ARTICLES

JESSE W. CARTER AND CALIFORNIA WATER LAW:

Guns, Dynamite, and Farmers, 1918-1939

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As a practicing attorney before he was appointed to the California Supreme Court in 1939, Jesse W. Carter was known for his impassioned and forceful representation of farming and ranching clients involved in water conflicts with large corporations — particularly hydroelectric power companies. Later, as a state supreme court justice until his death in 1959, Carter gained further attention (as well as the nickname, "The Great Dissenter") for his vigorous opposing judicial opinions.[1] However spirited his courtroom arguments or dissents may have been,

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they were consistent with Carter's point of view, in many of the water law cases he handled before he joined the high court, that common farmers, ranchers, and other landowners frequently were at the mercy of large business entities and their high-powered law firms.

Carter's upbringing in rural northern California undoubtedly help shape this outlook. Born on a small farm in Trinity County in 1888, Carter worked as a young man on his family's holdings as well as in nearby mines, and he readily identified with individual landowners and laborers. Moreover, after moving to San Francisco in 1905 to further his education, he easily empathized with that city's working classes. Employed by San Francisco's street railroad system while he studied to become a lawyer, Carter supported the anti-big corporation and anti-political machine attitudes prevalent in early-twentieth-century northern California.[2]

These characteristics were underscored in a highly-publicized 1958 water case in which Carter was neither attorney nor jurist, but rather the protagonist in the legal proceedings — a conflict that in some ways echoed the water cases he had handled several decades earlier. Bitterly fought, over the alleged lack of safety of a small dam and pond on Carter's ranch in Marin County, California, and heavily covered by the state's newspapers, the controversy stemmed from a severe winter rainstorm, which had caused his dam to spill over. The result had been flooding and

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[1] California Supreme Court Justice Jesse W. Carter: An Interview Conducted by Corrine L. Gilb," typescript manuscript, 1959, Bancroft Library, UC Berkeley, 65-66 [hereinafter: Carter Interview]; published edition, *California Legal History* 4 (2009), 181-337 [hereinafter: this vol.]. For Carter's views on why he found himself in the California Supreme Court's minority so often, see ibid., 211-212 [this vol., 289]. On Carter's reputation as a dissenter, see also "Judge Carter Is Dead at 71," *Washington Post*, March 16, 1959.

[2] Daniel S. Carlton, "In Memoriam — Jesse Carter: 'He Died as He Lived — Fighting,'" *Hastings Law Journal* 10 (May 1959), 353-359; Corinne L. Gilb, "Justice Jesse W. Carter: An American Individualist," *Pacific Historical Review* 29 (May 1960), 145-148; J. Edward Johnson, *History of the Supreme Court Justices of California, 1900-1950* (San Francisco: Bancroft-Whitney Co., 1966), vol. 2, 161-162. For an excellent political study of San Francisco around 1900, see Walton Bean, *Boss Reuf's San Francisco: The Story of the Union Labor Party, Big Business, and the Graft Prosecution* (Berkeley: University of California Press, 1967).

mudflow damages to neighboring properties. Carter's refusal to permit authorities to pump water out of the pond and the ensuing legal proceedings led to a constant stream of press reports due to the novelty of a conflict involving a sitting state supreme court justice, especially when the angry confrontation dragged on for months. Although the struggle was essentially over jurisdictional issues relating to governmental oversight of dams, the altercation became even more newsworthy when Carter threatened to shoot local officials if they ventured onto his ranch to lower the pond's water level. In addition, the press eagerly reported that Carter suggested he might seek intervention by California's National Guard or even federal troops to protect his property. It was only when Carter voluntarily repaired the dam that the controversy was resolved.[3]

Although the dispute over Jesse Carter's dam was certainly remarkable in its own right because of his position on the California Supreme Court, the fracas highlighted Carter's steadfast resolve throughout his life that government regulators and corporate powers had to be controlled to preserve personal liberties.[4] In relation to his dam in 1958, Carter saw the situation as one of local officials who abused their authority regarding an individual landowner. Yet many years earlier, when Carter had been in private law practice, it had been uncontrolled business corporations that had been the villains, especially in water conflicts

[3] For examples of the many California press reports see: "State Justice Vows to Shoot Trespassers," *Los Angeles Times*, March 26, 1958; "Judge's Threat to Shoot Halts Action on Dam," ibid., March 27, 1958; "Supreme Court Jurist Battles County Order," *Redlands Daily Facts*, March 26, 1958; "Judge Ready to Shoot to Guard Land," *San Mateo Times*, March 26, 1958; "Judge's Dam to Be Inspected," ibid., March 27, 1958; "Irate Judge Will Continue Dam Battle," ibid., Aug. 13, 1958; "Judge Carter: Has Gun, Won't Budge," *Independent* (Pasadena), March 28, 1958; "Showdown at Ranch: Jurist Beat in 'Water Draw,'" *Daily Review* (Hayward), March 28, 1958; "Judge Seeks Troops to Guard Ranch Dam," *Independent Star-News* (Pasadena), March 30, 1958; "Judge Sues in Dam Issue," *Press-Telegram* (Long Beach), May 8, 1958; "Row over Dam: Judge Defies County Edict," *Oakland Tribune*, March 25, 1958; "Judge Hurls New Threats in Pond War," ibid., March 28, 1958; "Embattled Jurist Threatens Plea to Ike in Dam War," ibid., March 30, 1958; "Judge's Blistering Word Fight Bared," ibid., April 22, 1958; "Grand Jury Clears Marin Officials in Row Over Dam," ibid., Aug. 13, 1958; "Marin Feud with Justice Carter Ends," ibid., Oct. 25, 1958.

[4] For more detail about Carter's perspective on this point, see Carter Interview, 21-28 [this vol., 202-206].

where Carter represented small ranchers and farmers. There were, in fact, many of these cases. Carter estimated that before he joined the California Supreme Court in 1939, about three-quarters of his legal work had related to water litigation, and a large number of these actions involved individuals' struggles with huge companies, particularly hydroelectric power corporations.[5]

The most famous of these cases was the long and contentious battle over water rights that Jesse Carter and his client, Shasta County rancher Louis P. Joerger, waged in the 1920s and 1930s against Pacific Gas and Electric Company (PG&E) and its subsidiary, Mt. Shasta Power Corporation. Fought for nearly two decades, Carter took Joerger's litigation to the California Supreme Court multiple times before the conflict finally ended shortly before Carter moved to the high court as a justice.[6]

In some respects, Louis Joerger's case typified the legal water struggles that many of Carter's clients fought against big businesses. But Joerger's quarrel with PG&E was especially noteworthy because of its length and repeated visits to the California Supreme Court — litigation and subsequent appeals that occurred at a time when the state's water laws were becoming more responsive to large-scale water uses and the needs of a growing state population. Joerger's long fight, however, was more extraordinary for several reasons. First, much like the later crisis over Jesse Carter's Marin County dam, the Joerger clash involved guns, dams, and an individual property owner with strongly-held convictions who confronted a large and powerful authority. Yet the Joerger water dispute was even more dramatic than the confrontation over Carter's dam because Joerger's struggle escalated into allegations of conspiracy between PG&E and Joerger's mortgage holder, possible threats to the safety of a superior court judge, and even a bombing and attempted murder.

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Much like Jesse Carter, who had been born in a rustic California setting in 1888, Louis P. Joerger was born two years later in the tiny rural town

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[5] Carter Interview, 70 [this vol., 228].

[6] Louis P. Joerger v. Pacific Gas & Electric Company, et al., 207 Cal. 8 (1929); Louis P. Joerger v. Mt. Shasta Power Corporation, et al., 214 Cal. 630 (1932); Louis P. Joerger v. Mt. Shasta Power Corporation, et al., 9 Cal. 2d 267 (1937).

of Clarksville (El Dorado County), on May 2, 1890. At age twenty-four, Joerger married Elizabeth (almost always known as "Beth") Milliken of Placerville, and the couple moved to Shasta County in far northern California. Three years later, in 1917, Joerger used his life savings to purchase some ranch lands at the junction of the Pit River and one of its tributaries, Hat Creek.[7] A seemingly ideal site nestled between the banks of both streams, the lands Joerger acquired (and added to over the next few years) were of high quality and well-suited to farming and ranching operations. In fact, shortly before Joerger bought his property, the California Conservation Commission had reported to Governor Hiram Johnson, as part of a major state-wide water resources study, that the land near the confluence of Hat Creek and the Pit River was among the best and most irrigable acreage in the region.[8] Joerger's ranch was indeed at a near-perfect location with respect to agriculture and water. Lying between the two streams, his property benefited from the annual spring floods that enhanced the fertile soil and saturated his landholdings, thus producing bountiful crops and lush forage for his livestock. In addition, Joerger's land also was supplied with water by two existing irrigation canals, which continued to provide flows to Joerger's property even after the spring inundations had subsided.[9]

Joerger began having legal problems related to Hat Creek's water within a few years of buying his ranch. The trouble centered on the operations of Mt. Shasta Power Corporation, a hydroelectric energy company that in 1904 had been awarded a franchise to provide electricity to

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[7] "Surprised Their Friends," *Mountain Democrat* (Placerville), Dec. 5, 1914; Draft registration card for Louis P. Joerger, Jan. 5, 1917, *World War I Selective Service System Draft Registration Cards, 1917-1918, Shasta County, California*, microfilm roll 1544332, M1509, U.S. National Archives, Washington, D.C.; Deed, Jasper S. Tucker and Elizabeth Tucker to Louis P. Joerger, March 20, 1917, book 127, p. 173, Records of the Shasta County Assessor-Recorder, Redding, California; Deed, Jasper S. Tucker and Elizabeth Tucker to Louis P. Joerger, Oct. 18, 1924, book 1, p. 418, ibid.

[8] Report of the Conservation Commission of the State of California, January 1, 1913, Transmitted to the Governor and Legislature, January 1, 1913 (Sacramento: Superintendent of State Printing, 1912), 101, 109. See also Frank Adams, et al., Reports on the Irrigation Resources of California (Sacramento: Superintendent of State Printing, 1912), 25.

[9] *Joerger v. PG&E,* 207 Cal. at 14-18 (1929). See also two Deeds, *supra* note 7.

Redding — then a small Shasta County town of barely three thousand people.[10] At the time, electricity was a new and rapidly growing energy source, and as domestic and industrial uses for electricity proliferated, so too did firms eager to supply the demand. Many electric companies had emerged throughout northern California in the late nineteenth and early twentieth centuries, and generating energy from the state's mountain streams had brought some of these firms — including Mt. Shasta Power Corporation — into the Pit River region. To gain access to one potential hydroelectric dam site on Hat Creek, Mt. Shasta Power had negotiated a business arrangement with Red River Lumber Company, a Minnesota timber firm that had logging operations in California. The agreement called for Mt. Shasta Power to lease some of Red River Lumber's lands along Hat Creek for a hydroelectric generation facility, and in exchange, Mt. Shasta Power would provide energy to the timber company. Shortly after this deal had been put together — and at about the same time that Joerger was buying his ranch lands — Mt. Shasta Power Corporation became a subsidiary of PG&E, as part of a major consolidation of energy firms throughout northern California. PG&E was then aggressively increasing its power generation facilities, and the acquisition of Mt. Shasta Power fit into that program well.[11] (For simplicity, the remainder of this

[10] "More Power for Shasta," *San Francisco Call*, July 13, 1904; "Shasta Power Company Wants New Franchise," ibid., July 14, 1904. On Redding's population, see *Census Reports, Volume I. Twelfth Census of the United States Taken in the Year 1900, William R. Merriam, Director. Population, Part I* (Washington, D.C.: United States Census Office, 1901), p. 79.

[11] On the history of these mergers, see the file: Pacific Gas and Electric Company Articles of Incorporation, Oct. 9, 1905, Records of the California Secretary of State, California State Archives, Sacramento, California; "Gets Water Rights in Shasta County," *San Francisco Call*, May 14, 1909; "Power Company Buys Water Rights," ibid., May 14, 1909; "Work Underway on 7 Mile Tunnel," ibid., May 17, 1910; "The Call's Page of Commercial News," ibid., Nov. 13, 1911; "Shasta Power Plants," *Oakland Tribune*, Dec. 19, 1909; "Rates Advance When Corporations Combine," ibid., Feb. 3, 1912; "Completion of Great Power Project Celebrated Today," *Woodland Daily Democrat*, Sept. 30, 1922; "P.G. & E. To Start Work on Pit 4 Dam," *Gridley Herald*, Oct. 28, 1925. For a detailed history of PG&E, see Charles M. Coleman, *P.G. and E. of California: The Centennial Story of Pacific Gas and Electric Company, 1852-1952* (New York: McGraw-Hill Book Company, 1952). See also Red River Lumber

article generally refers to the two power companies under their parent corporate name of PG&E, except in formal titles or direct quotations.)

It was this hydroelectric power expansion program that created the Hat Creek water conflict and led to Louis Joerger's decision to turn to Jesse Carter for legal advice in 1918 — about a year after Joerger had purchased his ranch. To Joerger, Carter was the logical selection for a water lawyer. Both men were about the same age (Carter was then thirty and Joerger twenty-eight), and they came from similar rural California backgrounds. Also probably enhancing Carter's appeal to Joerger was the fact that although Carter had passed the state bar exam only a few years earlier, by the time Joerger sought his aid, Carter had established a prominent law practice in Redding, and he was handling a large number of water cases in Shasta, Siskiyou, Tehama, and Trinity counties as well as a few in Lassen and Modoc counties. In addition, Carter was elected district attorney of Shasta County the same year that Joerger hired him, a position that Carter held until 1926, while he continued to manage his legal practice.[12]

Louis Joerger's decision to hire Jesse Carter was timely. In August 1920, PG&E installed a pipeline from a diversion dam on Hat Creek above Joerger's ranch to carry flows downstream past Joerger's property to where the company was building a major hydroelectric facility, Hat Creek Power Plant No. 2. PG&E's diversion took a considerable portion of Hat Creek's water supply — so much so that a flume that later replaced the pipeline was sixteen feet wide and nine feet deep.[13] Reacting angrily to PG&E's actions, Joerger — whom Carter later characterized as being "rather temperamental" — immediately asked Carter if he should retaliate and "shut the [company's] water off."[14] Carter persuaded Joerger not to cause a potentially violent confrontation, yet a legal fight appeared

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Company's Minnesota Articles of Incorporation, Nov. 17, 1884, copy in Records of the California Secretary of State, California State Archives, Sacramento, California.

12 Johnson, *History of the Supreme Court Justices of California*, vol. 2, 162; Carter Interview, 42-44 [this vol., 213-214].

13 "'Democrat' Scribe Views Stupendous Power Project Costing Hundred Millions," *Woodland Daily Democrat*, July 3, 1922.

14 Carter's opinion of Joerger can be found in Carter Interview, 85 [this vol., 236]. See also Joerger to Carter, Aug. 4, 1920, file: *Louis P. Joerger v. Pacific Gas &*

inevitable. When no results came from Carter's subsequent written demand that PG&E cease interfering with Joerger's water supplies, Carter filed a lawsuit on Joerger's behalf in Shasta County Superior Court.[15]

The suit's complaint (later amended as greater information became available) cited Joerger's riparian rights to the waters of Hat Creek as one of the mainstays to the legal argument. Riparianism was (and is) a well-established doctrine in California water law and throughout much of the United States (although it is not recognized in many of the more arid western states). Holding that a landowner adjacent to a watercourse may utilize the flows so long as his or her actions do not adversely impact similar privileges further downstream, riparian rights are a usufruct of a parcel next to a stream.[16] These circumstances precisely fit Joerger's

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Electric Company, et al., box 30, Jesse W. Carter Papers, Bancroft Library, UC Berkeley [hereinafter: *Joerger v. PG&E*, box 30, Carter Papers].

15 Carter to PG&E, Aug. 6, 1920, file: *Joerger v. PG&E*, box 30, Carter Papers; "Complaint," Aug. 27, 1921, ibid.

16 An excellent synopsis of the history of riparian rights in California can be found in M. Catherine Miller, "Riparian Rights and the Control of Water in California, 1879-1928: The Relationship between an Agricultural Enterprise and Legal Change," *Agricultural History* 59 (Jan. 1985): 1-24. For the history and present status of all aspects of water rights throughout the West, see: Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* (Washington, D.C.: U.S Department of Agriculture, 1972-1977; rev. ed., Clark, N.J.: Lawbook Exchange, 2004). For particular emphasis on current California water law, see Arthur L. Littleworth and Eric L. Garner, *California Water* (Point Arena, Calif.: Solano Press, 1995). For legal treatises describing riparian rights and the state of water law in California and the West before and at about the time of Joerger's lawsuit, see Joseph K. Angell, *A Treatise on the Law of Watercourses* (7th ed., Boston: Little Brown, 1877); Albert E. Chandler, *Elements of Western Water Law* (San Francisco: Technical Publishing Co., 1913; rev. ed., San Francisco: Technical Publishing Co., 1918); Henry P. Farnham, *Law of Waters and Water Rights*, 3 vols. (Rochester: Lawyers Cooperative Publishing Co., 1904); Clesson S. Kinney, *A Treatise on the Law of Irrigation including the Law of Water Rights*, 4 vols. (Washington, D.C.: W.H. Lowdermilk and Co., 1893; rev. ed., San Francisco: Bender-Moss Co., 1912); Joseph R. Long, *A Treatise on the Law of Irrigation Covering the States and Territories* (St. Paul: Keefe-Davidson Law Book Co., 1901; rev. ed., Denver: W.H. Courtright Publishing Co., 1916); John Norton Pomeroy *A Treatise on the Law of Riparian Rights as the Same is Formulated and Applied in the Pacific States, Including the Doctrine of Appropriation* (St. Paul: West Publishing Co., 1887; rev. ed., 1893); Samuel C. Wiel, *Water Rights in the Western States* (San Francisco: Bancroft-Whitney Co., 1905; 3rd ed., 2 vols., San Francisco: Bancroft-Whitney Co., 1911).

ranch. Thus, Carter wrote in the complaint that Hat Creek naturally overflowed Joerger's property on a regular basis and that these inundations had "so wet and irrigated a portion of said lands that without further irrigation said lands would produce and would have produced large and valuable crops of grass and cereals, and would maintain and have maintained abundant pasturage and feed for stock . . . ." Clearly, according to Joerger's complaint, PG&E's diversions were having a major adverse impact on his riparian rights under California law.[17]

In addition to riparian water rights claims, Joerger's lawsuit further alleged that PG&E's actions had caused his property to be covered with mud and debris because of the mismanagement of the company's diversion facilities. As a result of all of these contentions, the suit asked the court to confirm Joerger's rights to Hat Creek's waters and for $50,000 in damages (today, over $630,000 based on the consumer price index). With the complaint having been filed, Judge Walter E. Herzinger of Shasta County Superior Court promptly granted a temporary injunction ordering PG&E not to interfere with Joerger's water supplies until a trial could determine a just outcome.[18]

PG&E's attorneys had little to gain by resolving the conflict quickly, particularly because other water users in northern California had filed comparable suits against PG&E Because of these cases' similarities, the company's attorneys needed as much time as possible to shape consistent court defenses, and therefore they repeatedly sought (and received) postponements for the beginning of the trial. Jesse Carter concurred in many of these delays, perhaps partly because he simultaneously was handling

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17 "Amended and Supplemental Complaint," Sept. 27, 1923, file: *Louis P. Joerger v. Pacific Gas and Electric Company, et al*., Clerk's Transcript on Appeal, Records of the California Supreme Court, California State Archives, Sacramento, California.

