

*HISTORY OF THE BENCH  
AND BAR OF CALIFORNIA:  
Being Biographies of Many Remarkable Men, A Store  
of Humorous and Pathetic Recollections, Accounts of  
Important Legislation and Extraordinary Cases*

OSCAR T. SHUCK, EDITOR

Los Angeles: Commercial Printing House, 1901

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REVIEW ESSAY BY CHARLES J. McCLAIN\*

I. PROLOGUE

*Background to the Work*

This year marks the hundred and tenth anniversary of the publication of Oscar T. Shuck's mammoth survey of the California legal profession at the dawn of the twentieth century and look back into its pioneer past. His book is once again available in print, and the full text is also available online via Google Books. Consisting of some 620 biographical sketches of California lawyers and judges, living and dead, and of essays on aspects of California legal history, his *History of the Bench and Bar of California*<sup>1</sup> runs to over 1100 pages, most double-columned,

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<sup>1</sup> Hereinafter, *History of the Bench and Bar*.

closely printed. Sprawling in structure, generally uncritical in tone (the sketches are almost all complimentary), the book, nonetheless, offers us abundant and valuable information on the California legal profession in its formative periods and as it moved into modernity.

Shuck was not the originator of the work nor its first editor. M.M. Miller, a San Francisco lawyer, conceived the idea in 1899, found a publisher and was well into the task of collecting material when he was called to Hawaii to, as Shuck puts it, “take part in the transformation of the Hawaiian Islands into a portion of the American Union.”<sup>2</sup> Shuck was well suited to take over the project. A little over a decade earlier he had brought out a work entitled, *Bench and Bar of California: History, Anecdotes, Reminiscences*,<sup>3</sup> a compilation of sketches of prominent California lawyers and judges, published in three volumes between 1887 and 1889.

Works similar to Shuck’s 1887–89 *Bench and Bar* had appeared before. New York led the way in 1870 with its *Bench and Bar of New York*.<sup>4</sup> Missouri weighed in with its own publication eight years later, followed by Mississippi (1881), Wisconsin (1882) and Texas (1885). The structure of all of these publications, Shuck’s included, was similar. They consist of profiles of leading members of the bench and bar, compiled by the author/editor, or possibly with the assistance of the subjects themselves (Shuck’s, however, were entirely his own work), recollections of famous cases, humorous anecdotes. The profiles are for the most part adulatory, intended, as the New York volume put it, to hold up the lives of those sketched “as examples to those in the upcoming generation of lawyers.”<sup>5</sup> The project that

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<sup>2</sup> *Id.* Preface. Miller is otherwise unidentified, and his profile does not appear in the work, nor for that matter does Shuck’s.

<sup>3</sup> Oscar T. Shuck, *Bench and Bar of California: History, Anecdotes, Reminiscences* (San Francisco: The Occident Printing House, 3 vols., 1887–89). Shuck is more accurately characterized as the author of the earlier work, the editor of the latter.

<sup>4</sup> L.B. Proctor, *The Bench and Bar of New York: Containing Biographical Sketches of Famous Men, Incidents of the Important Trials in Which They Were Engaged, and Anecdotes Connected with their Professional, Political and Judicial Careers* (New York: Diossy, 1870). The Mississippi publication dealt almost entirely with deceased lawyers. Tennessee, Michigan, Indiana and Ohio issued their own “Bench and Bar” volumes in the 1890s.

<sup>5</sup> *Id.*, 1.

M.M. Miller conceived in 1899 and that Shuck completed in 1901, while similar in some respects to those earlier works, was different in others. It was more ambitious in scope and cast a wider net, encompassing large numbers of California lawyers, not just its leading lights.

It is impossible to say exactly how much of the final version of the *History of the Bench and Bar of California* should be attributed to the efforts of M.M. Miller, how much to Oscar Shuck's. Shuck tells us that by the time he took over the project from Miller enough work had been done on it to assure its success. But he tells us too that he gave all of his time and effort over the course of a full year to completing the book.<sup>6</sup> Exactly how this time was spent he does not say. Although, again according to Shuck, the idea of a history of the first century of the California profession originated with Miller, it is hard to say how much "history" Miller saw the work including. It seems reasonable to surmise that Miller conceived his volume primarily as a kind of lawyers' *Who's Who*, a vanity publication that would be bought by a goodly proportion of the sizable number of living lawyers whose biographies were to be included. In Shuck's hands it became something more.

### *Oscar T. Shuck*

Oscar Shuck's own biography is of more than passing interest. He was born in Hong Kong in 1843, the son of Baptist missionary parents. He was taken to Virginia as an infant after his mother died, and spent his early years there under the care of family members. His father eventually moved back to the United States, settling in Sacramento. Shuck graduated from high school in that city in 1859 and two years later moved to San Francisco, where he commenced his legal training, reading law in a number of law offices. In 1863 he relocated to Virginia City, Nevada Territory. After a year's clerkship in a law office he was admitted to the Nevada bar. He returned to San Francisco in 1867 and was soon elected a judge of the newly created Justices' Court. When his term expired, he turned briefly to journalism, serving stints as editor of the *Sacramento Reporter* and as a reporter for the *San Francisco Chronicle*. In 1875 he was

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<sup>6</sup> Shuck, *History of the Bench and Bar*, Preface.

admitted to law practice in California by the state Supreme Court, on the strength, it seems, of his Nevada bar membership.<sup>7</sup>

Shuck practiced law in San Francisco for many years, specializing in probate law. He became well known for his success in locating missing heirs. In one case, described at some length in the 1901 book, he recovered \$20,000 for a missing heir, receiving the handsome fee of \$3,000 for his efforts.<sup>8</sup> He published several other works during his lifetime, mainly anthologies of the writings or speeches of others, with commentary, and one book of his own verse, a collection of poems inspired by the sermons of the influential San Francisco Unitarian minister, Thomas Starr King.<sup>9</sup> He died in 1905, one obituary remarking that, “while well grounded in the law, he was known primarily for his literary accomplishments.”<sup>10</sup>

## II. THE BENCH AND BAR IN 1900: TRENDS IN THE PROFESSION

### *A Caveat on the Sample*

The 1900 edition of *Martindale-Hubbell* lists just over 3,000 California lawyers. Shuck’s *History of the Bench and Bar* includes profiles of some 548 living attorneys and judges. Since we do not know how Miller and Shuck went about gathering their materials, we cannot say for certain that these biographies represent a cross-section of the California bar. Still, a sample of 548 out of a total population of 3,000 is a significant fraction, and it seems a fair assumption that they do at least open a good-sized window on what was happening to the California legal profession as a whole at the beginning of the twentieth century.

