New Spain) had legislative as well as judicial functions. They advised the governor about royal policy and legislation and sometimes served as a temporary government.

hind them, were intentionally inconsistent and conflicting, giving rise to the wide gap between the law and its observance. The formula "*obedescio pero no cumplo*" provided a certain flexibility to the administration of justice so that a local official could bend the law to meet local conditions, but he did so at his peril.<sup>75</sup> In Spanish legal theory, all legislation sprang from the king as a permanent expression of justice. Therefore, the monarch could not lightly repeal laws and risk the perception of being arbitrary. Instead, new laws were enacted and old contradictory ones allowed to stand. The resulting inconsistency was an attribute of the law utilized by lawyers in Castilian courts to delay the outcome and confuse the issues where this was in their clients' interest.<sup>76</sup>

By following customary law, statutory conflict was minimized, but other contradictions remained. The basic contradiction of Spain's land policy in New Spain was this: If colonization were to be encouraged among Spanish settlers, it had to be made profitable. This implied some degree of exploitation of native labor, yet the royal laws protected the Indians against such exploitation and against encroachment upon their lands. In these New Mexico lawsuits, a similar conflict existed between elite Spanish owners of large private grants and *mestizo* residents of these grants, or Pueblo Indians. The inconsistencies had to be resolved by governors Vélez Cachupín and Mendiñeta. Vélez Cachupín sometimes dealt with these seemingly irreconcilable pressures by referring the matter to a higher authority for an advisory opinion, while Mendiñeta often did the opposite, referring the case down to the local *alcalde* and avoiding a decision altogether.<sup>77</sup>

With conflicting laws governing these disputes, it is no wonder that specific laws were not cited by the two governors. In the few cases that were appealed to the *audiencia*, the appellate judges went out of their way to urge New Mexico's governors not to be too rigid in following the legal rules that did exist, but to decide cases using equitable principles applied with flexibil-

<sup>75</sup>"I obey but I do not execute." For a discussion of Spain's sometimes inconsistent policies regarding the Americas, see John Leddy Phelan, *The Kingdom of Quito in the Seventeenth Century: Bureaucratic Politics in the Spanish Empire* (Madison, 1967), 324-25. Colin M. MacLachlan, *Spain's Empire in the New World: The Role of Ideas in Institutional and Social Change* (Berkeley, 1988), 13, and John Leddy Phelan, "Authority and Flexibility in the Spanish Imperial Bureaucracy," *Administrative Science Quarterly* 5 (June 1960), 47-65.

<sup>76</sup>Richard L. Kagan, *Lawsuits and Litigants in Castile: 1500-1700* (Chapel Hill, 1981), 22-32, 48.

<sup>77</sup>SANM I, nos. 31 and 1351.

ity.<sup>78</sup> Thus, in New Mexico, equity, flexibility, and moderation were most often the general tests of what was legal and just. The following analysis of the decisions in these cases sharpens this notion of Hispanic law into more specific principles.<sup>79</sup> These principles are title, use or possession, need, government policy, and equity.<sup>80</sup>

In the El Paso case the title of the Suma Indians to their common lands was upheld over the custom of El Paso residents using those lands for wood-gathering. The El Pasoans had argued that the 1764 grant to the Sumas did not cover the *montes*, but Vélez Cachupín had assigned these woodlands to the Indians when he marked the boundary between El Paso and San Lorenzo at the time of this 1764 *visita*. He weighed the relative need of the two sides and found in favor of the Indians because they depended solely on their woodlands while the El Paso citizens had their own common lands. In addition, equity and government policy favored the Suma Indians because the governor himself had promised to protect them if they would resettle south of El Paso. Note also the shifting meanings of "custom" in this case. The El Pasoans cloaked their usage of the Indians' common woodlands under the mantle of custom because of the perceived power of this concept in the ultimate decision,<sup>81</sup> but part of the governor's job in deciding the case was to determine whether this usage was in fact a custom entitled to protection. After all, it had been "the custom" of the Spanish since their arrival in New Mexico to exploit Pueblo Indians in the face of royal laws protecting the natives. But this decision by Vélez Cachupín established the law, not the usage of the El Paso residents.<sup>82</sup>

Title again prevailed over usage in the lawsuit concerning

<sup>78</sup>See, for example, the opinion of *lic.* Miguel de Olachea in the contested estate proceeding Julián Rael de Aguilar, et al., v. Melchora de Sandoval and Antonio de Ulibarrí, Presidio of El Paso, May 1, 1751, SANM I, no. 31.

<sup>79</sup>Reich, "Mission Revival Jurisprudence," *supra* note 1 at 871 et seq.; Ebright, *Land Grants and Lawsuits*, *supra* note 2.

<sup>80</sup>These principles are similar, but not identical, to those found in Michael Meyer's recent book *Water in the Hispanic Southwest*, *supra* note 2 at 146-64, which lists seven factors involved in the adjudication of water rights disputes: just title, prior use, need, injury to third party, intent, legal right, and equity and the common good.

<sup>81</sup>The El Paso residents claimed to have enjoyed the use, custom, and easement (*uso, costumbre y servidumbre*) of taking wood, timber, and willows for their dam. Juan Antonio García Noriega, José Manuel Telles Jirón, and Francisco García Carabajal to *alcalde* Pedro de la Fuente. El Paso, August 1765. SANM I, no. 691.

<sup>82</sup>SANM I, no. 691; SANM I, no. 1350.

the common lands of the Alameda grant. There the offending party provided no justification for his conduct, other than the fact that the Sandia priest was on his side. Title, need, and equity were all on the side of the Alameda grant. The usage of Montaña was not based on any document and he presumably could find other places to graze his flocks, as he later did when he joined the San Fernando grant. His unauthorized usage of the Alameda common lands, obstruction of the *acequia*, and building of corrals and other structures without permission were serious offenses that swung the balance of equity in favor of the Alameda community.<sup>83</sup>

In the case involving the San Fernando grant, title again prevailed over usage, this time by another land grant rather than an individual. The San Fernando residents had been granted title to land for pasture, to be used by them only and not in common with others. The Atrisco residents had neither title nor equity on their side. They were able to obtain their own grant a few years later, however, and the two grants continued to have disputes.<sup>84</sup>

In the next two lawsuits the claimants did not have title documents, but their claims were recognized based on usage, need, and equity. The dispute between Iturbietta and Gallegos involved land within the Belén grant and the classic conflict between original grantees claiming title versus those residents who had helped the grantees settle the land. Gallegos had no deed to the tract because it was unallotted irrigable common land used primarily by the *genízaro* population of Belén. Equity dictated a decision in favor of Gallegos because he had paid for and improved the land and was trying to farm it. Government policy also favored him since he was presumably one of the settlers who were helping to defend the land from attack by Plains Indian raiding parties. Vélez Cachupín seems to have realized that if Spanish settlements were to persist in the face of Indian attack, the settlers who were defending their lands had to have their property rights protected.<sup>85</sup>

In the second case vindicating possessory rights, Juan Roque Gallegos had his rights upheld by Governor Mendingueta against the claim of the heirs of Cristobal Gallegos. Cristobal had promised Roque a place to build his house, some farm land, and grazing rights on Cristobal's land, but apparently had never given Roque a deed. When Cristobal's children tried to renege

<sup>83</sup>SANM I, no. 29.

<sup>84</sup>Decree of Vélez Cachupín, Santa Fe, July 17, 1766. SANM I, no. 111.

<sup>85</sup>Order of Vélez Cachupín, SANM I, no. 362.

on the deal after Cristobal's death, the governor upheld Roque's rights, based upon his long period of possession.<sup>86</sup> Possession was more important than title here, but equity and government policy must have also played a part. The basis of Cristobal's promise was to induce Roque to help him defend his land against Apache attack—something that Mendingueta had encouraged in his official correspondence with the viceroy.

In the next case, the primary issue was the right of an Indian pueblo to acquire title to land by purchase from Spaniards. Before the 1753 purchase by San Felipe Pueblo, it had been held on one occasion that Pueblo Indians could not purchase land from Spaniards, while other Spanish-to-Indian purchases were routinely approved.<sup>87</sup> Faced with this confused situation, Governor Vélez Cachupín held that San Felipe Pueblo did have the right to purchase land from Spaniards because the pueblo badly needed irrigable land to survive. Thus need became the paramount issue. A different result was reached partly because of a government policy during Vélez Cachupín's administration that encouraged land acquisition by those willing to defend it from Apache and Comanche attack, whether those defenders were Spaniards, pueblos, or *genízaros*. Once the governor decided to intervene, his main concern was to establish a fair procedure involving an appraisal of the land to ensure that the pueblo would not be overcharged. He stated that the appointment of two appraisers and other procedural safeguards should provide a model for future cases.

This type of analysis illustrates what a Spanish official in New Mexico would have done when faced with a similar legal situation at the time. As more studies are published analyzing lawsuits in the frontier provinces of northern New Spain, it will become easier to put ourselves into the shoes of the official responsible for rendering decisions in legal disputes.<sup>88</sup> When today's courts do this consistently, mistaken applications of Hispanic law, as were found in *U.S. v. Sandoval*, are less likely

<sup>86</sup>Statements of Mariano, María Antonia, and Cristobal Gallegos, Jr., Santa Fe, May 21, 1770. SANMI I, no. 368.

<sup>87</sup>In 1734 a proposed sale of land at Bernalillo by Baltasar Romero to Santa Ana Pueblo was annulled by Governor Cruzat y Góngora because "it would prejudice the settlement [of Bernalillo] and is contrary to the royal laws which protect grants made to Spaniards." Romero was told that if he still wanted to sell he must sell to a Spaniard, not to an Indian or Indian community. Decree of Governor Cruzat y Góngora, Santa Fe, March 1, 1734. SANMI I, no. 1345.

<sup>88</sup>For example, Charles R. Cutter's book, *The Legal Culture of Northern New Spain, 1700-1810* (Albuquerque, 1995), examines six hundred civil and criminal cases from New Mexico and Texas and finds that "officials exhibited flexibility and sensitivity to frontier conditions, and their rulings generally conformed to community expectations of justice," p. 227.



to creep into their decisions. In fact, some of the cases studied here show why the *Sandoval* decision, holding that the common lands of community grants were owned by the Spanish government, was wrong.<sup>89</sup>

When Vélez Cachupín told the sheep owners of Atrisco that they could not graze on the common lands of the San Fernando grant without the grantees' permission, he made it clear that those common lands were owned by the land grant, not by the Spanish government. No attempt was made in *U.S. v. Sandoval* to examine this type of lawsuit for the light it might shed on the issue. If such an attempt had been made, the case of Calletano Torres of Sabinal might also have been discovered. Torres was a member of a faction attempting to settle Sabinal on the Belén grant, and he seems to have done well once he finally received his allotment there. When he died, his use-rights in the Belén grant's common lands were listed as an asset and valued in his estate. In 1780 his seven-hundred-*vara* tract of farmland under the main ditch was appraised at seven hundred pesos, and his "right as a settler [to use the common lands]" was appraised at two hundred pesos.<sup>90</sup> This indicates that the common lands were owned by members of the community, not by the government, as held in *Sandoval*. For, if the Spanish government owned the common lands of the Belén grant, the right to graze there would be shared equally by all residents of the area and would have no value as an asset in the estate of Calletano Torres.

In many of these decisions, Vélez Cachupín recognized the rights of Pueblo Indians and the less powerful members of society to a degree not found in New Mexico up to the mid-1700s. Although not as assiduous in protecting the natives and underprivileged classes, Mendinueta generally followed the direction set by Vélez Cachupín, confirming earlier rulings in important cases.<sup>91</sup>

These lawsuits demonstrate that New Mexico's Hispanic legal system was like the one described for California, "a formalistic administration of law . . . based on ethical or practical judgements rather than a fixed 'rational' set of rules."<sup>92</sup> The key word here is "fixed." Analysis of these cases shows that a set of rules did exist, but that they arose out of the tension be-

<sup>89</sup>*U.S. v. Sandoval*, 167 U.S. 278 (1897). The results of litigation in Hispanic New Mexico are a better index to what the law was in New Mexico than a statement by an Anglo legal commentator, as was used in the *Sandoval* case.

<sup>90</sup>"*la acucion de poblador*." Inventory and appraisal of the estate of Calletano Torres. San Antonio de Sabinal, April 25, 1780, SANM I, no. 997.

<sup>91</sup>See, for example, *Pueblo of Cochiti v. Romero*, SANM I, no. 1352.

<sup>92</sup>Langum, "Legal System of Spanish California," *supra* note 13 at 6.

tween flexibility and predictability. The predictability came from the edifice of Spanish jurisprudence built upon Roman foundations, of which these governors seem to have had some awareness. The flexibility came from the prevalence of custom, which allowed the governors to impose the stamp of their personalities and politics on their decisions. This dynamic counterpoint has existed throughout the history of the divergent strands of jurisprudence we call civil law and common law.<sup>93</sup> Custom played a large role in civil-law countries because of the need to interpret ambiguous statutes with accepted rules of customary law. In New Mexico, the lack of trained lawyers and law books magnified the part played by custom in the legal system to such an extent that government officials increasingly referred to "custom with the force of law" in New Mexico's Hispanic lawsuits.<sup>94</sup>

<sup>93</sup>The difference between civil and common law has increasingly narrowed, so that today decision-making under the two systems is often quite similar. Woodfin L. Butte, "Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere," in Dainow, *Role of Judicial Decisions*, supra note 15 at 57-67. Butte (pp. 54-55) likens the difference between civil law (a single, complete, coherent, and logical system of statutory law) and common law (a process of deciding cases with the aid of judicial precedent) as the difference between how a professor would teach each system using a set of building blocks. The civil-law professor would carefully construct an edifice before the eyes and minds of the students, showing how neatly and precisely the blocks are fitted together. The common-law professor, by contrast, would gleefully destroy any idea that such an edifice is possible by showing that the rule learned from the last case would not necessarily apply to the new one.

<sup>94</sup>See, for example, SANMI I, no. 1381 [Isleta argued that "custom with force of law" established its ownership of land at Ojo de la Cabra as common grazing land].

# THE SIX COMPANIES AND THE GEARY ACT: A CASE STUDY IN NINETEENTH-CENTURY CIVIL DISOBEDIENCE AND CIVIL RIGHTS LITIGATION

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ELLEN D. KATZ

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**I**n 1892, the Chinese Consolidated Benevolent Association in San Francisco urged the resident Chinese community to ignore a federal law. The United States Congress had just passed the Geary Act, which required all Chinese laborers living in the United States to register with the collector of internal revenue. Under the act, those who did not register would face arrest and likely deportation.<sup>1</sup> The Benevolent Association, also known as the Six Companies,<sup>2</sup> claimed that the act violated both the constitutional right to due process and treaty

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<sup>1</sup>Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892).

<sup>2</sup>The association was widely known as the Six Companies, but the actual number of district associations, called *hui kuan* or "companies," forming the whole organization varied over time. The association was initially composed of five *hui kuan*; it expanded and reorganized with the arrival of new groups and reformulation of established ones. See William Hoy, *The Chinese Six Companies* (San Francisco, 1942), 1-10 [hereafter cited as Hoy, *Chinese Six Companies*]; Victor G. Nee and Brett de Bary Nee, *Longtime Californ': A Documentary Study of an American Chinatown* (Palo Alto, 1973), 272-77 [hereafter cited as Nee and Nee, *Longtime Californ'*]; Stanford M. Lyman, "Conflict and the Web of Group Affiliation in San Francisco's Chinatown, 1850-1910," *Pacific Historical Review* 43 (1974), 473, 480 n.28 [hereafter cited as Lyman, "Conflict and the Web"]. See also *infra*, notes 14-26, and accompanying text.

obligations with China. To combat the legislation, the association enlisted the assistance of the Chinese Legation to exert diplomatic pressure, retained leading attorneys to bring a test case to the Supreme Court, and—perhaps most dramatically—called on the resident Chinese community to risk deportation and participate in a massive campaign of civil disobedience.

By opposing the Geary Act, the leaders of the Six Companies took a calculated gamble. They hoped that the nonregistration campaign, combined with diplomatic and legal action, would prompt the repeal or the judicial invalidation of the act. In retrospect, the association made a disastrous miscalculation. After thousands of Chinese residents had ignored the law and the registration period had expired, the Supreme Court upheld the act as constitutional in *Fong Yue Ting v. United States*.<sup>3</sup> Dozens of Chinese laborers were placed in deportation proceedings, Chinese residents in San Francisco challenged the authority of the Six Companies, and the association's president, Chun Ti Chu, lost his position. While Congress subsequently provided some relief by extending the registration period,<sup>4</sup> the Geary Act remained law.

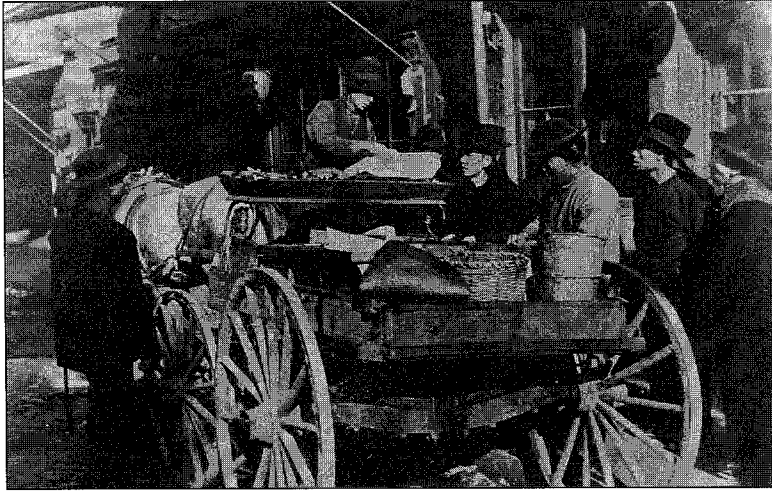
The leaders of the Six Companies and the thousands of Chinese laborers who ignored the act had failed to anticipate the Supreme Court's decision in *Fong Yue Ting*. During the decade before the congressional passage of the act, thousands of Chinese aliens, under the leadership of the Six Companies, had petitioned for writs of habeas corpus in the federal courts on the West Coast, and, with a remarkable degree of success, proved why otherwise valid restriction laws did not apply to them.<sup>5</sup> Several federal judges overlooked their own inclinations and public clamor to uphold treaty obligations and to protect the rights of Chinese litigants. As a result, the Chinese immigrant community came to view the federal courts as their reliable, if reluctant, allies.

In 1892, the leaders of the Six Companies anticipated similar support. They expected the Supreme Court to invalidate what

<sup>3</sup>149 U.S. 698 (1893).

<sup>4</sup>Act of November 3, 1893, ch. 14, 28 Stat. 7 (1893).

<sup>5</sup>During the late nineteenth century, both the federal district court and the circuit court in northern California functioned as federal trial courts. Chinese immigrants could petition for writs of habeas corpus in either court, although most went before the district court. When the circuit court decided appeals from the district court, it consisted of both the regularly appointed circuit judge and the U.S. Supreme Court justice responsible for the circuit. See Lucy Elizabeth Sayler, "Guarding the 'White Man's Frontier': Courts, Politics, and the Regulation of Immigration, 1891-1924" (Ph.D. diss., University of California, Berkeley, 1989), xx, 49 n.114 [hereafter cited as Sayler, "Guarding the 'White Man's Frontier'"].



The leaders of the Six Companies were merchants in the Chinese immigrant community generally regarded as men of education and ability. (Photograph by Arnold Genthe, Library of Congress)

they believed to be a blatant abrogation of legal principles that the federal courts had repeatedly upheld. They argued that Congress had no authority to order the mandatory registration of a resident immigrant population protected both by treaty obligations and the Constitution of the United States. They erred not because they believed in the redemptive power of the legal process, but, rather, because they failed to appreciate the extent to which immigration law itself had changed by 1892. The very success of Chinese litigants during the 1880s had prompted proponents of Chinese exclusion to secure more stringent legislation. As Congress eliminated many of the exemptions that had enabled Chinese aliens to gain entry, the federal courts handed down decisions less favorable to Chinese petitioners. By 1889, the Supreme Court had recognized congressional power to regulate immigration as an incident of sovereignty,<sup>6</sup> an expansive principle that the Court would use to uphold the Geary Act four years later.

Moreover, the Six Companies' campaign proved unsuccessful because the association failed to employ the strategy that had enabled Chinese litigants to circumvent much of the restriction legislation during the 1880s. Federal judges were committed to uphold the law, and ruled favorably in cases brought by Chinese petitioners because existing legislation and judicial

<sup>6</sup>*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

precedents mandated such results. Chinese litigants succeeded largely because they stressed that their claims were consistent with, but exempt from, the congressional legislation. Their strategy was to show why the exclusion laws did not apply to a particular petitioner.

By contrast, the association's campaign against the Geary Act sought the direct invalidation of federal legislation. Leaders of the Six Companies may have believed that the "consistent-exemption" strategy would be of little use in challenging this particular law, and thus eschewed the case-by-case approach. As a result, they abandoned the reason for which federal judges had previously ruled so favorably; in its place, they adopted a tactic that had failed before,<sup>7</sup> and held little promise of success.

Even so, the association's campaign against the act nearly succeeded. The Six Companies convinced more than eighty-five thousand Chinese laborers nationwide—87 percent of those targeted by the act—to ignore the congressional order and risk deportation.<sup>8</sup> The association's legal and diplomatic efforts brought its test case to the highest United States court only five days after the registration period had ended, and its attorneys persuaded three Supreme Court justices that the act was unconstitutional.<sup>9</sup> While a majority of the Court upheld the legislation, Congress subsequently enacted the McCreary Amendment, extending the registration period and thereby preventing massive deportations. Although the registration requirement remained the law, the Six Companies continued to challenge its provisions on a case-by-case basis, achieving thereby a modest success.

Indeed, it appears likely that the leaders of the Six Companies anticipated the McCreary legislation when they first promoted civil disobedience on a national scale. While they sought judicial invalidation of the Geary Act, they knew that the non-registration campaign would make the act, even if it were constitutionally valid, an administrative nightmare impossible to implement. Thus, while Congress would not enact legislation protecting the rights of Chinese laborers, the association knew that the prospect of deporting thousands of Chinese aliens presented an administrative and financial burden that would prompt congressional action. Its error was its failure to recognize how newly established legal principles would bar ultimate victory.

<sup>7</sup>Ibid.; see also *infra*, notes 101-4, and accompanying text.

<sup>8</sup>Saylor, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 114.

<sup>9</sup>149 U.S. at 734. Chief Justice Fuller and Justices Field and Brewer dissented. Justice Harlan did not participate in the decision.

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ARRIVAL, GROWTH, AND RESISTANCE

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During most of the nineteenth century the federal government had little interest in restricting immigration, and left the field free and unregulated.<sup>10</sup> As late as 1868, Congress endorsed the "the natural and inherent right" to expatriate<sup>11</sup> and "the inherent and inalienable right of man to change his home and allegiance."<sup>12</sup> Beginning in the late 1840s, Chinese immigrants took advantage of the open policy and began arriving in the United States in significant numbers. Most came to the West Coast and worked as miners, cooks, and laundrymen at mining camps. By the 1860s, many Chinese were laying tracks in the Sierra Nevada for the Central Pacific Railroad Company. With the end of the gold rush and the completion of the railroad, Chinese immigrants moved in greater numbers to cities like San Francisco and entered manufacturing and trade.<sup>13</sup>

The Chinese who settled in San Francisco and in other communities formed district associations known as *hui kuan*, the members of each of which spoke a common dialect, came from the same area in China, or belonged to the same ethnic group.<sup>14</sup> These associations functioned as benevolent societies similar

<sup>10</sup>For most of the century, the federal government became involved with immigration issues only when state and local enactments encroached on congressional authority to regulate interstate and foreign commerce. See, e.g., *Henderson v. Wickham*, *Commissioners of Immigration v. North German Lloyd*, 92 U.S.(2 Otto) 259 (1876), *Chy Lung v. Freeman*, 92 U.S. (2 Otto) 275 (1876), and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (invalidating state laws requiring ship masters to pay alien taxes for arriving passengers).

<sup>11</sup>An Act concerning the Rights of American citizens in Foreign States, ch. 249, 15 Stat. 223 (1868), quoted in Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny," *Harvard Law Review* 100 (1987), 853, 855 n.9 [hereafter cited as Henkin, "Constitution and United States Sovereignty"].

<sup>12</sup>Burlingame Treaty, 16 Stat. 739, T.S. no. 48 (July 28, 1868).