18 "Amended and Supplemental Complaint," Sept. 27, 1923, file: *supra* note 17. See also Joerger to Carter, Aug. 4, 1920, file: *Joerger v. PG&E*, box 30, Carter Papers; Carter to PG&E, Aug. 6, 1920, ibid.; "Complaint," Aug. 27, 1921, ibid. The consumer price index purchasing power of Joerger's damages claim was determined by converting dollars in 1923 (the date of Joerger's amended complaint) to 2008 values (the latest year available) at the internet web page: Samuel H. Williamson, "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to present," http://www.measuringworth.com/uscompare/. All subsequent references to current dollar values were similarly calculated at the same web page.

a significant number of these other lawsuits — many of which, like Joerger's case, involved riparian water rights.[19] Thus, Joerger's court case against PG&E did not begin for several years. In the meantime, despite the temporary injunction, PG&E continued to interfere with Joerger's water supply, especially after the company completed work on Hat Creek Power Plant No. 2 below Joerger's ranch in the fall of 1921.[20]

Eventually, on Monday, September 22, 1924, the trial in *Louis P. Joerger v. Pacific Gas & Electric Company, et al.* commenced in Shasta County Superior Court before Judge Herzinger and a jury. Four months, five thousand transcript pages, two hundred exhibits, and many witnesses later, the case went to the jurors in late January 1925. Given the fact that the jury consisted of local Shasta County residents, it is not surprising that its members quickly recommended a verdict in Joerger's favor,

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19 For some of Carter's other water cases involving PG&E or its subsidiary, Mt. Shasta Power Corporation, see, for example, *Mt. Shasta Power Corporation v. Malcolm Dennis, et al.*, 66 Cal.App. 186 (1924); *Fall River Valley Irrigation District v. Mt. Shasta Power Corporation*, 202 Cal. 56 (1927); *Mt. Shasta Power Corporation v. Roderick McArthur, et al.*, 109 Cal.App. 171 (1930); *Mt. Shasta Power Corporation v. Roderick McArthur, et al.*, 111 Cal.App. 640 (1931); *William J. Albaugh v. Mt. Shasta Power Corporation*, 117 Cal.App. 612 (1931); *Merton Crum, et al., v. Mt. Shasta Power Corporation*, 117 Cal.App. 586 (1931); *F.M. Callison, et al., v. Mt. Shasta Power Corporation*, 123 Cal.App. 247 (1932); *Anna McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 569 (1932); *Luther McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 570 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et al.*, 215 Cal. 559 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et al.*, 215 Cal. 771 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et al.*, 215 Cal. 772 (1932); *Roderick McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 571 (1932); *Merton Crum, et al., v. Mt. Shasta Power Corporation*, 124 Cal.App. 90 (1932); *William J. Albaugh v. Mt. Shasta Power Corporation*, 124 Cal.App. 779 (1932); *Merton Crum, et al., v. Mt. Shasta Power Corporation, and William J. Albaugh v. Mt. Shasta Power Corporation*, 220 Cal. 295 (1934); *Anna McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 704 (1935); *Roderick McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 765 (1935); *Luther McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 766 (1935). Most of these cases have extensive files in the Carter Papers. Also, Carter discusses some of these cases in his oral history. See Carter Interview, 68-98 [this vol., 227-243].

20 Formal dedication of these facilities did not take place until a year later. See Coleman, *P.G. and E. of California*, p. 287. See also "Completion of Great Power Project Celebrated Today," *Woodland Daily Democrat*, Sept. 30, 1922; "Power Project Is Completed," *Gridley Herald*, Sept. 30, 1922.

including a damages award of $40,000 — today, almost a half million dollars. (Carter later opined in his oral history interview that this verdict had been fair and "not excessive" because most of the jurors wanted to give Joerger $75,000 — more than the suit had asked for.)[21] Judge Herzinger then confirmed the jury's determination, explaining in his "Findings of Fact and Conclusions of Law" that Joerger had been substantially harmed by PG&E's diversions. In an important point, however (and one that became a basis for PG&E's appeal), Herzinger further ruled that PG&E also could claim Hat Creek riparian rights due to the company's land-lease arrangement (through Mt. Shasta Power Corporation) with Red River Lumber Company. With the timber firm owning the land adjacent to the stream where PG&E's diversion facilities lay, the power company benefited from the riparian rights held by Red River Lumber. Nevertheless, to protect Joerger's downstream status, Herzinger required PG&E to install gauges, ostensibly to maintain adequate flows to Joerger's acreage.[22]

Neither side was completely pleased with Judge Herzinger's ruling, although Joerger clearly had the greater victory. Jesse Carter and Louis Joerger applauded the recognition of Joerger's riparian rights and the monetary damages award, but they disliked the acknowledgment of PG&E's riparian rights, particularly because Joerger's predecessors had used the stream's flows long before PG&E began diverting water. For its part, PG&E lauded Judge Herzinger's recognition of the firm's riparian rights, but the company disputed the economic damages. As a result, both Joerger and PG&E immediately appealed to the California Supreme Court.[23]

Aside from legal issues, from a financial perspective, the twin appeals had one very important repercussion for Joerger — at least for the time being, PG&E's obligation to pay the lower court's award was stayed pending the higher court ruling. The delay in receiving the money was a

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21 See generally the case file for: *Louis P. Joerger v. Pacific Gas and Electric, et al*., Clerk's Transcript on Appeal, Records of the California Supreme Court. See also the file for the same case in boxes 29-30, Carter Papers. On Carter's recollection of the Joerger case's verdict, see Carter Interview, 89 [this vol. 238].

22 "Judgment," Jan. 29, 1925, file: see *supra* note 21.

23 "Notice of Appeal," March 31, 1925, *Joerger v. PG&E*, box 30, Carter Papers.

major problem to Joerger because of the lawsuit's costs (including expert witness fees), which still had to be paid while Joerger continued to operate his ranch. These were circumstances that affected many of Jesse Carter's other clients involved in similar lawsuits, because California water litigation was (and frequently still is) extremely expensive. Not every individual landowner could afford such costly court fights, although Carter considered himself an advocate of the small farmer, rancher, and landholder. As Carter explained in his oral history, "Naturally, I was on the farmers' side of all this water litigation," yet he also readily conceded that many of his clients had considerable financial resources — or else they banded together in groups to do legal battle.[24]

On paper at least, Louis Joerger was no exception. Compared to many Shasta County ranchers, Joerger was relatively well-to-do by the time his case was appealed. Although he had used his life savings in 1917 to purchase just a few hundred acres at the junction of Hat Creek and the Pit River, within a short period of time, Joerger had increased his landholdings substantially, and by the late 1920s, Joerger's ranch had grown to over 1,500 acres — three times the average Shasta County agricultural landholding. Indeed, Louis and Beth Joerger were doing so well financially that Jesse Carter estimated the value of the Joergers' land, livestock, and ranch improvements (four houses, seven barns, a dairy structure, a tool shed, and an equipment building) to be worth over $200,000 (today, more than $2.5 million). Moreover, according to U.S. Census records, the Joergers had a farmhand living at their Shasta County property, and perhaps as an even greater indication of their economic success, the Joergers also owned a home in the San Francisco Bay area's upscale community of Piedmont (where Beth lived during the school year with their three children). At their Piedmont home, the Joergers employed a live-in

[24] On groups of farmers who banded together to fight PG&E with Jesse Carter as legal counsel, see, for example, "Power Company and the Farmers Fail to Agree," *Courier-Free Press* (Redding), June 20, 1927; "Fall River and Pacific Gas Are Near Compromise on Their Squabble over Water Rights," ibid., June 27, 1927; "Water Case Expected to Close This Week," ibid., Sept. 27, 1927; *Fall River Valley Irrigation District v. Mt. Shasta Power Corporation*, 202 Cal. 56 (1927). See also "Carter Interview ," 70-75, with quotation at 70 [this vol., 228-230].

maid and enjoyed a panoramic view of San Francisco Bay and the Golden Gate.[25]

Yet despite their apparent financial well-being, like many farmers and ranchers even today, the Joergers were land-rich but dollar-poor. As Louis Joerger's appeal moved sluggishly forward between January 1925 (when Judge Herzinger had issued his ruling in Shasta County Superior Court) and 1929 (when the California Supreme Court decided Joerger's appeal), Joerger repeatedly had to borrow money, using his ranch, livestock, crops, and farm equipment as security. Such loan arrangements may have been common among other ranchers, who needed cash to tide themselves over from one crop season to the next, but the extent, frequency, and amounts of Joerger's borrowing and refinancing were especially noteworthy and routinely ran into tens of thousands of dollars. In fact, the Joergers' monetary circumstances were so strained that within just a few months of the 1925 lower court decision the Joergers transferred an undivided half interest in their Shasta County ranch and its water rights for $10 to Louis Joerger's brother, Elmer, and his wife, Theo, both of whom continued to live on their own ranch in Woodland, California. The reason for adding Elmer and Theo to the Shasta County property's title apparently was to help refinance Louis Joerger's mortgage of $47,300 (today, nearly $600,000) — a modified debt that was recorded in Shasta County's official files the same day that Elmer and Theo were made co-owners. In addition to this major restructuring of the Shasta County ranch obligation, Louis and Beth Joerger repeatedly utilized

[25] Interestingly, the Joergers were counted twice in the 1930 census, once at their Shasta County ranch, and again at their Piedmont home. For Piedmont, see entries for Louis P. and Beth M. Joerger, p. 5A, Enumeration District 334, Piedmont, Alameda County, California, Fifteenth Census of the United States, 1930, Records of the Bureau of the Census, Record Group 29, U.S. National Archives, Washington, D.C. (microfilm roll T626-110). For Shasta County, see entries for Louis P. and Beth M. Joerger, p. 3B, Enumeration District 21, Township 7, Shasta County, California, ibid. (microfilm roll T626-220). For details on Shasta County's farmlands in 1930, see *Fifteenth Census of the United States: 1930. Agriculture, Vol. 1, Farm Acreage and Farm Values by Townships or Other Minor Civil Divisions*, available at: http://www2.census.gov/prod2/decennial/documents/. See also [Jesse W. Carter], Statement of Property and Liabilities of Louis P. Joerger, undated but circa 1928, file: *Joerger v.PG&E*, box 30, Carter Papers.

chattel mortgages with livestock and ranch equipment as collateral to secure short-term loans. Their finances were so stressed, in fact, that at about the same time they were adding Elmer and Theo to the ranch's title, Louis Joerger was unable to pay the invoice submitted by one of his principal lower court expert witnesses. In addition, another consultant was forced to sue Joerger for payment — separate litigation that dragged on for several years.[26]

PG&E, of course, did not face these monetary problems. As Louis Joerger struggled to stay financially afloat in the mid-1920s, PG&E had continued to absorb multiple smaller firms and to build new power generation facilities. The company also had expansion plans that involved spending $100 million (over $1.2 billion today) to develop just the Pit River region alone. Moreover, in early 1927, company officials predicted "a splendid year," and several months after that, the firm reported that its outstanding common stock had gained in value during one three-week period alone nearly $15 million (now almost $186 million). In addition, PG&E had become nearly the sole provider of gas and electric energy throughout much of northern California and was one of the largest public utilities in the United States.[27]

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[26] For the location of Elmer and Theo Joerger's residence, see their entries, p. 5B, Enumeration District 57-24, Woodland Township, Yolo County, California, Fifteenth Census of the United States, 1930, Records of the Bureau of the Census, Record Group 29, U.S. National Archives, Washington, D.C. (microfilm roll T626-225). For examples of Louis and Beth Joergers' recorded debt arrangements, see: Deed, Louis and Elizabeth Joerger to Elmer and Theo Joerger, May 27, 1925, book 5, p. 61, Records of the Shasta County Assessor-Recorder; Deed, Louis and Elizabeth Joerger, to Elmer and Theo Joerger, May 27, 1925, book 5, p. 171, ibid.; Deed of trust, May 27, 1925, book 4, p. 66, ibid.; Chattel mortgage, April 2, 1926, book 3, p. 373, ibid.; Chattel mortgage, June 24, 1926, book 3, p. 472, ibid.; Chattel mortgage, April 25, 1927, book 21, p. 342, ibid.; Chattel mortgage, April 25,1928, book 38, p. 76, ibid. For details on Louis Joerger's problems in paying his litigation consultants, see Jesse Carter to George S. Nickerson, Feb. 20, 1925, file: *Joerger v. PG&E*, box 30, Carter Papers; Jennie R. Nickerson to Jessie Carter, undated but circa late February or early March 1925, ibid.; "Wiegel-Joerger Unable to Agree," *Courier-Free Press* (Redding), April 1, 1927; "Wiegel-Joerger Case Underway," ibid., March 29, 1929; "Wiegel-Joerger Case Ended in Compromise," ibid., Dec. 7, 1931.

[27] Coleman, *P.G. and E. of California*, 91-298; "Oaklanders View P.G.E. Power Units," *Oakland Tribune*, Sept. 6, 1925; "Pacific Gas Profits Up in January," *Los Angeles*

It was under these mismatched circumstances that in mid-1927 PG&E's attorneys (a consortium of several law firms from the San Francisco and Redding areas) filed their opening briefs in Joerger's case with the California Supreme Court. They did so at a time when the Progressive-era ideology of scientifically managing natural resources had gained a strong foothold in the state. With regard to water development, California officials were in the early stages of creating the State Water Plan (which Jesse Carter strongly supported), a massive program to capture stream flows in regions of the state with excess water and redistribute those supplies to areas of need.[28] Just as the State Water Plan was aimed at making water resources more useful to large numbers of California's residents, changes in the state's laws also were directed at making water rights "reasonable," and hence, responsive to the needs of more people. This had been a goal, for example, of the California Conservation Commission, the same agency that had assessed the site of Joerger's ranch lands in 1912 to be well-suited in relation to water. The commission's objectives had led to the 1913 Water Commission Act, a statute that required all new appropriative water rights filings (claims based on beneficial use, the date of diversion, and not necessarily linked to real property ownership) to be listed with California officials to create a centralized registry (pre-existing appropriative claims and riparian rights did not have to be similarly filed).[29]

Times, April 6, 1927; "Paper Profits Multiply," ibid., Sept. 27, 1927. See also: http://www.fundinguniverse.com/company-histories/PGamp;E-Corporation-Company-History.html.

28 The State Water Plan, later called the Central Valley Project and constructed by the U.S. Government in the 1930s and 1940s, should not be confused with the State Water Project, which was built by the State of California beginning in the late 1950s and early 1960s. For scholarly synopses of the histories of the Central Valley Project and the State Water Project, see Donald J. Pisani, *From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West, 1850-1931* (Berkeley: University of California Press, 1984), 381-439; and Norris Hundley, Jr., *The Great Thirst: Californians and Water, A History* (rev. ed., Berkeley: University of California Press, 2001), 234-302. For Carter's support for the State Water Plan (Central Valley Project), see Carter Interview, 165 [this vol., 279].

29 For the California Conservation Commission's mandate to recommend changes to California water law, see *Report of the Conservation Commission of the State of California*, 3-4. For the requirement that new appropriative water claims be

PG&E's appellate briefs endorsed the Progressive concept of rational and scientific uses of water, and while the company's lawyers did not dispute Joerger's riparian status, they emphasized that the lower court's "water allowance" to Joerger was, in their view, "excessive" and "not supported by the evidence." Instead, PG&E's attorneys contended that testimony and exhibits in the lower court trial had shown Joerger's irrigation habits to be "wasteful." In addition, PG&E's lawyers declared that the amount of water Joerger required was "far in excess" of what he could use beneficially. Moreover, just as the power firm's attorneys deemed Joerger's water practices to be extravagant, they also contended that the court-ordered financial damages award "in the sum of $40,000 is excessive and is not supported by the evidence."[30]

While PG&E's attorneys stressed recent trends in water law in their California Supreme Court briefs, so too (albeit with a different emphasis) did Jesse Carter and his colleague, Annette Abbott Adams, one of the most prominent women attorneys in early twentieth-century California.[31] Although by the mid-1920s California law was moving toward more sensible interpretations of water rights — particularly in relation

filed with California authorities, see An Act to Regulate the Use of Water Which Is Subject to Control by the State of California . . . , chap. 586, Cal. Stats. (1913). See also Miller, "Riparian Rights and the Control of Water in California," 10-11. For discussions of Progressivism and its relationship to California water law reforms, see Pisani, *From the Family Farm to Agribusiness*, 335-380; Pisani, "Reclamation and Social Engineering in the Progressive Era," *Agricultural History* 57 (1983): 46-63; Pisani, "State vs. Nation: Federal Reclamation and Water Rights in the Progressive Era," *Pacific Historical Review* 51 (1982), 265-282; Hundley, *The Great Thirst*, 113-115. Carter offered the opinion in 1955 that the Water Commission Act had created a bureaucracy that frequently overextended its authority in relation to individual water users. See Carter Interview, 228-229 [this vol., 299].

30 "Opening Brief for Appellant, Mt. Shasta Power Corporation," Aug. 15, 1927, p. 543, file: *Louis P. Joerger v. Pacific Gas and Electric Company, et al*., Clerk's Transcript on Appeal, Records of the California Supreme Court.

31 Adams was one of the first two women to receive a law degree from the University of California (in 1912). She subsequently became a U.S. attorney (1918-1920), an assistant U.S. attorney general (1920-1921), and a California appellate court justice (1942-1952). For more details on her background, see http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/justices_former/adams.htm. See also various biographical accounts of Adams, which are reproduced at the Stanford University Women's Legal History Biography Project's web page: http://www.law.stanford.edu/

to large-scale water resource management — purely by coincidence as Carter and Adams had been drafting their pleadings, riparian rights had received a major reinforcement by a California Supreme Court ruling. Issued only months before the appellate briefs in Joerger's case went to the high court's justices, *Herminghaus v. Southern California Edison Company*[32] became one of the most important water-related decisions ever handed down by the California Supreme Court (even though it was later reversed by California's voters with a state constitutional amendment). The case, which was originally filed in Fresno County Superior Court in August 1924, involved a plaintiff (Amelia Herminghaus) who owned a large amount of land bordering the San Joaquin River in Fresno and Madera counties. Much like Joerger and Hat Creek, Herminghaus relied upon the San Joaquin River's annual flooding to enrich riparian lands and cause grass growth for livestock forage. According to Herminghaus, however, Southern California Edison Company, which had upstream hydroelectric power works, was planning to expand its system (facilities then valued at $177 million and estimated be worth $400 million when completed — nearly $5 billion today). These power company objectives, if carried out, would substantially interfere with the regular inundations of Herminghaus's lands. Herminghaus sued to stop the power company's diversions and won in Fresno County Superior Court on the basis of riparian water rights. When Southern California Edison appealed to the California Supreme Court, the justices held that under state law as it then existed — and not withstanding other Progressive-era changes to water law — riparian landowners had a right to the full and undisturbed flow of adjacent watercourses.[33]

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library/womenslegalhistory. For Carter's recollections of Adams, see Carter Interview, 89, 142, 172-174 [this vol., 228, 266-267, 284-285].

32 200 Cal. 81 (1926).

33 *Amelia Herminghaus, et al., v. Southern California Edison Company*, 200 Cal. 81 (1926). For a news report on the filing of the *Herminghaus* case in Fresno County Superior Court, see "Suit Involves Vast Holdings," *Los Angeles Times*, Aug. 28, 1924. For the 1926 value of Southern California Edison's San Joaquin River power facilities, see Joseph C. Sharp, "Storage of Water in California by Riparians and Appropriators," *California Law Review* 14 (1925-1926), 199. For the estimated value of the completed works, see "Trial is Due in Big Creek Water Suit," *Los Angeles Times*, Jan.