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<sup>7</sup> Charles R. Boden, “Oscar T. Shuck, Historian of the California Bar,” *San Francisco Bar* 1:3 (April, 1937), 6-8; *Daily Alta California*, April 16, 1871; *Daily Alta California*, June 21, 1874.

<sup>8</sup> Shuck, “The Strange Story of an Old Bank Deposit,” *History of the Bench and Bar*, 197-206. Shuck’s probate exploits occasionally came in for notice in the San Francisco press. See *San Francisco Call*, Jan. 23, Feb. 23, March 25, 1898.

<sup>9</sup> Oscar T. Shuck, *Thomas Starr King in Verse* (San Francisco: self-published, 1905). Shuck’s other works include *Representative and Leading Men of the Pacific* (San Francisco: Bacon & Co., 1870) and *California Anthology: Striking Thoughts on Many Themes Carefully Selected From California Writers and Speakers* (San Francisco: Barry & Baird, 1880).

<sup>10</sup> *San Francisco Call*, May 30, 1905.

### *Formal Legal Education*

The profession on display in Shuck's pages was one in the process of transition. For one thing, formal legal education was becoming more common for California lawyers, as it was for lawyers elsewhere in the country.<sup>11</sup> Shuck divides lawyers then living into several categories, the two largest of which were "Seniors of the Collective Bar," those born in or before 1860, some 257, and the "Junior Rank," those born after that date, some 165. Of those in the first category, some twenty-five per cent had received some formal legal education. Of those in the latter class, the younger group, the figure had risen to forty-three percent. Shuck puts his very oldest contemporaries in a separate category, "Veterans Surviving in 1900." Of these nineteen men, average age seventy-eight, none had had any formal training. The term "formal legal education" is used here broadly to encompass anyone who had spent any significant time at a law school of any sort or in an undergraduate law department of a university, of which there were a fair number at the time. One such law undergraduate was Benjamin Bledsoe, who, according to his biography, entered Stanford in 1892 and graduated "from the departments of history, economics and law" four years later. Another, George E. Crothers, a San Francisco attorney, had an almost identical educational pedigree.<sup>12</sup>

The school most commonly attended, by far, was Hastings College of the Law, which had begun to offer a three-year degree program in 1879, and after that, the University of Michigan, whose law school dated from 1859. (Fifty-seven percent of those in the "Junior Rank" with formal legal training had attended Hastings.) Other schools included Yale, Harvard, Columbia, and the University of Virginia. Graduation from Hastings had a unique advantage. It conferred the so-called "diploma

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<sup>11</sup> In 1870 one quarter of bar admittees had attended law schools. By 1910 that figure had risen to two-thirds. Jerrold Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900–1922," "Law in American History," in vol. 5, *Perspectives in American History* (1971), 573.

<sup>12</sup> Shuck, *History of the Bench and Bar*, 1001, 1017. Stanford at the time had no professional law school but offered an array of law courses for undergraduates. Eighteen of California's ninety-two living state and federal judges had studied law in a school setting. Here, too, the younger the judge, the greater the likelihood that he had received formal training.

privilege,” the right, on graduation, to practice law without having to submit to the state’s formal admission requirements. These requirements changed somewhat between 1879 and 1900 but always consisted of, at least, the presentation of evidence of moral character and the passing of an oral examination in open court, conducted either by the justices of the Supreme Court or their appointed commissioners.<sup>13</sup>

It is interesting that some lawyers, already admitted to practice, apparently thought it prudent to seek further training in a school. That was true of D.R. Gale, who, after admission, earned a law degree from Columbian University in Washington, D.C. (later George Washington University), then earned a Masters at Yale. That was also the case for Clara Foltz, California’s most famous early female lawyer, who after practicing law for some time in San Francisco, sought to enroll in Hastings College of the Law only to be turned away because of her gender. A few, like Alfred Goldner, another San Franciscan, attended law school (Hastings) while simultaneously apprenticing in a law office.<sup>14</sup>

### *Admission to Law Practice in Nineteenth-Century California*

As context for Shuck’s references to legal education and admission to practice, it should be noted that the second half of the nineteenth century was a period of evolution in the forms of bar admission in California.

California passed its first statute regulating admission to the practice of law in February, 1851. The law required candidates to undergo a strict examination of their qualifications in open court by “one of the judges of the Supreme Court” and to “present testimonials as to good moral character.” Passing the exam entitled the candidate to a license to practice in all the courts of the state, and practicing without this license was made punishable as contempt of court. Lawyers licensed in other states

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<sup>13</sup> Thomas Barnes, *Hastings College of the Law: the First Century* (San Francisco: Hastings College of the Law Press, 1978), 171-72.

<sup>14</sup> Shuck, *History of the Bench and Bar*, 842-45, 828-31, 849-50. Foltz sought admission to Hastings after being admitted to the bar but before commencing her practice. California seems to have lagged behind other states in respect of formal legal education. The editor of *The Bench and Bar of Wisconsin*, published in 1882, commented that few in that state would then think of entering the legal profession without “taking the course of law offered by the state university,” 480.

might be admitted without examination. The lower courts (District and County courts) were authorized to admit candidates to practice in those courts upon conduct of a similar examination. Under the law only white male citizens twenty-one or older were eligible for admission.