<sup>13</sup>In 1852, several thousand Chinese were living in California, but sources differ as to the precise number, with estimates ranging between twelve thousand and twenty-five thousand. The number of Chinese in the United States had risen to more than sixty-three thousand by 1870 and more than one hundred five thousand by 1880. Ninety-nine percent of this population lived on the West Coast. See Mary Roberts Coolidge, *Chinese Immigration* (1909; reprint, New York, 1969), 425, 501 [hereafter cited as Coolidge, *Chinese Immigration*]; Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (1939), 16-17 [hereafter cited as Sandmeyer, *Anti-Chinese Movement*]; Hudson Janisch, "The Chinese, the Courts and the Constitution: A Study of the Legal Issues Raised by Chinese Immigration to the United States, 1850-1902" (J.S.D. diss., University of Chicago, 1971), 3 [hereafter cited as Janisch, "The Chinese, the Courts and the Constitution"]; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 21.

<sup>14</sup>Lyman, "Conflict and the Web," supra note 2 at 479.

to those created by European immigrants on the East Coast. They helped members find employment, housing, and medical care, provided credit and loan services, and kept order within the community by setting forth rules governing behavior.<sup>15</sup>

In the late 1850s, the district associations in San Francisco founded the Chinese Consolidated Benevolent Association, a coordinating council that functioned as the unofficial government of the Chinese community and as its voice in dealings with government officials and the Euro-American population as a whole.<sup>16</sup> The leaders of the Six Companies were merchants in the Chinese immigrant community and were regarded, by even the most vitriolic critics of the association, as "men of education and ability."<sup>17</sup> Similar organizations, such as the Chinese Civil Rights League in New York, existed in other parts of the country, but none achieved the prominence and influence of the Six Companies. The association became, in the words of the historian Charles McClain, "unquestionably the most important organization in Chinese-American society in the 19th century."<sup>18</sup>

<sup>15</sup>Two other types of community organizations—the family associations and the secret societies—operated as benevolent societies. Family associations consisted of members who shared the same lineage or a common surname and assisted newcomers with the immigration process, housing, and employment. Secret societies, known as "tongs," also provided lodging, medical care, and dispute mediation. In China, these organizations were associated with subversive activities, political rebellions, and criminal activities. In the United States, the tongs operated underground businesses involved with gambling, opium distribution, and prostitution. At times, they challenged the district associations for leadership in the Chinese community. See Nee and Nee, *Longtime Californ'*, supra note 2 at 64-65; Shin-Shan Henry Tsai, *China and the Overseas Chinese in the United States, 1868-1911* [hereafter cited as Tsai, *China and the Overseas Chinese*] (Fayetteville, 1983), 34-38; Ivan Light, "From Vice District to Tourist Attraction: The Moral Career of American Chinatowns, 1880-1940," *Pacific Historical Review* 43 (1974), 367, 370-75 [hereafter cited as Light, "Vice District"]; Lyman, "Conflict and the Web," supra note 2 at 474-79; Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 93-94.

<sup>16</sup>Jack Chen, *The Chinese of America* (New York, 1980), 26-28 [hereafter cited as Chen, *Chinese of America*]; Hoy, *Chinese Six Companies*, supra note 2; Nee and Nee, *Longtime Californ'*, supra note 2 at 67-69; Lyman, "Conflict and the Web," supra note 2 at 480, 484-90; Fong Kum Ngon, "The Chinese Six Companies," *Overland Monthly* (May 1894), 518 [hereafter cited as Fong, "Chinese Six Companies"].

<sup>17</sup>Richard Hay Drayton, "The Chinese Six Companies," *California Illustrated Magazine* (August 4, 1893), 472, 473 [hereafter cited as Drayton, "Chinese Six Companies"]. In China, the merchant class did not hold high social status, but, as a result of the absence of gentry and a scholar class in the Chinese community in the United States, merchants assumed leadership roles. Chen, *Chinese Americans*, supra note 16 at 27-28.

<sup>18</sup>Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870," *California Law Review* 72



The individual *hui kuan* and then the Six Companies led the Chinese community in challenging the numerous discriminatory practices Chinese immigrants faced virtually from their arrival in the United States.<sup>19</sup> While the federal government sanctioned unrestricted immigration, local and state governments, particularly on the West Coast, implemented policies meant to restrict the arrival of new Chinese immigrants and limit the rights of those already in the country. They enacted entry, license, and occupation taxes, denied Chinese aliens the franchise, and prevented Chinese children from attending public schools with Euro-American students.<sup>20</sup>

The district associations resisted these practices. They retained an attorney to represent Chinese interests,<sup>21</sup> objected in the popular press to anti-Chinese rhetoric,<sup>22</sup> and lobbied against

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(1984), 529, 540-41 n.57 [hereafter cited as McClain, "Chinese Struggle for Civil Rights"]. See also Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1870* (Cambridge, Mass., 1964), 77-100 [hereafter cited as Barth, *Bitter Strength*]; Chen, "Chinese of America," supra note 16 at 27-28; Nee and Nee, *Longtime Californ*, supra note 2 at 65-67.

<sup>19</sup>Anti-Chinese sentiment on the West Coast actually predated the arrival of Chinese immigrants. American traders, diplomats, and missionaries, among others, viewed the Chinese as being strangely dressed, superstitious, dishonest, and amoral, and as participating in acts of sexual deviance and other aberrational behaviors. See Stuart Creighton Miller, *The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882* (Berkeley, 1969), 83-94 [hereafter cited as Miller, *Unwelcome Immigrant*].

<sup>20</sup>Thomas Alexander Aleinikoff and David A. Martin, *Immigration: Process and Policy*, 2d ed. (St. Paul, 1991), 3 [hereafter cited as Aleinikoff and Martin, *Immigration*].

<sup>21</sup>Within months of their arrival in San Francisco, leaders of the Chinese community approached Selim Woodworth and asked him to act as their "adviser and arbitrator." Woodworth accepted the offer. *Daily Alta California*, December 10, 1849. On April 25, 1854, the *Daily Alta California* reported that "The Chinese fee the lawyers better than any other class of citizens." Lucile Eaves wrote that the Chinese "had learned at this early date the advantages of employing an able lawyer to present their side of the situation." Idem, *A History of California Labor Legislation* (Berkeley, 1910), 108 [hereafter cited as Eaves, *California Labor Legislation*]; see also McClain, "Chinese Struggle for Civil Rights," supra note 18 at 541 n.58.

<sup>22</sup>An example of this occurred in April 1852, when California's governor, John Bigler, wanted to impose state taxes to discourage Chinese immigration and to exclude Chinese immigrants from the state's mines, from its juries, and from giving testimony in court. Norman Asing, a Chinese merchant in San Francisco, responded by publishing an open letter criticizing the governor's remarks, saying that California lacked the authority to restrict Chinese immigration and arguing that Chinese aliens were entitled to American citizenship. Asing told Bigler that "The declaration of your independence, and all the acts of your government, your people, and your history, are against you." Asing to His Excellency Gov. Bigler, *Daily Alta California*, May 5, 1852. See McClain, "Chinese Struggle for Civil Rights," supra note 18 at 538; Lyman, "Conflict and the Web," supra note 2 at 481.

discriminatory legislation.<sup>23</sup> While achieving mixed success,<sup>24</sup> the associations' efforts underscore the point that, contrary to contemporaneous Euro-American perceptions<sup>25</sup> and many historical accounts,<sup>26</sup> Chinese immigrants knew their legal rights, and understood how to use legal and political processes to challenge discriminatory practices.

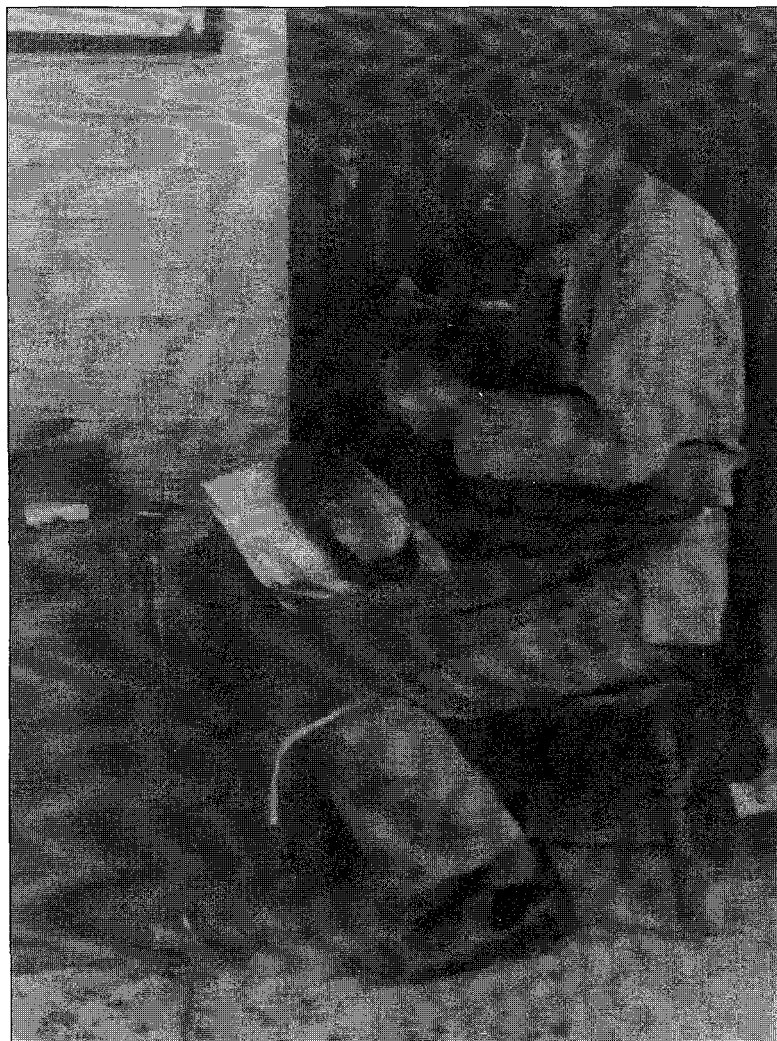
However, opposition to their efforts grew steadily, as did the number of people seeking to restrict Chinese immigration. The exhaustion of the mines, the completion of the railroad, and

<sup>23</sup>In 1853, for example, the California legislature considered a number of bills that threatened to limit and even bar Chinese access to California mines. The leaders of the district association met with legislators and pointed out that addressing Chinese grievances would increase trade between the United States and China. The committee responded favorably and called for the rejection of the most onerous proposals. See McClain, "Chinese Struggle for Civil Rights," *supra* note 18 at 540-43.

<sup>24</sup>For instance, while the district associations prevented enactment of mining restrictions in 1853, the legislature subsequently passed measures that limited Chinese access to the mines. See McClain, "Chinese Struggle for Civil Rights," *supra* note 18 at 543.

<sup>25</sup>From the popular press to Supreme Court justices, much of the Euro-American populace viewed the Chinese during this period as transient, unassimilable people who neither understood nor cared about American political and legal institutions. The *Daily Alta California* for July 24, 1869, reported that the typical Chinese immigrant "knows and cares nothing more of the laws and language of the people among whom he lives than will suffice to keep him out of trouble." A *New York Times* commentator warned that the Chinese had "no knowledge or appreciation of free institutions or constitutional liberty. . . . We should be prepared to bid farewell to republicanism and democracy." September 3, 1865. In 1884, Justice Field wrote, "Our institutions have made no impression on [the Chinese]." *Chew Heong v. United States*, 112 U.S. 536, 566 (Field, J., dissenting).

<sup>26</sup>Many historical accounts of the Chinese during this period depict a community unlikely to sustain a meaningful challenge to federal legislation. These accounts say that the Chinese immigrant community was characterized by corrupt and inept leadership, and passive and indifferent masses. They emphasize that, unlike all other immigrant groups to the United States, the Chinese did not intend to settle permanently in this country, but, rather, sought to make money and return to China. As a result, the argument goes, Chinese aliens had no interest in understanding American political and legal institutions and remained indifferent to them even as they faced increasingly severe legal restrictions. See, for example, Barth, *Bitter Strength*, *supra* note 18 at 1-8. This portrait is partially the result of the historic emphasis on Euro-American reaction to Chinese immigration rather than on the Chinese and their perceptions and experiences. As Roger Daniels wrote, "Other immigrant groups were celebrated for what they had accomplished; Orientals were important for what was done to them." *Idem*, "Westerners from the East: Oriental Immigrants Reappraised," *Pacific Historical Review* 35 (1966), 373, 375. The result, according to Stanford Lyman, was a "one-sided image of victimization unrelieved by any analytical accounts of the organizational activity or associational creativity of the Asian victims." *Idem*, "Conflict and the Web," *supra* note 2 at 473. See also Miller, *Unwelcome Immigrant*, *supra* note 19 at 169.



The Six Companies urged Chinese laborers like this cobbler to ignore the Geary Act's registration requirement. (Photograph by Arnold Genthe, Collection of The Oakland Museum of California, Gift of Anonymous Donor)

the growing population of Euro-American settlers on the West Coast substantially increased anti-Chinese agitation among Euro-American laborers. The panic of 1873 and depression of 1877 further galvanized the movement. Restrictionists like Dennis Kearney of the Workingman's Party demanded the elimination of the Chinese presence in California. The cry went up, "The Chinese Must Go!"<sup>27</sup>

As the Six Companies resisted these efforts, it found the federal government an increasingly dependable ally. The Reconstruction amendments had invalidated many anti-Chinese practices,<sup>28</sup> and constitutional principles of federalism as well as U.S. treaty obligations functioned to limit restrictionist efforts at the state and local level.<sup>29</sup> The 1868 Burlingame Treaty between the United States and China recognized "the mutual advantage of free migration and emigration of their citizens." It also guaranteed Chinese citizens in the United States all the

<sup>27</sup>See Coolidge, *Chinese Immigration*, supra note 13 at 150; Eaves, *California Labor Legislation*, supra note 21 at 136-50; Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920* (Berkeley, 1971), 154-77.

<sup>28</sup>Much Reconstruction legislation served to protect Chinese immigrants from discriminatory practices. See, e.g., the Voting Rights Act of 1870, 16 Stat. 144, §16 (guaranteeing to "all persons" the "same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of all persons and property as is enjoyed by white citizens"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the equal-protection clause of the Fourteenth Amendment protects Chinese immigrants from the discriminatory enforcement of a San Francisco ordinance regulating laundries); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882) (invalidating as an interference with the right to labor a city ordinance that required laundry owners to obtain signatures from twelve neighbors before the issuance of an operation permit); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (invalidating the provision of the state constitution prohibiting employment of Chinese immigrants in public works projects); *How Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (no. 6546) (invalidating the San Francisco "Queue Ordinance" that mandated maximum hair length for all city prisoners). But see *Barbier v. Connolly*, 113 U.S. 27 (1885), and *Song Hing v. Crowley*, 113 U.S. 703 (1885) (upholding as a legitimate exercise of the police power a city ordinance prohibiting the operation of laundries at night); *In re Wong Yung Quoy*, 2 F. 624 (C.C.D. Cal. 1880) (upholding burial regulation notwithstanding its disproportionate burden on Chinese immigrants). See also *Runyon v. McCrary*, 427 U.S. 160, 195-201 (1976) (White, J., dissenting); Aleinikoff and Martin, *Immigration*, supra note 20 at 3.

<sup>29</sup>*Henderson v. Wickham*, 92 U.S. (Otto) 259 (1876); *Chy Lung v. Freeman*, 92 U.S. (Otto) 275 (1876); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (no. 102) (invalidating as discriminatory the California statute denying entry to disabled, unaccompanied, or "lewd" immigrants who arrived by vessel). See also McClain, "Chinese Struggle for Civil Rights," supra note 18 at 545; Linda C.A. Przybyszewski, "Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit," *Western Legal History* 1 (1988), 23, 29 [hereafter cited as Przybyszewski, "Sawyer and the Chinese"].

"privileges, immunities and exemptions in respect to travel and residence" that the United States extended to citizens "of the most favored nation."<sup>30</sup>

In 1874, Justice Stephen J. Field instructed those seeking to restrict Chinese immigrants that their efforts at the state and local level were destined to fail: "Recourse must be had to the Federal government, where the whole power over this subject lies."<sup>31</sup> The restrictionists followed Field's advice, and applied increasing pressure on Congress to change the policy of open immigration, characterizing Chinese immigrants as deviant and criminal. In 1875 Congress responded to the growing xenophobia by enacting legislation limiting immigration. The statute prohibited the entry of criminals, prostitutes, idiots, lunatics, convicts, and "persons likely to become a public charge."<sup>32</sup>

The restrictionists believed the legislation did not go far enough, and sought the express exclusion of Chinese immigrants. In 1876, both the Democrat and Republican parties included provisions regarding "Mongolian immigration" in their platforms for the presidential election. Hoping to attract Californian voters, the Republicans called for a congressional investigation into the effects of Chinese immigration and a modification of the Burlingame Treaty.<sup>33</sup> The Democrats recommended outright exclusion.<sup>34</sup> That same year, a joint congressional investigation into the effects of Chinese immigration recommended exclusion.<sup>35</sup> Anti-Chinese demonstrations in

<sup>30</sup>Burlingame Treaty, 16 Stat. 739.

<sup>31</sup>*In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (no. 102).

<sup>32</sup>Act of March 3, 1875, ch. 141, 18 Stat. 477.

<sup>33</sup>The Republican party was divided on the issue of Chinese exclusion. Northern and eastern Republicans, including Hannibal Hamlin, Lincoln's first vice-president, opposed exclusion as being racist and contrary to America's liberal traditions. Western Republicans, including the California senator Aaron Sargent, led the fight for restrictive legislation. As a result, Rutherford B. Hayes, as the Republican candidate, avoided the issue during the campaign. See Coolidge, *Chinese Immigration*, supra note 13 at 111; Gary Pennanen, "Public Opinion and the Chinese Question, 1876-1879," *Ohio History* 77 (1968), 139, 141.

<sup>34</sup>Coolidge, *Chinese Immigration*, supra note 13 at 111.

<sup>35</sup>This recommendation was based on the report submitted by Senator Aaron Sargent of California, yet much of the testimony during the hearings supported continued Chinese immigration. Oliver Morton of Indiana, who had originally headed the investigation but died before its completion, believed the investigation failed to prove that California had suffered either morally or economically from the presence of the Chinese, and in fact indicated that the state had benefited from their presence. Sargent, who took over the investigation at Morton's death, submitted a report based on the same testimony that called for immigration restriction. Coolidge, *Chinese Immigration*, supra note 13 at 96-107, 132-33; Eaves, *California Labor Legislation*, supra note 21 at 163-66.

San Francisco and petitions from the California legislature buttressed the joint congressional committee's findings.<sup>36</sup>

The Six Companies challenged the movement toward exclusion. In 1876, the association called on the president for protection, stating, "Our people in this country . . . have been peaceable, law-abiding, and industrious. . . . While benefitting themselves with the honest reward of their daily toil, they have . . . left all the results of their industry to enrich the state."<sup>37</sup> The following year, the association called on congressional leaders to uphold U.S. treaty obligations by protecting Chinese immigrants from violence and rejecting restrictionist proposals.<sup>38</sup> Their efforts were to no avail. To federal legislators, the demands of Euro-American voters proved far more persuasive than the concerns of a disenfranchised immigrant group.<sup>39</sup>

However, while congressional support for restricting immigration grew, the Burlingame Treaty remained an obstacle to any legislative effort. Customs Inspector J. Thomas Scharf later wrote of the treaty, "The declaration concerning voluntary immigration was unfortunate in tying the hands of our Government so that it could not freely legislate against an invasion coming under the guise of a voluntary immigration."<sup>40</sup> In 1879, when Congress passed a bill that prohibited any ship from bringing more than fifteen Chinese immigrants to the United States in any single voyage, President Hayes vetoed the act as violating the Burlingame Treaty.<sup>41</sup>

In 1880, Congress responded by authorizing a diplomatic trip to China to renegotiate the 1868 treaty. The revised treaty permitted the United States "to regulate, limit or suspend" but not "absolutely prohibit" the immigration of Chinese laborers when U.S. officials believed such immigration threatened the country's interests or its "good order." Still, the treaty protected the right of Chinese laborers already in the United States "to go and come of their free will and accord." It also

<sup>36</sup>Eaves, *California Labor Legislation*, supra note 21 at 148-50.

<sup>37</sup>Chen, "Chinese of America," supra note 17 at 142.

<sup>38</sup>Lyman, "Conflict and the Web," supra note 2 at 481.

<sup>39</sup>Chinese immigrants were denied the right to become naturalized and thus could not vote. See infra, notes 192-97, and accompanying text.

<sup>40</sup>J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *North American Review* 166 (1898) 85, 87.

<sup>41</sup>*Cong. Rec.*, 1879, 45, 2275-76. The Yale College faculty had sent a petition to President Hayes urging him to veto the bill. The former secretary of the U.S. Legation to Peking, S. Wells Williams, who was then professor of Chinese history and language, had coordinated this response. Tsai, *China and the Overseas Chinese*, supra note 15 at 47. See also Coolidge, *Chinese Immigration*, supra note 13 at 136-39, 150; Eaves, *California Labor Legislation*, supra note 21 at 164-71.

reaffirmed the United States' commitment to protect Chinese immigrants from "ill treatment at the hands of any other person" and "to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation."<sup>42</sup>

Within a year of ratification, anti-Chinese agitation led Congress to conclude that the continued immigration of Chinese laborers "endangers the good order of certain localities." Pursuant to the 1880 treaty, it passed legislation that suspended the immigration of Chinese laborers for ten years.<sup>43</sup> It authorized the collector of customs at each port, under the supervision of the secretary of the treasury, to decide whether to admit or exclude Chinese aliens seeking entry. The legislation provided for a judicial evaluation of the status of Chinese laborers suspected of being in the United States illegally, and mandated the expulsion of those laborers found to be in the country unlawfully. Attorneys for the United States would represent the government in all litigation involving Chinese exclusion.<sup>44</sup>

Because the 1880 treaty had protected the right of Chinese laborers in the United States "to go and come of their free will and accord," the 1882 act exempted from its provisions Chinese laborers in the United States since the signing of the 1880 treaty. In order to protect their mobility, the act established an identification system to distinguish these laborers from new immigrants. When a Chinese laborer in the United States wanted to leave the country, the collector of customs would issue a "return" certificate that enabled the laborer to reenter the United States. The legislation also called on the Chinese government to issue what came to be known as Canton certificates to Chinese merchants and other non-laborers in the United States. These certificates identified the status of the holders and authorized entry into the United States.<sup>45</sup>

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### THE HABEAS CORPUS CASES

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Proponents of exclusion celebrated the 1882 legislation and anticipated the end of Chinese immigration, but the act did not

<sup>42</sup>Treaty of November 17, 1880, 22 Stat. 836, T.S. no. 49, art. 1, 3. For a description of the negotiations leading to the revised treaty, see Tsai, *China and the Overseas Chinese*, supra note 15 at 50-59.

<sup>43</sup>The act defined laborers as including both skilled and unskilled workers as well as all Chinese working in the mining industry. Act of May 6, 1882, 22 Stat. 58, §§12, 15.

<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.* at §§4, 6.

provide for such a result.<sup>46</sup> While limiting the entrance of laborers pursuant to the 1880 treaty, the legislation reaffirmed treaty obligations to protect Chinese aliens living in the United States and to assure them of most-favored-nation status. The act protected the right of all Chinese nonlaborers to enter the United States. Total exclusion of all Chinese immigration was never the goal.

Even under its own terms, the legislation failed to produce the expected results. Federal administrative officers and judges disagreed as to how the law should be interpreted and enforced, and Chinese aliens, led by the Six Companies, took advantage of this dispute to circumvent the restriction provisions.

After the passage of the 1882 act, Chinese laborers and other Chinese immigrants continued to arrive in the United States. In San Francisco,<sup>47</sup> the collector of customs adopted a rigid interpretation of the act and denied entry to all Chinese immigrants without either a return certificate or a Canton certificate.<sup>48</sup> These immigrants then petitioned for writs of habeas corpus in the federal courts in California. They claimed they possessed a right of entry under the categories exempted by the 1882 act.

In a remarkable number of cases, the federal judges in San Francisco agreed. While personally sympathetic to the anti-Chinese legislation, they were loath to interpret the 1882 act inconsistently with U.S. treaty obligations. Since the 1880 treaty granted China and the Chinese most-favored-nation status and all nonlaborers the right to free entry and exit, the federal courts recognized that Chinese aliens claiming exemption from the 1882 act had the right to petition the court for writs of

<sup>46</sup>That so many proponents of exclusions nevertheless expected this result may be attributed in part to the nearly thirty years of anti-Chinese agitation during which exclusionists were told that Congress, not the states, had the authority to restrict and exclude Chinese immigrants. As a result, anti-Chinese forces misconstrued the 1882 act to provide more than it did, and quickly became frustrated with the results. See Christian G. Fritz, "A Nineteenth-Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32 (1988), 347, 354 [hereafter cited as Fritz, "Nineteenth-Century 'Habeas Corpus Mill'"].