With the *Herminghaus* decision a fortuitous windfall (but one that was instantly controversial in light of state water management goals and Progressive thought),[34] Jesse Carter and Annette Abbott Adams argued in their California Supreme Court briefs that the circumstances in *Herminghaus* matched Joerger's situation exactly. (It also probably did not hurt that Adams had just represented Herminghaus before the California Supreme Court.) Stressing the key point underlying Joerger's victory in the lower court — his riparian rights — Carter and Adams asked the California Supreme Court to declare that PG&E had no right at all to Hat Creek's water if the company's uses interfered with Joerger's ability to enjoy his riparian claims to their fullest. In addition, the two attorneys wrote that *Herminghaus* meant that Joerger's irrigation techniques did not need to be compromised, even if his water uses were excessive by some standards.[35]

In April 1929, the California Supreme Court unanimously agreed with Carter and Adams (with one justice not participating). Although California's voters had overturned the *Herminghaus* ruling barely four months earlier by amending the state's constitution to require all water uses to be "reasonable,"[36] the justices declared in Joerger's 1929 decision

5, 1925; "Limits Use of Water," ibid., Feb. 14, 1925; "Edison Company Loses Fight for Vital Water," ibid., Dec. 25, 1926.

34 For a sampling of news reports on the controversial *Herminghaus* decision, see "Water Meeting May Be Called," *Los Angeles Times*, Jan. 2, 1927; "Power Ruling Review Asked," ibid., Jan. 14, 1927; "State's Water Plans in Shape," ibid., Jan. 23, 1927; "Riparian Water Law Proposed," ibid., Feb. 3, 1927; "Changes in Water Law Completed," ibid., Feb. 9, 1927; "Revolutionizing State Water Laws Proposed," ibid., Feb. 10, 1927; "Federal Suit May Reopen State Water Struggle," ibid., Feb. 28, 1928; "Water Plans to be Stressed," ibid., Aug. 8, 1928 "Action Taken to End Water Ruling Effect," *Mountain Democrat* (Placerville), Feb. 4, 1927; "Bill to Curb Water Right Given to [Governor] Young," *Oakland Tribune*, Feb. 8, 1927; "Water Problem Most Important Says Gov. Young," *Oxnard Daily Courier*, Feb. 21, 1927; "[California Attorney General U.S.] Webb Proposes Changes in Riparian Law," *Gridley Herald*, March 2, 1927. For a contemporaneous analysis of the legal impact of the *Herminghaus* decision, see Sharp, "Storage of Water in California by Riparians and Appropriators."

35 "Opening Brief of Appellant, Louis P. Joerger," Sept. 10, 1927, Supreme Court file: see supra note 21; "Reply brief of Respondent, Louis P. Joerger," [April 1928], *Louis P. Joerger v. Pacific Gas & Electric Company, et al.*, contained in bound collection of pleadings, Bancroft Library, UC Berkeley.

36 On the constitutional amendment approved by California's voters in 1928, see article X, section 2, of the California Constitution. For detailed analyses of the

that standards for water use needed to be decided on a case-by-case basis. Noting the voluminous and detailed record in the trial court's proceedings, the California Supreme Court rejected PG&E's argument that Joerger's water use was excessive, and the justices overwhelmingly confirmed Joerger's riparian rights to Hat Creek. In addition, the California Supreme Court upheld Joerger's $40,000 damages award.[37]

Joerger's California Supreme Court triumph over PG&E was widely celebrated in regions of the state with connections to Joerger. For example, the *Oakland Tribune*, which served Joerger's San Francisco Bay area hometown of Piedmont, carried the news on its front page.[38] Further north, Shasta County's *Courier-Free Press* (published in Redding) ran the banner headline, "Joerger's Victory is Boon to Farmer."[39] The *Press*'s subtitle added, "Decision in Joerger Case Means Trial Court Can Award Farmer Any Water He Can Beneficially Use" — a point that was especially relevant to some of Jesse Carter's other water litigants, who claimed similar riparian rights.[40] Yet, as if the *Press*'s headlines were

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1928 amendment before it was approved by voters, see Samuel C. Wiel, "The Pending Water Amendment to the California Constitution, and Possible Legislation," *California Law Review* 16 (March and May 1928), 169-207 and 257-280; Edward S. Treadwell, "Modernizing the Water Law," *California Law Review* 17 (Nov. 1928), 1-18. For a current analysis of the legal meaning of article X, section 2, see Littleworth and Garner, *California Water*, 89-95. For other scholarly discussions of the *Herminghaus* case and the 1928 constitutional amendment, see Hundley, Jr., *The Great Thirst*, 245-246; Pisani, *From the Family Farm to Agribusiness*, 412-415.

37 *Joerger v. PG&E*, 207 Cal. 8 (1929).

38 "Power Firm Loses Suit for $40,000," *Oakland Tribune*, April 10, 1929.

39 "Joerger's Victory is Boon to Farmer," *Courier-Free Press* (Redding), May 10, 1929.

40 Many of these Carter riparian water rights cases — like Joerger's suit — eventually were appealed. See: *Mt. Shasta Power Corporation v. Roderick McArthur, et al.*, 109 Cal.App. 171 (1930); *Mt. Shasta Power Corporation v. Roderick McArthur, et al.*, 111 Cal.App. 640 (1931); *William J. Albaugh v. Mt. Shasta Power Corporation*, 117 Cal.App. 612 (1931); *Merton Crum, et al., v. Mt. Shasta Power Corporation*, 117 Cal. App. 586 (1931); *F.M. Callison, et al., v. Mt. Shasta Power Corporation*, 123 Cal.App. 247 (1932); *Anna McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 569 (1932); *Luther McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 570 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et al.*, 215 Cal. 559 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et al.*, 215 Cal. 771 (1932); *Mt. Shasta Power Corporation v. The Superior Court of Shasta County, et*

not clear enough, Carter elaborated in an interview, stressing that the California Supreme Court had declared that "a farmer is not required to change his method of irrigation in order to leave more water in the stream for the use of a power company."[41]

The California Supreme Court's ruling may have been well-received by Joerger's supporters, but perhaps of greater satisfaction to Joerger was the fact that shortly after the decision had been issued, PG&E sent Joerger a check for $57,322 (about $720,000 in today's purchasing power). The payment comprised the original $40,000 lower court award plus interest since the lower court's 1925 decision. (Joerger immediately sent $30,000 to his creditors.)[42]

Although PG&E had paid the damages award, the power company still remained dissatisfied with the litigation's outcome, especially because Joerger retained riparian rights to Hat Creek. Not only did this situation interfere with the firm's plans for continued hydroelectric energy production at Hat Creek Power Plant No. 2, but the company already had spent significant sums constructing that facility as part of its larger Pit River development objectives — money the company's officials did not want to lose because of just one rancher.[43] In addition, the California

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al., 215 Cal. 772 (1932); *Roderick McArthur v. Mt. Shasta Power Corporation*, 215 Cal. 571 (1932); *Merton Crum, et al., v. Mt. Shasta Power Corporation*, 124 Cal.App. 90 (1932); *William J. Albaugh v. Mt. Shasta Power Corporation*, 124 Cal.App. 779 (1932); *A.J. Barr, et al., v. Henry B. Ream*, 216 Cal. 248 (1932); *Myrtle M. Morgan, et al., v. Leatha J. Walker, et al.*, 217 Cal. 607 (1933); *Merton Crum, et al., v. Mt. Shasta Power Corporation, and William J. Albaugh v. Mt. Shasta Power Corporation*, 220 Cal. 295 (1934); *Anna McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 704 (1935); *Roderick McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 765 (1935); *Luther McArthur v. Mt. Shasta Power Corporation*, 3 Cal. 2d 766 (1935).

41 "Joerger's Victory is Boon to Farmer," *Courier-Free Press* (Redding), May 10, 1929.

42 "Joerger Wins and Will Get $57,000," *Courier-Free Press* (Redding), April 10, 1929; "Redding Man Wins Big Damage Suit," *San Mateo Times*, June 8, 1929. On Joerger's payment to his creditors, see Jesse W. Carter, "Memorandum of Facts in Joerger Conspiracy," undated, contained in file: *Bank of America v. Joerger*, box 29, Carter Papers.

43 One newspaper reported in 1925 that PG&E anticipated spending $100 million ($1.2 billion in today's purchasing power) just on its Pit River section, including Hat Creek's power plants. See "P.G. & E. To Start Work on Pit 4 Dam," *Gridley Her-*

Supreme Court's decision in Joerger's case seriously threatened PG&E's power programs in other areas where individuals held riparian water rights — as did additional court proceedings against the company based on similar claims.[44] For these reasons, the power firm's officials did not let the matter die. Instead, they began an aggressive campaign to defeat Joerger at all costs.

PG&E pursued this goal in a variety of ways. First, the company's lawyers filed new appeals on aspects of the lower court ruling that appeared vulnerable to further legal challenges.[45] This tactic kept financial pressure on Joerger, especially when Elmer and Theo Joerger opted out as part owners of the Shasta County ranch. With Louis Joerger's brother and sister-in-law no longer available as co-signers for loans, using the ranch for funding became more difficult than it already was. Indeed, Louis and Beth Joerger now had to borrow against their Piedmont home.[46] In addition, Louis Joerger continued to rely on frequent chattel mortgages — including some made with his brother, who apparently was willing to advance money against livestock, crops, and farm implements even if he would not be a co-signer on the Shasta County ranch itself.

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ald, Oct. 28, 1925. Carter later estimated the total construction cost of the Hat Creek No. 2 power plant by itself to be $1.5 million (today, over $21 million). See Carter to Joerger, Oct. 28, 1931, file: *Louis P. Joerger v. Mt. Shasta Power Corporation, et al*., box 29, Jesse W. Carter Papers, Bancroft Library, UC Berkeley [hereinafter: *Joerger v. Mt. Shasta*, box 29, Carter Papers].

44 "Damages of $32,500 Awarded by Jury," *Courier-Free Press* (Redding), March 21, 1929; "M'Arthur Sues for $288,000 in Damages," ibid., March 3, 1930; "$71,630 Is Given M'Arthur by Jurors," ibid., April 2, 1930; "Shasta Court Is Upheld in Water Case," ibid., Oct. 30, 1930; "$71,630 Judgment Won in Riparian Suit of Pit River Landowners," *Woodland Daily Democrat*, April 3, 1930.

45 See, for example, "Petition for a Writ of Supersedeas to the Superior Court for Shasta County and Hon. Walter E. Herzinger, Judge Thereof; and for a Writ of Mandate to Said Court and Judge with Stay of Proceedings below Pending Return and Decision," [undated, but post-1929], file: *Joerger v. Mt. Shasta*, box 29, Carter Papers.

46 Deed, Elmer H. and Theo S. Joerger to Louis P. and Beth M. Joerger, Jan. 10, 1930, book 29, p. 427, Records of the Shasta County Assessor-Recorder; Deed of trust, Louis P. and Beth M. Joerger, trustor, and Mason-McDuffie Company, trustee, July 23, 1930, book 49, p. 415, ibid.; Deed of trust, Louis P. Joerger and Beth M. Joerger, trustor, and Mason-McDuffie Company, trustee, July 23, 1930, book 2445, p. 81, Records of the Alameda County Recorder, Oakland, California.

Each of these non-real estate loans involved thousands of dollars. Louis Joerger even executed a chattel mortgage with Jesse Carter, presumably to help pay legal expenses. (Due to Joerger's financial situation, Carter had offered to handle all of Joerger's considerable legal work after the 1929 California Supreme Court decision, including multiple new lawsuits, on contingency. Joerger, however, had refused and insisted on paying for Carter's services on an hourly basis.)[47]

These financial circumstances were difficult enough, but according to Jesse Carter and Louis Joerger, PG&E's real objective was not just to keep economic stress on Joerger while litigation continued. At about the same time that Joerger had won in the California Supreme Court, Carter and Joerger both began to suspect that the power company actually wanted, one way or another, to drive Joerger out of Shasta County entirely — undoubtedly because Joerger's fight with PG&E had received such widespread publicity. To this end, Carter and Joerger believed that PG&E had started to plot with Joerger's lenders to dry up all of his credit sources and force him to sell his ranch — or lose it to foreclosure. Carter and Joerger became so worried about this scenario that Carter drafted a memo for his files entitled "Memorandum of Facts in Joerger Conspiracy." In this document, Carter detailed how Bank of America (and its predecessors in the Shasta County area), which held the mortgage to Joerger's ranch, had repeatedly advised Joerger to settle the controversy with PG&E by selling some — but not all — of his water rights to the power firm. Nevertheless, according to Carter, when Joerger had followed this advice and agreements had appeared likely, the bank would

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47 Chattel mortgage, L.P. Joerger, mortgagor, and H.C. Watson, mortgagee, Sept. 21, 1929, book 57, p. 365, Records of the Shasta County Assessor-Recorder; Chattel mortgage, Louis P. Joerger, mortgagor, and Bank of America, mortgagee, May 9, 1930, book 48, p. 203, ibid.; Chattel mortgage, Louis P. Joerger, mortgagor, and Bank of America, mortgagee, Sept. 20, 1930, book 48, p. 272, ibid.; Chattel mortgage, Louis Joerger, mortgagor, and D.F. Knoch, mortgagee, Aug. 7, 1931, book 66, p. 370, ibid.; Chattel mortgage, Louis P. and Beth M. Joerger, mortgagors, and E.H. Joerger, mortgagee, Jan. 18, 1932, book 66, p. 215, ibid.; Louis P. and Beth M. Joerger, mortgagors, and Jesse Carter, mortgagee, Aug. 26, 1932, book 65, p. 413, ibid. Regarding the contingency offer and Joerger's refusal, see Carter to Louis P. Joerger, Oct. 29, 1930, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers; Carter to Louis P. Joerger, March 11, 1931, ibid.

not approve them, declaring that the accords would not cover Joerger's indebtedness. As Carter explained, "In this manner Joerger has been the victim of a buck-passing affair in which the bank sent him to the Pacific Gas & Electric Co. and the Pacific Gas & Electric Co. [sent him] back to the bank."[48]

The mere possibility that Joerger's bank was colluding with PG&E was undoubtedly worrisome. Yet Carter's and Joerger's apprehensions increased further when another attorney confidentially advised Carter that PG&E actually "wanted to get rid of" Joerger.[49] Carter's source also had stated that the seemingly menacing phrase may only have referred to buying Joerger out entirely instead of purchasing just some of his water rights. Nevertheless, Carter probably was understating the situation when he said he had been "a 'Doubting Thomas' so far as the good motives and intentions of the Power Company agents are concerned . . . [but PG&E's officials] will have to change their garments considerably before they will be able to cover up the image of the wolf behind the lamb skin so far as I am concerned."[50]

Whether PG&E's strong-arm tactics were real or merely imagined, Louis Joerger refused to acquiesce. In fact, the power company's approach (or Joerger's and Carter's perception of it) made Joerger intransigent and furious. Venting some of that anger, on August 1, 1930, Joerger went to PG&E's Hat Creek diversion dam armed, according to later court filings, "with a revolver and an ax." There, he destroyed part of the diversion dam to let more water flow downstream to his ranch. When shortly thereafter, the power company rebuilt the structure, hired armed guards, and obtained a restraining order against Joerger, he defiantly

48 Jesse W. Carter, "Memorandum of Facts in Joerger Conspiracy," undated but circa 1930, file: *Bank of America v. Joerger*, box 29, Carter Papers. For other suspicions that PG&E was conspiring with Bank of America against Joerger, see Annette Abbott Adams to Carter, Jan. 29, 1931, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers.

49 Carter to Joerger, Jan. 16, 1930, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers.

50 Carter to Edward F. Treadwell, Feb. 19, 1930, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers. See also Joerger to Carter, Feb. 24 1930, ibid.; Annette Abbott Adams to Carter, March 4, 1930, ibid.; Adams to Carter, March 12, 1930, ibid.

declared that the next time he demolished the dam, "it would not be so easy to repair because he intended to use two boxes of dynamite."[51]

Then the situation went from bad to worse. On November 10, 1930, the bold headline in Redding's *Courier-Free Press* declared, "Hat Creek No. 2 Dam Dynamited Monday."[52] Although the *Press* added, "There is no clue as to who did the dynamiting," everyone knew it was Joerger. Indeed, the next day the newspaper's page-wide headline shouted, "Joerger Admits Blowing Up Hat Creek 2 Dam," and the subtitles explained it all: "Says He Will Do Job Right If P.G. & E. Dares Repair It." "'Supreme Court Says It Is My Property,' Says Power Firm Foe." "'There Was Nothing Else To Do' Says Farmer — 'I Can't Go On Spending Thousands of Dollars To Get Rights That Are Mine.'"[53] Further south, the *Oakland Tribune* reported that Joerger's wife, Beth, had tried to excuse his actions by explaining that the Hat Creek court wrangling had gone on for nine years. "Two months ago, my husband became disgusted with the legal rigmarole," Beth explained. "He has gone through years of mental and physical anguish because of the [power] company's tactics . . . . Something, in all justice, had to be done to bring the conditions to light."[54]

Clearly, by now the situation was extremely dangerous and had the potential for becoming catastrophic, particularly from PG&E's perspective. The power firm was well aware that violence over water use and control was a serious problem throughout the entire United States. During

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51 "Affidavit of H.W. Bertholas," Aug. 20, 1930, file: *Red River Lumber Company and Mt. Shasta Power Corporation v. Louis P. Joerger*, box 29, Carter Papers. See also "Complaint," Aug. 8, 1930, ibid.; "Return to Order to Show Cause and Motion for Dismissal of Action," Aug. 20, 1930, ibid.; "Motion to Dissolve Injunction," Aug. 20, 1930, ibid.; "Says Joerger Threatened to Blow Out P.G. & E. Dam," *Courier-Free Press* (Redding), Aug. 11, 1930; "New Order Issued in Joerger Matter," ibid., Aug. 20, 1930.

52 "Hat Creek No. 2 Dam Dynamited Monday," *Courier-Free Press* (Redding), Nov. 10, 1930. See also "Dam Blown Up at Hat Creek," *Oakland Tribune*, Nov. 10, 1930; "Pacific Gas Power Dam Dynamited," *Los Angeles Times*, Nov. 11, 1930.

53 "Joerger Admits Blowing Up Hat Creek 2 Dam," *Courier-Free Press* (Redding), Nov. 11, 1930.