The law remained essentially in this form until 1872, when it was incorporated in the new Code of Civil Procedure. The codifiers at that time made a significant change. They left out the provision concerning admission to practice in the lower courts, deliberately, according to the code commentators, the intent being to make clear that the Supreme Court alone had the authority to admit attorneys to practice. This change was controversial, however, and proved short-lived. In 1874 the code section was amended to restore the power of the District and County courts to admit attorneys to practice in their respective courts. It wasn't until 1895 that the right to admit attorneys was taken away from the lower courts of record (one did not have to be an attorney to practice in the Justice or Police courts) and the power lodged exclusively in the Supreme Court.<sup>15</sup>

1878 witnessed a major revision in the law. Thanks to the efforts of Clara Foltz and others, references to race and gender were stricken from it so that thereafter any citizen or anyone who had declared an intention to become a citizen was eligible for admission upon proof of qualifications.

Down to the end of the nineteenth century, examinations were always conducted *viva voce*, either by Supreme Court justices or lawyer commissioners appointed by the Court. (In 1900, a bill creating a permanent board of bar examiners, with responsibility for administering a written as well as oral exam, passed both houses of the state legislature, but was not signed by Governor Henry Gage and did not become law.)

We know little about the content or conduct of nineteenth-century bar examinations. The 1892 Rules of the Supreme Court list as subjects of examination such classics of the common law as Sir William Blackstone's *Commentaries*, Simon Greenleaf's *Evidence*, and Theophilus Parsons's *Contracts*; statutory material such as the California Civil Code and Code of Civil Procedure; and the state and national constitutions.

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<sup>15</sup> The standards and procedures for admission to the bar are found in California Code of Civil Procedure (1899), Sec. 276; Rule I, Rules of the Supreme Court of California (1900), included in volume 130 California Reports, Appendix, xxxv-xxxvi.

Anecdotal evidence suggests that, at least in the beginning, the exams were not particularly rigorous. Admission standards in force in the late nineteenth century were certainly not as strict as they are today, but the bar examination was more than pro forma. Shuck informs us that at one testing administered in 1870, six of the fourteen applicants for admission were turned down, and that at the exam conducted in January, 1894, eleven of the forty-five candidates failed.<sup>16</sup>

### *The Persistence of Apprenticeships*

Talk of formal law study notwithstanding, the vast majority of Shuck's contemporaries had received their training in the law through apprenticeships or self-study or, more usually, a combination of both. Most had spent some time "reading law," as the expression went, in the office of a lawyer or a judge. Among the longer apprenticeships served was that of Stephen M. White, former U.S. senator from California and Democratic Party leader. He had spent almost three years, apprenticing in three separate law offices. For many, the apprenticeship was much briefer, amounting occasionally only to a few months. Apprentices were supposed to receive instruction from the lawyers or judges for whom they worked. In some cases, one suspects, they did little more than clerical tasks, picking up such instruction as they could by osmosis, so to speak. Shuck states, perhaps tellingly, that one of his subjects "prepared for the bar while acting as *clerk* [my emphasis]" in the venerable San Francisco firm of Shafter, Park and Shafter.<sup>17</sup>

More than a few of Shuck's lawyers and judges were entirely self-taught, having studied the law while working in non-law jobs. A.J. Buckles, judge of the Solano County Superior Court, had prepared for the law while teaching school and working part-time as a store clerk, "while

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<sup>16</sup> Shuck, *History of the Bench and Bar*, 717, 825.

<sup>17</sup> *Id.*, 642, 820. Instruction, even when given, may not have been terribly systematic. Philip Edwards told the young apprentice, George Cadwalader, to read every book in his (Edwards's) law library and to ask any questions the readings might raise. *Id.*, 461-62. Moses Cobb, a graduate of the Harvard Law School, who before coming to California had practiced law in Massachusetts with the likes of Caleb Cushing and Rufus Choate, had as many as six apprentices in his office at one time or another. According to Shuck he took the job of mentoring seriously. *Id.*, 806-07.



keeping his mind on the law and reading its pages as opportunities came.” J.R. Ruddock of Ukiah had learned his law on the side while acting as superintendent of schools in Mendocino County.<sup>18</sup>

One occasionally comes upon an example of someone who entered on the practice with the slenderest of backgrounds. H.R. Wiley, while teaching public school and reading law on the side “in accordance with an early formed plan to enter the legal profession,” was enlisted by a Redding lawyer to assist him in the conduct of a murder trial. That he did, Shuck tells us, among other things making an address to the jury on the defendant’s behalf. Shuck does not tell us what happened to the defendant.<sup>19</sup> Wiley had at least been reading law when he took on his first legal assignment. Not so R.H.F. Variel. “Mr. Variel,” Shuck writes, “presents to us . . . the unique instance of a man entering on the practice of law and the study of law at the same time.” He had had no legal training whatsoever when he was elected district attorney of Plumas County in 1873. But, Shuck assures us, “He diligently studied law from the time he took the office; . . . and left the place, after his long tenure, a well-informed and experienced lawyer.”<sup>20</sup> A little deadpan humor on Shuck’s part? It is hard to resist the thought.

That it was possible to become a skilled lawyer or judge, in late nineteenth-century America without having gone to law school, is abundantly clear. Some of the country’s most accomplished lawyers and judges fit this description. And examples abound in Shuck’s book of California judges and lawyers who attained success and renown in the profession without having had any formal legal education. To take but two examples: Robert E. Bledsoe, who was not only entirely self-educated in the law but who lacked even a “common school education,” went on to become one of the leading criminal defense lawyers in Southern California, and William Morrow, a very capable judge of the U.S. Circuit Court in San Francisco, who had studied law during his spare hours while working in government offices.<sup>21</sup>

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<sup>18</sup> *Id.*, 672, 921.

<sup>19</sup> *Id.*, 968. Wiley later took a law degree at Hastings.

<sup>20</sup> *Id.*, 949.

<sup>21</sup> *Id.*, 784-85, 655.