<sup>47</sup>The pivotal judicial decisions regarding the 1882 act took place in federal courts in San Francisco largely because most Chinese arrived at that port, the Six Companies was based in the city, and the collector there adopted a particularly stringent approach.

<sup>48</sup>The collector of customs was a coveted position, awarded out of patronage and closely tied to party politics. The public clamor against the Chinese pressured the collector to enforce the restriction provisions vigorously and with an eye toward maximum exclusion. See Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 49-50.



habeas corpus.<sup>49</sup> As a result, the federal courts reviewed the petitioner's claim to enter *de novo* and often reached conclusions contrary to those of the collector.

As an example, the collector and the federal judges disagreed as to what constituted sufficient evidence of prior residence or nonlaborer status. The collector maintained that only return or Canton certificates were acceptable, a rigid approach that presented immediate problems for protected groups who had left the United States before the 1882 legislation became effective. In contrast, the federal judges permitted Chinese petitioners to present evidence other than identification certificates to prove their exempt status. The judges emphasized that the 1880 treaty guaranteed the right of Chinese aliens in the United States to leave freely and reenter the country, and that the restriction act targeted only those Chinese laborers seeking entry for the first time after 1882. They asserted that the collector's approach penalized Chinese aliens for exercising their rights under the 1880 treaty. Absent express congressional authorization to abrogate treaty obligations, the judges said they would not sanction the collector's approach. To do so, they argued, would be to attribute to the legislative branch of government a want of good faith and a disregard of solemn national engagements that, unless upon grounds that left the court no alternative, it would be indecent to impute to it.<sup>50</sup> The collector's approach, they charged, was unreasonable; it violated the spirit of both the restriction legislation and the 1880 treaty with China, and would cause the repeal of the restriction legislation.<sup>51</sup>

Thus, when the San Francisco collector detained Ah Sing, the first Chinese alien to arrive in the city after the 1882 law went into effect, the circuit court granted his petition for relief. Ah Sing was a cabin steward who had lived in California since 1876, but had left the country before the 1882 act was passed and thus before the collector began issuing return certificates.

<sup>49</sup>Judge Ogden Hoffman argued that the right of detained Chinese aliens to seek writs of habeas corpus was undeniable: "That any human being claiming to be unlawfully restrained of his liberty has a right to demand a judicial investigation into the lawfulness of his imprisonment, is not questioned by any one who knows by what constitutional and legal methods the right of liberty is secured and enforced by at least all English-speaking peoples." *In re Chin Ah Sooy*, 21 F. 393, 393 (D.C.D. Cal. 1884). Hoffman later called the writ of habeas corpus "the most sacred" document of freedom that is available to everyone regardless of race. *In re Jung Ah Lung* and *In re Jung Ah Hon*, 25 F. 141, 143 (D.C.D. Cal. 1885).

<sup>50</sup>*In re Chin Ah On*, 18 F. 506, 507-8 (D.C.D. Cal. 1883).

<sup>51</sup>See, e.g., *In re Ah Sing*, 13 F. 286 (C.C.D. Cal. 1882).

Justice Stephen J. Field said that Congress did not intend the 1882 act to apply to Ah Sing's case.<sup>52</sup> Moreover, since Ah Sing did not leave the U.S. vessel during the voyage, Field said that he had not technically left U.S. territory.<sup>53</sup>

The collector responded by detaining other Chinese aliens who had travelled with Ah Sing and who had left the ship while on leave in Australia, but Field discharged the petitioners and chastised the collector for adopting an approach that would lead to the repeal of the act. According to Field, the "wisdom of its enactment will be better vindicated by a construction less repellent to our sense of justice and right."<sup>54</sup>

Field and his fellow judge, Ogden Hoffman, again provided relief when the collector refused admission to Low Yam Chow, a Chinese merchant from San Francisco who did not have a Canton certificate. Field said the 1882 law required only that a Chinese alien provide evidence of his right to enter; a Canton certificate helped to identify an alien's merchant status, but was not a prerequisite for admission.<sup>55</sup> Hoffman added that requiring Canton certificates and other rigid policies would result in the repeal of the Restriction Act.<sup>56</sup> He subsequently warned supporters of the 1882 act that unreasonable and over-harsh interpretations would bring the law into "odium and disrepute."<sup>57</sup> Hoffman held that Chinese laborers claiming prior residence could establish their right to entry with docu-

<sup>52</sup>*In re Ah Sing*, 13 F. 286, 288 (C.C.D. Cal. 1882). Field served on the California Supreme Court from 1857 to 1863, when he became an associate justice on the United States Supreme Court, where he sat until 1897. While he was a justice on the Supreme Court, he sat periodically on the circuit court in California. See *supra* note 5.

<sup>53</sup>*In re Ah Sing*, 13 F. 286, 289 (C.C.D. Cal. 1882).

<sup>54</sup>*In re Ah Tie*, 13 F. 291, 294 (C.C.D. Cal. 1882). See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill'," *supra* note 46 at 354.

<sup>55</sup>*In re Low Yam Chow*, 13 F. 605, 609 (C.C.D. Cal. 1882).

<sup>56</sup>*Ibid.* at 616-17.

<sup>57</sup>*Daily Alta California*, September 13, 1882. Hoffman demonstrated his commitment to the aims of the Restriction Act in a letter to Judge Matthew Deady, who sat on the district court in Oregon. Deady had held that Ho King, a detained Chinese actor, was not a laborer within the meaning of the 1882 act because a laborer was "one that hires himself out or is hired out to do physical toil." But, since some Chinese laborers (gardeners and fishermen, for instance) worked together and shared profits rather than receiving wages, Hoffman feared that Deady's definition of laborer might open "the door . . . to those classes whom the law intended to exclude." Hoffman asked Deady to modify his opinion before publication, but Deady did not comply. See Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" *supra* note 46 at 355-56; Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984) 561, 616-17.

mentary evidence or corroborative testimony that would suffice to satisfy any candid and unbiased mind.<sup>58</sup>

By insisting that all detained aliens had the right to petition for habeas corpus and to provide evidence in court, federal judges guaranteed themselves a crowded docket.<sup>59</sup> Thousands of detained Chinese aliens inundated the federal courts in San Francisco with petitions for writs of habeas corpus. Fourteen months after the 1882 legislation went into effect, 33 percent of Chinese immigrants gaining entry to the United States did so through successful habeas corpus petitions in federal court.<sup>60</sup> By September 1883, the *Daily Alta California* had dubbed the Northern District Court of California "the habeas corpus mill."<sup>61</sup>

Both to provide some relief to the overcrowded courts and to curb the number of successful Chinese petitioners, Congress enacted new legislation in July 1884. The new law rendered the return certificates the only means for nonlaborers to establish the right to reentry; testimony or other corroborative evidence would no longer be acceptable. Likewise, nonlaborers needed Canton certificates verified by the American consuls in China and customs-house officials in the United States to enter the country.<sup>62</sup>

Given this express congressional mandate, federal judges in California enforced the "no-certificate-no-entry" policy against all aliens targeted by the original legislation. Since the Customs House in San Francisco had begun issuing return certificates on June 6, 1882, Chinese laborers who left the United States after that date could not reenter the country without a return certificate.<sup>63</sup> Yet, because of U.S. treaty obligations, several federal judges refused to interpret the 1884 legislation retroactively, holding that the 1884 amendments did not apply to Chinese laborers who had left the country before the enactment of the 1882 legislation. Since the 1884 amendments did not explicitly address the issue, Hoffman refused to infer congressional intent to abrogate the 1880 treaty.<sup>64</sup> Judge Lorenzo

<sup>58</sup>*In re Tung Yeong*, 19 F.184, 186 (D.C.D.Cal. 1884).

<sup>59</sup>Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 358.

<sup>60</sup>Janisch, "The Chinese, the Courts, and the Constitution," supra note 13 at 497-99.

<sup>61</sup>September 16, 1882. See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 348.

<sup>62</sup>Act of July 5, 1884, ch. 220, 3 Stat. 155, §§4, 6.

<sup>63</sup>*In re Leong Yick Dew*, 19 F. 490, 492 (C.C.D. Cal. 1884).

<sup>64</sup>*In re Shong Toon*, 21 F. 386, 389-90 (D.C.D. Cal. 1884); *In re Ah Quan*, 21 F. 182 (C.C.D. Cal. 1884).

Sawyer also insisted that the "treaty and the act must, if possible, be so construed so that they can stand together."<sup>65</sup> Since the 1880 treaty provided that any restriction on immigration "shall be reasonable," Sawyer held that to require Chinese aliens to have return certificates that were not available until after they had left the country was both unreasonable and without legal basis.<sup>66</sup>

Field, who returned to the West Coast in September 1884, disagreed. Determined to take a hard line against the Chinese,<sup>67</sup> he said that the 1884 law absolutely required return certificates for all incoming laborers. He insisted that Chew Heong, a detained Chinese laborer who had been living in the United States when the 1880 treaty was signed, but had left California before the 1882 Restriction Act, needed a return certificate to reentry and had no right to reentry without one.<sup>68</sup>

Thomas D. Riordan, counsel for the Six Companies and for Chew Heong, tried to persuade Field otherwise. During oral argument, Riordan said that to insist on such a requirement violated U.S. treaty obligations and congressional intent regarding the 1882 and 1884 legislation. Moreover, Riordan pointed out, Field's view would leave stranded the thousands of Chinese aliens who were in the same position as Chew Heong.<sup>69</sup> Field responded:

And what shall the Courts do with them? Can it give each one of them a separate trial? Can it let each of them produce evidence of former residence? No; it was because the Courts were overcrowded that the

<sup>65</sup>*In re Chew Heong*, 21 F. 791, 795 (C.C.D. Cal. 1884) [Sawyer, J., dissenting].

<sup>66</sup>*Ibid.* at 807-8.

<sup>67</sup>Field's approach upon his return conflicted with his earlier and more favorable decisions toward Chinese aliens. Fritz attributes this changed approach to Field's frustrated political ambitions and the prevailing public opinion. Californians had not supported Field during his 1880 bid for the presidency, in part because of his decisions regarding the Chinese before the enactment of federal restriction legislation. While Field's *Chew Heong* decision came two months after he had lost his 1884 presidential bid and had renounced further political aspirations, public opinion is likely to have influenced his views. See *Daily Alta California*, September 27, 1884; Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" *supra* note 46 at 365 n.82.

<sup>68</sup>*In re Chew Heong*, 21 F. 791, 793 (C.C.D. Cal. 1884).

<sup>69</sup>Estimates vary as to the exact number of Chinese who found themselves in this situation. Between twelve thousand and fifteen thousand Chinese, like Chew Heong, left California after 1880 but before any return certificates had been issued. See *Daily Alta California*, September 27, 1884; Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" *supra* note 46 at 363.

second Act was passed. It was to relieve that pressure.  
... My mind is made up on the matter.<sup>70</sup>

Field insisted that, although the 1884 act did not expressly address the issue, Congress did indeed intend the "no-certificate-no-entry" policy to apply to Chew Heong and others like him. He said, "Congress never supposed that Chinamen intended to go back to China and stay several years. If they do not come back at once they should not be allowed to come at all. We can't have them going away and staying as long as they want to."<sup>71</sup>

Sawyer dissented, but, since Field was the presiding judge, he controlled the power of decision.<sup>72</sup> Riordan then appealed the decision to the Supreme Court, which reversed Field's ruling on the circuit court.<sup>73</sup> The Court agreed with Sawyer that, if possible, courts should adopt a statutory construction "which recognized and saved rights secured by the treaty." Writing for the majority, Justice Harlan stated that "any interpretation of [the new legislation] would be rejected which imputed to congress an intention to disregard the plighted faith of the government."<sup>74</sup>

Encouraged by this and other favorable decisions,<sup>75</sup> Chinese aliens denied entry continued to petition for writs of habeas

<sup>70</sup>*Daily Alta California*, September 27, 1884.

<sup>71</sup>*Ibid.*

<sup>72</sup>Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" *supra* note 46 at 363.

<sup>73</sup>*Chew Heong v. United States*, 112 U.S. 536, 549 (1884).

<sup>74</sup>*Ibid.* Field, who also heard the case again when it came before the Supreme Court, dissented, and said that the decision negated the 1884 act entirely. *Ibid.* at 561 (Field, J., dissenting). After the decision, Sawyer wrote to Judge Deady, "It is some consolation, after all the lying, abuse, threatening of impeachment as to our construction of the Chinese Restriction Act, and the grand glorification of Brother Field for coming out here and so early, promptly, and thoroughly sitting down on us and setting us right on that subject, to find that we are not so widely out of our senses after all." See Sawyer to Deady, December 22, 1884, quoted in Przybyszewski, "Sawyer and the Chinese," *supra* note 29 at 42 n.69.

<sup>75</sup>See *United States v. Jung Ah Lung*, 124 U.S. 621, 632 (1888), *aff'g*, *In re Jung Ah Lung* and *In re Jung Ah Hon*, 25 F. 141 (D.C.D. Cal. 1885) (upholding the right of detained Chinese aliens to full judicial review of the facts surrounding their detention); *In re Look Tin Sing*, 21 F. 905, 910-911 (C.C.D. Cal. 1884) (holding that even though Chinese immigrants could not become naturalized, their children born in the United States were American citizens and thus were not subject to restriction legislation); *In re Tung Yeong*, 19 F. 184 (D.C.D. Cal. 1884) (holding that children of merchants were exempt from the restriction provisions as well). But see *In re Ah Moy*, 21 F. 785, 786 (C.C.D. Cal. 1884) (holding that the families of laborers could not enter the United States even if the laborers were exempt from the restriction legislation).

corpus in federal court. By 1885, one-fifth of all Chinese immigrants to enter the country had done so through such petitions. By 1888, more than four thousand Chinese had petitioned for hearings; 85 percent had received favorable rulings.<sup>76</sup>

These decisions attracted a number of experienced Euro-American attorneys to represent Chinese immigrants in habeas corpus actions. As the historian Lucy Saylor has noted, "Chinese immigration cases became a new specialty."<sup>77</sup> Lawyers could earn between seventy-five and one hundred dollars for a case, and competed for a share of the practice. Still, a small group of attorneys retained by the Six Companies handled most such cases in San Francisco; the association paid legal expenses when a newly arrived immigrant was indigent. Independent Chinese "brokers" and family members also aided Chinese newcomers in finding legal assistance. It was widely acknowledged that Chinese immigrants hired the best legal talent,<sup>78</sup> and there is no doubt that this contributed to their success in court.

To many Euro-American citizens in California, the ability of so many Chinese immigrants to maneuver their way through the immigration process was a source of great frustration. Federal judges were criticized for granting Chinese immigrants too much deference, for creating loopholes, and for "engag[ing] in a persistent effort to defeat on technical grounds the operations of the [Restriction] law."<sup>79</sup> More vigorously, Euro-Americans condemned Chinese petitioners, the Six Companies, and their attorneys as the most culpable, alleging that Chinese immigrants consistently lied to evade and undermine the restriction legislation. As early as December 1883, the *Daily Alta California* satirized the restriction legislation, calling it both the "Chinese Evasion Act" and "An Act to perfect the art of lying among the Chinese and their white auxiliaries."<sup>80</sup> The following year, the paper reported that customs officials had become disgusted with the Chinese immigration cases.<sup>81</sup>

<sup>76</sup>Janisch, "The Chinese, the Courts, and the Constitution," supra note 13 at 678-79.

<sup>77</sup>Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 153.

<sup>78</sup>Thomas Riordan, counsel for the organization, represented dozens of Chinese aliens seeking entry. Others who provided counsel included former government inspectors from the Customs House and former U.S. attorneys. For instance, Marshall Woodworth, who, as a U.S. district attorney, had defended the collector's decisions to exclude Chinese aliens, began representing them when his term ended. Ibid. at 152-54.

<sup>79</sup>*In re Chin Ah Sooey*, 21 F. 393, 395 (D.C.D.Cal. 1884). See also *Daily Alta California*, January 17, 1884.

<sup>80</sup>*Daily Alta California*, December 18, 1883.

<sup>81</sup>Ibid.

Most legislators, administrative officials, and judges believed that nearly all Chinese aliens lied to gain entry to the United States.<sup>82</sup> Hoffman complained of the "unscrupulous mendacity" and "fertile ingenuity" of the Chinese people displayed in "the endless gamut of deceptions which have in so many instances wearied and disgusted the court."<sup>83</sup> Although he said that fraudulent evidence and dishonest testimony were less pervasive than most Californians seemed to think,<sup>84</sup> he acknowledged that some degree of fraud was inevitable in "any court honestly and fearlessly by discharging its duty under the law and the evidence." He explained:

To reject [a Chinese alien's] testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and law, which every one who sets a just value upon the uprightness and independence of the judiciary, would deeply deplore.<sup>85</sup>

Hoffman's point highlights the dilemma in which the federal judges found themselves. Personal inclinations and public sentiments demanded maximum exclusion, but institutional practices and legal provisions constrained judicial action.<sup>86</sup> Hoffman believed that, presented with consistent Chinese testimony, he was obliged to render favorable decisions. To rule otherwise would indict the integrity of the judicial system. Thus, despite his personal misgivings regarding the Chinese, he discharged Chinese petitioners.

To a certain extent, the perception that Chinese aliens lied to evade the restriction laws was accurate. After the enactment of the restriction legislation, Chinese immigrants continued to

<sup>82</sup>Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 102.

<sup>83</sup>*In re Shong Toon*, 21 F. 386, 392 (D.C.D. Cal. 1884).

<sup>84</sup>For example, Hoffman emphasized "that in no case has a person been allowed to land on the plea of previous residence on unsupported Chinese oral testimony," and pointed out that five times more Chinese had left San Francisco than had arrived. *In re Tung Yeong*, 19 F. 184, 186, 190 (D.C.D. Cal. 1884). See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" *supra* note 46 at 361.

<sup>85</sup>*In re Tung Yeong*, 19 F. 184, 189-90 (D.C.D. Cal. 1884).

<sup>86</sup>Robert Cover described a similar dilemma confronting several judges during the antebellum period. Personally opposed to slavery, these judges nevertheless felt constrained by their office to uphold and enforce legislation that included the fugitive-slave laws. According to Cover, these judges justified their rulings by elevating the formal stakes, retreating to mechanical formalism, and ascribing responsibility elsewhere. See Robert M. Cover, *Justice Accused* (New Haven, 1975), 119-22, 226-56.

come to the United States, hoping that with false papers and the false testimony of relatives in the country they would successfully navigate the immigration process.<sup>87</sup>

The provisions of the restriction legislation themselves seemed to invite fraud. For instance, the 1882 act provided that Canton certificates constituted prima facie evidence of the alien's right to land.<sup>88</sup> As a result, attorneys for the Chinese petitioners typically introduced a Canton certificate and then rested the case, leaving the U.S. attorney with the burden to rebut an immigrant's claim of merchant status. Notwithstanding the latitude given the U.S. attorney and the judge's own cross-examination, the government's inability to meet the burden of proof meant that Chinese aliens landed who were in fact laborers.<sup>89</sup>

Furthermore, the exclusion laws encouraged fraud by forcing Chinese immigration underground and creating a profitable business. Secret societies would pay about five thousand dollars to secure the landing of a Chinese prostitute,<sup>90</sup> while Chinese merchants in the United States claimed the birth of a new son when returning from visits to China and then sold the slot to a young Chinese immigrant who played the part.<sup>91</sup> United States immigration officials accepted bribes to provide false documents and to overlook problems in individual cases.<sup>92</sup> Even so, immigration fraud was less extensive than most people believed. The prevalent racist portrait of the Chinese as "deceitful, cunning and dishonest" contributed to an exaggerated account of the extent of immigration fraud.<sup>93</sup> However, many Californians viewed the success of Chinese litigants in federal courts as proof of fraud. Surely, if Congress had enacted legislation to restrict Chinese entry into the United States and thousands of Chinese immigrants continued to enter, something was awry. And that something was believed to be the mendacity of the Chinese community.<sup>94</sup> Such critics may have missed the extent to which the Chinese were simply asserting their legitimate claims to exemptions from the restriction laws.

<sup>87</sup>Tsai, "China and the Overseas Chinese," supra note 15 at 98-99.

<sup>88</sup>Act of May 6, 1882, 22 Stat. 58.

<sup>89</sup>See *In re Tung Yeong*, 19 F. 184, 188 (D.C.D.Cal. 1884); Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 361.

<sup>90</sup>Nee and Nee, *Longtime Californ'*, supra note 2 at 92.

<sup>91</sup>Peter C.Y. Leung, "When a Haircut Was a Luxury: A Chinese Farm Laborer in the Sacramento Delta," *California History* 64 (1985), 212-13.

<sup>92</sup>Eaves, *California Labor Legislation*, supra note 21 at 183.

<sup>93</sup>Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 106. See also Miller, *Unwelcome Immigrant*, supra note 19 at 29-31.

<sup>94</sup>*Ibid.*



Some lied to evade the law, but others were exercising their rights under it.

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CHAE CHAN PING AND THE PORTENT OF THINGS TO COME

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The perception that Chinese aliens were manipulating the immigration process led to increased hostility not only against the Chinese community but against the courts as well. As the legal system appeared to be of little use in blocking Chinese entry, exclusionists turned to extralegal means. In western states, they initiated violent attacks against Chinese aliens; in one such instance in Rock Spring, Wyoming, white miners murdered twenty-eight Chinese workers who had refused to strike.<sup>95</sup> In 1887, a Justice Department official warned that "The courts are already impaled upon the shafts of vituperation and ridicule by the Press of the State, and the danger is, that the people will lose all confidence in them, a result much to be feared, and than which there is not worse."<sup>96</sup>

Since the federal courts refused to abrogate the 1880 treaty, proponents of exclusion again pressed for the revision of U.S. obligations. In 1888, Congress sent a diplomatic mission to China to renegotiate the treaty. When it was rumored that the Chinese would not agree to the proposed twenty-year prohibition on the immigration of Chinese laborers, Congress passed the Scott Act, prohibiting Chinese laborers who left the country from returning.<sup>97</sup> The legislation invalidated all identification certificates issued pursuant to the 1882 and 1884 acts and banned the issuance of any further certificates.<sup>98</sup> The act left stranded approximately twenty thousand Chinese laborers who had left the United States thinking their certificates entitled them to reentry.<sup>99</sup>

While Chinese immigrants had previously gained entry to the United States by demonstrating their exemption from restrictive legislation, the Six Companies knew the strategy would not work for the thousands of laborers with invalid return certificates. Thus, when the collector denied entry to Chae Chan Ping, a laborer returning from a short visit to China, the association decided to challenge the constitutional-

<sup>95</sup>See John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (1983), 191, 192; Janisch, "The Chinese, the Courts, and the Constitution," *supra* note 13 at 790-85.

<sup>96</sup>Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 56, 79-80.

<sup>97</sup>Tsai, "China and the Overseas Chinese," *supra* note 15 at 89-93.

<sup>98</sup>Act of October 1, 1888, ch. 1064, 25 Stat. 504 (1888).

<sup>99</sup>Coolidge, "Chinese Immigration," *supra* note 13 at 280.

ity of the law and raised one hundred thousand dollars to fund the litigation.<sup>100</sup> The Six Companies' attorneys, James Carter and George Hoadley, argued that Congress had no authority to exclude aliens who had already entered the United States legally, and that to do so violated the 1880 treaty and breached the contract constituted by the return certificate. The Circuit Court agreed that the Scott Act violated the 1880 treaty, but nevertheless upheld the legislation as constitutional.<sup>101</sup> A unanimous Supreme Court agreed.<sup>102</sup> In an opinion written by Justice Field, the Court admitted that the Scott Act was in "contravention of express stipulations" of U.S. treaty obligations, but that such "contraventions" did not invalidate the legislation. The Court said that treaties were the equivalent of legislative action "to be repealed or modified at the pleasure of congress. . . . The last expression of the sovereign will must control." Thus the Court held that the Constitution did not prevent Congress from enacting legislation that conflicted with international treaties.<sup>103</sup>

Furthermore, the Court held that congressional power to regulate immigration stemmed from more than simply the federal power to regulate foreign commerce. Field wrote that the power to exclude, while not enumerated in the Constitution, was inherent in sovereignty. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation." And when Congress decided to exclude certain aliens, "its determination is conclusive upon the judiciary."<sup>104</sup>

The Court's decision in *Chae Chan Ping* gave Congress far greater power over immigration than had been previously recognized, and provided the basis for judicial abdication to congressional will. Still, the Court's holding raised significant and unanswered questions. Even if, as Field argued, the power of a sovereign nation to exclude aliens were "not open to contro-

<sup>100</sup>Tsai, "China and the Overseas Chinese," *supra* note 15 at 94.

<sup>101</sup>*In re Chae Chan Ping*, 36 F. 431, 433-436 [C.C.D. Cal. 1888].