54 "Blasted Dam Again Threatened by Oakland Man," *Oakland Tribune*, Nov. 11, 1930. For similar news reports, see "Farmer Admits Dynamiting Dam," *San Mateo Times*, Nov. 11, 1930; "Dam Blast Cuts Power in Hat Creek District," *Woodland Daily Democrat*, Nov. 11, 1930.

the three decades preceding Joerger's attack on the Hat Creek diversion dam, there had been scores of news stories around the country about murders over water rights, as well as accounts of various acts of sabotage against dams and diversion structures.[55] The most famous of these had been the repeated bombings of southern California's Owens Valley Aqueduct, which carried water away from irate farmers in the Owens Valley to Los Angeles.[56] Aside from the Owens Valley violence and in addition to Joerger's assault, PG&E itself already had been involved in other confrontations, although perhaps not on as grand a scale. Charles Coleman, who published a history of PG&E in 1952 celebrating the firm's hundredth anniversary, noted that during the first two decades of the twentieth century, PG&E's "days were punctuated by rifle shots, destruction of

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55 See, for example, "'Best Citizens' Try to Blow Up a Dam with Dynamite," *Waterloo Daily Reporter* (Iowa), May 23, 1900; "Destroyed Dam with Dynamite," *Nebraska State Journal* (Lincoln), March 23, 1902; "Farmers Demolish Dam," *Racine Daily Journal* (Wis.), May 13, 1902; "Chaffee County Pioneer Killed . . . As Result of An Old Feud Concerning Cattle and Water Right[s]," *Colorado Springs Weekly Gazette*, Aug. 4, 1904; "Dynamite Used on Clear Lake Dam," *Sioux County Herald* (Iowa), Nov. 1, 1905; "Dam Dynamiting," *Marshall Expounder* (Michigan), April 27, 1906; "Fish Dam Dynamited," *Evening Times* (Cumberland, Md.), May 11, 1906; "Dynamite Mill Dam," *Akron Register Tribune* (Ohio), June 6, 1907; [Masked Armed Men Blow Up Dam], *Robesonian* (Lumberton, N.C.), July 29, 1907; "Dam Dynamiting Suspects Nabbed," *La Cross Tribune* (Wis.), April 3, 1908; "Threaten To Dynamite a Dam," *Evening Telegram* (Elyria, Ohio), Oct. 2, 1908; "Dam Dynamited," *Logansport Daily Reporter* (Ind.), April 3, 1909; "Costly Louisiana Dam Is Blown Up," *Daily Review* (Decatur, Ill.), April 4, 1909; "Threatens To Dynamite Big Idaho Power Dam," *Coshhocton Daily Times* (Ohio), Aug. 13, 1909; "Farmers Who Wrecked Dam Secure Freedom," *San Francisco Call*, Sept. 28, 1909; "Desperate Farmers: Had Intended to Blow Up a Dam with Dynamite," *Ogden Standard* (Utah), July 29, 1910; "Dam Dynamiter Is Arrested," *Oelwein Daily Register* (Iowa), Jan. 14, 1911; "Dam Dynamited?" *Fitchburg Daily Sentinel* (Mass.), July 13, 1915; "Dam Dynamited: Investigation Started," *Ludington Daily News* (Mich.), March 7, 1919; "Attempt Is Made to Dynamite Dam," *Anaconda Standard* (Mont.), Jan. 9, 1922; "Kills Neighbor in Water Fight," *Billings Gazette* (Mont.), June 3, 1926; "Farmer Gets Life for Killing Boy, . . . After Dispute over Water Rights [with Boy's Father]," *Cumberland Evening Times* (Md.), March 6, 1929.

56 For detailed accounts of the struggle over the Owens Valley water supplies, see Abraham Hoffman, *Vision or Villainy: Origins of the Owens Valley-Los Angeles Water Controversy* (College Station: Texas A & M Press, 1981); William Kahrl, *Water and Power: The Conflict over Los Angeles' Water Supply in the Owens Valley* (Berkeley: University of California Press, 1982).

water diversion dams, cutting of wires," and arrests. Moreover, Coleman added, at least one of these other acts of aggression had been carried out by another of Jesse Carter's clients, Mollie Flood, who had "attempted to split . . . [a PG&E official's] head open with an ax when he stopped her from diverting water . . . ."[57] (Carter later recalled that he had pleaded with his clients not to resort to such acts of violence, and he believed that had it not been for his intervention, other clients would have followed Louis Joerger's lead and dynamited additional power facilities.)[58]

Understandably, therefore, PG&E's leaders did not want to confirm publicly that Louis Joerger had indeed destroyed their Hat Creek diversion dam nor did they want to publicize his threats of more possible mayhem. Thus, while Joerger openly bragged about dynamiting the dam, power firm officials blandly asserted that "no serious trouble had been encountered with farmers in the region . . . . [We are] at a loss to explain the attempt on the [Hat Creek] structure."[59] Yet PG&E's leaders were not about to let Joerger completely off the hook. Instead of seeking to have Joerger charged with a criminal act,[60] the power firm filed a new lawsuit against him, this time seeking nearly $10,000 for damages to the dam. PG&E also asked for a court order to prevent Joerger from destroying any more of the company's property.[61] The idea, apparently, was to place yet more financial strain on Joerger without making him a martyr in the eyes of other California ranchers and farmers.

PG&E's response to Joerger's demolition of the Hat Creek diversion dam appeared measured and coldly calculated. Yet simultaneously and more ominously, the *Oakland Tribune* reported that the company's first vice president, Paul M. Downing, had warned that PG&E would "take the

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57 Coleman, *P.G. and E. of California*, p. 290. For Mollie Flood's California Supreme Court case, see *Northern California Power Company v. Mollie Flood*, 186 Cal. 301 (1921).

58 Carter Interview, 82-89 [this vol., 235-238].

59 "Pacific Gas Power Dam Dynamited," *Los Angeles Times*, Nov. 11, 1930.

60 "No Criminal Complaint Filed Against Joerger," *Courier-Free Press* (Redding), Nov. 14, 1930.

61 "P.G. & E. Sues Joerger For $9,367 Dam Damages," *Courier-Free Press* (Redding), Nov. 19, 1930; "Company Sues Rancher for Dam Blast," *Woodland Daily Democrat*, Nov. 19, 1930. See also "Dam Bomber Faces Suit for $9367," *Oakland Tribune*, Nov. 19, 1930; "P.G. & E. Sues Rancher for Blast," *San Mateo Times*, Nov. 19, 1930; "Power Concern Sues Rancher Over Blast," *Los Angeles Times*, Nov. 20, 1930.

situation in its own hands in a manner that Joerger would regret later."[62] Downing did not explain exactly what he meant, but about three weeks later, a hidden assailant shot Joerger with a rifle while he was working at his Shasta County ranch. The impact knocked Joerger to the ground, and he only survived because a large packet of papers in his shirt pocket deflected the bullet. At first, Joerger insisted that he had no idea who was to blame for the incident. "It is unthinkable that the P.G. and E. could be in any way responsible," he told one newspaper.[63] Yet Joerger's attempted murder was undeniably a warning. So too was the decision at about the same time by Judge Walter Herzinger — who was soon due to rule on one aspect of PG&E's suit against Joerger — to leave Redding for "a month's rest" in San Francisco. According to Annette Abbott Adams, however, his "vacation" was really due to concerns for his own safety. Adding that she believed Judge Herzinger's circumstances were "most precarious," she wondered in a letter to Jesse Carter, "Is the Judge afraid of the situation?"[64]

Despite these foreboding circumstances, the fight between Louis Joerger and PG&E eventually returned to the calmer venue of Shasta County's Superior Court. There, PG&E's damages suit against Joerger for destroying the Hat Creek diversion dam went to trial. So, too, did a new lawsuit brought by Joerger against the company asserting further claims to more of Hat Creek's waters. Shortly thereafter, in early 1931 when Joerger won his new suit and PG&E lost its case for damages,[65] Joerger

62 "Dynamiter of P.G.E. Dam Is Defiant," *Oakland Tribune*, Nov. 12, 1930.

63 Joerger's quote is in "Dam Blaster Escapes Death from Ambush," *Woodland Daily Democrat*, Dec. 11, 1930. See also "Dam Dynamiter Shot from Ambush," *San Francisco Chronicle*, Dec. 11, 1930; "Letters Save Rich Oaklander From Bullet," *Oakland Tribune*, Dec. 11, 1930; "Joerger Missed Death By An Inch — [Says Sheriff] Stevenson," *Courier-Free Press* (Redding), Dec. 12, 1930.

64 Adams to Carter, Jan. 13, 1931, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers. On the judge's situation, see also Carter to Roderick McArthur, Dec. 15, 1930, ibid.

65 "Court Decision May Shut Down Hat Creek 2 — Joerger Beats Power Company," *Courier-Free Press* (Redding), Jan. 30, 1931; "Court Upholds Blasting Dam," *Woodland Daily Democrat*, Jan. 30, 1931; "Power Firm Loses Fight to Keep Hat Creek Dam," ibid., Feb. 5, 1931; "Hat Creek Power House Shut Down," ibid., Feb. 12, 1931; "Rancher Beats P.G. & E." *Hayward Daily Review*, Jan. 30, 1931; "Dam Bomber Wins P.G. & E. Water Fight," *Oakland Tribune*, Jan. 30, 1931; "Diverting of Water Enjoined

was elated. But then PG&E — of course — appealed.[66] This turned Joerger's sentiments to rage, and no longer caring about court actions or legal arguments (even after he prevailed in early 1932 over PG&E's new appeal and the power company pursued additional legal approaches to keep its Hat Creek diversions flowing),[67] Joerger defiantly vowed he would not be defeated. Perhaps intending a play on words, Joerger swore to Jesse Carter that "a fight to the last, last ditch is my idea."[68] Joerger was so adamant that he would not yield to PG&E that when Bank of America sued him for repayment of a chattel mortgage and simultaneously began foreclosure proceedings due to nonpayment of his Shasta County ranch's mortgage, Joerger still would not sell the property or any of its water rights to the power company to pay his debts. Instead, Joerger responded by filing for bankruptcy in federal court to protect his Shasta County ranch from being seized. Now completely convinced that there really was a conspiracy against him by his banking creditors and PG&E, Joerger had Jesse Carter institute a new lawsuit against those corporations, alleging that they had schemed to force him off his ranch and seeking damages of nearly $300,000 (almost $5 million today).[69]

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by Court," *Los Angeles Times*, Feb. 6, 1931; Carter to Joerger, Feb. 6, 1931, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers; Adams to Carter, Sept. 30, 1931, ibid.

66 "Joerger Elated at Court Decision," *Courier-Free Press* (Redding), Jan. 31, 1931; "Power Company May Go To [California] Supreme Court," ibid., Feb. 13, 1931; 'Power Company Files Notice of Appeals," ibid., Feb. 14, 1931; "P.G.E. Appeals in Hat Creek Dam Battle," *Oakland Tribune*, Feb. 6, 1931; "Appeals Filed in Dam Bombing Case," ibid., March 30, 1931; "Joerger Fight with P.G.E. to Be Reviewed," *Woodland Daily Democrat*, Feb. 25, 1931.

67 *Louis P. Joerger v. Mt. Shasta Power Corporation, et al.*, 214 Cal. 630 (1932); "Joerger Again Wins in Court," *Woodland Daily Democrat*, Jan. 26, 1932; "Power House Again Active," ibid., Jan. 29, 1932; "Dam Dynamiter Wins New Court Victory," *Oakland Tribune*, Jan. 26, 1932; "Joerger Right to Hearing Attacked," *Courier-Free Press* (Redding), Feb. 19, 1932.

68 Joerger to Carter, March 4, 1932, file: *Joerger v. Mt. Shasta*, box 29, Carter Papers.

69 Notice of breach and election to sell by Bank of America, Jan. 27, 1932, book 63, p. 472, Records of the Shasta County Assessor-Recorder; "Bank Sues for Joerger Land," *Courier-Free Press* (Redding), Feb. 13, 1933; "Joerger Sued on Notes Said to Be Past Due," ibid., Aug. 12, 1933; "Joerger Asks $289,553 In Damage Action," ibid., Aug. 17, 1933; "District Court Here Halts Action Against Joerger," ibid., Sept. 22, 1934; "Joerger in Court Suit Asking Big Damages," *Woodland Daily Democrat*, July

Then, much like the events that had escalated to the point where he almost had been killed, Joerger embarked on an even more zealous crusade resulting in more self-inflicted disasters. First, he sold his livestock to fund the conspiracy litigation against Bank of America and PG&E. Then, perhaps seeing a better way to fight against what he believed were abuses of corporate power, Joerger ran for Congress, campaigning (with few funds) as a New Deal Democrat and citing his long battles against big businesses. In quick succession, however, Joerger lost the conspiracy lawsuit, lost the election, and — after temporarily blocking the foreclosure proceedings on his ranch with his bankruptcy filing — ultimately lost that property to Bank of America.[70] And as if these events were not bad enough, Joerger also forfeited his Piedmont home when he was unable to make mortgage payments on that property.[71] Incredibly, even when it no longer actually mattered because he did not own the Shasta County ranch anymore, Joerger continued to fight over that property all the way to a final decision before the California Supreme Court in July 1937. He lost that battle, too.[72]

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Two decades later, much had changed. Mt. Shasta Power Corporation had ceased to exist and had become an integral part of PG&E, which, in turn, had continued to expand its hydroelectric power facilities in the Pit River basin (including on Hat Creek) and throughout all

17, 1933; "Joerger in Court Suit Asking Big Damages," *Oakland Tribune*, July 17, 1933; "Answer and Cross Complaint," July 14, 1933, file: *Bank of America v. Louis P. Joerger*, box 30, Carter Papers.

70 "Pledged to Back President Roosevelt in His Work to Restore American Democracy; Louis, P. Joerger, Democratic Candidate for Congressman, 2nd Congressional District" [newspaper advertisement], *Mountain Democrat* (El Dorado County), Aug. 17, 1934; "Incumbent Group Wins," *Los Angeles Times*, Aug. 30, 1934; "Joerger Files Cross-complaint Against Bank," *Courier-Free Press* (Redding), Feb. 7, 1935; "Joerger Wins Court Action," ibid., July 29, 1935; "Bank-Joerger Case To Be Argued," ibid., Dec. 6, 1935; "Joerger Ranch Sold Second Time Under Foreclosure," ibid., Dec. 28, 1935; "Bank Victor in Ranch Suit," *Woodland Daily Democrat*, Feb. 19, 1936.

71 Notice of Default, Mason-McDuffie Company, July 15, 1932, book 2866, p. 9, Records of the Alameda County Recorder; Trustee's deed, Mason-McDuffie Company to Homes Loan Corporation, Nov. 28, 1932, book 2875, p. 360, ibid.

72 Louis P. Joerger v. Mt. Shasta Power Corporation, et al., 9 Cal. 2d 267 (1937).

of northern California.[73] The company — like other large water-using firms around the United States — no longer faced the scale of violent opposition that had existed in the first three decades of the twentieth century. Moreover, reforms in state water law, such as the 1928 California constitutional amendment that had reversed the *Herminghaus* decision and additional legal changes, eventually permitted California's officials to move forward with a state-wide water program. These alterations in the state's water laws also eased the way for other large-scale water developments, both public and private.

Louis Joerger, having lost both his Shasta County ranch and Piedmont home to foreclosure, first moved with Beth to Sacramento during the late 1930s. According to voter registration rolls, they lived within that city itself only a few blocks from the California State Capital building, although Louis continued to call himself a farmer and rancher (Beth identified herself as a housewife). Then for a year or two in the early 1940s, Louis Joerger took a job as a hotel manager in Butte County, California. By 1942, the Joergers were living in Sonoma County, where Louis worked on a cattle ranch. Although Louis registered for the draft during World War II, the historical record is uncertain as to whether he actually served in that conflict (he would have been in his early fifties when Pearl Harbor was attacked). After the war years, the Joergers continued to live in Sonoma County, where Louis died in 1955. Beth outlived her husband by nearly four decades. During that time, she became a playwright, poet, and song-writer (especially for school children) until her 1991 death, also in Sonoma County.[74]

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[73] Mt. Shasta Power Corporation, Certificate of Winding Up and Dissolution, July 28, 1936, file: Mt. Shasta Power Corporation Articles of Incorporation, Records of the California Secretary of State, California State Archives, Sacramento, California. See also generally Coleman, *P.G. and E. of California*.

[74] Voter registration entries for Louis P. and Beth M. Joerger, Sacramento County, 1936, *Great Register of California Voters, 1900-1944*, microfilm (Sacramento: California State Library, 1986); Voter registration entries for Louis P. and Beth M. Joerger, Sacramento County, 1938, ibid.; Voter registration entries for Louis P. and Beth M. Joerger, Butte County, 1940, ibid.; Listing for Louis P. and Beth M. Joerger, *Sacramento City Directory*, 1936, p. 306; Draft registration for Joerger *supra* note 7; Death listing for Louis P. Joerger, March 20, 1955, *California Death Index, 1940-1997* (Sacramento: California Department of Health Services, Nd.); Death listing for

For his part, in the 1930s Jesse Carter became the legal representative for the municipalities of Redding and Mount Shasta, California. In this capacity, he handled even more water cases as well as other types of legal issues (while also continuing to defend many of his other riparian water rights clients). At the same time, he strongly backed efforts to see the State Water Plan carried out.[75] On January 17, 1939, Carter won a special election to fill the California State Senate seat of John B. McColl, who had died in an auto accident. Only six months later, Governor Culbert Olson named Carter to the California Supreme Court.[76] There, Justice Jesse W. Carter brought to the high court the same qualities that distinguished Carter's representation of Louis Joerger in the 1920s and 1930s, when he defended the rights of the individual farmer's private property, and that reappeared later in Carter's fight for his own Marin County ranch. As described in Justice Grodin's introduction to Carter's oral history, these constituted "a strong-willed commitment to a constellation of values."[77] ✯

Elizabeth Milliken Joerger, Aug. 1, 1991, ibid. On Beth Joerger's writing and musical career, see, for example, *Something Wonderful: Clairee! 1913: A Musical Comedy, Set in Petaluma, California* (Petaluma, California: Np., Nd.); "Santa Is On His Way" (song), *Grade Teacher* 78 (1960), 29.

75 On Carter's views and efforts regarding the State Water Plan (Central Valley Project), see ibid., 152-153, 159, 164-166 [this vol., 272, 276, 278-280].

76 "Jesse Carter Is Candidate," *Courier-Free Press* (Redding), Dec. 30, 1938; "Carter Winner of Senatorial Election," ibid., Jan. 18, 1939; Johnson, *History of the Supreme Court Justices of California*, vol. 2, p. 162; Carter Interview, 161 [this vol., 277]; Carlton, "In Memoriam — Jesse Carter," 353-359.

77 This vol., 185.

PUBLIC LAND, PRIVATE SETTLERS,

and The Yosemite Valley Case of 1872

PAUL KENS*

In a 2009 documentary film, Director Ken Burns and writer Dayton Duncan describe the National Parks as "America's Best Idea."[1] Although they may be right, the establishment of the national parks has not been without controversy. This article is about the creation of one of America's first national parks, the Yosemite National Park in California. More specifically, it is about a controversy that arose when plans for the park came into conflict with claims of pioneers who had already settled in the Yosemite Valley. One of those settlers, James Mason Hutchings, persistently resisted California's efforts to have him removed from the land he had claimed. Hutchings's legal battle with the state eventually reached the United States Supreme Court in the 1872 case called *The Yosemite Valley Case*.[2]

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1 Web page for the documentary is found at http://www.pbs.org/nationalparks/history/. All Web sites cited in this article were last accessed on October 1, 2009.

2 *The Yosemite Valley Case*, 82 U.S. 77 (1872), also referred to as *Hutchings v. Low*.

JAMES MASON HUTCHINGS.

Courtesy National Park Service, Yosemite National Park, Catalog Number: RL-14,396.

In today's thinking, Hutchings's battle to retain his land may appear to be a greedy campaign to exploit a national treasure.[3] However, a closer look at *The Yosemite Valley Case* reveals that the conflict was much more complicated. Usually overlooked is that Hutchings's legal battle was also woven into a question of how the vast wealth of the West would be distributed. Most accounts in the press of Hutchings's battle focused on the hope of preserving the wonders of Yosemite. But the stakes were different in the courts, where the issues involved the future of the homestead movement and land reform — the idea that the public domain should be distributed in small plots to "actual settlers" who would live on the land and cultivate it.