### *Specialization and Stratification*

There is a consensus among legal historians that the American legal profession changed in fundamental ways after the Civil War. As Maxwell Bloomfield, perhaps the preeminent historian of the American bar, observes: “With the rise of big business in the decades following the Civil War, specialization and stratification increased within the bar. . . . The prestige that attached to a corporate clientele placed certain metropolitan lawyers at the head of the profession and marked a shift in emphasis from advocacy to counseling.”<sup>22</sup> Shuck clearly believed that such changes were afoot in California as the century drew to a close. “Modern conditions have so recreated the profession of the law,” he writes, “as, in effect, to give it a new character.” The increase of industry and commerce, the rise of the corporation, he went on, had “wrought a truly amazing evolution in the trade of the lawyer.” (He meant, no doubt, the big-city lawyer.) His chief function now was that of counselor and guide to practical men of affairs. And Shuck holds up several examples of this new type of lawyer, William F. Herrin of San Francisco and Lewis Andrews, of Los Angeles, to name two. Andrews, he observes, had been successful enough as a trial lawyer but had lately established his reputation by his success in advising his clients how to keep out of court. His business was now primarily handling the affairs of corporations.<sup>23</sup>

Most contemporary lawyers profiled in Shuck’s book appear to have been generalists, but Shuck mentions any number who were specializing in one field or another: Henry Hazard of Los Angeles, patent law; E.O. Larkins of Visalia, water rights and land titles; William Craig of Los Angeles, corporate and mercantile law, to take several examples. Others besides Shuck had noticed this trend. In a paper given at San Francisco in 1890, S.F. Leib, a San Jose lawyer, opined: “In this age, pre-eminent

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<sup>22</sup> Maxwell Bloomfield, *American Lawyers in a Changing Society: 1776–1876* (Cambridge: Harvard University Press, 1976), 346. On the rise to prominence of the counselor to business, see also J. Willard Hurst, *The Growth of American Law: The Lawmakers* (Boston: Little Brown, 1950), 297–308 and Wayne K. Hobson, “Symbol of the New Profession: Emergence of the Large Law Firm,” *The New High Priests: Lawyers in Post Civil War America*, Gerald W. Gawalt, ed. (Westport, Conn.: Greenwood Press, 1984), 3.

<sup>23</sup> Shuck, *History of the Bench and Bar*, 633, 996.

success in any department of life is rarely ever obtained except by specialists in that department.” And the law, he went on to say, was no exception, pointing to such fields as patent law, criminal law and probate.<sup>24</sup> Shuck was, of course, himself a specialist — in probate law, and a narrow niche of probate law at that.

### *Rise of the Southland*

San Francisco, with a population of 342,000, was at the time of publication the largest city in California, twice as big as Los Angeles, and San Francisco lawyers dominate Shuck’s pages. But a fair number of important Southern Californians appear in the volume, and one gets a definite sense that southern California lawyers and the southern part of the state generally were looming ever larger in the state’s affairs in the closing decades of the century. Shuck notes, for example, that San Francisco Superior Court judge Jeremiah Sullivan, despite having piled up an unprecedented majority in his home city, was defeated in his 1888 bid for a seat on the California Supreme Court by a San Diegan, “for whom the southern part of the State, as a result of a great increase of population, cast a phenomenal vote.”<sup>25</sup> One interesting note on Judge Sullivan suggests, perhaps, that then as now private practice may have exerted an at-times irresistible pull on wearers of the robe: the year after his defeat Sullivan resigned his seat and formed a partnership with his brother because, in Shuck’s words, “the practice of law was of higher consequence from a financial standpoint.” Other Superior and Supreme Court judges had done the same thing for the same reason, Shuck observes.<sup>26</sup>

As is abundantly evident from the book, it was certainly possible to earn a great deal of money in law practice at the time. To take but one

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<sup>24</sup> S.F. Leib, “Needed Reforms in Our Judiciary System,” in *California State Bar Association: Proceedings of the First Meeting of the California State Bar Association* (San Francisco: Currey & Co., 1890), 29-30. The title notwithstanding, the California State Bar Association does not seem to have actually gotten off the ground until 1901. See *Report of the First Annual Meeting of the California State Bar Association, Held at San Francisco, December 20–21, 1901* (San Francisco, 1901). Both reports are available through Google Books, <http://books.google.com>.

<sup>25</sup> Shuck, *History of the Bench and Bar*, 748.

<sup>26</sup> *Id.*

example, Charles F. Hanlon, who besides managing the legal affairs of railroads, litigated large will contests, earning a fee of \$125,000 in two such cases. In another protracted case involving creditors' claims on an estate, the court awarded him a fee of \$90,000. Translated into today's dollars, these are of course enormous sums of money.<sup>27</sup>

One trend in legal affairs beginning to emerge on the East Coast does not seem to have taken hold in California, namely, law firm consolidation. To judge both from Shuck and *Martindale-Hubbell*, most California lawyers, even urban lawyers, continued to practice in small firms, firms with more than four lawyers being unusual.

### *Lawyers' Backgrounds: Some Recurring Features*

Shuck's lawyers came from a variety of circumstances, but in looking through his profiles one is struck by certain recurring and arresting features. One is the very large number of lawyers who, like A.J. Buckles and J.R. Ruddock (noted above), had been schoolteachers before turning to the law, a fact noticed by the author.<sup>28</sup> Many were involved in Republican or Democratic party politics, some having been elected to local or statewide offices. There was an appreciable number of surviving Civil War veterans still practicing in 1901. Buckles himself, a member of the Indiana infantry, had been wounded four times in that conflict and had had to have a leg amputated. Henry Dibble, a prominent lawyer and Republican politician and another Union veteran, had lost a foot at the Battle of Port Hudson, in Louisiana. John H. Russell had seen considerable action as commander of a company in the 38th United States Colored Troops. One finds a scattering of Confederate veterans as well. Erskine Ross, former California Supreme Court justice and then judge of the United States Circuit Court for Los Angeles, had served in the Southern forces, taking part as a Virginia Military Institute cadet in the bloody Battle of New Market.<sup>29</sup>

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<sup>27</sup> *Id.*, 854-57.

<sup>28</sup> *Id.*, 1036.

<sup>29</sup> *Id.*, 672, 823, 923-24, 657. On the extraordinary career of Henry C. Dibble, see Charles McClain, "California Carpetbagger: the Career of Henry Dibble," 28 *Quinnipiac Law Review* 885 (2010).