<sup>102</sup>*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>103</sup>*Ibid.* at 600. The Court had previously held that courts would uphold congressional acts that were inconsistent with earlier treaty obligations. See *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884). In 1900, the Court extended this doctrine in what Louis Henkin called "opaque dictum . . . without explanation or justification, from U.S. treaty obligations to customary international law" in *The Paquette Habana*, 175 U.S. 677, 700 (1900). Henkin, "Constitution and United States Sovereignty," *supra* note 11 at 863-64.

<sup>104</sup>*Chae Chan Ping*, 130 U.S. at 603, 606.

versy," the Court's holding failed to address why that power should be lodged with the federal government and not with the states. After all, the Tenth Amendment retained for the states all non-delegated powers. Indeed, the principle of inherent powers conflicted with the idea of the federal government as a government of only delegated powers.<sup>105</sup> Moreover, even if the federal government had the "inherent" power to control immigration, the Court failed to explain adequately why congressional exercise of that power was "conclusive on the judiciary."<sup>106</sup>

Nevertheless, the Court's unanimous holding in *Chae Chan Ping* sparked little controversy.<sup>107</sup> In retrospect, the Six Companies should have recognized the decision as a warning that its campaign against the Geary Act was unlikely to succeed. In *Chae Chan Ping*, the association had brought a direct attack against federal legislation and lost. Four years later, it would issue a similar challenge and lose again.

In part, the Six Companies' confidence that it would defeat the Geary Act may be attributed to the continued success of Chinese petitioners in the federal courts. While the Supreme Court had upheld the Scott Act, Chinese aliens found they

<sup>105</sup>Nearly fifty years later, the Court would extend the principle that sovereignty was a source of federal power. In *United States v. Curtiss-Wright Export Co.*, Justice Sutherland stated that the federal government's power over foreign affairs stemmed not from the Constitution but, rather, from the very independence of the nation. The principle of enumerated powers, he said, applied to the federal government "only in respect to our internal affairs." *Ibid.*, 299 U.S. 304, 315-18 (1936). See also Aleinikoff and Martin, *Immigration*, *supra* note 20 at 15; Henkin, "Constitution and United States Sovereignty," *supra* note 11 at 858.

<sup>106</sup>Henkin has argued that no historical, theoretical, or constitutional basis exists to exempt "any exercise of governmental power from constitutional restraint," maintaining that "no such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional." *Idem*, "Constitution and United States Sovereignty," *supra* note 11 at 857, 860 n.31, 862. The Court, however, has repeatedly upheld this principle and allowed Congress to discriminate against aliens and exclude them based on vague standards and undisclosed factual findings. See, e.g., *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that following the exercise of administrative discretionary power to exclude an alien, "no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence"). See also Aleinikoff and Martin, *Immigration*, *supra* note 20 at 15.

<sup>107</sup>Pointing out that the *Harvard Law Review* simply reported the holding without comment, Henkin asserts that "legal commentators were unperturbed by the idea that the federal government had an unenumerated power to exclude immigrants." *Idem*, "Constitution and United States Sovereignty," *supra* note 11 at 857 n.20. See also *Harvard Law Review* 3 (1889), 136.

could still gain entry to the United States through petitions for writs of habeas corpus. Those asserting nonlaborer status or citizenship resulting from birth in the United States continued to claim exemption from the exclusion legislation. Overall, they received favorable rulings from the U.S. commissioners, who, since 1888, had replaced the federal judges hearing habeas corpus cases.<sup>108</sup> While the commissioners granted government attorneys substantial leeway in cross-examining Chinese witnesses, they typically discharged Chinese petitioners. For instance, Commissioner E.H. Heacock believed that uncontroverted testimony should control the decision of the court, a position less stringent than that set forth by the Supreme Court.<sup>109</sup> Heacock also said that testimony containing minor discrepancies did not necessarily mandate denial of the petitioner's claim.<sup>110</sup> Thus, notwithstanding *Chae Chan Ping*, the federal courts continued to discharge Chinese petitioners, authorizing their entry into the United States. In 1890, a customs inspector estimated that since 1888, the federal district court had reversed the collectors' decisions in 86 percent of the cases.<sup>111</sup>

The Six Companies' confidence in challenging the Geary Act may also be attributed to the Chinese exemption from an 1891 act restructuring the administration of immigration proceedings.<sup>112</sup> This legislation gave a new federal superintendent of immigration sole authority over the enforcement of immigration laws, subject only to review by the secretary of the trea-

<sup>108</sup>Just before passage of the Scott Act, Congress authorized a U.S. commissioner in the federal courts to hear the habeas corpus cases brought by Chinese immigrants. As early as 1884, Hoffman had called on Congress to transfer responsibility for these cases from the federal courts. Otherwise, he predicted, "It will be impossible for the courts to fulfill their ordinary functions" because of the backlog of Chinese petitions. *In re Chow Goo Pooi*, 25 F. 77, 82 (C.C.D. Cal. 1884). To ease that backlog, beginning in 1888, U.S. commissioners replaced federal judges in hearing Chinese habeas corpus cases, determining whether petitioners had the right to enter, independent of the collector's previous decisions. Federal judges then provided appellate-style review of the commissioners' decisions, differing only on matters of law. While a judge could reverse a commissioner's holding, in practice this rarely occurred. Saylor, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 162-71.

<sup>109</sup>*Quock Ting v. United States*, 140 U.S. 417, 419-22 (1891) (holding that courts need not decide in favor of Chinese petitioners presenting consistent and uncontroverted testimony).

<sup>110</sup>Saylor, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 167.

<sup>111</sup>*Ibid.* at 73.

<sup>112</sup>Act of March 3, 1891, ch. 551, 26 Stat. 1084-86. This act also added to previous legislation designating excludable aliens (polygamists, people with contagious diseases, and people likely to become public charges), and provided for the deportation of aliens within one year of their arrival upon a finding that they were excludable at entry.

surey. It thus eliminated judicial review in immigration cases.<sup>113</sup> The act, however, expressly exempted Chinese aliens from its provisions, and thereby established a dual system for the administration of immigration laws.<sup>114</sup> The collector of customs continued to enforce the law against Chinese immigrants, while the new superintendent of immigration enforced it against all other aliens seeking entry. The 1891 prohibition of judicial review did not apply to Chinese immigrants, who became the only immigrant group to continue to enjoy that right through habeas corpus petitions in federal court.

Access to judicial review and success in the federal courts contributed to the confidence with which the Six Companies pursued its campaign against the Geary Act. Equally important was its conviction that the act's provisions differed fundamentally from those the Court had upheld in *Chae Chan Ping*.

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## THE CAMPAIGN AGAINST THE GEARY ACT

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### NONREGISTRATION AND DIPLOMACY

Congress passed the Geary Act in 1892 to replace the 1882 legislation that was about to expire. The legislation was, in the words of Senator Henry Teller of Colorado, "exceedingly harsh in its provisions," but well supported by "public sentiment."<sup>115</sup>

<sup>113</sup>No congressional comment or debate took place as to why the act included this provision. Sayler suggests that the denial of judicial review was consistent with, although not identical to, similar statutes pertaining to the Treasury Department and providing executive and administrative officers final decision-making authority. Idem, "Guarding the 'White Man's Frontier,'" supra note 5 at 70-72. It is also possible that the success of Chinese litigants in contesting the collectors' decisions on the West Coast prompted Congress to enact legislation that would preclude similar litigation involving other immigrants. Regardless of the intent, the Supreme Court subsequently upheld the denial of judicial review as constitutional. Affirming the principle set forth by Field in *Chae Chan Ping*, Justice Gray wrote, "It is not within the province of the judiciary to order that foreigners . . . shall be permitted to enter. . . . The decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U.S. at 660.

<sup>114</sup>No congressional debate is recorded as to why the Chinese were exempted from the 1891 act, and congressional intent on the issue is not clear. This provision seems particularly odd given the frustration in Congress and among voters regarding continued Chinese immigration. Sayler surmises that the act merely reflected the perception of the Chinese as being separate from other immigrants. Congress targeted the 1891 act at European immigrants; Chinese exclusion laws already existed and a system of enforcement was in place. Idem, "Guarding the 'White Man's Frontier,'" supra note 5 at 75.

<sup>115</sup>*Cong. Rec.*, 1892, 52, 3558.

The act included strengthened enforcement measures to curb what legislators perceived as pervasive Chinese fraud. Senator Wilbur F. Sanders of Montana explained, "We have been mocked and that is why we are dissatisfied."<sup>116</sup>

The Geary Act extended all existing restriction legislation for ten years and ordered the removal of all Chinese aliens found to be illegally in the United States. The law mandated that a Chinese alien charged with illegal status must "establish by affirmative proof" his or her right to remain in the country. It thereby shifted the burden of proof from the government to the alien.<sup>117</sup>

The act required Chinese laborers legally residing in the United States to register with the collector of internal revenue within one year of the act's passage. Those failing to register would be arrested without opportunity for bail, and, very likely, deported. The statute prescribed a summary deportation proceeding with limited judicial involvement: it ordered the deportation of any Chinese laborer without a certificate unless that laborer could prove that "accident, sickness, or other unavoidable cause" prevented him from registering. Upon providing such proof, the laborer then had to establish that he was in the United States lawfully and present at least one Euro-American witness to testify on his behalf.<sup>118</sup>

The Geary Act was not the only existing federal statute to contain a deportation provision,<sup>119</sup> but it was unique in that it provided for the deportation of aliens who had legally entered the United States.<sup>120</sup> While the Scott Act had prevented Chinese laborers from coming into the country, the Geary Act threatened to uproot and deport longtime, legal residents of the United States.

The attorneys for the Six Companies, J. Hubley Ashton and James Carter, asserted that the Geary Act granted the collector of internal revenue a degree of discretion that violated the con-

<sup>116</sup>*Ibid.* at 3568.

<sup>117</sup>Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892).

<sup>118</sup>*Ibid.* at §6.

<sup>119</sup>Congress had enacted a deportation statute in 1888 when it amended existing laws prohibiting the importation of aliens to perform preexisting contracts in the United States to authorize the deportation of those immigrants who had landed notwithstanding the prohibition. Act of October 19, 1888, ch. 121, 25 Stat. 566 (1888) [amending Act of February 26, 1885, ch. 164, 23 Stat. 332 [1885]] and Act of February 23, 1887, ch. 220, 24 Stat. 414 [1887]].

<sup>120</sup>Immigration law continues to authorize the deportation of aliens for conduct occurring subsequent to lawful entry. See Immigration and Nationality Act, §241 (a)(2)(A), 8 U.S.C.A. §1251 (a)(2)(A) (1995) (designating as deportable an alien who commits a crime of moral turpitude within five years of lawful entry to the United States).

stitutional guarantee to due process.<sup>121</sup> Section Six of the act ordered Chinese laborers to apply to the collector for a certificate of residence, but neither required the collector to issue such a certificate nor specified what evidence would suffice to qualify for certification. In addition, the law did not provide for judicial or administrative appeals through which laborers who were denied certificates could challenge the collector's decision. As a result, said Ashton and Carter, the act provided legal resident aliens no protection from the arbitrary discretion exercised by the collector. Acknowledging *Chae Chan Ping's* holding that Congress had the inherent power to restrict immigration, Ashton and Carter maintained that, in the context of deportation, constitutional principles significantly constrained that power. They argued that the Scott Act had abrogated the 1880 treaty only insofar as it prohibited the free entry and exit of Chinese laborers.<sup>122</sup> Treaty provisions protecting Chinese aliens living in the United States remained valid. While the registration requirement was ostensibly meant to protect Chinese laborers legally in the country, its harsh enforcement mechanisms violated constitutional norms of due process. Ashton said, "It is not for Congress to devise any process by which [legal resident aliens] may finally be deprived of their liberty or property, and make it 'due process of law' by its mere will."<sup>123</sup>

The Six Companies was thus convinced that the Geary Act was both distinct from the Scott Act and constitutionally invalid. Adding to this conviction was the criticism the act had sparked. Senator Butler of South Carolina voted against the act and called it a "disgrace to the country." Senator Hitt of Illinois pointed out that the legislation reversed the presumption of innocence until proven guilty and held Chinese laborers guilty per se until they could prove otherwise. He stated, "Never before was this system applied to a free people, to a human being, with the exception of the sad days of slavery."<sup>124</sup> Numerous newspapers denounced the legislation as a vote-getting measure, a sop thrown to the far-western states, and an insult to China and the Chinese people.<sup>125</sup>

Anticipating that the judiciary would agree with such assessments, the Six Companies decided to bring a test case challenging the law, and began soliciting contributions from members

<sup>121</sup>Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 112-13.

<sup>122</sup>The 1880 treaty had protected the right of Chinese laborers to "go and come of their free will and accord." See supra, note 44, and accompanying text.

<sup>123</sup>Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 113-14.

<sup>124</sup>Tsai, *China and the Overseas Chinese*, supra note 15 at 98.

<sup>125</sup>Coolidge, "Chinese Immigration," supra note 13 at 219-20.

to fund the effort.<sup>126</sup> At the same time, the association also urged Chinese laborers to ignore the registration requirement. In conjunction with organizations like the Chinese Civil Rights League in New York City, the Six Companies posted circulars in San Francisco and other cities describing the Geary Act as "cruel [and] unjust" and asking Chinese immigrants to "stand together." Because the law violated both the United States Constitution and treaty obligations, the Six Companies argued, civil disobedience was appropriate.<sup>127</sup>

In September 1892, the Six Companies told John Quinn, the collector of internal revenue in San Francisco, that the Chinese community would not comply with the act. Calling the legislation "an unwarranted and an unnecessary insult to the subjects of a friendly nation," the Six Companies said the Geary Act violated "every principle of justice and equity and fair dealing between friendly powers."<sup>128</sup> Moreover, the association claimed that the law, while limited to laborers, would harass all Chinese residents and subject them "to blackmail of the worst type."<sup>129</sup> As an example, the association said a San Francisco merchant travelling to New York on business would "be stopped at every little hamlet, village, and town on the line of the railroad and arrested on the charge of being a laborer who has failed to register."<sup>130</sup> Finally, the presidents of the association defended nonregistration as the only reasonable response to legislation. They argued that if the English government had enacted a similar regulation applicable to American citizens, "we think the U.S. would resent the indignity."<sup>131</sup> They stated, "We know of no law which makes it a crime for us to advise our fellow subjects that they have a right to disregard a law which is in violation of the constitution and the treaties."<sup>132</sup>

The nonregistration campaign proved successful. Noncompliance was so extensive that when a laborer named Charlie

<sup>126</sup>See Tsai, *China and the Overseas Chinese*, supra note 15 at 97; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 111 n.68. See also San Francisco *Morning Call*, September 10, 20, 30, 1892.

<sup>127</sup>Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 110.

<sup>128</sup>*Cong. Rec.*, 1893, 53, 2443.

<sup>129</sup>*Ibid.*

<sup>130</sup>*Ibid.*

<sup>131</sup>Coolidge, "Chinese Immigration," supra note 13 at 209.

<sup>132</sup>*Ibid.* at 220-21. At a meeting in New York regarding the Geary Act, members of the Chinese Civil Rights League agreed with this position. Dr. J.C. Thoms noted that bail was available to all criminals except murderers, "yet the crime of being born a member of the greatest race in earth is made not bailable. Do you ask us to obey the laws of the land? We say yes, but to submit to such a yoke of tyranny, never, never!" *New York Times*, September 23, 1892.



Kee registered, the *New York Times* reported on its front page Kee's "defiance" of the Six Companies' campaign.<sup>133</sup> Eleven months into the registration period, only 439 of the approximately 26,000 Chinese laborers targeted by the Geary Act in San Francisco had applied for certificates of residence.<sup>134</sup> When the registration period ended on May 5, 1893, only 13,242 Chinese laborers in the United States had registered. Eighty-five thousand Chinese aliens had ignored the Geary Act.<sup>135</sup>

The association planned to test the Geary Act in court no matter how many, or how few, laborers refused to register. Thus the nonregistration campaign was clearly susceptible to the "free-rider" problem. A laborer who ignored the Six Companies' campaign and registered would benefit from the litigation if it proved successful; he would also be protected from deportation in the event the association lost its case.<sup>136</sup> Yet only 13 percent of the Chinese laborers targeted by the act chose this course. The rest ignored the requirement and refused to register.

Representative Thomas Geary, the original sponsor of the act, attributed Chinese noncompliance to the coercive practices of the Six Companies. He accused the association of manipulating the Chinese population, alleging that "The edict of these Six Companies is more powerful and far-reaching than an edict of the Czar of Russia."<sup>137</sup> He called on the U.S. attorney in San Francisco to indict the presidents of the Six Companies for interfering with registration, hoping that such action would intimidate the association into changing its policy. The U.S. attorney informed the attorney general of Geary's request, but both attorneys decided that the indictment would not withstand judicial scrutiny.<sup>138</sup>

Geary's belief that Six Companies had manipulated the Chinese community into noncompliance was widely shared. One journalist in California, Richard Hay Drayton, wrote that the Six Companies had imposed a "forced contribution of one dollar per head" on all Chinese immigrants. He claimed that the association had originally been founded to import Chinese laborers to be its serfs and that, in return for passage money, legal assistance, medical care, and even funeral arrangements, the new immigrant "binds himself to obey the orders of the Com-

<sup>133</sup>*New York Times*, September 30, 1892.

<sup>134</sup>Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 111.

<sup>135</sup>*Cong. Rec.*, 1893, 53, 2441.

<sup>136</sup>See Mancur Olson, Jr., *The Logic of Collective Actions* (Cambridge, Mass., 1965), 5-65.

<sup>137</sup>Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 111.

<sup>138</sup>*Ibid.* at 111-12, 112 n.71.

panies. . . . Few are the Chinamen residents here," he continued, "who get out of the clutches of the Six and become independent of them; the vast majority are their bondsmen." As such, he said, the immigrants had no choice but to obey the Six Companies' command not to register.<sup>139</sup>

Drayton's claims ignore the possibility that the Chinese laborers shared the association's conviction that the Geary Act was legally invalid and that civil disobedience was justified. It also misrepresents the nature of the relationship between the Six Companies and its members. By providing the services Drayton noted, the association did receive the loyalty of its members, but its authority was closer to that of a ward politician who could rely on the loyalty and support of his constituents in exchange for services rendered. In defense of the association, Fong Kum Ngon wrote in 1894 that the "Six Companies have power only to advise their people to do things, but not to compel."<sup>140</sup> Yet, Fong noted, most Chinese immigrants "naturally obeyed the advice of the Six Companies."<sup>141</sup> The historian Stanford Lyman has argued that the "electoral irrelevance" of the Chinese community meant that "the Chinese, unlike European immigrants, were not the objects of any local ward politician's solicitations."<sup>142</sup> This isolation forced the Chinese community to develop its own benevolent and governmental organizations. It engendered solidarity within the community, fostered a system of internal social norms, and reduced organizational costs. Thus, when the Six Companies urged Chinese laborers to challenge the Geary Act, the majority "naturally obeyed" and refused to register.<sup>143</sup>

The leaders of the Six Companies had presented nonregistration as a symbolic and principled response to what they believed to be unjust law, but this response proved to be of strategic value as well. The association anticipated judicial invalidation of the act, but unless that invalidation came quickly after the registration period had ended, many Chinese laborers without certificates would be deported. The Six Companies' leaders thus wanted to accelerate the normal judicial process, and were aided in this by the nonregistration campaign, which presented the attorney general, Richard Olney,

<sup>139</sup>Drayton, "Chinese Six Companies," *supra* note 17 at 472.

<sup>140</sup>Fong, "Chinese Six Companies," *supra* note 16 at 524.

<sup>141</sup>*Ibid.* at 525.

<sup>142</sup>Lyman, "Conflict and the Web," *supra* note 2 at 476 n.5, 476 n.8.

<sup>143</sup>See Bruce A. Ackerman, "Beyond Carolene Products," *Harvard Law Review* 98 (1985), 713, 724-25 (arguing that the insularity of minority populations enables them to "break through the free-rider barrier and achieve organizational effectiveness").

with the responsibility to arrest and deport eighty-five thousand Chinese laborers. Before undertaking a task of this magnitude, Olney wanted the Six Companies' case against the act resolved. He therefore needed the Supreme Court to hear the case as quickly after the close of registration as possible.<sup>144</sup>

The diplomatic support enlisted by the Six Companies further ensured a speedy hearing before the Court. In September 1892, the association appealed to the Chinese government for assistance in challenging the registration requirement. Enclosing a copy of the Geary Act, the presidents of the Six Companies told the Chinese emperor that the legislation violated treaty obligations and "heaped upon the Chinese people indignity and degradation."<sup>145</sup> The Chinese government responded with verbal protestations to the United States government and support for the Six Companies' litigation effort. The Chinese vice-consul in San Francisco said the act would never stand the test in the courts.<sup>146</sup> The Chinese minister, Tsui Kwo Yin, denounced the act as an abrogation of the 1880 treaty and a "violation of every principle of justice, equity, reason and fair dealing between two friendly powers."<sup>147</sup> In March 1893, he called on the newly appointed secretary of state, Walter Gresham, to ask Olney to schedule the case before the Court before its adjournment in May. Gresham and Olney complied with this request.<sup>148</sup>

On May 5, 1893, the registration period mandated by the Geary Act ended. The following day, United States marshals arrested Fong Yue Ting, Wong Quan, and Lee Joe. Fong Yue Ting and Wong Quan were Chinese laborers who had failed to obtain certificates of residence during the registration period. Lee Joe was a Chinese laborer who had applied for a residence certificate a month earlier, but whose application had been

<sup>144</sup>Coolidge, *Chinese Immigration*, supra note 13 at 219 n.19.

<sup>145</sup>*New York Times*, September 21, 1892.

<sup>146</sup>*Ibid.*, March 28, 1893. See also *San Francisco Morning Call*, September 20, 1892.

<sup>147</sup>Coolidge, *Chinese Immigration*, supra note 13 at 221.

<sup>148</sup>*New York Times*, March 25, 1893. See also George E. Paulsen, "The Gresham-Yang Treaty," *Pacific Historical Review* 37 (1968), 281, 282-83, 283 n.4 [hereafter cited as Paulsen, "Gresham-Yang Treaty"]. Rumors circulated during the registration period that the Chinese government would retaliate against American missionaries and commercial interests in China if the Geary Act were enforced. American missionary societies lobbied for repeal of the registration requirement and Representative John F. Andrew introduced a bill calling for that result. *New York Times*, January 27, 1893. Still, both Gilbert Reid, a missionary in China, and the U.S. minister in Peking, Charles Denby, reported that retaliation seemed unlikely, although Denby speculated that the deportation of the thousands of Chinese laborers to southern China might prompt anti-foreign riots. *New York Times*, March 38, 1893.

denied because the witnesses he produced to verify his residence "were persons of the Chinese race and not credible witnesses."<sup>149</sup> On May 6, the District Court for the Southern District of New York ordered all three laborers deported in accordance with the Geary Act. Each petitioned for a writ of habeas corpus, arguing that he had been detained without due process of law and that the registration requirement was unconstitutional. The circuit court dismissed the writs but allowed the laborers to appeal. Four days later, on May 10, the Supreme Court heard the Six Companies' arguments against the act. Five days after that, the Court rejected those arguments and upheld the act as constitutional.<sup>150</sup>

Justice Gray, writing for the five-justice majority,<sup>151</sup> stated that the inherent sovereign powers doctrine set forth in *Chae Chan Ping* included the right of every independent nation to "exclude and to expel all aliens." This right "rests upon the same ground, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."<sup>152</sup> That the Chinese laborers targeted by the Geary Act had entered the United States legally was of no consequence. Gray said that the laborers "continue to be aliens . . . and therefore remain subject to the power of Congress to expel them . . . whenever in its judgment their removal is necessary or expedient for the public interest."<sup>153</sup> He insisted that deportation was not punishment and that the act's deportation provisions constituted due process.<sup>154</sup>

The three dissenting justices, however, agreed with the Six Companies that *Chae Chan Ping* was not controlling. They said that deportation was distinct from exclusion and constituted a penalty warranting more procedural safeguards than Congress had provided in the Geary Act. Field, who had written the Court's decision in *Chae Chan Ping*, noted "a wide and essential" difference between preventing Chinese aliens from entering the country and deporting those who had acquired

<sup>149</sup>149 U.S. at 702-4.

<sup>150</sup>149 U.S. at 698-704.

<sup>151</sup>The majority consisted of Justices Blatchford, Brown, Gray, Jackson, and Shiras.

<sup>152</sup>149 U.S. at 707.

<sup>153</sup>*Ibid.* at 713-14.