James Mason Hutchings, an English cabinetmaker, came to California in the Gold Rush. Like many pioneer Californians, he was a frustrated gold miner, aspiring entrepreneur, and something of an adventurer. In 1855 he set off on an adventure that would shape his destiny. Guided by two Yosemite Indians, Hutchings took a small expedition, including artist Thomas A. Ayres, to the relatively unexplored Yosemite Valley. In 1855, after returning from his expedition, Hutchings published his experience, along with Ayres's drawings, in the *Mariposa Gazette* and the *San Francisco Daily California Chronicle*. He later included it in the inaugural edition of *Hutchings' California Magazine*. In his own words, he hoped "to portray its [Yosemite's] beautiful scenery and curiosities; to speak of its mineral and agricultural products; to tell of its wonderful resources and commercial advantages; and to give utterance to the inner life and experience of its people."[4]

Hutchings was not the first white man to visit the valley, nor was his group even the first tourist party. Yosemite was discovered by a loosely organized army of whites who set out on a campaign against local

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[3] Alfred Runte, *Yosemite: The Embattled Wilderness* (Lincoln, Neb.: University of Nebraska Press, 1990), 13-27 and 31-39 passim. Although Runte's account is measured and fair, it emphasizes the threat Hutchings's claim posed to conservation of the park. Burns and Duncan take a similar view saying that "now that the nation had moved to protect it in perpetuity by declaring it public, no one fought that decision with greater vehemence or moved more quickly to exploit the valley" than did Hutchings. http://www.pbs.org/nationalparks/history/ep1/2/.

[4] Quoted in Runte, *Embattled Wilderness*, 14.

Indians, and a man named James C. Lamon led the first tourist party into the valley. Nevertheless, Hutchings was the earliest and one of the most vocal advocates of the beauty of Yosemite, and he and Lamon were among the original white settlers of the valley.[5]

Believing that the Yosemite Valley lay within the public domain of the United States, and was therefore open to settlement, Hutchings and Lamon each claimed plots of land in what was then the usual manner. Homestead and preemption laws of the time were designed to distribute the public domain in small plots, usually 160 acres, to "actual settlers." The laws differed in that preemption laws were, in essence, a sale. The settler paid a nominal price for the land. Under the Homestead Act the government gave the land for free. The laws were similar in most other ways, however. They required that a settler occupy the land, cultivate and improve it, have it surveyed if the government had not already done so, file a claim, and pay the price of the land (or administrative fee in the case of a homestead).

Lamon claimed his land in 1859 when he located a parcel of land at the upper end of the valley and staked his claim. He recorded his preemption claim to 160 acres of land on May 17, 1861, built a log cabin, and planted crops and an apple orchard.[6]

Hutchings purchased his claim from an earlier settler. After exploring Yosemite in 1855, he decided to settle in the valley. In 1861 he and his wife set out on a journey to the valley with the hope of settling but were turned back by bad weather. In 1863 he purchased a preemption claim to 160 acres of land from George and John Hite, who had settled there earlier. The claim included a primitive hotel. Finally, on April 20, 1864, Hutchings brought his family to the valley. He made improvements to the hotel, built a cabin for his wife and three children, and cultivated crops.[7]

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[5] The fate of Native Americans who occupied the Yosemite Valley is important but beyond the scope of this article. For one treatment of the topic see, Mark Spence, "Dispossessing the Wilderness: Yosemite Indians and the National Park Ideal, 1864-1930," *Pacific Historical Review* 65:1 (Feb. 1996), 27-59.

[6] Robert F. Uhte, "Yosemite's Pioneer Cabins," *Sierra Club Bulletin* 36:5 (May 1951), 58-59.

[7] *Id.*, 61-62; Mrs. H. J. Taylor, "James Mason Hutchings," in *Yosemite Indians and Other Sketches* (San Francisco: Johnck & Seeger, 1936), 31ff. Part of this summary

At the time Congress designated Yosemite as a park neither Hutchings nor Lamon had completed the last two steps in the preemption process. The government had not yet surveyed the Yosemite Valley, and Hutchings and Lamon had not surveyed their claims. Consequently, it was impossible for them to perfect the claims and pay the fee. This was a common situation for settlers. Thus, the most important question in *The Yosemite Valley Case* involved the rights of preemptors who had settled on a parcel of land, cultivated it, and improved it, but not yet paid for it.

On June 30, 1864, a little more than two months after Hutchings had moved to the valley, President Lincoln signed the Yosemite Park Act into law.[8] The act granted to the State of California a large section of the Yosemite Valley. Its directive that the state would hold the land "inalienable forever" was intended to guarantee that the unique and majestic region would be preserved for the public. Control of Yosemite Park did not remain in California, but the goal of preserving the region continued. Eventually Congress took back the land and expanded the preserve. In 1890 Yosemite National Park joined Yellowstone as our first national parks and the model for our national parks system.[9]

The story of Yosemite can be told as a tale of success. In an era characterized by individualism and exploitation of the nation's natural wonders, it was an unusual step toward preserving a wilderness for the benefit of the community. As California Senator Conness put it, the objective of his act was to assure that the Yosemite Valley would be "used and preserved for the benefit of mankind . . . ."[10]

The story of Yosemite is also a tale of tension. Yosemite — as historian Alfred Runte deftly pointed out — has always been an "embattled

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also comes from Hutchings's own account found in *Memorial of J. M. Hutchings and J.C. Lamon, Settlers in the Yosemite Valley, Mariposa County, California. To the Senate and House of Representatives of the United States, in Congress Assembled*, December 10, 1867, found in Library of Congress, *American Memory,* "An American Time Capsule: Three Centuries of Broadsides and Other Printed Ephemera," at http://memory.loc.gov/ammem/rbpehtml/.

8 Act of June 30, 1864, *United States Statutes at Large*, 38th Cong. 13 (1864) 325. The act also granted to California the Mariposa Grove of giant sequoias.

9 *Congressional Globe*, 38th Congress, 1st session, May 17, 1864, pp. 2300-2301.

10 Runte, *Embattled Wilderness*, 21, citing *Congressional Globe*, 38th Cong., 1st Session, May 17, 1864, pp. 2300-2301.

wilderness."[11] Built into the Yosemite Park Act and implicit in the campaign to create the park was a tension between the ideal of preserving the area as a wilderness and the ideal of making it available to the public. It was a tension that a visitor to our national parks today can still detect: a tension between preservation and tourism.

The history of Yosemite is peppered with the names of men who have become well known to Americans. Publisher Horace Greeley, landscape architect Frederick Law Olmsted, and Sierra Club founder John Muir were among the prominent photographers, artists, and political figures who took part in the drive to preserve Yosemite as a park.

Less appreciated is the early role Hutchings played in bringing the beauty of the Yosemite Valley to the attention of the American people. Perhaps that is because, in addition to playing a significant role in bringing the beauty of the Yosemite Valley to the attention of the public, Hutchings also played a role in increasing what had been up to then a slow trickle of visitors to Yosemite. By 1857, one enterprising pioneer had built a rugged guesthouse. Two years later a larger structure called the Upper Hotel was built in the valley. Still, tourism in the valley was primitive. In his account of one expedition, Hutchings describes a service offered to assist visitors to ascend a cliff leading to Vernal Falls:

> Beneath a large, overhanging rock at our right, is a man who takes toll for ascending the ladders, eats, and "turns in" to sleep, upon the rock. The charge for ascending and descending is seventy-five cents; and as this includes the trail as well as the ladders, the charge is very reasonable.[12]

Primitive though it may have been at the time, Hutchings obviously saw the potential for tourism when he purchased the rights to a hotel in 1863.

For Alfred Runte, and others who have written the history of Yosemite, the first threat to the ideal of preservation came from settlers,

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[11] Runte, *Embattled Wilderness*, the phrase serves as the subtitle and theme of his book.

[12] J.M. Hutchings, *Scenes of Wonder and Curiosity in California* (New York and San Francisco: A. Roman and Co., 4th ed., 1871), 132.

like Hutchings, who had previously laid claim to land within what was to become the park. At the time it would have been difficult to envision Yosemite's budding tourist industry as particularly destructive, but park advocates nevertheless saw it as a threat. And, private ownership only exacerbated that threat. Recalling how Easterners had spoiled the beauty and serenity of the Adirondack Woods and White Mountains, *The New York Times* predicted what "fast" and "practical" California entrepreneurs would make of Yosemite:

THE HUTCHINGS HOUSE HOTEL, PHOTOGRAPHED BY EADWEARD MUYBRIDGE, CA. 1872.

Courtesy The Bancroft Library, UC Berkeley.

> The exquisite "Bridal Vail" [sic] will have a bowling alley at the foot of it; the solemn "El Capitan" will look down upon faro tables; the "Cathedral Rock" will be pasted up with advertisements of "Angelica bitters;" and the glorious Yosemite fall will run the wheels of a woolen factory. We shall have rowdy liquor shops and gambling saloons, and slovenly Chinese hovels, scattered about those scenes of unequaled poetry and loveliness; . . .[13]

Taking a cue also from the experience of Niagara Falls where trees and wildflowers framing the Niagara River had by 1850 been replaced by tourist traps and other eyesores, park advocates took a stance that the scenery of Yosemite should never be private property.[14]

Attractive as it might have been, the idea of prohibiting private ownership in Yosemite Valley created a moral and legal dilemma. At the time Congress granted the park to the state, Hutchings, Lamon, and several other settlers had already staked preemption claims in the valley.

Park advocates were not impressed. While emphasizing the theme that the purpose of Congress's grant was to preserve the wonders of Yosemite for the whole community, they hammered at the charge that Hutchings and Lamon were merely "squatters." Hutchings and Lamon's claims were illegal, they said, because the Yosemite Valley had not yet been surveyed by the government and was thus not open to settlement.[15] Some further maintained that Hutchings and Lamon knew the land was not open for settlement and simply hoped to put themselves in a position to monopolize the region for profit.

Subsequent events demonstrated, however, that many Californians thought Hutchings and Lamon should be allowed to keep their claims. One indication of this sentiment was that the first state commission to govern the park offered to Hutchings and Lamon ten-year concessions to operate tourist facilities. The men turned down the opportunity for

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13 *The New York Times*, Feb. 14, 1870; see also, Feb 13, 1872.

14 Runte, *Embattled Wilderness*, 26; *San Francisco Daily Evening Bulletin*, Dec. 17, 1869; *The New York Times*, Feb. 14, 1870.

15 See, for example, *San Francisco Evening Bulletin*, February 29, 1872; *The New York Times*, July 3, 1870. The strength of this particular charge is illustrated by the fact that it remains accepted to this day. See, Runte, *Embattled Wilderness*, 18.

concessions, however. Instead, they went to the state Legislature, hoping it would grant them clear title to their claims. On January 24, 1868 the California Assembly voted overwhelmingly to grant to both Hutchings and Lamon the 160 acres of land in the Yosemite Valley upon which each had settled and made preemption claims. Hutchings and Lamon's victory appeared to be thwarted when Governor Haight vetoed the bill on February 4. But a week later the assembly once again expressed overwhelming support for the settlers when it voted to override the governor's veto.[16]

Even ardent park advocates recognized that Hutchings and Lamon had settled on the land, expended significant sums of money to improve it, and had played a part in opening the Yosemite Valley to visitors. Equity and fairness surely swayed some people to their cause.

For many Californians, support for the settlers' claims ran deeper, however. It traced to an ongoing struggle over how the resources of California, inherited from Mexico, would be shared. Some Californians tended to favor the distribution of the land in large blocks to claimants of Mexican Land grants or railroad grants. Influenced by a long-running movement for land reform, others insisted that the land in the state should be distributed in small amounts to homesteaders and settlers. It was important to these land reformers that as much as possible of the state's unclaimed, unimproved, or uninhabited land be declared public domain and thus remain open for settlement.[17] For the most single-minded of land reformers, the Yosemite Valley was no exception. They maintained that, rather than being set aside as a playground for the rich and powerful, the valley should remain open to settlement.[18]

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[16] *Memorial of J. M. Hutchings and J. C. Lamon*, 4th unnumbered page (with handwritten notation, "2/9"), *supra* note 7; *San Francisco Evening Bulletin*, Feb. 1, 1868, Feb 13, 1868; *The New York Times*, Feb. 13, 1868.

[17] See, W. W. Robinson, *Land in California* (Berkeley: University of California Press, 1948); Paul Gates, *Land and Law in California: Essays on Land Policies* (Ames: Iowa State University Press, 1991).

[18] *San Francisco Evening Bulletin*, June 8, 1870 (criticizing an essay in the *Sacramento Union*); Comments of Representative Johnson, *Congressional Globe*, House of Representatives, 40th Congress, 2nd Session, June 3, 1868, p. 2817.

A less sweeping version of the land reformers' view held that by settling on and improving the land before it became a park, Hutchings and Lamon had established prior ownership of it. This led some Californians to believe that, while the government had a right to convert their land to a park, the settlers should receive just compensation. Others believed that, regardless of the language or purpose of the Yosemite Park Act, the State of California should grant clear title to the settlers.

The terms of the grant from Congress to California did not allow the state to give away any land within the park. To the contrary, by accepting the land, California promised to hold it "inalienable forever." Thus, when the state Legislature granted the lands to Hutchings and Lamon it could only do so subject to the approval of the United States Congress. Hutchings thereupon prepared a Memorial (petition) to Congress in December of 1867 urging confirmation of his and Lamon's claim.[19] Pressed by Congressman George Julian, in June 1868 and again in July 1870, Congress considered resolutions to confirm California's grant of the land.[20] A bill eventually passed in the House of Representatives but failed in the Senate.[21] Thus, without congressional approval, the state's efforts to transfer ownership to the settlers failed.

Reports surfaced in California that Lamon and another settler accepted $10,000 from the state in settlement of their claims, but Hutchings refused to leave.[22] California's subsequent legal proceedings to force him off the land eventually reached the United States Supreme Court as *The Yosemite Valley Case*.[23]

The case began when park commissioners filed a suit to eject Hutchings from the land. This first round of the legal proceedings went to Hutchings. Observing that ejectment would result in great hardship and irreparable injury to Hutchings, the California district judge rejected the commissioners' petition. Speaking to the legalities, he reasoned that

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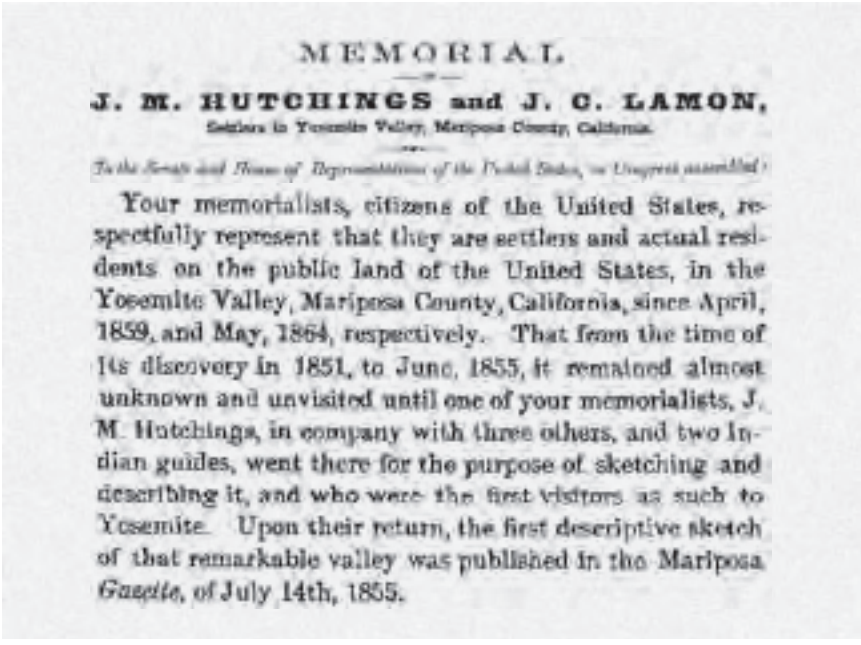
19 *Memorial of J. M. Hutchings and J. C. Lamon, supra* note 7.

20 *Congressional Globe*, House of Representatives, 40th Congress, 2nd Session, June 3, 1868, pp. 2816-17; *The New York Times*, July 3, 1870.

21 Runte, *Embattled Wilderness*, 24.

22 *San Francisco Evening Bulletin*, January 30, 1872.

23 *The Yosemite Valley Case*, 82 U.S. 77 (1872), also referred to as *Hutchings v. Low*.



MEMORIAL.

J. M. HUTCHINGS and J. C. LAMON,

Settlers in Yosemite Valley, Mariposa County, California.

To the Senate and House of Representatives of the United States, in Congress assembled:

Your memorialists, citizens of the United States, respectfully represent that they are settlers and actual residents on the public land of the United States, in the Yosemite Valley, Mariposa County, California, since April, 1859, and May, 1864, respectively. That from the time of its discovery in 1851, to June, 1855, it remained almost unknown and unvisited until one of your memorialists, J. M. Hutchings, in company with three others, and two Indian guides, went there for the purpose of sketching and describing it, and who were the first visitors as such to Yosemite. Upon their return, the first descriptive sketch of that remarkable valley was published in the Mariposa *Gazette*, of July 14th, 1855.

[TWO PAGES OF TEXT INTERVENING]

Your memorialists would therefore ask from your Honorable Body that you take their case into consideration and afford them the relief demanded by Justice and Right, by having the Act of Donation so amended as to exempt their pre-emption claims of 160 acres each from the conditions of that act.

In the hope of their petition being heard at your earliest convenience, and their request being granted, your memorialists, as in duty bound, will ever pray.

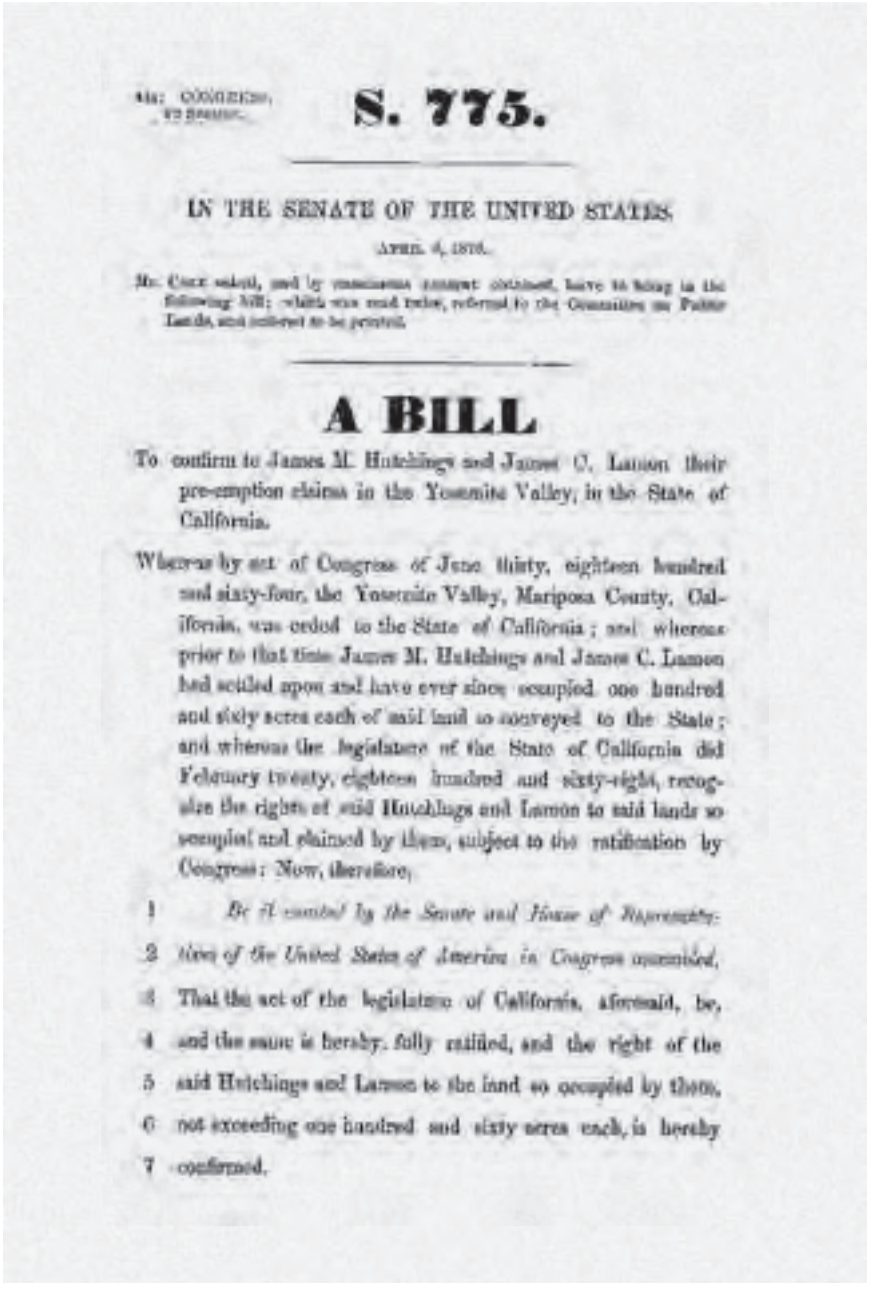
J. M. HUTCHINGS,
J. C. LAMON.