The Gold Rush was a half-century old at the time of publication, but veterans of the Gold Rush appear in Shuck's volume with regularity. A.J. Gunnison had left law practice in Massachusetts to dig for gold, working in the placer mines "with the crude implements of the time — the pan, shovel and rocker," but had given up after a year and a half and turned to law practice in his new state. Something similar was true of Isaac Belcher, a Vermont lawyer turned miner turned lawyer again. C.V. Gottschalk, a Calaveras County judge for twenty years, had gone to the mines from New Orleans in 1850, where he worked for several years "with indifferent success."<sup>30</sup>

### III. THE BENCH AND BAR IN 1900: SOME NOTABLE LAWYERS AND JUDGES

#### *The "Strong Men of Today"*

In one article Shuck focuses on fourteen lawyers whom he dubs, "Some of the Strong Men of Today." What entitled one to inclusion in this list is not clear since many equally impressive careers are profiled elsewhere in the book. John F. Garber, one of the strong men, is described as "holding the first place at the great bar of San Francisco," probably because he placed first in a survey the book's publisher sent out in 1899 to all the state's lawyers, asking them to choose the twelve best San Francisco lawyers. But Shuck acknowledges that the response to the survey was very light.<sup>31</sup> One of the group, William F. Herrin, general counsel of the Southern Pacific Railroad ("thus the foremost man in the professional life of the Pacific coast"), is held up by Shuck as emblematic of the new type of lawyer, the adviser and counselor to "the so-called practical men who are doing the world's work." But Shuck observes that Herrin was also a gifted litigator, a member of the Interstate Commerce Commission, describing him as the ablest attorney who had ever appeared before that body.<sup>32</sup>

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<sup>30</sup> *Id.*, 527, 541, 695.

<sup>31</sup> *Id.*, 629.

<sup>32</sup> *Id.*, 633, 634.

*Criminal Defenders, Public-Spirited Attorneys, Clara Foltz*

The biographies of living lawyers in Shuck's book are, with a few exceptions, brief and not notably revealing. Most (though not all) read, not surprisingly given the work's likely provenance, as if the text was supplied by the subjects themselves, with some embellishments added by Shuck. Still, arresting facts about individuals do come to light from time to time. Thus we learn of the remarkable careers of two criminal defense lawyers: Samuel F. Geil of Salinas, a former prosecutor, represented thirty-six capital defendants, only five of whom were convicted, none in the first degree. The Los Angeles lawyer, Earl Rogers, a mere thirty-two at the time of publication, had handled more than a hundred felony cases in the previous three years with, according to Shuck, only one conviction. This was a period, it should be noted, when the odds were stacked rather heavily in favor of the prosecution in criminal matters.<sup>33</sup>

From time to time one comes across the public-spirited lawyer and the lawyer willing to act on behalf of society's less privileged members. Frank Stone of San Francisco, not a criminal law specialist, while observing the trial of a Swede convicted of murder and sentenced to death took an interest in the man's case. He had noticed a scar on the man's forehead and by dint of extensive correspondence with officials in the man's home country, determined that he had shot himself in the head while in Sweden and that a bullet was still lodged in his brain. He persuaded the governor to commute the sentence to life imprisonment.<sup>34</sup> Shirley Ward earned his keep or a good part of it representing American Indian tribes. George Monteith, subject of a long sketch, represented labor unions, handling some high-profile cases, including the 1894 case of the American Railway Union strikers. In one capital case he succeeded in saving the life of a union man accused of train wrecking. Shuck comments that "a great deal of his business is among the poorer class of clients."<sup>35</sup>

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<sup>33</sup> *Id.*, 1068, 846.

<sup>34</sup> *Id.*, 938-39.

<sup>35</sup> *Id.*, 1084-85, 1053. In a separate article on contemporary judges, Shuck observes that Waldo York, Los Angeles Superior Court judge spoke up often on behalf of Indian rights, condemning reservations and demanding that Indians be treated as citizens. *Id.*, 760.

Shuck devotes significant space to the career of Clara Foltz, the California lawyer who made history by opening the doors of Hastings law school to women, giving a full account of her struggle. He notes, too, that, prior to this, she had drafted the 1878 amendment to the California Code of Civil Procedure that opened the practice of law to women.<sup>36</sup> He acknowledges that she had had to overcome the skepticism and condescension of male lawyers in the pursuit of her career but states that by virtue of her skills as well as “womanly graces” had eventually won the esteem of the profession. She had also proved that she was perfectly capable of defending herself against sexist insults, which continued even as she became established. Once in the course of a case, opposing counsel said she would be better off spending time at home caring for her children than arguing cases in court. “A woman had better be in almost any business than raising such men as you,” she retorted.<sup>37</sup>

#### IV. CALIFORNIA'S PIONEER LEGAL PAST

##### *Men of the First Era and the Second*

Besides opening a window on the state of the California bar and bench circa 1900, Shuck, in another set of biographical sketches, gives us revealing glimpses into the state of the profession in earlier periods of the state's history. These sketches, many reproduced almost verbatim from his 1887–9 volumes, are fewer in number than those of his contemporaries, but, in general, richer in content. Except when Shuck quotes from other sources, they appear to have come completely from his hand. (In preparing them, he seems to have drawn liberally on the wide web of acquaintanceships he had built up over the years.) A few examples will convey the flavor of Shuck's treatment of California's legal pioneers.

Among the earlier lawyers profiled, pride of place must probably go to the man whose photograph graces the frontispiece of the book, Hall McAllister. Shuck declares that McAllister, who died in 1888, combined “more of the essential qualities of the great lawyer than any of his competitors,” a principal virtue being his ability to handle cases in

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<sup>36</sup> 22nd Sess., Calif. Legislature, 1877–78, Amendments to the Codes, Ch. 600, p. 99.