<sup>154</sup>*Ibid.* at 730. Courts have consistently held that deportation, while often a severe measure, is not punishment, and that deportation proceedings remain civil in nature. Sixth Amendment procedural protections do not apply. See, e.g., *Argiz v. I.N.S.*, 704 F. 2d 384, 387 (7th Cir. 1983) (per curiam) (holding that the Sixth Amendment guarantee to speedy trial does not apply in deportation proceedings).

residence in the United States in accordance with U.S. treaty obligations.<sup>155</sup> He admitted that the registration requirement served a constitutional goal—to identify and thus protect Chinese laborers legally in the United States from the restriction provisions—yet he objected to the means by which the law sought to accomplish that goal. He concluded that the Geary Act deprived resident aliens of the full protection of the law to which they were entitled, and emphasized that a laborer who failed to register faced deportation. He wrote:

His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment for his neglect, and that being of an infamous character can only be imposed after indictment, trial, and conviction. If applied to a citizen, none of the justices of this court would hesitate a moment to pronounce it illegal. . . . The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence.<sup>156</sup>

So, too, Justice Brewer found it significant that the registration requirement targeted laborers who were lawfully in the country and protected by the Constitution. He admitted that the Constitution had no extraterritorial effect, but emphasized its “potency within the limits of our territory.” While noting that aliens seeking entry at the borders of the United States could not claim constitutional protection, Brewer insisted that legal resident aliens, such as the Chinese laborers targeted by the Geary Act, were entitled by the Constitution to more procedural protections than the act provided.<sup>157</sup>

Similarly, Chief Justice Fuller insisted that congressional power to deport rested “on different grounds” from its exclusion power. Deportation, unlike exclusion, deprived an alien

<sup>155</sup>149 U.S. at 746-47 (Field, J., dissenting).

<sup>156</sup>*Ibid.* at 758-59.

<sup>157</sup>*Ibid.* at 733-34, 742-44 (Brewer, J., dissenting). David Martin has criticized this “location” theory, arguing that it “requires almost willful shutting of one’s eyes to physical reality.” Martin points out both that modern exclusion cases typically involve aliens detained or paroled in the United States and that all aliens in exclusion proceedings are, at the very least, in U.S. territorial waters. He insists that “such aliens plainly come within the territorial jurisdiction of the United States in the significant sense that the country’s sovereign will . . . can be applied to them immediately, uncomplicated by any direct contest with another sovereign.” *Idem*, “Due Process and Membership in the National Community: Political Asylum and Beyond,” *University of Pittsburgh Law Review* 44 (1983), 165, 179.

of "that which has been lawfully acquired." Like Field, Fuller pointed out that the Geary Act punished laborers for failing to register. "No euphemism can disguise the character of the act in this regard. It . . . inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and as such, absolutely void."<sup>158</sup> Fuller found the provisions of the act incompatible with the "immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured."<sup>159</sup>

The dissenters argued that the Geary Act was unconstitutional because, like the Six Companies, they believed that the congressional power to deport was fundamentally different from its power to exclude. They believed that the Constitution limited congressional exercise of the deportation power and that more rights were due to aliens in deportation proceedings.<sup>160</sup> Field objected to the majority's ruling, arguing that had the Geary Act applied to citizens, "none of the justices would hesitate a moment to pronounce it illegal."<sup>161</sup> The majority agreed. The Court found the important distinction not between deportation and exclusion, but rather between alienage and citizenship. As Justice Gray stated, "legal resident aliens continue to be *aliens* [emphasis added],"<sup>162</sup> and thus subject to expulsion at congressional will. To the majority, the power to deport, like the power to exclude, was an element of congressional plenary power to regulate immigration. Congress could afford resident aliens as few or as many rights as it deemed appropriate. The Court would not second-guess congressional

<sup>158</sup>149 U.S. at 763 (Fuller, C.J., dissenting).

<sup>159</sup>*Ibid.* at 762-63. Aleinikoff and Martin have labeled Fuller's rationale in distinguishing exclusion from deportation the "stake" theory: it suggests that legal resident aliens are "due" more "process" because of their identification to, and ties with, America. Yet modern cases afford recently arrived illegal aliens with ostensibly no ties to the United States more procedural protections than aliens facing exclusion proceedings at the border. Moreover, while Fuller argued that the Geary Act deprived the petitioners of something lawfully acquired—their legal residence—he failed to explain why the Scott Act did not similarly deprive Chae Chan Ping of something lawfully acquired, that being a return certificate. *Idem*, *Immigration*, *supra* note 20 at 35.

<sup>160</sup>Interestingly, neither the Six Companies nor the dissenters challenged the existence of congressional power to deport aliens, even though the constitutional principles supporting congressional power to exclude aliens—murky in their own right—do not obviously provide the basis for the power to deport. See *ibid.*

<sup>161</sup>149 U.S. at 759 (Field, J., dissenting).

<sup>162</sup>149 U.S. at 714.

decisions in this realm, and thus upheld the validity of the Geary Act.<sup>163</sup>

#### REACTION AND THE MCCREARY AMENDMENT

The Court's decision in *Fong Yue Ting* took the Chinese community by surprise.<sup>164</sup> In San Francisco, "consternation and dismay filled Chinatown."<sup>165</sup> The *Morning Call* reported, "The confidence in the success of their fight had been so universal and supreme that the defeat stunned the leaders."<sup>166</sup> Members of the secret societies saw the ruling as a means to wrest power from the Six Companies. It was alleged that on May 17 a contract had gone out for the murder of the association's president, Chun Ti Chu, the leader who spearheaded the campaign against the Geary Act. Placards posted in the Chinese community in San Francisco denounced him as an enemy of the Chinese people, offered three hundred dollars for his murder, and promised both protection and legal assistance if the murderer were caught.<sup>167</sup> Chun Ti Chu survived the threats, but was removed as Six Companies' president.<sup>168</sup>

Although the Court had validated the Geary Act, the question of enforcement remained. Estimates of the cost to arrest and deport all eighty-five thousand nonregistered Chinese aliens ranged from seven million to more than ten million dollars. The task would occupy at least three judges for a dozen years.<sup>169</sup>

<sup>163</sup>Three years later the Court affirmed that the judiciary would place "no limits . . . upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Still, a decade after *Fong Yue Ting*, the Court observed that it "has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). Within the context of deportation proceedings, which procedures constitute essential elements of due process has remained a source of debate. See, e.g., *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966) (holding that deportation orders must rest on "clear, unequivocal, and convincing evidence"); *Aguilera-Enriquez v. I.N.S.*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (holding that absence of counsel does not deprive an alien of fundamental fairness).

<sup>164</sup>Coolidge, *Chinese Immigration*, *supra* note 13 at 223.

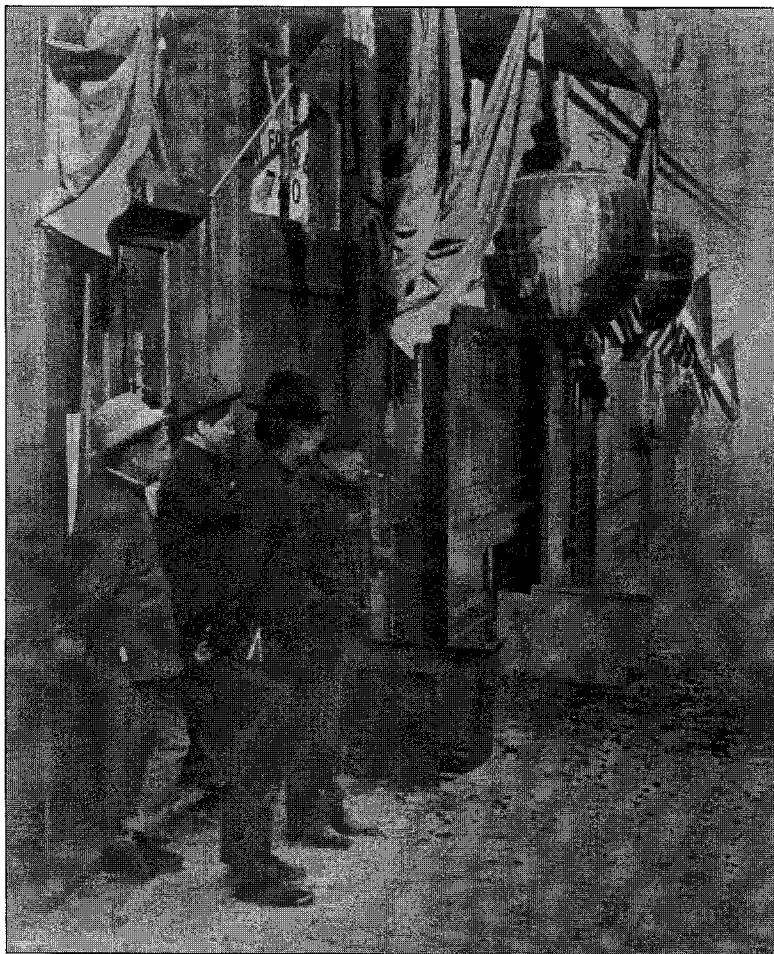
<sup>165</sup>Sandmeyer, *Anti-Chinese Movement*, *supra* note 13 at 105.

<sup>166</sup>May 16, 1893.

<sup>167</sup>Drayton, "Chinese Six Companies," *supra* note 17 at 475.

<sup>168</sup>Lyman, "Conflict and the Web," *supra* note 2 at 481-82 n. 35.

<sup>169</sup>*Cong. Rec.*, 1893, 53, 2422, 3687. See also Eaves, *California Labor Legislation*, *supra* note 21 at 195.



Street in Chinatown (Photograph by Arnold Genthe, Collection of The Oakland Museum of California, Gift of Anonymous Donor)

Indeed, it seems likely that the Six Companies had anticipated as much when it first advocated nonregistration as a tactic to combat the act. When Congress originally passed the act, administrative officers noted that the standing appropriation of sixty thousand dollars was insufficient to cover deportation costs, even without a nonregistration campaign.<sup>170</sup> Thus the Six Companies knew that the failure of thousands of laborers to register would render the act impossible to enforce. Even the

<sup>170</sup>Coolidge, *Chinese Immigration*, *supra* note 13 at 219.



most ardent exclusionists in Congress would have no choice but to provide some legislative relief.

The relief sought by both the Six Companies and Chinese diplomats was an extension of the registration period and delayed enforcement of the act until that period had expired. Minister Tsui informed Secretary of State Gresham that the Chinese government would view an extension of the registration period with great satisfaction.<sup>171</sup> Rumors circulated that enforcement of the act would prompt retaliation from China. Viceroy Li Hung Chang predicted the expulsion of Americans in China, and W.A.P. Martin, the missionary president of the Imperial College in Peking, said that China would eliminate missionary rights. The Six Companies' attorney, Ashton, said that China would terminate all diplomatic and commercial relations with the United States.<sup>172</sup> At the end of May 1893, Secretary of the Navy Hilary Herbert ordered United States gunships to the Yangtze River to protect American interests in China.<sup>173</sup>

As a result of massive noncompliance, inadequate funding, and pressure from the Six Companies and the Chinese government, the Cleveland administration decided not to enforce the Geary Act.<sup>174</sup> Gresham told Tsui that enforcement would be delayed due to lack of funds and that Congress would amend the act during the next session to moderate some of its harsher legislative provisions.<sup>175</sup> Both the secretary of the treasury and the attorney general instructed their subordinates to refrain from enforcing the law.<sup>176</sup>

Nonenforcement enraged much of the white population on the West Coast. White mobs in Fresno and Tulare forced Chinese laborers from the towns and ordered Chinese merchants to close their shops.<sup>177</sup> The anti-Chinese Law and Labor League in San Francisco called for the impeachment of the "law-defying traitor known as Grover Cleveland."<sup>178</sup> The *Morning Call* reported that the Chinese "have invaded the White House and captured Grover the Great and [the Chinese Minister] and his big retinue of Celestials are masters of the situation."<sup>179</sup> Dray-

<sup>171</sup>Ibid. at 230.

<sup>172</sup>Paulsen, "Gresham-Yang Treaty," supra note 148 at 286.

<sup>173</sup>*New York Times*, May 18, 28, 1893; see also Paulsen, "Gresham-Yang Treaty," supra note 148 at 287.

<sup>174</sup>*Cong. Rec.*, 1893, 53, 2444.

<sup>175</sup>Paulsen, "Gresham-Yang Treaty," supra note 148 at 285.

<sup>176</sup>*Cong. Rec.*, 1893, 53, 2444.

<sup>177</sup>Paulsen, "Gresham-Yang Treaty," supra note 148 at 288.

<sup>178</sup>*San Francisco Morning Call*, September 15, 1893.

<sup>179</sup>Ibid., September 12, 1893.

ton, among the journalists, demanded strict enforcement of the act:

The Six Companies doubtless are to blame for the failure on the part of most of the Chinese to register, but if the latter—be they here by right or fraud—are under more obligation to follow the dictates of the former than to obey the laws of this country, Hong Kong or San Quentin is a good destination for them, and the sooner they reach one place or the other the better for ourselves. The inimical and defiant attitude assumed by the Six Companies ought to entail punishment, which can be inflicted upon them by depriving them of the slaves from whose labor they make their wealth.<sup>180</sup>

Frustrated with official nonenforcement, members of the Labor League decided to enforce the act as private citizens. Beginning in September 1893, they swore out complaints against Chinese laborers who had not registered;<sup>181</sup> some federal judges then issued warrants pursuant to the complaints.<sup>182</sup> But these warrants created problems for United States attorneys who had been instructed by the Cleveland administration not to enforce the act. Some refused to order arrests pursuant to

<sup>180</sup>Drayton, "Chinese Six Companies," *supra* note 17 at 477.

<sup>181</sup>San Francisco *Morning Call*, September 21, October 18, 1893. To obtain the names of nonregistered Chinese laborers, members of the Labor Council had enlisted the support of the San Francisco Police Department, which orchestrated raids in Chinatown and arrested sixty-eight Chinese suspects on fictitious charges. Although the suspects were subsequently released, the police gave to the council the identification information obtained during the bookings. Labor Council members then used this information to swear out complaints against Chinese laborers who had not registered. See Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 188.

<sup>182</sup>The Geary Act did not specify whether private citizens could enforce its provisions, but District Judge Jonathan Ross and other federal judges who issued warrants pursuant to these complaints inferred authorization by looking to earlier restriction legislation, which provided that "any party on behalf of the United States" could file complaints for the arrest of Chinese aliens who violated restriction legislation. See Act of September 13, 1888, ch. 1015, § 13, 25 Stat. 476 (1888). However, judicial reliance on this statute appears somewhat dubious, since the validity of the law itself was unclear. The 1888 act was meant to become effective upon the ratification of a pending treaty with China. When China failed to ratify, courts upheld certain provisions deemed not dependent on ratification; Section 13, however, was generally regarded as invalid, absent ratification. See Sayler, "Guarding the 'White Man's Frontier,'" *supra* note 5 at 189.

these private complaints;<sup>183</sup> others opted for selective enforcement, arresting only "Chinese gamblers, highbinders, and other of the criminal classes, so as not to interfere with the industrious and tax-paying portions of that population."<sup>184</sup>

Ashton objected to these private enforcement measures, saying that the courts had followed "irregular and unauthorized" procedures in sanctioning private complaints. He demanded that judges recognize only complaints from government officers.<sup>185</sup>

Tsui also objected to private enforcement, calling on the Cleveland administration to stand by its promise of non-enforcement. Gresham responded by reiterating the administration's commitment to nonenforcement, and the attorney general halted further private prosecutions.<sup>186</sup> More than one hundred Chinese laborers had already been ordered deported, but all had appealed the deportation orders, objecting to the circumstances surrounding their arrests. Olney prohibited their deportation until the appeals were resolved.<sup>187</sup>

In November 1893, Congress enacted the McCreary Amendment, which gave Chinese laborers an additional six months to register. The amendment mandated the release of the laborers who had been arrested and ordered deported under the Geary Act, and discontinued all legal proceedings begun under the original legislation.<sup>188</sup> Virtually all nonregistered Chinese laborers took advantage of this "second chance" and registered with the collector of internal revenue.

However, while massive deportations never occurred, resi-

<sup>183</sup>On August 1, 1893, U.S. Attorney Denis wrote to the attorney general, stating, "I have at present locked in my safe nineteen warrants issued upon complaints which I have refused and still refuse to put in the hands of the marshal for service." Quoted in Saylor, "Guarding the White Man's Frontier," *supra* note 5 at 191 n.66.

<sup>184</sup>*Ibid.* at 192.

<sup>185</sup>J. Hubley Ashton to Attorney General, September 7, 1893, reprinted in *ibid.* at 190.

<sup>186</sup>Paulsen, "Gresham-Yang Treaty," *supra* note 148 at 289.

<sup>187</sup>*Ibid.*

<sup>188</sup>Act of November 3, 1893, ch. 14, §1, 28 Stat. 7 (1893). The amendment also made stricter the guidelines by which resident Chinese merchants could prove their status upon reentering the United States. The act defined a merchant as "a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name." The amendment required that the merchant seeking reentry present the testimony of two non-Chinese witnesses that he had conducted a business for not less than one year before his departure from the United States, and that during that time he had engaged in no manual labor, other than was necessary to his business. A merchant unable to provide such testimony would be denied landing. *Ibid.* at §2.

dent Chinese laborers remained subject to the registration requirement and faced deportation if they failed to comply. During 1894, most Chinese laborers prosecuted for failing to register were, in fact, deported. The majority had previously been convicted of a felony, placing them in a class the McCreary Act held immediately deportable,<sup>189</sup> but, as prosecutions expanded from Chinese felons to other Chinese laborers, the courts began providing more favorable rulings. Some laborers avoided deportation by demonstrating their inability to obtain certificates; others established that they had become laborers only after the registration period had ended.<sup>190</sup> Procedures regarding the admissibility of evidence became more flexible and, in some cases, courts accepted corroborative testimony from Chinese witnesses when no Euro-American ones were available. As with the Chinese habeas corpus cases regarding entry, many Chinese aliens avoided deportation by demonstrating their exemption from the harsher provisions of the legislation.<sup>191</sup>

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## CONCLUSION

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Passage of the McCreary legislation meant that the United States would not expel the eighty-five thousand Chinese laborers who had ignored the Geary Act. The amendment gave them a second opportunity to register. But, while the repercussions for noncompliance with the act proved relatively minor, the

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<sup>189</sup>San Francisco *Morning Call*, December 19, 1893. Chinese laborers convicted of a felony could escape deportation only by proving citizenship resulting from birth in the United States or by demonstrating receipt of a valid certificate of residence before the felony conviction. Most Chinese laborers with felony convictions could not meet either of these provisions. Moreover, prison wardens sent the names of Chinese inmates nearing the end of their terms to U.S. attorneys in the region; U.S. marshals then arrested these laborers upon their release. See Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 195. Leaders of the Six Companies viewed these prosecutions as a means to restore some of the authority they had lost as a result of the Court's decision in *Fong Yue Ting*. Since the secret societies had used the Six Companies' defeat to increase their power (Chen, *Chinese of America*, supra note 16 at 182-84, 198), the association retaliated by providing the U.S. attorney's office in San Francisco with a list of known tong members. See Lyman, "Conflict and the Web," supra note 2 at 480-82; Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 199.

<sup>190</sup>For instance, Commissioner Heacock released laborers who had been at sea during the registration period and who had been in Alaska, where registration was impossible. He also released a former merchant who had become a laborer only when his business had been destroyed. Saylor, "Guarding the 'White Man's Frontier,'" supra note 5 at 200-201.

<sup>191</sup>*Ibid.*

Six Companies' challenge to the legislation had failed. Leaders of the association had promoted nonregistration and initiated litigation because they were convinced that Congress lacked the authority to pass legislation like the act. The association's members expected the Court to agree that deportation was distinct from exclusion and that legal resident aliens were constitutionally entitled to more procedural protections than Congress had provided in the Geary Act.

To the association's members, the habeas corpus cases during the 1880s had indicated that federal judges would protect Chinese aliens from efforts to abrogate the rights provided by treaty obligations and the Constitution of the United States. The Six Companies insisted that the Scott Act and the Court's holding in *Chae Chan Ping* had invalidated the 1880 treaty only with regard to the free entry and exit of Chinese laborers. The Scott Act had embodied the express congressional intent to reject the free-entry provision, and, as a result, the federal courts upheld the measure. Neither the Scott Act nor *Chae Chan Ping*, however, said anything about the rights of Chinese laborers who chose to remain in the United States. As a result, the Six Companies believed, these laborers were still protected by treaty obligations. Indeed, Congress included the registration requirement in the Geary Act to protect resident Chinese laborers from being mistaken for those illegally in the country. As a result, the association's members believed the judiciary would invalidate the Geary Act insofar as the enforcement of the registration provision represented an unduly onerous burden and violated both due-process and treaty provisions that Congress never expressly meant to reject.

*Fong Yue Ting* proved them wrong. In part, the association had misconstrued the success of Chinese aliens in the habeas corpus cases. Federal judges had not protected the rights of Chinese aliens as much as they had upheld the law. During much of the 1880s, discharging Chinese petitioners conformed with the legal principles to which the judges had sworn their loyalty. Chinese aliens succeeded because they had demonstrated their claims as consistent with, but exempt from, the restriction laws.

But this very success prompted opponents of Chinese immigration to secure stricter legislation that allowed fewer "consistent-exemption" claims. When the Six Companies tried a different approach by seeking to invalidate the Scott Act, the Court responded by upholding the legislation and recognizing congressional plenary power to restrict immigration. By 1893, the expansive doctrine set forth in *Chae Chan Ping* proved too powerful to permit a majority of the justices to invalidate the Geary Act. Having already identified the inherent power of

Congress to restrict immigration absent judicial interference, the Court felt no compulsion to distinguish deportation from exclusion. As with its power regarding exclusion, Congress had the power to make choices regarding deportation. Its determinations would bind the judiciary. Thus, whether seeking entry or contesting deportation, Chinese laborers, as aliens, were entitled to no more rights than Congress chose to afford them.

The alien-citizen distinction not only explains the Court's decision in *Fong Yue Ting*, but also reveals why the Six Companies' campaign was doomed to fail long before the litigation even began. A vote in the Senate twenty-three years before Congress passed the Geary Act provides what may be the best explanation for the failure of the association's 1892-93 campaign against the legislation. In July 1870, Senator Charles Sumner proposed amending the naturalization laws to eliminate all references to the word "white." He stated, "All men are created equal, and therefore all men have a right to equal political power in this country."<sup>192</sup> Several senators, particularly those from western states, objected, because Sumner's proposal would authorize the naturalization of Chinese immigrants.<sup>193</sup> Ultimately, the Senate agreed to permit "aliens of African descent or nativity" to become naturalized, but expressly rejected expanding the provision to include "persons born in the Chinese empire."<sup>194</sup>

The rejection of Sumner's 1870 amendment denied Chinese immigrants the right to become naturalized and the right to vote. The post-Reconstruction disenfranchisement of African-American citizens in the southern states demonstrates that the passage of Sumner's amendment would not necessarily have guaranteed newly naturalized Chinese-American citizens full voting rights.<sup>195</sup> But the rejection of Sumner's amendment ensured that Chinese immigrants would be denied the franchise. In 1910, Lucile Eaves wrote that the rejection of this amendment "branded [Chinese immigrants] as permanent aliens who should never be admitted to membership in the body politic."

<sup>192</sup>*Cong. Globe*, 41st Cong., 2d sess., 1870, 5121, 5157.

<sup>193</sup>*Ibid.* at 5121.

<sup>194</sup>Act of July 14, 1870, ch. 254, §7, 16 Stat. 254, 256 (1870); *Cong. Globe*, 41st Cong., 2d sess., 1870, 5177. Because the statute as passed did not expressly prohibit Chinese from naturalization, a few courts permitted Chinese aliens to become American citizens. In 1878, however, Judge Sawyer held that the 1870 amendment did not apply to Chinese aliens and that they had no right to become naturalized under it. *In re Ah Yup*, 1 F. Cas. 223, 224-25 (C.C.D. Cal 1878) (no. 104). See also Eaves, *California Labor Legislation*, supra note 21 at 129-33; McClain, "Chinese Struggle for Civil Rights," supra note 18 at 538 n.46, 544.