Subscribed and sworn to before me this tenth day of December, A. D. 1867.

ANGEVINE REYNOLDS, Clerk of Mariposa Co.
By JOHN C. HAMILTON, Deputy Clerk.

MEMORIAL (PETITION) TO CONGRESS BY HUTCHINGS AND LAMON

(caption, first paragraph, and conclusion reformatted for publication). Source: Library of Congress.



44th CONGRESS, 1st SESSION.

S. 775.

IN THE SENATE OF THE UNITED STATES.

APRIL 4, 1876.

Mr. CRAY asked, and by unanimous consent obtained, leave to bring in the following bill; which was read twice, referred to the Committee on Public Lands, and ordered to be printed.

A BILL

To confirm to James M. Hutchings and James C. Lamon their pre-emption claims in the Yosemite Valley, in the State of California.

Whereas by act of Congress of June thirty, eighteen hundred and sixty-four, the Yosemite Valley, Mariposa County, California, was ceded to the State of California; and whereas prior to that time James M. Hutchings and James C. Lamon had settled upon and have ever since occupied one hundred and sixty acres each of said land so conveyed to the State; and whereas the legislature of the State of California did February twenty, eighteen hundred and sixty-eight, recognize the rights of said Hutchings and Lamon to said lands so occupied and claimed by them, subject to the ratification by Congress: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the legislature of California, aforesaid, be, and the same is hereby, fully ratified, and the right of the said Hutchings and Lamon to the land so occupied by them, not exceeding one hundred and sixty acres each, is hereby confirmed.

The failed U.S. Senate bill that would have confirmed Hutchings and Lamon's claims of land.

Source: Library of Congress.

"when a preëmptioner enters upon the unsurveyed public lands, under the sanction of a public law, and makes improvements and becomes a bona fide settler, he acquires such rights as the Government cannot divest or take from him."[24]

The park commissioners then appealed to the California Supreme Court, which disagreed with the underlying presumption of the district judge's opinion: that Hutchings was a bona fide settler. Instead it adopted the theme, advanced by Hutchings's detractors, that Hutchings and the other settlers were little more than squatters. Writing for the California Supreme Court, Justice Crockett admitted that Hutchings had been ready and willing to prove up his claim and pay the purchase price, but could not do so because the land had not been surveyed and was, therefore, not open to preemption.[25] Nevertheless, Crocket concluded that Hutchings's act of settling on the land did not establish ownership and Congress had the right to sell or transfer the land to someone else. The circumstances may have resulted in a hardship entitling Hutchings to relief in some form, Crocket noted, but it was clear that he had no established rights that could afford him relief in the courts.[26]

Although there was some merit to the charges that Hutchings's claim was illegal, the law on the matter was not clear. There is no doubt that unsurveyed lands in California were open to settlement under the preemption laws in effect between 1853 and 1862 — before Hutchings made his claim. Congress complicated the matter, however, when it enacted the Homestead Act of 1862.

The Homestead Act was considered to be a victory for the cause of land reform because it offered free land. But, according to land historian Paul W. Gates, the Act was also a step backward because it did not authorize settlement of unsurveyed lands. Gates presumed that enactment of the Homestead Act invalidated the earlier preemption statutes that did allow claims to unsurveyed lands. In fact the Homestead Act said nothing about its effect on existing laws. Furthermore, many settlers, and some judges and legislators, believed the old laws were still in effect.

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24 *Low v. Hutchings*, 41 Cal. 634, 635 (1871).

25 *Id.* at 638.

26 *Id.* at 639-640.

Consequently, settlers continued to lay claims to unsurveyed lands on the basis of those earlier statutes.[27] It is likely that Hutchings and Lamon genuinely believed they had the legal right to claim their plots.

On appeal to the United States Supreme Court, Hutchings maintained that he had a valid claim to the land under federal preemption law.[28] Hutchings's attorneys did not press the issue, however, and neither did the state.[29] The technical legal question of which law applied to Hutchings's claim was not a factor in the Supreme Court's opinion. Both sides seemed intent on testing a broader issue.

The presence of George Julian on Hutchings's legal team indicated what it was. For the past several decades the former congressman had been one of the most prominent and persistent proponents of land reform. Along with men like George Henry Evans and Horace Greeley, Julian campaigned for a policy to use the public domain to provide free or cheap land to a class of actual settlers.

For the most ardent advocates of land reform, like Julian, this policy was more than a matter of fair distribution of the resources of the West. It was linked to the ideals of free labor and, in that respect, to the abolition of slavery.[30] It also represented a particular view of natural rights. Julian insisted that, "In laying the foundations of empire in the yet unpeopled regions of the great West, Congress should give its sanction to the natural right of the landless citizen of the country to a home upon its soil."[31] But, perhaps more than anything else, land reformers believed

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27 Paul W. Gates, *History of Public Land Law Development* (D.C.: Public Land Review Commission, 1968) 244-247, 394-395; see, Act of May 30, 1862, 37th Congress, United States Statutes at Large, 12 (1862) 409-410; *San Francisco Daily Evening Bulletin*, Dec. 18, 1869.

28 *Hutchings v. Low*, Brief for the Plaintiff in Error, 1; citing Act of May 30th 1862, 37th Congress, *United States Statutes at Large*, 12 (1862) 410, sec 7. This and the following are the briefs in *The Yosemite Valley Case*. The style of the case in both briefs uses *Hutchings v. Low*.

29 *Hutchings v. Low*, Brief for Defendants in Error.

30 Patrick W. Riddleberger, *George Washington Julian: Radical Republican: A Study in Nineteenth Century Politics and Reform* (Indianapolis: Indiana Historical Bureau, 1966), 76-78.

31 George W. Julian, *Speeches on Political Questions* (New York: Hurd and Houghton, 1872), 51-52.

this policy provided the only means of saving American democracy from the influence of a landed monopoly and connected elite. Idealizing the agrarian republic, Julian maintained that, "Independent farmers are everywhere the basis of society, and true friends of liberty."[32]

In the minds of land reformers, the government's attempt to remove Hutchings from his preemption claim threatened to water down the achievements they had made. Recall that homestead and preemption laws required that a settler occupy the land, cultivate and improve it, have it surveyed if the government had not already done so, file a claim, and pay the price of the land or administrative fee. Through his purchase of the claim and subsequent settlement on the land Hutchings had satisfied the initial requirements for preemption. Since the land had not yet been surveyed, however, it had been impossible for him to pay the fee. Hutchings's situation was not unique in this regard. Preemptors, and even homesteaders, commonly found themselves in this position, facing a period of time during which they had committed to settlement, improved the land, but not yet satisfied all of the conditions necessary to finalize their claims.

Julian argued that settling on the land and improving it was enough to give Hutchings an equitable title to the property. The pioneer settler, he maintained, has been treated as the favorite of the law and the government was bound by good faith to protect settlers who had cultivated and improved the land.[33] He concluded that there is no justice in the argument that a preemptor, after having made valuable improvements on a claim, and complied with all the conditions of title which were within his power, may nevertheless be driven from his possession, his improvements confiscated, and land conveyed to another.[34]

Julian had actually lost this same argument in a United States Supreme Court decision four years earlier. In *Frisbie v. Whitney* (1869), the Court ruled that until a preemptor had satisfied all the conditions imposed by the law, including the survey and fee, he had no legal or equitable

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32 *Id*., 55; quoting Andrew Jackson's Fourth Annual Message to Congress, Dec. 4, 1832.

33 *Hutchings v. Low,* Brief for the Plaintiff in Error.

34 *The Yosemite Valley Case*, 82 U.S. at 84.

right to the land.[35] *Frisbie v. Whitney* was similar to *The Yosemite Valley Case* in that Whitney, the preemptor, had settled on the land but had not registered his claim or paid the required fee. It was different in that, where the *Yosemite* case involved a claim directly against the government, *Frisbie* was a dispute between competing private parties who each claimed the same parcel of land. Given this different circumstance, Julian argued that the *Frisbie* decision was an anomaly. He hoped to limit its impact as precedent.

He was to be disappointed. On January 6, 1873, the Court again rejected Julian's theory and, following the trend started in *Frisbie v. Whitney*, strictly interpreted the requirements of the statute. Writing for the majority, Stephen Field ruled that, until a settler had satisfied *all* the conditions of the law, he or she had no right against the government. Settling on the land did not give the settler a right but rather "only a privilege of pre-emption in the case the lands are offered for sale in the usual manner." In Field's view the act of settlement merely gave the preemptor a preference over others to purchase the land when and if the government decided to offer it for sale.[36]

Field's opinion reads like one side of a debate between old foes: A debate in which Field controlled the forum. Noting that Julian relied on the 1850 case *Lytle v. Arkansas*, Field spent a better part of his opinion demonstrating why *Lytle* did not apply here. He did not resist the temptation to toss barbs directly at Julian. Emphasizing that Julian had been one of the attorneys in *Frisbie*, Field began with lightly disguised sarcasm. "Inasmuch as counsel of the defendant contends with much earnestness that *Lytle* settles the case at bar," he said, "we are induced to state at some length what that case was and what it actually decided."[37] Describing Julian's theory as "little less than absurd," he concluded:

> The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction . . . between the acquisition by the settler of a *legal right to the land* occupied by

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35 *Frisbie v. Whitney*, 76 U.S. (9 Wall.) 187 (1869).

36 *The Yosemite Valley Case*, 82 U.S. at 87.

37 *Id.* at 89.

> him against the owner, the United States; and the acquisition by him of a *legal right as against other parties to be preferred in its purchase* when the United States have determined to sell . . . .[38]

Hutchings lost his appeal, but the Court's decision in *The Yosemite Valley Case* did not prove to be a boon for those who sought to preserve the park as a wilderness.[39] Almost as soon as the State of California accepted the grant, park commissioners immediately let out concessions for hotels, inns, stagecoach lines, toll roads, and other tourist services.[40] Even use of the specific plot of land Hutchings had claimed did not change. Hutchings continued to operate his hotel until 1875. When the state finally ejected him, commissioners gave the concession to John K. Barnard. The only obvious change was that the Hutchings House became the Barnard Hotel.[41]

The decision did not even have as much of an impact on James Mason Hutchings as one might have expected. He continued to write and lecture about Yosemite, and continued to live with his family near the Yosemite Valley. At one time he was the innkeeper of the Calaveras Big Tree Grove Hotel, located just north of the park. Many Californians continued to believe that Yosemite Valley's early settlers had at least an equitable interest in the land they had claimed. Consequently, in 1874 the state legislature appropriated money to pay the settlers for their claims. Hutchings received $24,000. Californians did not forget Hutchings's role as a pioneer settler and the first promoter of the Yosemite Valley. In 1880 Hutchings was awarded the office of "guardian of the valley," a position that he held until 1883. He died in Yosemite in 1902.[42]

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38 *Id*. at 93-94.

39 Given the outcome, Runte and other writers who are focused on the ecological or geographic history of the park conclude that *The Yosemite Valley Case* "in effect, established that national parks were indeed constitutional." However, the Court's decision was not about the constitutionality of the act or the power of Congress to create a park. See, Runte, *Embattled Wilderness*, 35.

40 See, Peter J. Blodgett, "Visiting 'The Realm of Wonder': Yosemite and the Business of Tourism, 1855 -1916," *California History* 69:2 (Summer 1990), 118-133.

41 Taylor, 34.

42 *Id*., 39.

The only impact of *The Yosemite Valley Case* was on the land reform movement. Afterward, the Court continued to follow the pattern of strictly construing homestead and preemption laws. Occasionally its formalistic interpretation of homestead and preemption law worked to the benefit of settlers. Although it held to the proposition that, until they complied with every requirement, settlers did not have a right to the land, the Court also recognized that settlement on the land did create a legally enforceable

"Distant view of the 'Pohono,' or Bridal Veil Waterfall, from a Photograph by C. L. Ward,"

in J. M. Hutchings, *Scenes of Wonder and Curiosity in California. Illustrated with over one hundred engravings. A tourist's guide to the Yo-Semite Valley* (1871), 109.

right of preference, or a right of first claim if the government should offer the land for sale. It also ruled that this right was transferable.[43]

The Yosemite Valley Case solidified the Court's intention to strictly interpret claims to the public domain based on preemption and homestead laws, and to require settlers to satisfy all conditions of the statute in order to obtain a property right in the land. In cases involving preemptors and homesteaders the Supreme Court emphasized the need to protect the public domain and preserve Congress's control of public property. But the Court did not apply the same strict interpretation in cases testing the validity of Mexican land grants or railroad grants.[44] The real effect of the decision was therefore to put "actual settlers" at a distinct disadvantage when competing with railroads, claimants of Mexican land grants, and others who had designs on the public domain. It was a major setback for advocates of land reform. ✯

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[43] *Lamb v. Davenport*, 85 U.S. 307 (1873); *Shepley v. Cowan*, 91 U.S. 330 (1875); *Quinn v. Chapman*, 111 U.S. 445 (1884); see also, *United States v. Schurz*, 102 U.S. 378 (1880) [once the Department of Interior had granted a patent, it could not subsequently withhold delivery of the patent to the settler]; *Wirth v. Branson*, 98 U.S. 118 (1878) [a settler who had complied with all the requirements of the law, including the survey and payment, but had not yet received a patent was to be regarded as the equitable owner of the land. A subsequent grant of the same land to another was therefore void].

[44] I have previously written about this other side of distribution of the public domain in Paul Kens, "A Promise of Expansionism," in Sanford Levinson and Bartholomew H. Sparrow, *The Louisiana Purchase and American Expansion 1803-1898* (Boulder, Colo.: Roman & Littlefield, 2005), 150-60.

HOW EVOLVING SOCIAL VALUES HAVE SHAPED (AND RESHAPED) CALIFORNIA CRIMINAL LAW

MITCHELL KEITER*

TABLE OF CONTENTS

* As a California Supreme Court Chambers Attorney, the author participated in the determination of *People v. Sanchez*, 26 Cal.4th 834 (2001); *People v. Steele*, 27 Cal.4th 1230 (2002); *People v. Bland*, 28 Cal.4th 313 (2002); *People v. Taylor*, 32 Cal.4th 863; and *People v. Wright*, 35 Cal.4th 964 (2005). The author also briefed and argued *People v. Stone*, 46 Cal.4th 131 (2009).

INTRODUCTION

A student could learn much about cultural history by studying doctrines of criminal liability. As the United States Supreme Court has observed, the law mirrors evolving societal values. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man."[1]

This adjustment has shifted not only individual doctrines, but their collective rationale as well. The California Supreme Court described this

[1] *Powell v. Texas*, 392 U.S. 514, 536 (1968).

conflict in the 1884 case of *People v. Blake*,[2] which addressed the responsibility of an intoxicated killer. Culpability considerations warranted mitigation: "In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication."[3] Public safety, however, demanded punishment, as "human laws are based upon considerations of policy, and look rather *to the maintenance of personal security and social order*, than to an accurate discrimination as to the moral qualities of individual conduct."[4] This doctrinal debate, and many others, concerned whether the law would measure crimes according to "the conscience of the individual" or "the social conscience."[5]

Nineteenth century law favored the social conscience. To deter presumably rational offenders from misconduct, legislatures prescribed punishment according to the objective gravity of the crime, with little regard for the offender's subjective characteristics. For example, an intoxicated killer could be convicted of murder, and sentenced to life imprisonment.

The law shifted course for most of the twentieth century. An increasingly deterministic understanding of human (mis)behavior generated greater solicitude toward criminal defendants. Criminal penalties sought less to deter wicked offenders than to rehabilitate weak ones.[6] Thus, even in the absence of statutory change, the California Supreme Court revised numerous doctrines to give greater weight to the offender's subjective characteristics in evaluating liability. By the late 1970s, the effective sentence for killing another human being due to a severe but self-induced intoxication was 16 to 32 months.

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2 65 Cal. 275, 277 (1884).

3 *Id.* at 277, quoting *People v. Rogers*, 18 N.Y. 9 (1858).

4 *Blake,* 65 Cal. at 277 (italics added).

5 *Keenan v. Commonwealth*, 44 Pa. 55, 59 (1863).

6 This trend was not limited to California, but was national, indeed transatlantic, in scope. *See* Martin J. Wiener, Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914 12, 338 (1990). This article will mostly, though not exclusively, cite California law, which has often set the pace for the nation. Jake Dear & Edward Jessen, *"Followed Rates" and Leading State Cases, 1940-2005*, 41 U.C. Davis L. Rev. 683 (2007).

The pendulum has swung back toward social protection over the past three decades.[7] The subjectivist trend shielded offenders from punishment in excess of their blameworthiness, but exposed the public to greater danger. The newest trend, implemented by both statute and case law, punishes and incapacitates offenders in accordance with their objective dangerousness as well as their subjective culpability.[8] An intoxicated killer is now subject to punishment of 15 years to life imprisonment.[9]

This article attempts to document the shift toward subjectivity (Part I), and the return to a more objective evaluation of liability (Part II). Each Part will address the underlying cultural backdrop (Subpart A), and then the attendant doctrinal developments (Subpart B). The doctrinal subparts will first address the mitigating defenses that distinguished murder from

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[7] Of course, not all the doctrines changed simultaneously.

[8] There are three main determinants of liability: culpability (mens rea), dangerousness, and harm. Arnold H. Loewy, *Culpability, Dangerousness and Harm: Balancing the Factors on Which Our Criminal Law is Based*, 66 N.C. L. Rev. 283 (1988); see also Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. Rev. 261, 263-268 (2004) (*With Malice Toward All*). Accordingly, an assault may be aggravated due to its (1) purpose of rape (culpability); (2) use of a deadly weapon (danger); or (3) infliction of serious injury (harm).

For the doctrines described herein, the shift toward a subjectivist emphasis on culpability reduced the offender's liability. For example, a homicide may be only manslaughter, or second degree murder, where the offender's culpability is reduced by intoxication or provocation, or the lack of express malice. Such offenders thus benefited from greater scrutiny of their mental state, rather than the objective harm inflicted. Some doctrines, however, are exceptions to this general rule. For example, an offender who attempts to commit an impossible crime, or who seeks to form a conspiracy with an undercover officer (a type of impossible crime), does not create an objective harm, yet manifests the same subjective culpability as a "successful" offender. Such offenders, therefore, would appear to benefit from a more objective analysis.