<sup>37</sup> Shuck, *History of the Bench and Bar*, 831–32.

an impressively wide range of fields, ranging, as Shuck says, from patent rights to land titles to constitutional law. A judge at the time said he knew of no other who was his equal in this respect. McAllister was first and foremost a trial litigator and, to judge not only from Shuck's but from other accounts, had formidable trial skills. His effectiveness rested on his exhaustive preparation of his cases for trial ("His table," Shuck writes, "was covered with books and papers, and a boy was generally waiting to make fresh drafts upon his well-stocked library"), his competency in eliciting testimony (he got the information he wanted "without trying the patience of the witness"), and his rapport with the jury. He was, too, a skilled appellate lawyer, his name, Shuck notes, dotting the pages of the *California Reports*. He argued several cases before the Supreme Court of the United States, among the most important (though unmentioned by Shuck) the landmark equal protection case of *Yick Wo v. Hopkins*.<sup>38</sup> McAllister there represented Chinese laundrymen in a successful challenge to a discriminatory laundry law. One evidence that McAllister stood as high in the estimation of his peers as he did in Shuck's can be found in the fact that after his death the state bar had a bust of him placed on a pedestal outside San Francisco City Hall.

Shuck's biography of Oscar L. Shafter, a San Francisco lawyer who practiced in San Francisco between 1854 and 1867, offers insights into the conduct of law business in these early years. It is also notable for its frankness. Shafter hailed from Vermont and had practiced law in that state for eighteen years before moving to San Francisco, lured by the annual salary of \$10,000 promised him by the leading firm of Halleck, Peachy, and Billings. (It is surprising that Shuck supplies so little information on this important early California firm.)<sup>39</sup> When that firm dissolved, he started his own, which, Shuck reports, was soon able to clear an annual profit of \$110,000. His forte seems to have been the organization of his office for the efficient delivery of services and a special responsiveness to clients' needs. At the time many businessmen were

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<sup>38</sup> *Id.*, 417-21. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). On the history of the *Yick Wo v. Hopkins* case, see Charles J. McClain, *In Search of Equality: The Chinese Struggle for Civil Rights in Nineteenth-Century America* (Berkeley: University of California Press, 1994), 115-26.

<sup>39</sup> The only member of the firm profiled is Frederick Billings. *Id.*, 467-68.



reluctant to leave their offices by day and preferred to handle legal affairs at night. Shafter shone in this regard. He kept his office open well into the late evening hours and was himself usually the last to leave. Shafter was elected to the California Supreme Court in 1864 but, according to Shuck, was a great disappointment as a justice. (Shuck doesn't say why.) He withdrew from the profession in 1867, apparently because of incipient senescence. ("He could no longer grasp the isolated fact, and bind it in eternal fealty to its principle," as a local minister charitably put it.) He died in 1873, after, in Shuck's words, "five years' wandering" through Europe.<sup>40</sup>

The career of Creed Haymond illustrates the fact that even in this early period one career path open to lawyers was that of counselor to the large business enterprise. Haymond came to California in 1852 at the age of seventeen. Like many of Shuck's pioneer lawyers, he dabbled in mining for a while, then spent some years carrying the mails for Wells Fargo, and at length entered on a legal apprenticeship. His reputation grew quickly after he entered practice. He served in the state senate for four years and in 1881 he took a position as general counsel for the Central Pacific Railroad. Within two years he succeeded in settling the vast majority of the hundreds of claims then pending against it and, in the process, according to Shuck at least, "wrought a great change in public sentiment toward the corporation." In Shuck's earlier work, though not in the 1901 volume, he highlights the crucial role Haymond played in the molding of American constitutional law. He was lead counsel for the railroad in the federal case that established the principle that corporations are constitutional persons and as such able to invoke the protections of the Due Process and Equal Protection clauses of the Fourteenth Amendment.<sup>41</sup> Haymond was deeply involved in the founding of Stanford University, drafting the university's organizational act and the Articles of Endowment by which Leland Stanford and his wife transferred their accumulated wealth to that institution.<sup>42</sup>

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<sup>40</sup> *Id.*, 573-75. The quote is from Rev. Horatio Stebbins.

<sup>41</sup> *Railroad Tax Cases* (Circ. Ct., D., Calif.) 13 F. 722 (1882). The principle was later affirmed by the U.S. Supreme Court in *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886).

<sup>42</sup> Shuck, *History of the Bench and Bar*, 580-82.

### *Leading Early Judges*

Leading judicial lights of the early generations come in for considerable attention, but one would search in vain for significant information on their judicial outlooks. The focus is rather on their careers off the bench or other aspects of their professional (or personal) lives. Some of the details, to be sure, are illuminating. Serranus Hastings, California's first chief justice, we learn from Shuck, left the post because the \$10,000 salary that came with it was not enough to meet his needs in Gold Rush California. He ran for and was elected to the office of attorney general because that position allowed him to practice law on the side, which he did very profitably. Solomon Heydenfeldt, justice of the Supreme Court from 1851–57, also left the bench for pecuniary reasons. Originally from South Carolina, Heydenfeldt was one of a handful of California lawyers who refused to take a loyalty oath during the Civil War, making it impossible for him, for a time at least, to try cases in the state's courts. Joseph G. Baldwin, on the Supreme Court from 1857–64, was a lawyer in Alabama before coming to California and was the author of a very popular book of humorous anecdotes about law practice in that state and its next-door neighbor, *Flush Times of Alabama and Mississippi*.<sup>43</sup> Baldwin displayed great logical power on the bench but did not have "an agreeable voice," which Shuck thinks, explains his lack of success as a trial lawyer in California.

Shuck gives most space to Stephen J. Field, "the most distinguished name in the judicial history of the state," as he puts it, but someone, Shuck allows, who had his share of enemies. ("There were always those who did not like the man . . .")<sup>44</sup> Shuck's sketch is devoted almost exclusively to Field's tumultuous quarrels as a young lawyer with a local judge in the delta town of Marysville, to his accomplishments as a state legislator, and to rather stormy episodes in his personal life, including his narrow escape from an attempted assassination by improvised explosive device (if one may use an anachronism). Field served for six years on the California Supreme Court and thirty-four (then a record) on the Supreme Court of the United States, authoring on the latter body some of the most

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<sup>43</sup> Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi: A Series of Sketches* (New York: D. Appleton & Co., 1854). The book is still in print.

<sup>44</sup> Shuck, *History of the Bench and Bar*, 421.

influential, and controversial, opinions of the era. Shuck mentions none of them, however.