<sup>195</sup>See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

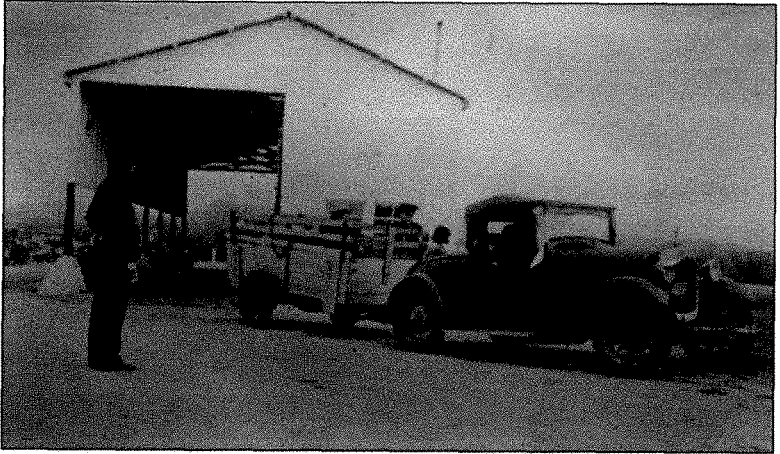
And since no segment of the voting population was committed to protect Chinese interests, the 1870 senatorial debate "paved the way" for more onerous and restrictive legislation.<sup>196</sup>

As Mary Roberts Coolidge pointed out, with the exception of the McCreary Amendment, Congress had enacted all restriction measures during an election year.<sup>197</sup> Denied electoral power, the Six Companies exhausted all other available channels in its campaign against the Geary Act and very nearly succeeded in defeating the legislation. It called on, and received contributions from, the Chinese community to fund the litigation efforts; it convinced the laborers targeted by the act to ignore the registration requirement; and it enlisted the assistance of the Chinese government to exert diplomatic pressure. All this helped bring a test case to the Court and minimize the damage following the Court's decision. The Six Companies' attorneys convinced Chief Justice Fuller, Justice Brewer, and even Justice Field, the author of *Chae Chan Ping*, that deportation was indeed different.

In sum, the Six Companies coordinated a multifaceted campaign against the Geary Act, organizing grass-roots opposition nationwide, and exhausting legal and diplomatic channels at the highest levels of government. The campaign is remarkable because members of an immigrant benevolent society believed they could defeat a federal law. Even more remarkable, however, is that they nearly did just that.

<sup>196</sup>Eaves, *California Labor Legislation*, supra note 21 at 133.

<sup>197</sup>Coolidge, *Chinese Immigration*, supra note 13 at 233.



Los Angeles Police Chief James Davis's "bum patrol" turned back transients at California's border crossings. (SRA Report)



# CALIFORNIA'S "ANTI-OKIE" LAW: AN INTERPRETIVE BIOGRAPHY

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NANCY J. TANIGUCHI

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**T**he American West has long been viewed by many as an immigrants' magnet, in which California has exerted an especially attractive force. What happened when the West did not deliver on its promise of a better life, when those who arrived found further misery? What happened when the door slammed shut—not in Frederick Jackson Turner's sense of a "closed" frontier, not in the exclusion of foreign nationals or a "despised race," but on the very people who seemed to represent the American mainstream? How were these predicaments addressed by law? How did their legal resolution fit with the history of the American West, its interpretations, and its myths?<sup>1</sup>

California's "Anti-Okie" law, as the statute later became known, was born in the heat of early progressive reform. George Mowry, who made an exhaustive study in *The California Progressives*,<sup>2</sup> defined both the movement and the men. Progressivism, he claimed, was not just an American impulse,

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<sup>1</sup>Kevin Starr, *Americans and the California Dream, 1850-1915* (New York, 1973), esp. 415-44. See also *Interstate Migration Hearings . . . Pursuant to H. Res. 63 and H. Res. 491* [hereafter cited as *Tolan Report*], pt. 6, San Francisco Hearings, September 24 and 25, 1940 (Washington, 1941), 2412-13. This article is a partial response to Professor Kermit Hall, who in his 1987 article on law and western legal history (in *Western Historical Quarterly* [October 1987], 435), wrote: "If we are to understand the exceptionalism of the West and the tension within its history, we have no choice but to take account of the law's course."

<sup>2</sup>George E. Mowry, *The California Progressives* (Berkeley, 1951) [hereafter cited as Mowry, *California Progressives*].

but "a western European phenomenon, its impulse being felt all over the Western world at the end of the nineteenth and the beginning of the twentieth century. Wherever one found that characteristic ferment arising out of Western society's attempt to adjust its archaic agrarian social system to the new industrial urban world, there one found the moral, humanitarian, and democratic strains of progressivism." Mowry went on to define progressivism in American terms. He saw it as a protest "against the rapid concentration of twentieth-century American life and its attending ethical, economic, and political manifestations, . . . growing out of the new industrial and urban social complex."<sup>3</sup> Not only was Mowry right about the initial time, place, and causes of progressivism, but, as we shall see, California maintained archaic landholding patterns side-by-side with modern industrialization and urbanization that increased the complexity of the adjustment.

Mowry also provided a profile of the typical California Progressive. He was a young, middle-class idealist, caught between corrupt labor unions at the bottom and even more corrupt big business—exemplified by the Southern Pacific Railroad—at the top.<sup>4</sup> His only major defect was a "refusal or inability to see the connection between economic institutions and . . . rising class consciousness,"<sup>5</sup> an important, persistent link. Like most historians, Mowry pictures Southern California, and, to a lesser extent, San Francisco, as the incubator of California's progressivism, which later led to the state's preeminence in the national Progressive movement. Only a few historians, like Kevin Starr, mention in passing that Governor James H. Budd was an early—albeit unsuccessful—opponent of the Southern Pacific machine, a Progressive hallmark in California.<sup>6</sup>

Budd was from Stockton, in the heart of San Joaquin County. Stockton's turn-of-the-century history seems to indicate the existence of another Progressive enclave. The town went through the agrarian-to-industrial transformation that, according to Mowry, fostered progressivism. As an inland seaport, it had long been the outlet for the Central Valley's wheat and fruit trade. In the late nineteenth century, the arrival of three national railroad lines dramatically quickened its pace. The first of these, the Central Pacific, passed through Stockton in

<sup>3</sup>Ibid. at 88, 89.

<sup>4</sup>Ibid. at 86-104.

<sup>5</sup>Ibid. at 103.

<sup>6</sup>Ibid. at 23-56; Kevin Starr, *Inventing the Dream: California Through the Progressive Era* (New York, 1985), 202; R. Coke Wood and Leonard Covello, *Stockton Memories: A Pictorial History of Stockton, California* (Fresno, 1977), 61, 65 [hereafter cited as Wood and Covello, *Stockton Memories*].

1869 on its way to connect Sacramento and the goldfields with Oakland and the Pacific. The Central Pacific's sister line, the Southern Pacific, entered a year later, placing Stockton on its north-south railroad route. In 1898 the Atcheson, Topeka and Santa Fe (known as the Santa Fe) arrived, bringing competition for the Southern Pacific.<sup>7</sup> By 1900, Stockton had developed other diverse industries as well, including shipbuilding, railroad shops, iron works, flour mills, and the California Paper Company, billed as a "pioneer recycling plant" for turning old rags, paper, and straw into newsprint and wrapping paper.<sup>8</sup>

Out of this industrialization arose new problems. Cries for reform—specifically, for aid to the needy—peppered the Stockton press. For example, a clergyman writing in the *Weekly Mail* in September 1900 stoutly defended the necessity of helping the less fortunate, countering the earlier argument that the poor deserved their lot. In November, Stockton hosted its first charity ball, organized by the Ladies' Aid Society for the benefit of the Old Ladies' and Children's Home. A month later, San Joaquin County citizens actively participated in the formation of a state charities board whose delegates were treated to a lecture on "Cooperation Between Public and Private Charities." Aging firemen demanded specific legislation to fund "care of indigent members of exempt fire companies," which had been formed beginning in the 1850s, and whose members were growing old. Only weeks before the opening of the 1901 California legislative session, the San Joaquin County sheriff and his deputies published their legislative "wish list," which included a need to "solve the tramp question."<sup>9</sup>

The targets of these remarks were San Joaquin County's state representatives, Senator August E. Muentner and Assemblyman F.E. Dunlap. Both were reelected by healthy margins in the 1900 election, which attracted the largest voter participation in the history of Stockton. Their constituents expected a quick response to local needs.<sup>10</sup>

Anxiety deepened in San Joaquin County with the worsening conditions of that winter. For example, in November 1900, a major local shipyard closed, throwing dozens of men out of

<sup>7</sup>Wood and Covello, *Stockton Memories*, supra note 6 at 27.

<sup>8</sup>Ibid. at 41-43.

<sup>9</sup>"In Reply to J.A. Plummer's Latest," [Stockton] *Weekly Mail*, September 1, 1900; "For Sweet, Sweet Charity's Sake," *Stockton Daily Independent* [hereafter cited as *SDI*], November 14, 1900; "New Features For Charity Ball," *SDI*, November 16, 1900; "To Form A State Charities Board," *SDI*, December 8, 1900; "Will Make Effort For Legislation," *SDI*, December 8, 1900; Wood and Covello, *Stockton Memories*, supra note 6 at 79-81; "Some Legislation Sheriffs Want," *SDI*, December 20, 1900.

<sup>10</sup>"The Republicans Sweep The County," *SDI*, November 7, 1900.

work.<sup>11</sup> Concurrently, the Santa Fe let go over one hundred section hands who had violently protested the introduction of cheaper Japanese labor on train crews. The men took their final pay in Stockton and drifted to the waterfront, where "they consumed large quantities of liquor and created considerable damage."<sup>12</sup> Meanwhile, beginning in mid-November, a series of severe winter storms whipped the West, stopping railroad traffic on the Southern Pacific and the Santa Fe and halting the movement of perishable fruit and grain. Silt-laden floodwaters surged into Mormon Slough, one of the main channels of the Stockton harbor. Trying to break through flood-borne driftwood, a dredger broke down and had to be abandoned. By December 1, wheat, the major local commodity, was selling so poorly that the newspaper predicted the largest stockpile ever accumulated in the state's history. With each of these setbacks, people suffered.<sup>13</sup>

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#### AID FOR INDIGENTS IS MANDATED

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Against this backdrop, Muentner and Dunlap introduced the Indigent Persons Act in to the California legislature in January 1901. Signed into law on March 23, it mandated that cities and counties care for the indigents within their borders if relatives or other responsible persons could not be found to do so. Section 3 made it a misdemeanor for any "person, firm or corporation, or the officers, agents, servants or employees" thereof to aid in bringing or to bring in "any pauper or poor or indigent or incapacitated or incompetent person" to a county or city where he or she was not resident with the knowledge that the person was indeed indigent. Subsequent sections required that if any relatives "of sufficient pecuniary ability" could be found within the state, they would have to pay a monthly sum to the county

<sup>11</sup>"The Busy Scenes Have Disappeared," *SDI*, November 10, 1900.

<sup>12</sup>"Serious Riot Narrowly Averted," *SDI*, November 20, 1900, and "Were Paid Off," *SDI*, November 21, 1900.

<sup>13</sup>*SDI*: "No Steamers, Light Freights," November 21, 1900; "California Storm Is Over, Says McAdie," November 22, 1900; "Indications of Storm's Violence," November 22, 1900; "News of Great Storm That Stopped Traffic," November 23, 1900; "Grain Business At Standstill," November 23, 1900; "Freight Business Tied-Up and Much Damage To Fruit," December 9, 1900; "Water Backed Up Filling Channel," November 23, 1900; "Dredgings Fall Into Channel," November 25, 1900; "Work Abandoned By The Dredger," November 29, 1900; "The Entire Grain Stocks of State," December 1, 1900; "Tramps on the Waterfront," December 23, 1900; "Needy To Get Some Relief," January 15, 1909; Olive Davis, *Stockton: Sunrise Port on the San Joaquin* (Woodland Hills, Calif., 1984), 62-63.

that was supporting the needy family member. If they were unable "wholly to maintain such poor person or pauper," but could contribute something, they were "required to pay a sum in proportion to their ability."<sup>14</sup>

This law served to aid indigents during the next two decades, and they came in increasing numbers. According to the statements of Governor Culbert L. Olson before a 1940 federal committee, California had long been dealing with the problem of indigent transients. He noted that a 1913 survey of cheap San Francisco boardinghouses found nearly forty thousand single men holed up for the winter. Almost twenty-five thousand more were in Los Angeles, with additional numbers stopping in Stockton, Fresno, and Bakersfield. State surveys in 1924, 1927, and 1929 revealed the same general pattern of winter idleness among single men and boys. The increasing use of the automobile, following the first overland trip in 1912, magnified California's problems. The state actively encouraged immigration until 1920, and by 1922 an estimated twenty-two thousand cars had crossed the continent. Presciently, a 1925 survey of western cities revealed that "a considerable proportion of these new interstate migrants had to apply for one type or another of local, private, charitable assistance."<sup>15</sup>

In the thirties, the situation worsened. The state tried to handle the indigent caseload through a variety of agencies. In 1931 and 1932 a series of work camps were established under the California State Unemployment Commission. Concurrently, the State Emergency Relief Administration was instituted, which later shortened its name to State Relief Administration, as the "emergency" wore on. It coordinated activities with federal agencies such as the Civilian Conservation Corps and the Works Progress Administration. Most importantly, the State Relief Administration worked with the Federal Transient Service, which operated from 1933 until its demise on September 30, 1935. The federal agency limited its services to those who had been in any state less than twelve months and therefore did not qualify for aid to resident indigents. California was its leading customer. With only 4.7 percent of the national population, California accounted for 12.4 percent of the transients and 16.3 percent of the transient families receiving federal aid.<sup>16</sup> The migrants came because of the good weather,

<sup>14</sup>*Final Calendar of Legislative Business . . . 1901* (Sacramento, 1901), 447, 223; *California Statutes*, 1901, ch. 210, 636-38.

<sup>15</sup>*Tolan Report*, *supra* note 1 at pt. 6, 2234-35.

<sup>16</sup>California State Relief Administration, *Transients in California* (San Francisco, 1936), 24-25, 3, 285 [hereafter cited as *SRA Report*].

and, as the Dust Bowl whipped over the Midwest, because of their knowledge of cotton cultivation.<sup>17</sup>

In the midst of these adjustments, officials in California called a statewide conference to study the indigence problem. A resulting one-day survey revealed approximately 101,174 destitute transients in California on September 1, 1933, alone.<sup>18</sup> The pressure of these numbers was far beyond the abilities of county and city relief, and caused Californians to seek legislative help.

Accordingly, in June 1933, the state legislature passed a new law that repealed the 1901 Indigent Persons Act. Counties and cities were still responsible for the indigents' care in the absence of sufficiently well-heeled relatives. Those entitled to aid had to be residents of California, based on a three-year requirement. The penultimate section (Section 12) declared that

Every person, firm or corporation, or officers or agents thereof, bringing into or assisting in bringing into the State of California any indigent person *as described in this act*, who is not a resident of the State of California, knowing him to be an indigent person, shall be guilty of a misdemeanor [*italics added*].<sup>19</sup>

When the federally funded Transient Service was discontinued in 1935, the results were devastating. A report by the State Relief Administration noted that in the six weeks of midwinter immediately following the service's closure, "69,731 transients and homeless asked for aid from 124 public and private agencies in 19 cities in California." This survey covered only half the state, and made an incomplete count of those turned away. Furthermore, "most of those assisted received only one meal or shelter for one night." The report continued: "The small amount of assistance provided was not occasioned because workers in the several agencies were unfeeling, but rather because funds were unavailable to the private agencies, and because legal inhibitions on the part of county agencies [i.e., the requirements of the 1933 law] added difficulties to an already complex situation."<sup>20</sup>

When the federal Transient Service closed in 1935, California's Bureau of Plant Quarantine border inspectors began keeping data on migrants "in need of manual employment" and

<sup>17</sup>Carey McWilliams, *Factories in the Field* (1939; reprint, Salt Lake City, 1971), 193-96 [hereafter cited as McWilliams, *Factories in the Field*].

<sup>18</sup>Tolan Report, *supra* note 1 at pt. 6, 2236.

<sup>19</sup>*Statutes of California, 1933*, ch. 761, 2005-2010.

<sup>20</sup>SRA Report, *supra* note 16 at 285.

their families entering by motor vehicle. By March 1938 their numbers had reached almost two hundred ninety thousand.<sup>21</sup> Most of them came from the states of Oklahoma, Texas, Arizona, Arkansas, and Missouri, and included professionals, small-businessmen, farm owners, and tenants.<sup>22</sup> Collectively, however, they were generally known as "Okies" and regarded as poor white trash. For historical reasons, this paper will maintain that nomenclature and perception in dealing with this group.

Most of these new arrivals filled the migrant-labor niche, previously occupied by successive waves of "brown" people, including Chinese, Japanese, Indians (from India), Filipinos, and Mexicans.<sup>23</sup> As these supposedly "inferior races" were replaced by the white Okies, Californians grew increasingly uncomfortable with the miserable conditions in which migratory laborers had always lived. To ameliorate the problem, the State Relief Administration established approximately two hundred fifty migratory-labor camps. Yet by the time the federal Rural Relief Administration was created late in 1936, only two of these camps were considered worth keeping and were turned over to federal authorities.<sup>24</sup> The federal government ultimately ran thirteen permanent and five mobile camps, housing approximately two hundred apiece, for a total of roughly thirty-six hundred persons accommodated. Obviously, this did little to solve the huge transient problem. Instead, people could be seen camped out by rural ditches, stoically pursuing the chance to work and settle down.<sup>25</sup>

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### AN EARLY FORM OF BORDER PATROL

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With an increasing influx of indigents and a state ever less able to care for them, the Los Angeles police chief, James E.

<sup>21</sup>Paul Schuster Taylor, *On the Ground in the Thirties* (Salt Lake City, 1983), 226.

<sup>22</sup>See charts reproduced in James Noble Gregory, *American Exodus: The Dust Bowl Migration and Okie Culture in California* (New York, 1989), 18, and analysis 3-19 [hereafter cited as Gregory, *American Exodus*], also John Steinbeck, *The Harvest Gypsies: On the Road to the Grapes of Wrath* (Berkeley, 1936), 20-25 [hereafter cited as Steinbeck, *Harvest Gypsies*].

<sup>23</sup>McWilliams, *Factories in the Field*, supra note 17 at 48-151.

<sup>24</sup>*Ibid.* at 296, 297.

<sup>25</sup>Walter E. Packard, "Land and Power Development in California, Greece and Latin America," 311a, interview with Willa Klug Baum, 1970 [hereafter cited as Packard interview], Regional Oral History Office, Bancroft Library; John Steinbeck, *Their Blood Is Strong* (San Francisco, 1980), 17; Steinbeck, *Harvest Gypsies*, supra note 22 at 26-31.

Davis, hit on a drastic solution: keep the Okies out of California. He implemented a plan of dubious legality to man border crossings with more than one hundred of his own men, who were charged with turning away "transients."<sup>26</sup> Los Angeles assemblymen introduced legislation aimed at banning all "paupers, vagabonds, indigent persons and persons likely to become public charges, and all persons affected with a contagious or infectious disease," but it failed in the state senate on a constitutional challenge.<sup>27</sup> The task of exclusion then fell to Chief Davis's "bum patrol."

Their subjective, arbitrary, and capricious activities brought new notoriety to California. Newspapers printed damning articles, and protests poured in from the American Civil Liberties Union, the American Association of Social Workers, the governor of Nevada, the attorneys general of Arizona and Oregon, the chief of the California Highway Patrol, and numerous others.<sup>28</sup> Paramount and Metro-tone News shot footage of the bum patrol in action, using a leading California industry to publicize California's newest iniquity. Paramount News recorded the poignant scene of a family of nine hauling all they owned in a new, homemade trailer west to the California border. Their thirty dollars in cash was not enough to ensure their entry. "If only," the mother whispered, "I could see her [her sister in California]—I don't care so much if we can't stay here." But they were ordered to go back to New Mexico, their "legal residence," according to the license plates on their car and trailer. Under intense public pressure, the bum patrol was withdrawn in April 1936, but the ACLU continued to keep records of those convicted of violating the 1933 anti-indigent law, which was rapidly becoming the bum patrol's statutory twin.<sup>29</sup>

<sup>26</sup>The only legal challenge to the bum patrol was *John Langun v. James E. Davis, as Chief of Police of the City of Los Angeles*, brought in the Federal District Court, Central Division, Southern District of California. The judge ruled that because this was a dispute between two residents of California, it was a matter for the state courts, not the federal courts. Furthermore, because those who had arrested Langun had been deputized by Riverside County, they were deemed not to be acting as officers in the Los Angeles Police Force. (Not all of the bum patrol had been thus deputized. See *SRA Report*, supra note 16 at 247.) The Fourteenth Amendment, on which the case was brought, was deemed not to apply because the complaint was not directly against California, nor was Chief Davis acting on behalf of the state. The case was dismissed. A copy of the decision is found in MS 3580, ACLU Papers, Series 111, Box 35, Folder 748, California Historical Society, San Francisco [hereafter cited as MS 3580, ACLU Papers]. The case is discussed in the *SRA Report*, supra note 16 at 262.

<sup>27</sup>Ernest Besig to Hon. H.H. McPike, February 6, 1936, MS 3580, ACLU Papers.

<sup>28</sup>*SRA Report*, supra note 16 at 261.

<sup>29</sup>*Ibid.* at 256-59.



Increasingly, Section 12 of Chapter 716, the 1933 "Act to provide for the aid and relief of indigents," was being used to keep indigents out of the state. Typically, an individual would be arrested for aiding an indigent, usually a family member, to come to California. The accused would be hauled before a justice of the peace, charged with a misdemeanor, and convicted. Usually the justice would suspend sentence (generally a six-month term) if the offender would agree to take the indigents back out of the state of California. Around two dozen of these cases were recorded by the Northern California branch of the ACLU.<sup>30</sup>

The director of the Northern California branch, Ernest Besig, actively sought a test case for the harassment of transients from the inception of the bum patrol. His efforts resulted in a vote by his board in December 1936 to "offer assistance through the California branches to persons prosecuted under the California Indigent Law."<sup>31</sup> To make matters worse, when this act was codified the following year, the crucial wording of indigents "as described in this act" was omitted. As a result, no definition of "indigent" remained in the law and the term was even more widely applied.<sup>32</sup> The codified version promptly became known as the "anti-Okie" law, in recognition of its preferred target.

The so-called anti-Okie law was actually applied to a diverse group of individuals, including not only citizens, but foreign nationals, especially Mexicans.<sup>33</sup> But its new name pointed to one of the major incongruities in American history: a mainstream people being denied freedom of movement. Unlike the population that originally stimulated the passage of California's 1901 Indigent Persons Act, the Okies were seldom aged or infirm, nor were they predominantly single men. Instead, they were families of traditionally self-sufficient, white Protestants, from a generally rural background. Their plight highlighted a case of the agrarian myth gone bad. This favorite American vision, early fostered by Thomas Jefferson, then fueled by Manifest Destiny and embodied in the Homestead Act, offered a national Eden for those willing to settle on small farms, till the soil, and raise sturdy families. Such a multitude was supposed

<sup>30</sup>These lists, indicating facts about the defendants and the cases, are in MS 3580, ACLU Papers, and in idem, Box 46, Folder 1105. They have no title.

<sup>31</sup>Besig to McPike, February 6, 1936; Besig to George B. McGinty, February 15, 1936; Jerome M. Britchey to Besig, December 26, 1936; all in MS 3580, ACLU Papers.

<sup>32</sup>*California Statutes*, 1937, ch. 464, 1097-1102.

<sup>33</sup>See, for example, *People of the State of California v. Richard Ochoa* and accompanying correspondence in MS 3580, Series 111, Box 62, Folder 1566.

to be the wellspring of American democracy.<sup>34</sup> Instead, they were dispossessed and were flooding into California.

There, they came hard upon the reality of California's latifundia (large landed estates). Paul Schuster Taylor noted in 1930 that "more than one-third of all large scale farms in the entire country are located in California."<sup>35</sup> This pattern persisted into the nineteen-sixties, when Paul Gates recorded California's landholdings, ranging from over fifteen thousand acres to almost four hundred thousand.<sup>36</sup> The social inequities of a small, rich, agricultural upper class and a large, poor, migrant-labor class echoed the progressive blind spot noted by Mowry: an "inability to see the connection between economic institutions and . . . class consciousness."<sup>37</sup> The problem the Progressives had failed to resolve with the 1901 Indigent Persons Act exploded with the force of the Okie migration: the new, white, California "underclass."

In 1939 the Okies' suffering became part of American literature with the publication of John Steinbeck's *The Grapes of Wrath* and Carey McWilliams's *Factories in the Field*.<sup>38</sup> As the California tragedy became a national scandal, the time seemed propitious for a legal challenge to the law.

Among the ACLU records at the California Historical Society is a 1939 letter from Ernest Besig to "Fred F. Edwards, County Jail, Marysville, California" bearing a handwritten note at the top, "This is how the Edwards case started."<sup>39</sup> Besig apparently sent the letter in response to an enclosed newspaper clipping from the *San Francisco News* entitled "Rare Law Hits At Indigents." The article stated that Edwards had brought his sister (actually, his wife's sister) and brother-in-law, Mr. and Mrs. Frank Duncan, and their child into California from Texas, in violation of the 1933 statute.<sup>40</sup> Duncan, who had been on the

<sup>34</sup>Henry Nash Smith, *Virgin Land: The American West As Symbol and Myth* (New York, 1950), 138-200 [hereafter cited as Smith, *Virgin Land*]; Frederick Jackson Turner, "The Significance of the Frontier in American History," *Proceedings of the Forty-First Annual Meeting of the State Historical Society of Wisconsin* (Madison, 1894), 79-112.