However, the objective determinant of danger would still favor liability in these cases. "[O]ne who intends to harm others and acts upon that intent poses sufficient present danger to warrant subjecting him to [criminal sanction]." Arnold Enker, *Mens Rea and Criminal Attempt*, 4 American Bar Foundation Res. Journal 845, 856 (1977). "A person who believes he is conspiring with another to commit a crime is a danger to the public regardless of whether the other person in fact has agreed to commit the crime." *Miller v. State,* 955 P.2d 892, 897 (Wyo. 1998).

[9] Cal. Penal Code §§ 22, 190(a).

manslaughter (intoxication, diminished capacity, provocation, unreasonable self-defense) as well as the requisite elements of malice itself. The doctrinal subparts will then address the grounds for first degree murder, including Penal Code section 189 (the felony-murder rule, special means, premeditation and deliberation), the doctrines of indirect causation and transferred intent, and the sentencing changes that imposed first degree murder sentences for crimes other than first degree murder.

I. THE SHIFT TO SUBJECTIVISM

A. The Shift in Philosophy

1. OBJECTIVIST ORIGINS

The classical theory of crime dominated nineteenth-century thinking. According to this Enlightenment-shaped doctrine, individuals were rational agents, motivated by self-interest. The central premise of classical criminology was the individual's freedom to choose, and consequent desert of punishment for choosing to do wrong. "The guiding vision of . . . criminal justice was that of the responsible individual."[10]

Punishment's purpose was the deterrence of crime. Sufficient sanctions could outweigh the perceived benefits of criminal activity, so even the most self-interested individual would desist.[11] These sanctions deterred most effectively where they clearly indicated the consequences of misconduct before its commission. Determinate punishment facilitated deterrence.[12]

The individual's moral freedom generated a corresponding duty to preserve such self-determination. "It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason."[13] Because the law perceived intoxication as voluntary, the offender deserved

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[10] Wiener, *supra* note 6, at 11.

[11] Daniel J. Currant & Claire M. Renzetti, Theories of Crime 11 (2001).

[12] Fixed sentences also protected the public from arbitrary enforcement. Wiener, *supra* note 6, at 11.

[13] *People v. Rogers*, 18 N.Y. 9, 18 (1858).

blame for his crimes, as he could have avoided such intoxication from the start. "He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting."[14] Intoxicated offenders were thus responsible for all consequences, both intended and unintended, of their inebriation. Under the prevailing objectivist jurisprudence, the offender's "undeserved" punishment (liability for unintended harms) was less objectionable than society's suffering undeserved and unpunishable harm.

This philosophy shaped other criminal law doctrines besides intoxication. The law held offenders accountable when an intended wrong (e.g. a felony), produced a greater harm (e.g. a victim's death). Likewise, there was minimal inclination to consider the defendant's subjective mental state in evaluating liability, lest the law reward, and thus encourage, certain vices (e.g. temper, drunkenness).[15] The law hindered factually guilty defendants from asserting successful defenses based on their mental state. "It was the behavior that was dangerous and had to be stamped out; the state of the actor's mind was much less relevant."[16] It was easy for prosecutors to establish that homicides were murder, not manslaughter, and that those murders were in the first degree.

2. THE RISE OF THE SCIENTIFIC SCHOOL

In the late nineteenth century, the scientific school began to displace its classical forerunner, a trend that reached full maturation in the third quarter of the twentieth century. Owing as much to Darwin as the Enlightenment,[17] the scientific school attributed criminal behavior

14 *Roberts v. People*, 19 Mich. 401, 419 (1870).

15 See *Keenan v. Commonwealth*, 44 Pa. 55, 58 (1863): "If such were the rule, a defendant would be much more likely to injure than to benefit his case by showing a good character, and the law would present no inducement to men to try to rise to the standard of even ordinary social morality."

16 Lawrence Friedman, A History of American Law 593 (1985).

17 "Humans were beginning to appear to scientists merely as one type of creature, with no special links to divinity. . . . [as well as] creatures whose conduct was influenced, if not determined, by biological and cultural antecedents rather than self-determining beings who were free to do what they wanted." Currant & Renzetti,

to biological and environmental determinism: "The new view of crime and criminals is, that what a man does is a result of his heredity and his environment . . . ."[18] Criminals were thus neither selfish nor sinful, merely sick.

> "[T]he sciences of criminology" — challenged the assumptions which saw individuals as responsible for their own behavior. The sources of criminal activity were now traced to physical and biological factors, or social conditions beyond the control of each individual. This epistemological approach to "social problems" had the effect of undermining the responsibility of individuals, while simultaneously allowing the State to assume even greater powers in "correcting" problems now deemed beyond the individual's power to alter.[19]

The new understanding of why individuals offended reshaped how the law responded to them.

The purpose of punishment, according to the scientific school, was rehabilitation. The goal was less to deter rational actors than to heal dysfunctional ones. Indeterminate sentencing better fit the new model.

> It was popular to speak of crime in medical terms — crime was no more or less than a treatable disease, as the 1931 Wickersham Commission explained: "Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No

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supra note 11, at 15, quoting G.B. Vold & T.J. Bernard, Theoretical Criminology 36 (3d ed. 1986).

[18] Ernest Bryant Hoag and Edward Huntington Williams, Crime, Abnormal Minds and the Law xxi (1923).

[19] Mimi Ajzenstadt and Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 Int'l J.L. & Psychiatry 127, 135 (1990); see also Wiener, *supra* note 6, at 338: "[A] diminished estimate of the capabilities of the unaided individual both contributed to a more expansive appreciation of the need for and possibilities of state action and was itself more deeply established by the very growth of the state." California exemplified the trend of relaxing personal responsibility while tightening state control; by the late 1970s, the state punished the possession of certain controlled substances more severely than killing under their influence. See Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. of Crim L. & Criminology 482, 490 n.52 (1997) (*Just Say No Excuse*).

> more can judges intelligently set the day of release from prison at the time of trial."[20]

Consonant with the broader social trends,[21] crime control increasingly relied on medicine rather than morality.[22]

This new outlook had special salience for the intoxication defense. No longer was the inebriate culpable for having "set his will free from the control of reason;"[23] he was now the passive victim of an intoxication that could "completely paralyze the will of the defendant and . . . take from him the power to withstand evil impulses."[24] No longer did the community impose a duty of sobriety ("the inestimable gift of reason") on the individual; duty now lay with society, to protect the "individual subject to its control" "'against the misuse of the criminal law . . . by authorizing sentences reasonably related to the conduct and character of the convicted person . . . .'"[25] From the new perspective, misconduct committed while intoxicated did not necessarily establish a bad character: "So long as this release [of inhibitions] is traced to a drug rather than a quality inherent in the individual, it is more difficult to blame the individual for the ensuing behavior."[26] The fault lay not in their selves, but in their substances.

The new outlook increased sympathy for, and thus limited the potential liability of, intoxicated offenders. Intoxication was less a predicate wrong, like a felony, than an excusable symptom of illness. In 1956, the American Medical Association first recognized alcoholism as a "disease." Three years later, the California Supreme Court reversed a century of precedent and allowed defendants to introduce evidence of self-induced

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20 Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 893 n.62 (1990).

21 See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1852-1854 (1984).

22 Wiener, *supra* note 6, at 12.

23 *Roberts v. People*, 19 Mich. 401, 419 (1870).

24 *State v. McGehearty*, 394 A.2d 1348, 1351 n.5 (R.I. 1978).

25 Case Comment, *Criminal Law: Chronic Alcoholism as a Defense to Crime*, 61 Minn. L. Rev. 901, 917 (1977) (quoting Minn. Stat. 609.01(2) (1976)).

26 John Kaplan, *Alcohol, Law Enforcement, and Criminal Justice*, in Alcoholism and Related Problems: Issues for the American Public 78, 85 (Louis Jolyon West, ed., 1984).

intoxication in defending against charges of second degree murder — and voluntary manslaughter.[27,28]

The trend toward exculpation slowed, but did not cease, when the United States Supreme Court considered the question in 1968.[29] In examining whether the Eighth Amendment permitted public intoxication prohibitions, the high Court expressed the extant ambivalence about intoxication, which the California Supreme Court soon echoed.[30] Although a majority of justices recognized the inebriate's "uncontrollable compulsion to drink,"[31] Justice White's decisive concurrence concluded there was no comparable compulsion for the inebriate to appear in public, and therefore validated the challenged statutes.[32] Although Justice Fortas's dissent would have struck down public intoxication laws, he rejected such "compulsion" as a defense to more serious charges like assault or robbery.[33] Justice Marshall's plurality opinion rejected that distinction: "If Leroy Powell cannot

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27 *People v. Gorshen*, 51 Cal.2d 716 (1959).

28 Even reduced liability was objectionable to some "scientific" advocates.

> Since it is now judicially as well as medically and legislatively recognized that alcoholism is a "disease" which compels its victims to drink involuntarily, there is no logical reason why an alcoholic should be held responsible for *any* conduct performed while involuntarily intoxicated . . . . the traditional punishment of an alcoholic for conduct performed while involuntarily intoxicated as a result of alcoholism "is as archaic as the medieval outlook that the community once had with respect to insanity, tuberculosis and leprosy."

(Daniel R. Coburn, Note, Driver *to* Easter *to* Powell*: Recognition of the Defense of Involuntary Intoxication*, 22 Rutgers L. Rev. 103, 122-123, 125 (1967) (quoting Johns, A Practical Approach, in Report of Proceedings of the Rocky Mountain Conference of Municipal Judges 52 (Oct. 1959) italics added).

Two federal courts agreed, comparing the punishment of public intoxication with the punishment of insanity, infancy, or leprosy. *(Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966) [insane person and infant]; *Driver v. Hinnant*, 356 F.2d 761, 764-765 (4th Cir. 1966) [leper].)

29 *Powell v. Texas*, 392 U.S. 514 (1968).

30 See *People v. Hood*, 1 Cal.3d 444, 456 (1969), describing the intoxication defense as a "compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."

31 *Powell*, 392 U.S. at 557 (1968) (Fortas, J., dissenting).

32 *Id*. at 549-550 (White, J. concurring).

33 *Id*. at 559 n.2 (Fortas, J., dissenting).

be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill . . . ."[34]

As the "scientific" community came to see alcohol consumption as involuntary for alcoholics, an emerging societal consensus saw consumption as legitimate, and not intrinsically culpable, for everyone else.[35] If drinking was not culpable per se, its unintended harms were not the natural and probable consequences of an intentional "mutiny," but "bare chance result[ing] in an unsought harm."[36] The offender might be responsible for the nuisance of intoxication, but not all its consequences. "To indulge was, of course, blameworthy; but people were also ready . . . to believe that the liquor [and] drugs . . . robbed you of your mind, your freedom, your very self."[37] Although the culture had long characterized drinking as a vice, in the post-Prohibition era, it, like other behaviors once thought to require public intervention, was perceived as just another private choice, from which malice could not be inferred.[38]

The broader acceptance of the intoxication defense paralleled other developments in the criminal law. Regarding many doctrines, the law increased its concern with the offender's subjective blameworthiness, and decreased its concern with public safety. Several causes generated this shift.

One was the biological and environmental determinism to which the scientific school attributed crime. It was seen as unfair to impose complete accountability on offenders who had incomplete control over their behavior.[39] Objections to full punishment continue to cite offenders' insufficient control over their conduct.[40]

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34 *Id*. at 534.

35 Lawrence Friedman, Crime and Punishment in American History 341 (1993) (Crime and Punishment).

36 Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1072 (1944).

37 Crime and Punishment, *supra* note , at 148.

38 James Q. Wilson & Richard Herrnstein, Crime and Human Nature 436 (1985).

39 H.L.A. Hart, Punishment and Responsibility 152 (1968).

40 *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005).

Abuses of individual dignity also may have undermined support for the *Blake* imperative of emphasizing public safety over fairness to the individual offender. From forced sterilization[41] to the infamous Tuskegee experiment, from the internment of Japanese-Americans to the even worse atrocities of Hitler and Stalin, Americans in the twentieth century witnessed too many occasions where the rights of individuals were compromised for some "greater good." On constitutional issues (including criminal procedure), as well as substantive criminal law, American law after World War II increasingly favored the asserted rights of individuals when they conflicted with asserted communal interests.[42]

This championing of individual rights, even at the possible expense of a communal good, conformed to public preferences. The transformation produced by urbanization, technology and immigration shaped a new relationship between the individual and the community. Modern cities, with their anonymity, weakened traditional family, neighborhood and religious bonds, as did the successive developments of railroads, telephones, automobiles, radio, movies, jet airplanes and television.[43] Migration between states and countries further loosened the individual's connection to any community.[44] Individuals increasingly came to see their interests through their own perspectives, rather than those of a community to which their grandparents had owed loyalty and duty. The law responded by reallocating rights enjoyed by the community to the individual. Thus, the prior imperative of protecting the community against harm partially gave way to the imperative of protecting the individual offender from harm (in the form of liability for unintended consequences).

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41 *Buck v. Bell*, 274 U.S. 200 (1927).

42 *See* e.g. *Zablocki v. Redhail*, 434 U.S. 374 (1978) [state could not compel back payment of child support as condition of remarriage]; *Cohen v. California*, 403 U.S. 15 (1971) [prohibition of indecent language unconstitutional]; *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) [anti-loitering law unconstitutional]; *Katz v. United States*, 389 U.S. 347 (1967) [Fourth Amendment protects privacy of telephone communications]; *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal.2d 536 (1946) [state could not condition provision of free meeting space on group's swearing it did not support the violent or unlawful overthrow of the government].

43 Wilson & Herrnstein, *supra* note 38, at 451.

44 Crime and Punishment, *supra* note 35, at 193.

The criminological goal of rehabilitation was perhaps most central to the new emphasis on subjective blameworthiness. Personal rehabilitation required an individualized approach to sentencing; the offender's reformation depended on addressing his moral blameworthiness. It was the extent of that blameworthiness, rather than the harm suffered by any victim, that determined the proper measure of punishment. Therefore, in determining whether a homicide was murder or manslaughter, and whether a murder was in the first degree, courts increasingly considered the offender's subjective mental state.

B. The Shift in Law

The California Supreme Court responded to the philosophical shift by modifying criminal law doctrines. The Court facilitated the characterization of homicides as manslaughter rather than murder, or, if the latter, as murder in the second degree.

1. MURDER VS. MANSLAUGHTER

The expansion of manslaughter (and the contraction of murder) liability occurred through the broadening of mitigating doctrines based on the offender's mental state. The California Supreme Court enhanced the mitigating effect of intoxication.[45] The Court further expanded the category of manslaughter by developing the doctrine of diminished capacity,[46] broadening the construction of provocation,[47] and requiring instruction on unreasonable ("imperfect") self-defense.[48] The result was a trade-off: The doctrines of intoxication, provocation, and unreasonable self-defense resembled diminished capacity, as they all "[brought] formal guilt more closely into line with moral blameworthiness but only at the cost of driving a wedge between dangerousness and social control."[49]

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45 See Subsection (a).

46 See Subsection (b).

47 See Subsection (c).

48 See Subsection (d).

49 Model Penal Code § 210.3, commentary at 72-73 (1962).

(a) Intoxication

Courts were not sympathetic to intoxicated offenders in California's early years, reflecting *Blake*'s priority of social protection.[50] Judges instructed juries that "when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime."[51] Intoxication evidence was admissible to show a murder was in the second degree, but it could not reduce a murder to manslaughter.

Greater mitigation later occurred, due not to any statutory change, but to greater judicial solicitude for the intoxicated (and thus unintentional) offender.[52] The Court's 1959 *Gorshen* decision, which recognized voluntary intoxication as an available defense to not only first degree murder but also second degree murder and voluntary manslaughter,[53] was the culmination of three decades of increasingly sympathetic dicta.

The first case, *People v. Kelley*,[54] involved a woman's death during an illicit sexual affair, in which both parties were "probably more or less inflamed by the use of intoxicating drink,"[55] and there was no evidence of motive, or intent to kill.[56] The Court reduced the conviction from first degree murder to voluntary manslaughter based on the overall factual predicate, rather than any legally exculpatory effect of the defendant's intoxication.

The stronger evidence of intoxication in *People v. Chesser*,[57] (along with the defendant's lack of an intelligent waiver of counsel)[58] warranted reversal. The defendant's wife observed him choking their infant daughter, in accordance with his prior threats to do so.[59] The defendant then threatened to kill his wife if she told anyone about his conduct.[60] The

50 *People v. Blake*, 65 Cal. 275, 277 (1884).
51 *People v. Hower*, 151 Cal. 638, 641 (1907).
52 *People v. Hood*, 1 Cal.3d 444, 456 (1969).
53 *People v. Gorshen*, 51 Cal.2d 716, 732-734 (1959).
54 208 Cal. 387 (1929).
55 *Id*. at 390.
56 *Id*. at 391, 393.
57 29 Cal.2d 815 (1947).
58 *Id*. at 821-22.
59 *Id*. at 817-18.
60 *Id*. at 818.

Court nevertheless concluded, "there was evidence which would indicate that defendant may have been so deeply under the influence of intoxicating liquor that he was incapable of forming in his mind that malice aforethought which is an essential element of the crime of murder in either degree."[61]

The shift from *Kelley* (1929) to *Chesser* (1947) was sharp, even though the defense remained dicta for another twelve years. In the first case, two intoxicated adults engaged in sexual activity that apparently led to fatal injury, for which there was no witness, or evidence of motive or intent. By contrast, the later case involved the witnessed, purposeful choking of a helpless infant, preceded and followed by homicidal threats. The Court's extension of the defense to increasingly culpable conduct reflected the growing attribution to the intoxicant rather than the offender.[62]

The dicta became law in *People v. Gorshen*. After drinking one fifth of a gallon of gin, the defendant had an altercation, in which his foreman knocked him to the ground. The defendant threatened to "go home and get a gun and kill this fellow."[63] However, expert defense testimony challenged the traditional notion that the individual was "captain of his conduct." A published article by the expert had cited Freud for the theory that "voluntary choice is merely the conscious rationalization of a chain of unconsciously determined processes."[64] The *Gorshen* court applied the "mental impairment" defense, for which it declined to distinguish "intoxication" from "disease" as a legitimate basis. In other words, intoxication *was* a disease, no more or less culpable than tuberculosis or leprosy.[65] The Court disapproved many precedents in concluding "it appears only fair and reasonable that defendant should be allowed to show that in fact, *subjectively*, he did not possess the mental state or states in issue,"[66] regardless of *why* he did not.

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61 *Id*. at 824.

62 Kaplan, *supra* note 26, at 85.

63 *People v. Gorshen*, 51 Cal.2d 716, 720 (1959).

64 *Id*. at 724.

65 See *id*. at 731.

66 *Id*. at 733 (italics added).

(b) Diminished Capacity

Early common law likewise did not recognize defenses based on mental illness other than insanity. As Oliver Wendell Holmes observed, based on the premise "that every man is able as every other to behave as they command," legal standards "take no account of incapacities unless the weakness is so marked as to fall into well-known exceptions such as infancy or madness."[67] California thus recognized the defense of insanity, where the defendant did not know right from wrong, but excluded any evidentiary showings of "partial insanity."[68]

As with intoxication, the mid-century California Supreme Court expanded the exculpatory effect of mental illness short of insanity. The Court developed the defense of "diminished capacity" in the 1949 case of *People v. Wells*.[69] The trial court had excluded the defendant's evidence that showed he suffered from a condition causing him to fear for his safety based on even slight external stimuli.[70] The Supreme Court found the exclusion erroneous: "competent evidence, other than proof of . . . insanity, which tends to show that a . . . legally sane defendant either did or did not in fact possess the required specific intent . . . is admissible."[71] This "partial insanity" excuse could refute malice.[72] *Wells* established a (formerly rejected) middle ground between legal insanity (which would excuse the homicide altogether) and full responsibility for murder.