### *Admission to the Bar in the Early Era*

One final note on the pioneer generation. If the experience of the San Francisco attorney, John R. Jarboe, is at all typical, the bar on admission to the practice of law was not set very high in those days. Jarboe, another schoolteacher who had studied law in his spare time, went to Sacramento in 1858 to present himself for examination for bar admission. Examinations at the time were conducted by three members of the bar, appointed by the justices of the Supreme Court. These men asked Jarboe a series of questions on the common law of England, including a few on obscure points of feudal law, which he answered as best he could. One of the trio who had been silent up to that point then interrupted the questioning, declaring that it seemed to him pointless since the candidate showed that he knew more than his examiners. He turned to Jarboe and asked if he knew how to make a brandy punch. Jarboe replied that he didn't but that he knew of a saloon across the street that made a good one and that he "would be pleased if the learned committee would join me in testing one." The committee did that and returned afterward to the court to report that it had subjected Mr. Jarboe "to a most thorough examination" and was entirely satisfied with his qualifications.<sup>45</sup>

## V. ARTICLES ON THE PAST

### *Essays on Law and Illegalities*

Fully a third of Shuck's book is given over to essays on aspects of early California legal history, many written by Shuck himself. They furnish useful details on such important subjects as the organization of the state

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<sup>45</sup> Shuck, *History of the Bench and Bar*, 587. For a similar story, see the account of Abraham Lincoln's examination of Jonathan Birch for admission to the Illinois bar while Lincoln was taking a sponge bath in a hotel room. J. Willard Hurst, *The Growth of American Law: The Lawmakers* (Boston: Little Brown & Co. 1950), 282. It goes without saying that one must be cautious about extrapolating from anecdotal evidence of this sort. Official statistics on bar admissions during this early period seem impossible to find.

judiciary and the decision to reject the civil law as the rule of decision in the state's courts, notwithstanding its entrenched status, and to adopt instead the common law of England. Several essays discuss the development of bodies of California law that were conspicuous in the first years. John F. Davis, a mining and water law specialist, contributed a lengthy piece on "The History of Mining Laws in California,"<sup>46</sup> describing, among other things, how the rules, regulations and customs adopted by the miners concerning claims, often embodied in written codes, eventually came to be recognized by the legislature and the courts as having the force and effect of law. Davis is capable of humor. He records that the Mariposa mining district regulations ended with the statement: "for the full and faithful maintenance of these Rules and Regulations . . . we sacredly pledge our honors and our lives." Noting that these words parrot those in the famous coda of the Declaration of Independence, he comments that "the only reason they did not pledge their *fortunes* is because they did not have any!"<sup>47</sup> John D. Works sheds much light on the vexed, complex and crucially important subject of water and irrigation law in the longest essay in the collection, in the process calling attention to inconsistencies in doctrine and issues that needed to be addressed.<sup>48</sup>

Two articles underscore the fact that, notwithstanding pioneer California's earnest efforts to establish a civilized legal order, this was a frontier society, with a frontier society's sometimes fluid sense of legality and justice.

In an essay entitled, "The Field of Honor: Historic California Duels,"<sup>49</sup> Shuck discusses the subject of dueling and chronicles some of the most famous duels in California history, several involving prominent lawyers or judges. Duels were illegal in California, but, at least in the first years of the state's history, occurred with regularity and were rarely prosecuted. (Stephen Field, it may be noticed, came within a hair's breadth of fighting two duels himself.) The most notorious duel by far was that fought in 1859 between David S. Terry, who resigned his seat as chief justice of California to engage in the affray, and David Broderick, California's

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<sup>46</sup> *Id.*, 279-331.

<sup>47</sup> *Id.*, 297-98.

<sup>48</sup> *Id.*, 101-72.

<sup>49</sup> *Id.*, 227-64.

senior U.S. senator at the time. Terry killed Broderick and was brought to trial, but it ended in acquittal. After service in the Confederate army during the Civil War, Terry returned to California to resume the practice of law and to re-enter politics. (He was a delegate to the 1878–79 Constitutional Convention.) Among other high-profile duels chronicled by Shuck was that in 1852 between Secretary of State James Denver and Edward Gilbert, editor of the *Daily Alta California*, the state's leading newspaper. Gilbert died, but Denver was never prosecuted. Indeed, he went on to become a member of Congress and governor of Kansas Territory.<sup>50</sup> Flaunting the law against dueling, it seems, was no barrier to the pursuit of a successful political career.

An article on “Lynch Law in California”<sup>51</sup> by the leading San Jose attorney, John Jury, constitutes something of a companion piece and reminds us that Californians regularly took the law into their own hands in the state's early years. Jury, on the one hand, condemns the practice of vigilantism, recognizing that haste and lack of deliberation often “militated against justice and provoked the infliction of cruel and unusual punishments” but, on the other, offers an apology for it, attributing it to the pioneers’ “hatred of crime” and desire to get things done quickly and efficiently. He makes great allowance for the San Francisco Vigilance Committees of 1851 and 1856, completely extralegal bodies whose actions led to the hanging of several men. They were organized, he argues, because of a breakdown in the justice system and did in fact put a stop to lawlessness and corruption.<sup>52</sup>

Quite apart from unofficial, vigilante justice, Shuck's article on “The Death Penalty for Larceny”<sup>53</sup> points up some of the harsh features of the standing criminal law. A statute set the penalty for grand larceny as death or imprisonment, the choice being left up to the jury. In *People v. Tanner*,<sup>54</sup> an 1852 case, the California Supreme Court upheld a death sentence for a defendant convicted of the theft of food provisions from a warehouse, rejecting an appeal based on the exclusion from the jury

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<sup>50</sup> *Id.*, 245-64, 227-31. On the Broderick-Terry duel, see A. Russell Buchanan, *David S. Terry: Dueling Judge* (San Marino, Calif.: Huntington Library, 1956).

<sup>51</sup> *Id.*, 267-78.

<sup>52</sup> *Id.*, 274-76.

<sup>53</sup> *Id.*, 75-80.