<sup>35</sup>Paul Schuster Taylor, "Synopsis of Survey of Migratory Labor Problems in California," for the Resettlement Administration, MS 3580, ACLU Papers.

<sup>36</sup>Paul W. Gates, *History of Public Land Law Development* (Washington, 1968), 116.

<sup>37</sup>Mowry, *California Progressives*, supra note 2 at 103.

<sup>38</sup>John Steinbeck, *The Grapes of Wrath* (New York, 1939); McWilliams, *Factories in the Field*, supra note 17.

<sup>39</sup>Besig to Edwards, February 10, 1940, and "Rare Law Hits At Indigents," *San Francisco News*, February 10, 1940, both in MS 3580, Series 11, Box 46, Folder 1105. The resultant case was *Edwards v. California*, 314 U.S. 160 (1941).

<sup>40</sup>"Fred F. Edwards . . ." fact sheet, *San Francisco News*, February 10, 1940.

WPA in Texas, applied for relief under the Farm Security Administration in California. (Specifically, he applied in order to get prenatal care for his wife, who was pregnant with their second child.) His record of relief work in Texas was used to brand him as a "known indigent." Edwards was therefore charged with a misdemeanor under the anti-Okie law. Besig urged Edwards not to plead guilty to the charge and offered the resources of the ACLU in his defense. Edwards accepted.<sup>41</sup>

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### THE EDWARDS CASE PROCEEDS

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The case went first to the Justice Court of Yuba County. Edwards lost, and his lawyers appealed to the Yuba County Superior Court in March 1940. The ACLU's attorneys, Philip Adams and Wayne M. Collins, carefully worded their appellant's brief to highlight constitutional issues, fully aware of the implications of judicial procedure. For those cases involving constitutional issues only, appeals bypassed the California Supreme Court and went immediately to the court of last resort, the United States Supreme Court.<sup>42</sup> By taking this route, the ACLU could force a federal judicial hearing of this blot on the American Dream.

To provide a proper constitutional framework, Adams and Collins first asserted that the "indigents" being prosecuted under this law were, in fact, "the innocent victim[s] of State created inequalities" resulting from the worldwide disequilibrium of the Great Depression. They then attacked the anti-Okie law as a violation of the Fourteenth Amendment, of the privileges and immunities clause, the due process clause, and the equal protection clause. In regard to the equal protection clause, they claimed that it criminalized the act of *bringing* an indigent into the state, although it was actually aimed at keeping out the nonresident indigents themselves, while having no effect on resident indigents or on indigent residents who had been temporarily out of the state. Furthermore, this law had never been applied to California's agricultural elite, who had enticed thousands of migratory workers into the state. Instead, it had been solely applied to individuals bringing in family members. The anti-Okie law was also attacked as an improper regulation of commerce, on the basis that California was usurping federal power in violation of Article I of the Constitution, and on other grounds.

<sup>41</sup>Besig to Edwards, February 10, 1940.

<sup>42</sup>[Besig] to Jerome M. Britchey, July 29, 1940, MS 3580, Series 111, Box 46, Folder 1105.

Although Edwards lost again in superior court, the Supreme Court consented to hear his case in 1941.<sup>43</sup> A New York lawyer, Samuel Slaff, agreed to reargue the case for the ACLU. He relayed the justices' request for additional information on prosecutions under the anti-Okie law, and the indefatigable Besig went to Tulare County, the site of the greatest number of arrests, to find additional cases.<sup>44</sup>

In the interim, the United States Congress jumped on the Help the Transients bandwagon. The Tolan Committee, formed to study interstate migration, held hearings during 1940 and 1941 and issued a document that ran to thousands of pages. John Tolan, a congressman from California, voiced a special interest in the *Edwards* case. He prompted the filing of an amicus brief, which began with the privileges and immunities clause as the primary reason why the anti-Okie law was unconstitutional.<sup>45</sup>

In November 1941, Besig's views were vindicated. The Supreme Court handed down a unanimous decision for Edwards. The justices' reasoning, however, was far from uniform. Justice James F. Byrnes, writing for the majority, held that the anti-Okie law placed an unconstitutional burden on interstate commerce, relying on an interpretation that dated back to well before the Civil War. However, the majority refused to address the extent to which Congress could regulate such transportation, nor did they determine whether other constitutional provisions prohibited the state's actions.<sup>46</sup> As a contemporary law-review article noted, basing the majority decision in *Edwards* on commerce was "consistent with the trend toward retarding the effect of that [privileges and immunities] clause . . . [to avoid] judicial control over state action to an unknown degree."<sup>47</sup>

On the other hand, strongly worded concurring opinions specifically tried to resuscitate the privileges and immunities clause of the Fourteenth Amendment. In the first concurring opinion, Justice William O. Douglas explicitly dismissed consideration of the commerce clause, instead saying that the right of individual movement was fundamentally different from "the movement of cattle, fruit, steel and coal" across state lines. He

<sup>43</sup>*People v. Edwards*, "Appellant's Brief on Appeal," *ibid*.

<sup>44</sup>Samuel Slaff to Besig, April 23, 1949, and November 4, 1941, both in MS 3580, Series 111, Box 46, Folder 1105; *Tolan Report*, *supra* note 1 at pt. 26, January 19, 1942, 10204-11.

<sup>45</sup>Slaff to Besig, May 5, 1941; Besig to Slaff, May 9, 1941, and June 6, 1941; both in MS 3580, Series 111, Box 46, Folder 1105.

<sup>46</sup>314 U.S. 160, 160-161.

<sup>47</sup>*Texas Law Review* 20 (1941-42), 618.



Fred and Mellie Edwards and their five children (SRA Report)

promptly added, "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."<sup>48</sup> He based his entire reasoning on this clause, and was joined by Justices Hugo Black and Frank Murphy in this opinion.

Justice Robert H. Jackson, in his own concurring opinion, admitted the applicability of the commerce clause, but, like Douglas, Black, and Murphy, placed his own reasoning squarely on the privileges and immunities clause. Referring to the court's history, he noted, "For nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause. . . . But," he continued, "the difficulty of the task [of resuscitating this clause] does not excuse us from giving these general and abstract words whatever of specific content and correctness they will bear as we mark out their application, case by case."<sup>49</sup>

<sup>48</sup>314 U.S. 160, 177-78.

<sup>49</sup>*Ibid.*, 182-83. Justice Jackson's reference to "nearly three-quarters of a century" pinpoints the *Slaughterhouse Cases*, 83 U.S. 36 (1873), as the beginning of judicial morbidity of the privileges and immunities clause. In this decision, the Supreme Court gave its first extended judicial construction of the Fourteenth Amendment. Although the facts of the case involved a slaughterhouse monopoly in New Orleans, the Court took this opportunity to delineate the federal balance of power between states and the national government. Regarding the privileges and immunities clause, the majority made a sharp

Jackson's discussion ranged even more widely through American history, explicitly referring to the "inescapable implications of the westward movement of our civilization." Thus alluding to one of our most deeply cherished myths, he decried any measure that was "at war with the habit and custom by which our country has expanded." Consequently, Jackson felt, like Douglas, that the right of interstate migration was protected as an attribute of national citizenship under the privileges and immunities clause of the Fourteenth Amendment.<sup>50</sup> The illogic of accepting the myth but denying the right to implement it was therefore his main cognitive foundation.

Despite all this provocative reasoning, the gap remained between ruling and reality. While California's anti-Okie law was thus declared unconstitutional, its demise did not give the Okies security or acceptance. Statistics compiled by one historian indicate that as late as 1970, Okies still earned less and had lower-status jobs than other California whites, to say nothing of persistent social stereotyping.<sup>51</sup> To a large extent, the Dust Bowl migrants remained obscure, like the Duncans, the catalysts for the *Edwards* case. Despite all the historical and legal commentary the case engendered, they were seldom mentioned. Yet they were the ones whom Edwards had brought into California; they were the hardworking people in the prime of life who wanted a new start; they were the ones being pressured to leave.

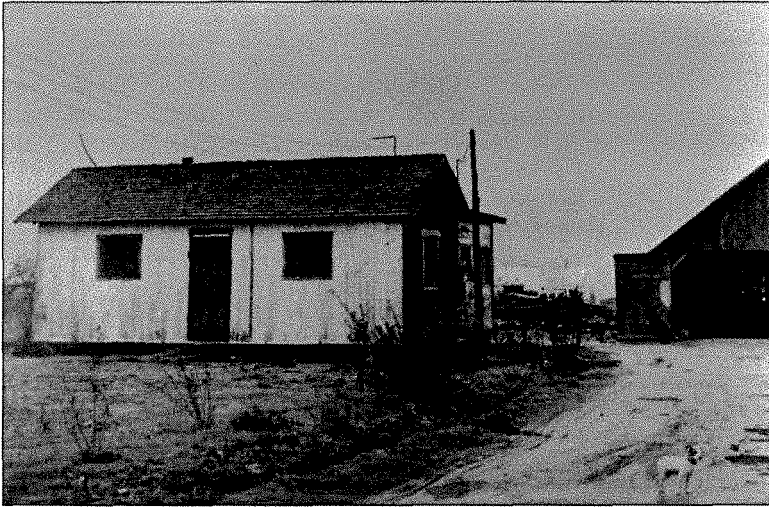
Based on research by the ACLU and Part 26 of the Tolan Report, what we know about the Duncan family is as follows. Edwards had driven two other men back to Texas from California in December 1939. He spent that Christmas with Frank

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distinction between rights deriving from national citizenship and those stemming from state citizenship. The rights of national citizenship were very narrowly defined, and the rights of the states to exercise their police powers in enforcement of the rights derived from state citizenship were thereby assured. Although dissenting opinions in the *Slaughterhouse Cases* argued that national citizenship was primary and state citizenship therefore derivative and subordinate, the 1941 Court majority was still unwilling to adopt this interpretation. This decision has been widely discussed, but two thorough sources are M. Franklin, "The Foundation and Meaning of the Slaughterhouse Cases," *Tulane Law Review* 18 (October, December 1943), 1-88, 218-62, and the more accessible work by Donald G. Neiman, "The Fourteenth Amendment Receives Its First Judicial Construction," in *Historic U.S. Court Cases, 1690-1990: An Encyclopedia*, ed. John W. Johnson (New York, 1992), 252-60.

<sup>50</sup>314 U.S. 160, 184-85.

<sup>51</sup>Gregory, *American Exodus*, supra note 22 at 252-53; "Owner gets \$37,500 from state after legal battle with CalTrans," *Merced Sun-Star*, October 31, 1991. These damages were awarded after CalTrans had insisted that the owner of the "Okie Girl" restaurant remove her signs from Interstate 5 on the basis that they "were in poor taste and offensive to some travellers."



The Edwardses' home in Marysville, California (SRA Report)

Duncan and his pregnant wife (whose full name is never given). She was the sister of Edwards's wife, Mellie, who had stayed behind in California. The Duncans had a two-year-old son who had probably never met his cousins, the five Edwards boys, who were in California with his Aunt Mellie. On New Year's Day, 1940, Fred Edwards and the Duncans set out from Spur, Texas. The Duncans paid for the gas and oil needed to reach Marysville, California, expending all of their funds to do so. For the first month after their arrival, they relied on aid from the Farm Security Administration, which they had originally approached for prenatal care for Mrs. Duncan. On February 7, Frank Duncan began working on a peach ranch and the family was on its way to being self-supporting. But on February 6, Fred Edwards was arrested, beginning the case that overturned California's anti-Okie law and twenty-seven others like it. The Duncans promptly slipped into historical obscurity.<sup>52</sup>

Westward movement, especially of young, hardworking whites, has been the traditional solution of our national problems. For most of our history, that option has held out a shimmering promise, Turner's thesis notwithstanding. In a real sense the West did not "close" in 1890, because people kept coming whether or not there was open land. Just over a decade later, California faced up to the dilemma of those who came without a place to stay, and passed its first Indigent Persons

<sup>52</sup>Edwards profile, MS 3580, Series 111, Box 46, Folder 1105.



Mr. and Mrs. Frank Duncan and their two children (SRA Report)

Act to give them some relief. The people kept coming, and help was continually proffered, until the Dust Bowl inundation of the thirties. Then the West *really* closed, with the passage of California's anti-Okie law. California's refusal to admit Okies became a national scandal. The nation had to reopen the door. The vehicle was the *Edwards* case and the verdict a triumph for the interstate movement of persons, if not for reevaluating constitutional provisions.

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### THE DREAM AND THE REALITY

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Ultimately, we must return to the question we originally posed: How do the events described fit with established views of the American West, its myths, and its interpretations?

Simply speaking of "the West" in itself acknowledges a particular orientation. We are not viewing this land as Mexico's El Norte, or Canada's southern borderlands, or local Native Americans' center of creation. Semantically, and by common agreement, our national use of the term focuses on a migration from east to west that began with English settlement and continued through to the logical conclusion of Manifest Destiny. Ever since Turner claimed that this process engendered American democracy, historians—especially western historians—have reacted to his thesis. His followers saw the end of the process as the "closing" of the frontier in 1890, although the demo-



cracy thus established remained.<sup>53</sup> The "new" western historians disagree not only with Turner either entirely or in part, but often with the idea that the frontier closed at all.<sup>54</sup> Furthermore, the saga of this westward expansion, with its heroes and villains, has been central to our national psyche, coloring our view of wilderness, providing the story line for children's games, books, and movies, and even enlivening the foreign press, which frequently sees Americans as "cowboys," those denizens of the open range.<sup>55</sup>

With all of this rich, varied emphasis on the glories of westward movement, no state could act as a bar to the national dream. Among the twenty-eight states that had laws restricting freedom of movement, and the three that had the equivalent of the bum patrol, California almost inevitably became the site of the judicial showdown.<sup>56</sup> Thus the life of California's indigent (or anti-indigent) law offers a case study of the dynamic relationship of East and West—in a historical and a legal sense. Although one commentator, Neil Morgan, asserts that California is now statistically like the rest of America, its past, at least, has been distinctive. Even Morgan agrees that "The central truth in California history has always been migration."<sup>57</sup> And he's right. California had the first major gold rush in North America. California became the western terminus of the first transcontinental railroad. California attracted entrepreneurs who developed medieval-style estates side-by-side with world-class cities. California became the goal of Okies who wrote:

California, California  
Here I come too.  
With a coffee pot and skillet  
And I'm coming to you.  
Nothing's left in Oklahoma  
For us to eat or do.<sup>58</sup>

<sup>53</sup>An enormous amount has been written on Turner and his thesis. A good diversity of opinion is presented in *The Turner Thesis: Concerning the Role of the Frontier in American History*, ed. George Rogers Taylor, 3d ed. (Lexington, Mass., 1972).

<sup>54</sup>See, for example, Patricia Nelson Limerick, et al., eds., *Trails: Toward a New Western History* (Lawrence, Kans., 1991).

<sup>55</sup>Smith, *Virgin Land*, supra note 34; Erik H. Erickson, *Childhood and Society*, 2d ed. (New York, 1963), 293-94; David Dary, *Cowboy Culture: A Saga of Five Centuries* (New York, 1981), 332-38; Jack Weston, *The Real American Cowboy* (New York, 1985), 209-52.

<sup>56</sup>*Tolan Report*, supra note 1 at pt. 26, 10159-203.

<sup>57</sup>"It Is High Noon in California," *San Francisco Chronicle*, September 9, 1993.

<sup>58</sup>Quoted in Gregory, *American Exodus*, supra note 22 at 21.

As the epitome of the fascinating, mythical West, California seemed to offer all a better life, and people followed its siren song. They first came by wagon, on foot, and in ships, and then on railroads, which brought settlers and "tramps." Those who stayed sometimes went broke; they became "indigents," and were aided by the state law of 1901. California next hosted "interstate migrants" in the early twentieth century, then turned on Dust Bowl refugees during the Great Depression. These newcomers were barred by statute, with the 1933 passage and 1937 codification of the anti-Okie law. This law could not survive. It was not just an affront to the Okies; it was intolerable to a nation that prided itself on a history of westward expansion.

Under these circumstances, only the federal government could intervene to save the national dream. The Supreme Court assumed the task in *Edwards v. California*. While the majority sidestepped the opportunity to restore the power of the privileges and immunities clause to our constitutional protections, the court effectively ended California's forceful "closing" of a part of the national frontier.

## BOOK REVIEWS

*The Responsible Judge: Readings in Judicial Ethics*, edited by John T. Noonan, Jr., and Kenneth I. Winston. Westport, Conn.: Praeger Publishers, 1993; 416 pp., bibliography, index; \$75.00, cloth; \$35.00, paper.

If formalism on the bench were possible, there would be little need to worry about judicial ethics. If judging were a mechanical process, with not much discretion, then a conscientious and honest judge should be able to determine the correct result regardless of any other influences. But today, after almost a century of legal realism, few believe in such mechanical jurisprudence. The accepted reality is that judges have enormous discretion and there is a great need to regulate judicial conduct.

Judge John T. Noonan, Jr., and Kenneth I. Winston have compiled an excellent collection of readings on judges' behavior. There are more than fifty excerpts, drawn from a wide array of sources, ranging from Raleigh and Bracton in 1270 to *Marbury v. Madison*, from contemporary cases about judges' immunity to civil suits to law-review articles. Although the book is subtitled "Readings in Judicial Ethics," its focus is much broader. Indeed, relatively little of it discusses "ethics" in the narrow sense of the professional rules that regulate judges' behavior. There is little consideration of the American Bar Association's *Model Code of Judicial Conduct*, revised in 1990, or, except for the subchapter on recusal, of topics that would usually fall under the rubric of judicial ethics. The book's objective is much more ambitious, and the editors have done a superb job of selecting readings that illuminate the issue of how judges should do their jobs.

The book is divided into three major parts. The first of these, "The Ideal Judge and the Partial Judge," describes the idealized image of neutral and impartial judges. Particularly interesting is a subchapter entitled "Monsters," which focuses on examples of judges who have abused their office by taking bribes and kickbacks. Also fascinating is a subchapter on the political activities of sitting judges, which includes articles discussing the propriety of Justice Felix Frankfurter's involvement with the Roosevelt White House.

Part 2 is simply titled "Judging," and focuses on fifteen specific aspects of judging behavior. The essayists include Lon L.

Fuller, Robert Cover, Alexander M. Bickel, Guido Calabresi, Walter F. Murphy, and Justice Ruth Bader Ginsburg. They cover numerous topics, among which are the judge's responsibility to decide on the record, the place for compassion, the judge's role in securing settlements, and when judges should write separate opinions.

Part 3, "Independent and Accountable," addresses two primary topics: the circumstances under which judges must recuse themselves, and the methods for holding judges accountable. The latter includes discussion of judicial elections and their potential effects on judging behavior, criminal prosecutions, civil liability, and peer pressure.

*The Responsible Judge* contains some notable omissions that the editors might want to include in subsequent editions. For example, there is virtually no discussion of race or gender bias in judging. Across the country, there has been a trend to create commissions to study the problem of bias and possible solutions. For example, Judge Noonan's court, the United States Court of Appeals for the Ninth Circuit, created a committee on gender bias that produced an excellent report that was released in 1993. Inclusion of such findings would improve the collection.

Another omission is the process of selecting judges and holding them accountable. For example, in the appointment or election process, when, if at all, should judges state their views on disputed legal issues? This question has recently received great public attention in the confirmation battles over the nominations of Robert Bork, David Souter, and Clarence Thomas for the Supreme Court. There is also a provision limiting speech on controversial issues by candidates for elected judicial office. Does preserving the appearance of judicial independence require that judicial candidates avoid stating their views on issues likely to come before their courts? Or does the need for accountability and informed choice require that judicial candidates honestly state their positions on important matters?

Despite these omissions, *The Responsible Judge* is an admirable work on the subject of judging. As a collection of relatively short excerpts—some as brief as a page and none longer than about fifteen pages—it is perhaps best suited for use as a reader in a college or law-school course. However, anyone interested in thinking more about the task of judges will find the book useful and illuminating.

Erwin Chemerinsky  
University of Southern California Law Center

*Crime and Punishment in American History*, by Lawrence M. Friedman. New York: Basic Books, 1993; 578 pp., bibliographic essay, notes, index; \$15.00, paper.

Lawrence M. Friedman has produced another "must" read for all those interested in American legal history generally and American criminal-law history specifically, or, for that matter, anyone interested in the issue of crime in America.

In this cultural and social history of American crime and punishment, Friedman, the Marion Rice Kirkwood Professor of Law at the Stanford University Law School, applies his enormous analytical and stylistic skills to the history of American crime, criminal law, and the criminal-justice "system." What he discovers is not always to his liking; in fact, what he discovers is that (to paraphrase), on the topic of crime and crime control, "We have met the enemy—and he is us." Other researchers and writers have made the same point, but no one has demonstrated the cultural and social basis of crime and the changing perceptions of crime across the sweep of American history as Friedman does here, or done it so persuasively. *Crime and Punishment in American History* was one of three finalists for the Pulitzer Prize in History in 1993, but the committee declined to name a winner for that year, and, quite frankly, Friedman was robbed. This book both synthesizes the vast literature on criminal-law history and provides a new, overarching interpretation of what historians thought they already knew. Based on thorough scholarship and yet written in a style accessible to the mythical "reasonable" person, it is a work by a legal historian at the top of his craft.

Only Friedman's own language can convey the appeal and power of this book. In his last chapter, "A Nation Besieged," the author reflects on both the "crime problem" and, one suspects, on what he learned in the production of this work. He admits that

In my view, the "crime problem" flows largely from changes in the culture itself; it is part of us, our evil twin, our shadow; our own society produced it. It has been a central theme of this book that criminal justice systems are organic, rooted in society. Crime is no different. It is part of the American story, the American fabric. Perhaps—just perhaps—the siege of crime may be the price we pay for a brash, self-loving, relatively free and open society (p. 464).

Plain speaking, well argued. While it is true that not all eras in the United States' history are equally examined; while some

areas of the criminal law and criminal process are examined more closely than others; and while Friedman emphasizes the Northeast and urban areas over other regions and the rural areas (he includes western legal history whenever possible), such observations are not so much criticisms of this monograph as challenges to future researchers and students. For decades to come, this book will be the standard against which other works on American crime and criminal-justice history will be judged. Buy it, borrow it, read it, force students to confront it, recommend it to friends—all can profit from *Crime and Punishment in American History*.

Thomas C. Mackey  
University of Louisville

*Called from Within: Early Women Lawyers of Hawaii*, edited by Mari J. Matsuda. Honolulu: University of Hawaii Press, 1992; 344 pp., illustrations, notes, index; \$26.95, paper.

Harriet Bouslog, a labor lawyer, responds with intelligence and flair to McCarthy-era prosecutions and to a political and economic system she deems oppressive and un-American. Marybeth Yuen Maul sets up a small-town law practice and provided government service to leprosy patients at an isolated patient settlement. Patsy Takemoto Mink forges a progressive identity within the Democratic party, challenging the Republican sugar-planters' oligarchy. Rhoda Lewis, who, though first in her class at Stanford Law School, is unable to find private employment, establishes a reputation for brilliance with the territorial attorney general's office and becomes the first woman state supreme court justice. Marguerite Kamehaokalani Ashford, the only woman among sole private practitioners for many years, earns a reputation as a fighter on behalf of the unpopular and achieves preeminence as an appellate lawyer. Biographies of these and twelve other women lawyers of early Hawaii are collected in *Called from Within: Early Women Lawyers of Hawaii* and tied together marvelously in Mari Matsuda's introductory chapter.

The movement to reclaim women's history and the revival of scholarly biography, described in Barbara Babcock's foreword, provided the impetus for the book Matsuda has edited. Each biography of an earlier woman lawyer of Hawaii is written by a contemporary counterpart. Group participation was inspired by a recognition, in the words of one of the authors, Bambi E. Weil, that "sometimes it is essential to go backward in order to go forward." In going backward, two themes of femi-

nist historiography emerge. The first of these is carefully researched storytelling. More particularly, Matsuda's introduction describes an initial compensatory stage of writing women's history, writing that tells "the story of women and rescue[s] their lives from historical amnesia."

The authors of *Called from Within* tell those stories, often superbly, and thereby link the lives of significant but otherwise largely ignored women in Hawaii's volatile hundred-year transition from monarchy to republic, from territory to state. The authors tell of diversity among early women lawyers—adventurers, children of Asian immigrant laborers, spouses following husbands, descendants of missionaries. They tell of women unusual in terms of professional attainment but typical in terms of gender struggles. They tell of gender discrimination and exclusion, compounded for some by racism and religious prejudice. They tell of women searching for ways in which to integrate their demanding, uncharted professional lives with the expectations and joys of family. And they reveal ways in which their subjects challenged these adversities, coped with them, and often transcended them.

A second, related theme also emerges. The individual biographies, collected into a whole, suggest an inquiry for which Matsuda furnishes a framework in her sections "Gendered History" and "Women in Professions." In the sections "Professional History In Hawaii," "Hawaii History," and "Individual Women in History," the editor traces obstacles and opportunities regarding gender in a multi-racial, multi-cultural, multi-religious, pre-statehood Hawaii controlled by a white, male, Christian, American oligarchy. Thus she places each of these lawyers' struggles and contributions within complex, shifting socio-economic-political settings.

By focusing upon and contextualizing biographies of women lawyers in early modern Hawaii, *Called from Within* invites a rethinking of many scholarly and popular accounts of Hawaii's history. Kuykendall and Day's widely read account of Hawaiian history, for example, describes a salutary westernizing trajectory from "stone age" heathenism to "atomic age" civilization and excludes serious reference to women as historical agents.\* Matsuda proposes that when women's experiences are added to such singular visions of historical progress, "we see more conflict and ambiguity, and we derive notions of progress and of the good that challenge not just the exclusion of women from history, but the very concept of history as we know it."

*Called from Within* thus speaks to a variety of readers—the

\*Ralph S. Kuykendall and A. Grove Day, *Hawaii: A History from Polynesian Kingdom to American State*, 2d ed. (New York, 1961).

feminist historiographer, the critical historian, the legal historian, the post-colonial scholar, among them. For these and many others it is an eminently worthwhile book.

Eric K. Yamamoto

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*Letters from the Nevada Frontier: Correspondence of Tasker L. Oddie, 1898-1902*, edited by William A. Douglass and Robert A. Nylen. Norman: University of Oklahoma Press, 1992; 392 pp., illustrations, appendix, notes, index; \$37.95, cloth.

Once the Comstock boom went bust, so did Nevada's economic fortunes. The Tonopah and Goldfield discoveries early in the twentieth century breathed life into Nevada's economy, and sired the next generation of its political leaders: George Wingfield, Nevada's mining and political ruler for more than two decades; Key Pittman, a longtime U.S. senator, and his brother Vail, who later became governor; Pat McCarran, a powerful senator for twenty years and Wingfield's successor as political boss; and Tasker Oddie, a governor and two-term senator. The only previous work on Oddie had been a rather abbreviated biography by Loren Chan. This collection of Oddie's correspondence is a welcome addition that adds to our understanding of him, and of the environment that spawned him and his political friends and foes.

William Douglass and Robert Nylen, the book's editors, make a strong case for the importance of Oddie's letters, stating that they "bracket the discovery in 1900 of the fabulous Tonopah mines, one of the watershed events in Nevada history," and represent the thoughts of "not a mere observer of an unfolding scene but rather one of its prime architects" (p. xi). Oddie was only twenty-seven when he arrived in Nevada as a lawyer for the Anson Phelps Stokes family, New York investors who hoped, as Oddie did, to find riches in central Nevada. He handled their legal problems, and created another when he uncovered mismanagement by Philo Farnsworth, the general manager of the Stokes's Nevada Company. Oddie's discovery led to Farnsworth's ouster and a successful lawsuit by the Stokes family against what Oddie hyperbolically called "one of the most desperate villains that live" (p. 76).

While Oddie's letter provide an interesting and useful portrait of the mining towns of Ione and Belmont, one senses and shares his excitement over the beginnings of Tonopah. "There is a chance, and a good one, that this will be a great camp, as there is no telling what is under the surface," he wrote home



with rare understatement (p. 232). His letters reflect not only the growth and development of the mining society, but of the writer himself. He came to Nevada an apparently cosmopolitan eastern lawyer and, while retaining a strong sense of his breeding and background, wound up a western miner, outdoorsman, and politician who would eventually write about some investors, "They are a queer outfit, as they do not understand the ways of the country" (p. 309). His letters reveal a typical yet educable racist of the time. At the beginning of his stay in Nevada he wrote of Indians to his mother (the recipient of most of these letters), "They are lazy creatures and I don't think they are ever truthful," while less than two years later, having hired an Indian worker, he wrote, "I fed him yesterday. You would be astonished to see a big red skin sitting at my table eating with me" (pp. 25, 190). He also displayed modesty—"People have me very much overrated, as they think I know a lot of law. I do know a little but not much"—mingled with a growing confidence that proved his own undoing and that of many other western miners (p. 231). What becomes apparent, however, is that Oddie knew more than enough about mining law, politics, culture, and people to make himself an important part of the Tonopah boom, and thus of Nevada itself.

Douglass and Nylen have done a fine job of editing the collection, retaining the flavor of the letters without cluttering them with corrections or leaving them in an unclear form. Their introduction puts Oddie, the land, and the era in perspective without attaching more significance to him than he deserves, although more detail about his subsequent career would help the reader understand why, as the editors write, "Despite his prior education, business experience and . . . his own sweat, brawn, and capital, he was forever too optimistic about his prospects," and why that applied to him not only as a miner, but also as a politician who lost about as often as he won (p. xxi). The endnotes are extensive, informed, and informative, providing much necessary background, although it is a pity that the realities of publishing preclude their inclusion as footnotes. The editors and the University of Oklahoma Press have produced an attractive, interesting, and useful collection that scholars and students of the West as whole, of Nevada, and of mining law and society will—and should—read with profit and enjoyment.

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*Founding of the Far West: California, Oregon, and Nevada, 1840-1890*, by David Alan Johnson. Berkeley: University of California Press, 1992; 488 pp., illustrations, appendices, notes, index; \$35.00, cloth.

The study of western legal history is a flourishing enterprise. In this important book, David Alan Johnson traces the development of the political cultures of California, Oregon, and Nevada during the half century of 1840-1890. He does so by a study of the adoption of constitutions in the new states of California, in 1849; Oregon, in 1857; and Nevada, in 1864. Johnson organizes much of the history around the lives of leaders at the constitutional conventions, borrowing from T. H. Breen by referring to each set of leaders as a "charter group," one of whose functions was to establish a framework of laws for the new society. The lives of charter-group members illustrate themes prominent throughout the book, and provide an illuminating study of the evolving politics of persons born during the first decades of the nineteenth century, whose ideology was shaped during the Jacksonian period. This approach to the history, and the book's excellent photographs and maps, translate what could have been an abstracted and statistics-laden monograph into a highly readable narrative. (The book's appendices provide statistics of constitutional convention votes.)

Nevertheless, *Founding of the Far West* is somewhat cumbersome and overlong. It is divided into three parts, each with three chapters dealing consecutively with aspects of the history of California, Oregon, and Nevada. Parts 1, 2, and 3 successively relate their territorial, constitutional, and early state histories. Johnson's choice to organize the book in this manner means that the reader zigzags in and out of the histories of the three territories/states, though one can follow the history of each by skipping chapters. In addition, the book raises yet again the difficult question of how much context a writer should provide for a historical study. Although individual sections move crisply, Part 2, the core of the study, constitutes considerably less than half of the entire work. While the book abounds with fascinating stories of people, places, and the law, there are times when it becomes so enmeshed in these stories that it seems to lose sight of important themes.

This is not at all to suggest that *Founding of the Far West* is devoid of themes. It proposes a significant interpretation of the development of the political cultures of its three territories/states that offers a challenge both to Frederick Jackson Turner's view that the frontier environment made American culture homogeneous, and to studies that present western history separated from the larger panorama of American history. Johnson

argues that each charter group worked from "a common political vocabulary drawn from a variety of ideological materials available in the larger national setting." But because of the multiplicity of traditions, as well as the individual circumstances and peculiar character of each of the charter groups, he proposes that each state constitution "expressed a distinctive version of antebellum American political culture" (p. 11). Specifically, California's constitution, written on the heels of the gold rush, oozed an individualistic Lockean liberalism. Many of Nevada's early American settlers migrated from California, again in search of mineral wealth, but by 1864 Nevada's constitution reflected the influences of corporate capitalism. Oregon's constitutional experience, however, reflected the influence of classic republicanism.

Johnson's interpretation of the development of these societies and political cultures represents a balanced appreciation of local and national influences, one that is creative and in many respects compelling. But it also raises a number of questions. He argues that each state's constitution was crucial to its developing political culture. However, in light of developments that he skillfully chronicles in California, Oregon, and Nevada during the late nineteenth century, his view, especially in the first two states, is perhaps too static.

Johnson's rendition of the constitutional convention histories in Part 2, filled with insightful observations, is the best available account in scholarly literature. Even so, the support that the author proffers for his characterization of each leaves the reader with doubts. These begin in the book's initial paragraph, in which Johnson records how he, like many historians, discovered the interpretive power of the republican paradigm for understanding the nature of Oregon's political culture. Its application to Oregon history, however, is open to question. It is now generally acknowledged that the republican interpretation has been applied far too expansively, and the period of the latter 1850s is quite late for a vital republicanism. Some of the distinctions Johnson draws between Oregon's republicanism and liberalism seem as murky as those made in recent literature. No matter how one chooses to denominate Oregon's political culture, the author makes clear that those who went to this isolated antebellum territory, in contrast to migrants to California and Nevada, had eschewed the pursuit of mineral wealth for a more stable agrarian lifestyle. Early Oregonians were a political, not an economic, people.

More problematic is a theme prominent in the genre of legal history that considers the adoption of laws in American colonies and territories from the seventeenth through the nineteenth centuries. In successive experiences, lawmakers repeat-

edly adopted familiar laws and reshaped them into distinctive legal cultures. For example, two generations ago Walter Prescott Webb, in his still foundational study, *The Great Plains*, found a melange of tradition and design in the shaping of western law and culture. Johnson suggests some recasting of old law when he observes that constitutional convention delegates sometimes confronted particular issues; that they occasionally crafted novel constitutional provisions; or that they resolved the same issues similarly but for quite different reasons. His study of how convention delegates debated and resolved questions relating to banks and corporations provides excellent examples of all of these phenomena. However, without resurrecting the discredited view that western culture was a servile imitator of eastern precedents, he found—typical of American state constitution-making throughout the nineteenth century—that all of the constitutions borrowed provisions from a narrow range of existing models. California and Oregon drew heavily upon midwestern models, namely the Iowa and Indiana constitutions respectively, and Nevada borrowed freely from the California constitution. If the influence of legal traditions was so strong in the shaping of these constitutions, and if they in turn were critical to the political development of their states, then how can one characterize their political cultures as distinctive?

*Founding of the Far West* documents another evocative theme, Robert Wiebe's search for order, which again suggests important similarities in the development of the three territories/states. The book contains fascinating examples of the ordering of their new societies, including conflicts between informal community justice and formal legal institutions, with a legalist order invariably prevailing. Each of the constitutions, of course, provided a legal framework for a youthful society in which disorder lurked at its very gates. The ordering theme recalls again Turner's old view that the frontier experience was repetitive in American history, and that there were notable similarities in its process of societal development. It also suggests Patricia Nelson Limerick's recent "legacy of conquest" interpretation of western history. All of this was related to a process of absorption of the three states into the nation's modern culture that was clearly discernible, even in Oregon, by the late nineteenth century.

Acknowledging recurrent historical processes, the force of legal traditions, and emerging themes of national culture, can one still perceive distinguishing characteristics in the legal cultures of the nineteenth-century West? Variations were a hallmark of the legal cultures of its multicultural traditional communities. The cumulative effect of both Johnson's book

and related scholarship suggests attention to the following inquiry in future studies: How, exactly, did nineteenth-century lawmakers adopt and reshape legal traditions, not only common law but possibly also the law of traditional communities, in ways that contributed to the intricate tapestry of western legal culture? *Founding of the Far West* is a richly textured book that provides an excellent basis and model for further studies of major facets of western legal history. It constitutes essential reading for anyone interested in the early American histories of California, Oregon, and Nevada, as well as political culture during the last half of the nineteenth century.

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*Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America*, by Edward A. Purcell. New York: Oxford University Press, 1992; 446 pp., notes, index; \$59.00, cloth.

*Litigation and Equality* presents a lively and thoughtful discussion of the history of federal diversity jurisdiction during the period from 1870 to 1958. Edward A. Purcell is to be commended for this history, which is useful reading for academics, students, judges, and practicing attorneys.

Purcell writes in his introduction that his book originated as a study of federal court civil jurisdiction from the Civil War to the present. During the course of his research, he became interested in how the legislative debates were fueled by what was occurring in the courts of the day. The author, who holds a doctorate in history and a law degree, is blessed with a historian's heart and a litigator's eye with which he describes the battle for strategic advantage waged by the plaintiffs' and corporate defense bar during the book's eighty-eight-year span.

Purcell brings to life the daily contest of wills and stratagems that breathe life into the law. Avoiding statistical analysis (which often results in errant conclusions), he looks to the broad scope of the litigation system, taking care to include a discussion of settlement strategies as well as appellate decisions.

He notes the extreme differences in how tort cases—usually workers suing large corporations for damages—and contract cases—usually insurance policy litigation between insured and insurer—were handled in many cases. Plaintiffs faced enormous challenges suing large corporations. Plaintiffs preferred to litigate in state court, while corporations preferred the federal courts. The scope of diversity jurisdiction and the procedural

rules surrounding it in the later nineteenth and early twentieth centuries clearly favored the corporate defendant. Often the mere threat of removal would cause a plaintiff to settle quickly. Purcell also discusses the various ploys corporate defendants would employ to confuse or even terrorize plaintiffs, who were frequently ignorant of their rights or options.

One letter from an insurance adjuster to a claimant is particularly amusing in its simple discussion of the realities faced by individual plaintiffs attempting to sue a corporation. The claimant is seeking the sum of thirteen hundred dollars to cover the costs of an accident; the insurer is offering two hundred. The first and last lines of the communication say it all: "We will not pay your claim. . . . Take it or leave it." This strategy was referred to as "the 'Net Return' or Starvation Plan." I was struck when I read it by how little the adjuster's art had changed in the last century.

As brutal as the corporate defense bar could be in its dealings with plaintiffs, the plaintiffs' bar was equally ingenious in dealing with the various obstacles they faced. What the plaintiffs' bar did not achieve for many decades was a change in the federal courts or legislation that would provide them with an even playing field upon which to argue their cause. As a direct result, the plaintiffs' bar came to pursue various litigation strategies to avoid removal to federal court, including suing on exclusively state grounds and limiting damages to amounts below the federal jurisdictional limit.

Of particular interest to practicing litigators and armchair court watchers is that the tone of the times was clearly as adversarial and contentious as our own. Until reading this book, I had no idea just how uncivil lawyers involved in civil litigation were in past decades. Our current concern over the lack of civility between attorneys on opposite sides of a case is treated as a new phenomenon. Purcell provides ample evidence that the problem in the past was much worse.

The author uses the final chapter to provide an overview of the changes in the federal judiciary and in the civil-litigation system detailed in previous chapters, as well as discussing previous treatises on the civil-litigation system. His analysis of Judge Richard Posner's "economic efficiency" theory is alone sufficient reason to read the book. Without taking anything away from Posner's scholarship, Purcell makes a strong case for a broader analysis of litigation's effects on society and the more numerous concerns than mere economic efficiency that are part of the policy debate.

Purcell describes and details a reversal in the tide of litigation during the time span of this book. He informs and enlightens in equal measure. While *Litigation and Inequality* should

be read by every litigator and judge for its informational content, it will be enjoyed by other readers for its engaging style and lack of pretension.

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*Juggernaut: The Whitman Massacre Trial, 1850*, by Ronald B. Lansing. Pasadena: Ninth Judicial Circuit Historical Society, 1993; 140 pp., illustrations, appendices, notes, index; \$15.95, paper.

Prompted by the fact that the Whitman massacre has attracted its share of historical attention but that the 1850 trial of the five Cayuse charged with the crime has not, Ronald Lansing, professor of law at the Northwestern School of Law of Lewis and Clark College, has written an account of the four-day trial and its aftermath. Remedying historical neglect is not his only goal, however. Lansing suggests that the trial is worthy of consideration as Oregon's "first attempt to formalize and record judicial procedures." Furthermore, it provides "insight into the difficult beginnings of formal law . . . and the confrontation of civilizations" (p. xii).

Lansing's sources include an article about the trial published in the *Oregon Spectator*, legal materials (the 1850 Order Book of the U.S. Court for Clackamas County, a summary transcript of testimony, and the judge's rulings, for example), recollections of witnesses, spectators, and survivors of the massacre, and various secondary materials. Because Lansing wishes to provide "a living account" of the trial, and possibly because he considers legal evidence difficult, he has created a fictional eyewitness narrator, complete with the "patois and idiom" of the time (p. xi). The story, then, is told from the narrator's viewpoint.

This novel strategy produces an account that will appeal to a broad readership. The fictional narrator provides a sense of immediacy and captures the volatile atmosphere surrounding the trial. The perspective of white spectators and the determination of both the territorial governor, Joseph Lane, and the judge, Orville Pratt, to teach the Cayuse a lesson are apparent. Various legal maneuvers have colloquial and clear explanations.

Lansing's approach allows him to supply information missing from the historical record. Although primary sources neither reveal where the trial was held nor include verbatim testimony of witnesses, for example, the narrator confidently places the trial in the hotel saloon in Oregon City and presents a

"text" for witness testimony, "the best as I recollect" (p. 50).

While there are clear advantages to using the narrator, the device has its disadvantages. It is not always obvious in the text itself just what is based on historical evidence and what is based on surmise. The historian must read footnotes along with the text, a process that becomes tedious and destructive of Lansing's goal of making a living account.

More important, telling the story from the vantage of the narrator (whether white settler or mountain man) means that the Cayuse perspective of both the missionary presence and the trial itself is almost missing. Lansing's grasp of Cayuse culture is weaker than his understanding of the law and the white point of view. While legal testimony suggests that the Cayuse may have believed that Whitman was poisoning them, Lansing does not explore the cultural differences that lay behind the ongoing trouble between the Whitmans and the Cayuse and the massacre itself. Fundamentally, the Cayuse remain the "orneriest" of the Plateau tribes, while the Whitmans are loving and kind (p. 20). The reader never grasps, then, what was actually at stake in the "confrontation" of cultures (p. xii).

The book makes clear that the trial was a shabby attempt to provide justice. Everybody knew, the narrator points out, how the trial should turn out. Judge Pratt ensured that the public's expectations would not be dashed. The narrator notes Pratt's dubious actions: his swift denial of all the prosecution's motions, his selection of a defense team that included only one lawyer, his decision to allow as a juror a man who both knew and liked Marcus Whitman. Most important was Pratt's charge to the jury suggesting that because the Cayuse turned in the five men requested they were the murderers.

The presence of the narrator, however, prevents an extended analysis of the trial's legal shortcomings. Material in one of the appendices suggests just how legally questionable Pratt's rulings were. But this reader would have appreciated a lengthier analysis of the trial in the text itself. Were the proceedings in any way typical of other nineteenth-century trials? Was the defense's case weak because the team lacked legal expertise or commitment to winning the case? Exactly what insight into the beginnings of the formal legal system in Oregon does the trial provide? Such are the questions that this provocative little book raises.

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*Then to the Rock Let Me Fly: Luther Bohanon and Judicial Activism*, by Jace Weaver. Norman: University of Oklahoma Press, 1993; 212 pp., appendix, notes, bibliography, index; \$27.95, cloth.

In this brief biography of the controversial Oklahoman Luther Bohanon, Jace Weaver (who is a lawyer) offers a rare glimpse into the life and work of a federal district judge. Placing a particular emphasis on the judge's decisions in the areas of civil rights and civil liberties, Weaver paints a highly favorable portrait of Bohanon as a liberal judicial activist who consistently championed the cause of the oppressed. The book offers some insights into the recent history of the lower federal courts, but its tone and style make it more useful and appealing to lawyers and Oklahoma history buffs than to professional historians.

After tracing Bohanon's family background, early career, and appointment to the bench, Weaver devotes his lengthiest chapter to the judge's record on desegregation, the most controversial aspect of his career. The case of *Dowell v. Board of Education*, which was originally filed in 1961, came before Bohanon eight times over the next three decades. During the early history of the case, Weaver claims, Bohanon emerged as a staunch defender of the right of African-American children to attend integrated schools. In the first *Dowell* decision, the judge declared the segregation provision of the Oklahoma Constitution to be violative of the United States Constitution and gave the Oklahoma City School Board ninety days to draw up a comprehensive integration plan. Four years later, he took a similarly hard line when he refused to obey an appellate court's decision not to implement a disputed busing plan.

Weaver focuses on Bohanon's devotion to desegregation during the sixties and early seventies, but glosses over the judge's later, more conservative, decisions. In 1989, for example, Bohanon ruled that considerable racial imbalances in Oklahoma City schools did not necessarily warrant judicial intervention. A sharply divided United States Supreme Court, in which the conservative majority was led by Chief Justice William Rehnquist, subsequently upheld the decision. Weaver offers no explanation for this shift—a glaring omission in light of his description of Bohanon as a liberal activist.

In the remainder of the book, Weaver elaborates on the theme of judicial activism by examining Bohanon's record on the rights of prisoners and Native Americans and on the right to privacy. The author especially credits the judge for his efforts on behalf of prisoners. In a series of cases, Bohanon ruled that living conditions in Oklahoma's prisons violated inmates' con-

stitutional rights, and ordered extensive improvements. After periodic reviews by the court and noncompliance by some facilities, the judge mandated the closure of the most structurally deficient cell blocks. Threatened with continued judicial oversight, prison officials eventually complied with the ruling, and Oklahoma's prisons improved dramatically. In a couple of less spectacular cases, Weaver commends Bohanon for following a Supreme Court order to divide title to the Arkansas riverbed among local Indian tribes, as well as for attempting to extend the right to privacy to terminally ill cancer patients wanting to use the unapproved drug Laetrile. Taken as a whole, Weaver concludes, Bohanon's career represents the way in which the federal court system has served as "the hard rock upon which we have stood in our struggles for justice, equality, and dignity" (p. 8).

While this study is a welcome addition to the literature on the history of the lower federal courts, it suffers from two shortcomings. One of these is that Weaver fails to offer a clear explanation of Bohanon's activist behavior. The author describes the judge both as "a strong advocate of the principle of *stare decisis*" (p. 156) and as one "who has taken some of the most activist positions in the history of the judiciary" (p. 157), yet makes no attempt to come to terms with these seemingly contradictory elements of his subject's jurisprudence. Another unexplored aspect of Bohanon's judicial behavior is the relationship between his liberal activism and his religious beliefs, a theme the author mentions at the outset of the book but subsequently fails to develop.

The second major shortcoming is that Weaver's admittedly close association with Bohanon in writing the book at times clouds the author's objectivity. Weaver not only describes the judge as "one of the ablest jurists this country has produced," but dedicates the book to Bohanon himself (p. 158). This bias prevents the author from delving into some of the contradictions and ambiguities of his subject's career, namely his record on desegregation and his peculiar decision in the Laetrile case (which a unanimous Supreme Court eventually overruled). In short, Weaver has written a much needed biography of an important judge, but the work's lack of an explanatory framework and its celebratory tone detract from its merit.

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## 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.

Ades, Stephanie Ann, "The Archaeological Resources Protection Act: A New Application in the Private Property Context," *Catholic University Law Review* 44 (1995).

Alarcon, Hon. Arthur L., "Judicial Speech: Off-the-Bench Criticism of Supreme Court Decisions by Judges Fosters Disrespect for the Rule of Law and Politicizes Our System of Justice," *Loyola Law Review* 28:3 (April 1995).

Ambler, Marjane, "Maturation of Tribal Governments During the Atomic Age," *Halcyon* 16 (1994).

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Baird, Lisa, "South Dakota v. Bourland: The Court Replaces the Cavalry," *Loyola of Los Angeles Law Review* 28:2 (1995).

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Brigandi, Phil, and John W. Robinson, "The Killing of Juan Diego: From Murder to Mythology," *Journal of San Diego History* 40 (Winter-Spring 1994).

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*California Bankruptcy Journal* 22:1 (1994). Tribute: "George Treister."

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Flaherty, Martin S., "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review* 95:3 (April 1995).

Forsythe, Clarke D., "The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered," *Notre Dame Law Review* 70 (1995).

Fritz, Christian G., "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal* 25:4 (Summer 1994).

Gish, Robert F., "Rights Gone Wrong: Legal and Literary Implications of Indigenous Hunting Rights in Contemporary Native American Fiction," *North Dakota Quarterly* 61 (Fall 1993).

*Golden Gate University Law Review* 25:1 (Spring 1995). Special issue: "Ninth Circuit Survey."

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