<sup>54</sup> 2 Cal. 257 (1852).

of a man who expressed opposition to executing someone for stealing. Chief Justice Murray did scold the legislature for having chosen such a disproportionate punishment, but, as Shuck observes, the Court never addressed the question of the law's constitutionality.<sup>55</sup>

### *Some Causes Célèbres*

Articles on bodies of law are complemented by accounts, often colorful, of famous early California cases. Foremost among these, without doubt, is Shuck's narrative of the Sharon-Hill marriage litigation, possibly the most lurid case in the annals of California jurisprudence.<sup>56</sup> William Sharon, a U. S. senator from Nevada and a man who had made a fortune in the Comstock Lode, while on a visit to San Francisco fell under the influence of Sarah Althea Hill, a woman, in the words of one author, "of fair education, strong passions, and infinite resources, in the pursuit of whatever fancy took possession of her mind." Hill claimed to be Sharon's wife and produced a declaration of marriage, but Sharon brought a diversity action in federal court to have the document declared a forgery. Hill, in turn, sued in state court to have it declared genuine and for divorce. The two courts reached diverging results, the federal court ruling for Sharon, the state court for Hill. Sharon soon passed away, and Hill married and retained as counsel none other than David Terry. A second action in federal court produced a second decision, this by Justice Stephen Field, that the marriage document was a fraud. While Field was reading his decision, Hill rose to accuse him of being paid off, whereupon Field ordered the marshal to remove her from the courtroom. She and Terry then proceeded to assault the marshal, and both were committed to jail for contempt. The following year, Mr. and Mrs. Terry encountered Field and a bodyguard at a train station restaurant in Lathrop, California. Terry struck Field in the face and was promptly shot and killed by the bodyguard.<sup>57</sup>

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<sup>55</sup> Shuck, *History of the Bench and Bar*, 76. The death penalty for larceny was eliminated by the legislature in 1856. One of Shuck's correspondents informed him that he had witnessed the hanging of three men for larceny near Stockton before a crowd of thousands in 1852.

<sup>56</sup> *Id.*, 173-90.

<sup>57</sup> Mrs. Terry was eventually committed to an insane asylum.

Less sensational but thoroughly engaging, is John T. Doyle's narrative of the so-called "Pious Fund" case,<sup>58</sup> a matter that stretched over two decades and whose handling by Doyle shows how competent and resourceful early California lawyers could be. The "Pious Fund" was the name given to an endowment established originally in the seventeenth century for the propagation of the Catholic faith in Spanish California. It was managed first by the Jesuit religious order, later by the Spanish government, and then by the independent Mexican government, which eventually took control of the fund and sold its assets. In 1853, after the end of the Mexican-American war and the conclusion of the 1848 Treaty of Guadalupe Hidalgo, Doyle was asked by the archbishop of San Francisco to determine whether he might have any claim against the Mexican government. He concluded that would have to wait until a commission of some sort was established for the adjudication of such claims. He then put the matter aside, but in 1870 happened to see that a mixed Mexican and American commission had been established. Its jurisdiction, however, was limited to claims arising since the 1848 treaty. Doyle relates in fascinating detail how he found a way around this limitation and how, after exhaustive historical research and the able marshaling of legal precedents, he was in the end able to vindicate a claim before the commission (more precisely, before a British umpire, asked to break a tie in the body) and recover a substantial sum of money for the archdiocese.

## VI. A CONCLUDING NOTE: POLITICS AND THE BAR

Though concern with political issues is far from a central theme of Oscar Shuck's *History of the Bench and Bar*, they do occasionally peer out at one from his pages. Chinese immigration had, by this time, faded in importance as a topic of public discussion, but some of Shuck's biographies highlight what a burning issue it once was and to what a low level the public discourse surrounding it could sink. John Boalt, prominent San Francisco lawyer and namesake of Boalt Hall, we are reminded, was a staunch opponent of Chinese immigration, arguing that the "Caucasian and Mongolian races" were incapable of living together

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<sup>58</sup> Shuck, *History of the Bench and Bar*, 81-94.

harmoniously. He was also, Shuck notes, the man chiefly responsible for the 1878 statewide plebiscite on the continuation of Chinese immigration. (The vote was overwhelmingly negative.) Samuel Shortridge, another die-hard exclusionist, delivered a fiery speech against Chinese immigration in 1887, in which he compared Californians facing Chinese immigrants to the Athenians, “threatened by the advancing hosts of Syria,” or the Romans, menaced by the barbarian tribes. Lyman Mowry, on the other hand, gets brief acknowledgment as an attorney who represented Chinese litigants in several Exclusion Act cases.<sup>59</sup> And the volume includes a thoughtful essay by Marshall Woodworth, a leading member of the federal bar, analyzing and praising the then recent U.S. Supreme Court decision holding that persons of Chinese ancestry born in the United States were, by virtue of the Fourteenth Amendment, citizens of the United States.<sup>60</sup>

The Spanish-American War had concluded three years earlier, giving the United States possession of the former Spanish colonies of Puerto Rico, Guam and the Philippines, and some Americans, including some Californians, a taste for expansion overseas. Thus we learn that George T. Rolley was a firm supporter of expansion, retention of the Philippines, in particular, and believed the United States “should have the finest navy afloat.” And J. Wade McDonald, characterized by Shuck as “the original ‘Prophet of Expansion,’” thundered in an 1898 Memorial Day speech that not one foot of Spanish territory should be yielded up. “That which we take with the strong hand of war we will retain; and we shall not ask permission from czar, kaiser or potentate to do so.” On the other hand, J.C. Ruddock, a Ukiah attorney, was a strong opponent of the war, believed that America’s mission in the Philippines ended with Spain’s defeat, and was, Shuck observes, “opposed to anything that savors of militarism and imperialism.”<sup>61</sup> ★

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<sup>59</sup> *Id.*, 786, 1080, 911.

<sup>60</sup> *Id.*, “Citizenship for Chinamen,” 1099-1103. The article originally appeared in the July-August, 1898 issue of the *American Law Review*. The case is *Wong Kim Ark v. United States*, 169 U.S. 649 (1898).

<sup>61</sup> *Id.*, 1064, 810, 922. Shuck himself had been involved in the pro-Cuban independence movement and, one presumes, must have supported the war with Spain. See *San Francisco Call*, Feb. 18, March 13, 1897.