The Court further tightened the elements of malice in *People v. Conley*,[73] and *People v. Poddar*.[74] In *Conley*, the Court held the statutory elements of implied malice included "an awareness of the obligation to act within the general body of laws regulating society."[75] A defendant who intentionally killed, but lacked such awareness, was therefore guilty

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67 Oliver W. Holmes, The Common Law 43 (Mark DeWolfe Howe, ed., 1960).

68 *People v. Troche*, 206 Cal. 35, 47 (1928).

69 33 Cal.2d 330 (1949).

70 *Id*. at 345; see also *People v. Saille*, 54 Cal.3d 1103, 1109 (1991).

71 *Wells*, 33 Cal.2d at 351.

72 *Id*. at 356-57.

73 64 Cal.2d 310 (1966); see also *People v. Gorshen*, 51 Cal.2d 710, 731 (1959).

74 10 Cal.3d 750 (1974).

75 *Conley*, 64 Cal.2d at 322.

of only manslaughter. The *Poddar* court extended *Conley* to require not only an *awareness* of the duty to abide by society's laws, but also an *ability* to do so.[76] Although offenders unaware of or unable to conform to society's laws were likely to be *more dangerous* than other individuals, the Court found them insufficiently *culpable* to be guilty of murder.

The *Poddar* court thus summarized the state of the responsibility-reducing doctrine as of 1974. "If it is established that an accused, because he suffered a diminished capacity, was unaware of or unable to act in accordance with the law, malice could not properly be found and the maximum offense for which he could be convicted would be voluntary manslaughter."[77] The doctrine reflected the tension between individual culpability and public danger: "[T]he very forces that call for mitigation under this doctrine are the very aspects of an individual's personality that make us most fearful of his future conduct."[78]

(c) Provocation

Consistent with the common law, the early California Supreme Court recognized a partial defense of provocation, which could mitigate a homicide to voluntary manslaughter. The evaluation was objective: "[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man."[79] A defendant thus could not offer evidence showing he was especially prone to blinding passion due to a prior sunstroke.[80] Similarly, where the decedent did not produce the provocation, but was an innocent, intentionally targeted by the defendant, the homicide was murder, regardless of the defendant's subjective passion.[81] Thus, the killing of an adulterous spouse might be only manslaughter, but not the killing of an infant.

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76 *Poddar*, 10 Cal.3d at 758.

77 *Id.* at 758.

78 Model Penal Code § 210.3, commentary at 72 (1962).

79 *People v. Logan*, 173 Cal. 45, 49 (1917).

80 *People v. Golsh*, 63 Cal.App. 611, 613 (1923).

81 Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 306-307 (1996).

The philosophical shift also transformed provocation law. The Model Penal Code, developed in the late 1950s, abandoned the traditional, objective determination of passion. According to the Code's mitigating defense of "extreme medical or emotional disturbance" (EMED), "criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance . . . .[82] The subjectivist EMED doctrine evaluated the crime according to the "conscience of the individual,"[83] rather than that of society. So long as the defendant subjectively was sufficiently disturbed, it did not matter whether he killed an adulterous spouse or a helpless infant.

The *Gorshen* court, without renaming the provocation doctrine, applied it as if California had adopted EMED. Due to the defendant's alleged mental illness, the victim's "statement that defendant was drunk and should leave his work was to defendant the psychological equivalent of the statement that `You're not a man, you're impotent, . . . you're a sexual pervert."[84] Under the new rule, it did not matter what the victim did or said; what mattered was how the defendant perceived it, reasonably or not. The Supreme Court thus construed provocation, like the other voluntary manslaughter doctrines of intoxication and diminished capacity, through a subjective lens.

(d) Unreasonable Self-Defense

In the 1979 case of *People v. Flannel*,[85] the Supreme Court formally recognized another basis for voluntary manslaughter beyond intoxication, diminished capacity and provocation: unreasonable or "imperfect" self-defense. Whereas only a defendant's *reasonable* belief in the need for deadly force exculpated completely, *Flannel* held that a defendant who actually but unreasonably harbored such belief was guilty of only voluntary manslaughter. The concept was not new; the Court quoted both

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82 Model Penal Code § 210.3, quoted in *People v. Spurlin*, 156 Cal.App.3d 119, 127 n.4 (1984).

83 *Keenan v. Commonwealth*, 44 Pa. 55, 59 (1863).

84 *People v. Gorshen,* 51 Cal.2d. 710, 722 (1959).

85 25 Cal.3d 668 (1979).

Wells and an earlier Court of Appeal case[86] that noted the doctrine's longstanding basis. *Flannel* broke new ground, however, in declaring the rule so well-established that future defendants would be entitled to such instruction *sua sponte*.[87]

Such unreasonable self-defenders underscored the subjectivist/objectivist debate. On the one hand, such defendants were not only less blameworthy than murderers, they were less blameworthy than those who committed voluntary manslaughter due to provocation, knowing their conduct was wrongful. Subjectivists could thus oppose even manslaughter liability for killing in unreasonable self-defense. On the other hand, defendants who perceived a lethal conflict where none existed were arguably more dangerous than those driven to kill only by objectively provocative conduct. Objectivists could thus oppose any mitigation. Voluntary manslaughter liability reflected a compromise between judging according to the "social conscience" and the "conscience of the individual."

The new cultural and philosophical perspectives thus helped change decisional law. The Supreme Court expanded the grounds that could mitigate murder to manslaughter to include intoxication, "partial insanity," and subjectively adequate provocation and self-defense. Similar developments reshaped the distinctions between first and second degree murder.

2. FIRST DEGREE VS. SECOND DEGREE MURDER

Second degree murder, like manslaughter, originally developed to limit the death penalty's reach.[88] From the state's beginning, California Penal Code section 189 provided three main categories of first degree (potentially capital) murder: homicides committed during an enumerated felony, homicides committed by special means such as poison, explosives or lying in wait, and homicides committed with premeditation and deliberation. (The doctrines of indirect causation and transferred intent also may support a first degree murder conviction, even where the offender

86 See *People v. Best*, 13 Cal.App.2d 606, 610 (1936).

87 *Flannel*, 25 Cal.3d at 681-682.

88 *People v. Whitfield*, 7 Cal.4th 437, 472 (1994) (Mosk J., dissenting).

does not directly or intentionally inflict the fatal injury on the decedent.) The California Supreme Court narrowed all these grounds for first degree murder liability during the subjectivist period.[89] Moreover, sentencing changes increased the significance of the first degree/second degree distinction by magnifying the sentencing disparity.[90]

(a) The Felony-Murder Rule

The felony-murder rule imputes malice to all killings, even if unintentional, committed in the course of felonies.[91] The rule holds offenders liable for murder due to their blameworthiness in intentionally committing the lesser wrong of the underlying felony, just as intoxication law held offenders liable for murder due to their blameworthiness in forfeiting their reason. Although these lesser wrongs may reflect less culpability than express malice, both felonies and intoxication potentially endanger more victims than premeditated murders.

As in *Blake*, the California Supreme Court initially emphasized the objective, social protection benefits of the felony-murder rule, and discounted the absence of full culpability. "The statute was adopted for *the protection of the community* and its residents, not for the *benefit of the lawbreaker*."[92] The court thus rejected the defendant's argument that the killing was incidental and not "in pursuance of" the underlying felonies of rape and/or burglary; it was enough that the felony and the homicide were both "parts of one continuous transaction."[93]

The developing emphasis on subjective intent constricted the felony-murder rule's scope, even without legislative modification. In *People v. Washington*,[94] Washington's accomplice Ball pointed a gun at a shopkeeper, who returned fire and killed Ball.[95] Because neither Washington

89 See Subsections (a) through (d).

90 See Subsection (e).

91 California law deems murders to be in the first degree when they occur during the felonies enumerated in section 189, or in the second degree where they occur during other "inherently dangerous" felonies. *People v. Patterson*, 49 Cal.3d 615, 620 (1989).

92 *People v. Chavez*, 37 Cal.2d 656, 669 (1951) (italics added).

93 *Id.* at 669-670.

94 62 Cal.2d 777 (1965).

95 *Id.* at 779.

nor his co-felon fired the fatal shot, the Court precluded operation of the felony-murder rule, which it criticized on "forum of conscience" grounds. "[The rule] has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it *erodes the relation between criminal liability and moral culpability*."[96]

The *Washington* majority and dissent disputed both the rule's purpose, and reach. The dissent justified felony-murder liability on social protection grounds, asserting that the "advance judicial absolution" of such victim-resistance killings "removes one of the most meaningful deterrents to the commission of armed felonies."[97] The majority, however, confined the purpose of the rule to deterring inadvertent killings during the felonies, not the commission of the felonies themselves, as felons received a fixed punishment for the commission of the felony.[98] Furthermore, the majority precluded felony-murder liability unless the killing was committed to further the felony, not, as in *Washington*, to thwart it.[99] The dissent perceived that this exception would swallow the rule, as few inadvertent killings further the underlying felony.[100]

The Court also narrowed the felony-murder rule by developing the "merger" doctrine, which precluded felony-murder liability where the felony was integral to, rather than independent of, the homicide. The defendant in *People v. Ireland*[101] shot and killed his wife from close range, although he asserted he suffered from diminished capacity.[102] The jury convicted the defendant of second degree murder, as the killing occurred during the (inherently dangerous) felony of assault with a deadly weapon. The Supreme Court rejected such felony-murder liability in assault cases, based on culpability concerns. "To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great

96 *Id*. at 783 (italics added).
97 *Id*. at 785.
98 *Id*. at 781.
99 *Id*.
100 *Id*. at 787 (Burke, J., dissenting).
101 70 Cal.2d 522 (1969).
102 *Id*. at 527-528, 539 n.13.

majority of all homicides."[103] In other words, imposing felony-murder liability for assaults would virtually abrogate the mitigating doctrines of provocation or diminished capacity, and prevent juries from considering the offender's mental state to distinguish murders from manslaughters.

Although some other states had developed the merger rule before *Ireland*, by the next year California had the nation's broadest merger bar.[104] In *People v. Wilson*,[105] the Court broke new ground in barring felony-murder liability based on a burglary that was committed for the purpose of assault.[106] This extension did not flow inexorably from *Ireland*, as applying the felony-murder rule to burglaries would not abrogate mitigating doctrines as in *Ireland*, but *Wilson* recharacterized *Ireland*'s rationale. "In *Ireland*, we reasoned that a man assaulting another with a deadly weapon could not be deterred by the second degree felony-murder rule, since the assault was an integral part of the homicide."[107] Actually, this reasoning, and even the very word "deterrence," was entirely absent from *Ireland*'s analysis.[108]

The Court then barred felony-murder liability in *People v. Sears*,[109] where the defendant committed a burglary to assault his estranged wife, but instead inadvertently killed his stepdaughter.[110] Although the assault

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103 *Id*. at 539.

104 Mitchell Keiter, Ireland *at Forty: How to Rescue the Felony-murder Rule's Merger Limitation From its Midlife Crisis*, 36 West. St. L. Rev. 1, 9 (2008) (Ireland *at Forty*).

105 1 Cal.3d 431 (1969).

106 Only Alaska expanded the rule this far. *Kirby v. State*, 649 P.2d 963, 970 (Alaska Ct. App. 1982). Fourteen states that have a merger bar do not apply it in burglary-assault cases. Ireland *at Forty*, *supra* note 105 at 9-10.

107 1 Cal.3d at 440.

108 70 Cal.2d at 538-540. Furthermore, the validity of this reasoning may have depended on *Ireland*'s exceptional facts. Because the defendant in *Ireland* shot his victim from close range, and his defense was diminished capacity, rather than the absence of an intent to kill, it appears that the assault was committed to kill, not merely injure or intimidate. Contrariwise, deterrence may well be possible where these lesser goals appear. See Robinson, Criminal Law 734 (1997): "Dangerous assaults . . . are instances where there is the greatest need to motivate an actor to be careful not to cause death."

109 2 Cal.3d 180 (1970).

110 *Id*. at 183-184.

(and homicide) of the stepdaughter was unintended, and thus the intended felony (the wife's assault) had a purpose independent from the homicide, *Sears* extended the merger rule to bar felony-murder liability for the killing of an unintended victim "in light of ordinary principles of culpability."[111]

> It would be anomalous to place the person who intends to attack one person and in the course of the assault kills another inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and killed one or both.[112]

This reasoning supported not only an expanded merger bar, but the abolition of the entire felony-murder rule, which routinely places inadvertent killers in a worse position than intentional ones. No other state extended the merger bar this far.[113]

Ireland expressly cited *Washington*'s policy of minimizing the reach of the felony-murder rule.[114] This policy derived from the Court's emphasis on offenders' subjective intent (or lack thereof), rather than the objective danger they posed.

(b) Indirect Causation and Transferred Intent

Prosecutors use the related doctrines of indirect causation and transferred intent to establish malice. Indirect causation occurs where, although the defendant is the proximate cause of death and thus legally responsible, a different person is the direct cause of death. Transferred intent supports liability where the victim is someone other than the intended victim. Both deviate from the standard homicide where the defendant directly kills the intended victim. The doctrines overlap where the defendant intends to kill A, whose reaction innocently causes B's death. For example, in *Wright v. State*,[115] the defendant shot at a driver, who consequently

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111 2 Cal.3d at 189.

112 *Id*.

113 Ireland *at Forty*, *supra* note 105 at 9.

114 *Ireland*, 70 Cal.2d at 539, citing *People v. Washington*, 62 Cal.2d 777, 783 (1965).

115 363 So.2d 617 (Fla. Dist. Ct. App. 1978), cited in *People v. Roberts*, 2 Cal.4th 271, 319 (1992).

lost control of his vehicle and killed a pedestrian. The case involved both doctrines, but either could have operated without the other.[116]

Early California law did not distinguish between direct and indirect proximate causation in imposing homicide liability. In *People v. Fowler*,[117] the defendant bludgeoned the victim and left him on a roadway, where a driver inadvertently ran him over.[118] Because the defendant was responsible for creating the conditions where death was the "natural and probable result," he could not evade liability by asserting he had no control over the driver's accident.[119] Likewise, in *People v. Harrison*,[120] a robber began shooting at a clerk, who fired in self-defense and inadvertently killed the store owner.[121] Although the robber did not fire the fatal shot, he was liable for the homicide as its proximate cause.[122] The felony-murder rule fixed the level of the homicide as first degree murder.[123]

Whereas indirect causation concerns an unexpected source of the fatal wound, transferred intent involves an unexpected destination. The transferred intent doctrine holds an offender, who intended to kill one victim but killed another, guilty of the same level of homicide, notwithstanding the variance of identity.[124] As even one first degree murder conviction formerly supported a death sentence,[125] early courts had no need to determine liability where the offender intended one homicide but committed two.

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116 If the defendant had shot and missed the driver and instead fatally hit the pedestrian, there would have been transferred intent but not indirect causation. If the defendant's shot caused the driver to crash his car and kill himself, there would have been indirect causation but not transferred intent. See *People v. Lewis*, 124 Cal. 551 (1899).

117 178 Cal. 659 (1918).

118 *Id*. at 669.

119 *Id*.

120 176 Cal.App.2d 330 (1959).

121 *Id*. at 331.

122 *Id*. at 345.

123 *Id*.

124 *People v. Suesser*, 142 Cal. 354, 367 (1904).

125 *Id*. at 356.

The felony-murder case of *People v. Washington*[126] shifted causation law in a subjectivist direction. Whereas *Fowler* and *Harrison* had imposed liability on the defendant for creating conditions that proximately caused death, *Washington* restricted the defendant's responsibility for the acts of others.

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . . To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but *solely on the basis of the response by others* that the robber's conduct happened to induce.[127]

Washington epitomized the new subjectivity. The law had formerly imposed liability for conduct the defendant "happened to induce" under an objective, proximate causation analysis.[128] *Washington*, however, barred "discrimination" based on harms not committed or intended by the defendants; an offender could be held liable for only his own acts and thoughts (and his accomplices'), not those of others.

This contrast resembled the intoxication debate; in each case the offender committed a dangerous act (the felony/excessive consumption) but did not specifically intend its harmful consequences. The traditional view had that held the dangerous act "set in motion a chain of events which were, or should have been, within [his] contemplation when the motion was initiated. . . . [and where the homicide] was the natural result of [the offender's] acts."[129] By contrast, the new view held that a felon/inebriate "has little control over . . . a killing once the [dangerous act] is undertaken."[130]

This same shift reshaped transferred intent law. It was well established that a defendant who intended to kill A would be guilty of the same charge of intentional murder if he unexpectedly killed B instead.

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126 62 Cal.2d 777 (1965).

127 *Id*. at 781 (italics added).

128 *Fowler*, 178 Cal. 657; see also *People v. Harrison*, 176 Cal.App.2d 330 (1959).

129 *Harrison*, 176 Cal.App.2d at 345.

130 *Washington*, 62 Cal.2d at 781.

People v. Birreuta,[131] however, raised a new question: What was the liability of a defendant who intended to kill one person, but killed *both* the intended victim and an unintended victim?

Like the Supreme Court, the Court of Appeal preferred to determine liability according to the offender's blameworthiness rather than public safety needs. According to the *Birreuta* defendant's account, he intended to kill his neighbor; however, his shots into the neighbor's darkened bedroom also killed his wife, who was unexpectedly present.[132] *Birreuta* held that a defendant who intended only one death deserved a lesser punishment.

> [T]he interests of justice are best served by differentiating between killers who premeditatedly and deliberately kill two people, and killers who only intend to kill one person, and accidentally kill another. . . . [T]he former type is clearly more culpable. . . . If the transferred intent doctrine is applicable when the intended victim is killed, this difference disappears.[133]

From the subjectivist perspective, the decision properly protected the offender from undeserved punishment. On the other hand, like *Washington*, *Birreuta* shielded defendants from full liability for the harms they inflicted, at the expense of public safety. After *Birreuta*, the law provided a version of what the *Washington* dissent described as "advance judicial absolution"; an offender could kill his target with the knowledge that he was safe from intentional murder liability for any bystander deaths.[134] This absolution from full liability for bystander deaths provided defendants with less incentive to avoid them. Conversely, it rendered especially attractive to offenders dangerous means like explosives or poison, which maximize the danger to bystanders, but minimize the probability of the offender's apprehension.[135]

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131 162 Cal.App.3d 454 (1984), *overruled by People v. Bland*, 28 Cal.4th 313 (2002).

132 *Birreuta*, 162 Cal.App.3d at 458.

133 *Id*. at 460.

134 *Birreuta* allowed for a lesser conviction of second degree murder or manslaughter for such unintended homicides. *Id*.

135 See *People v. Morse*, 2 Cal.App.4th 620, 646 (1992).

(c) Special Means and Special Circumstances

For much of California's history, the "special means" ground of first degree murder did not require a specific intent-to-kill, only implied malice.[136] The heightened danger objectively posed by such conduct warranted aggravated liability, even absent a subjective intent-to-kill.[137] Similarly, California authorized capital punishment for first degree murderers whose liability derived from the felony-murder rule: e.g., liability required no specific intent-to-kill, only the intentional performance of the felony that caused death.[138] Such punishment emphasized protecting society from harm, but discounted culpability considerations.

The increased focus on subjective blameworthiness produced a specific intent requirement for heightened punishment under sections 189 and 190.2. Whereas lying-in-wait liability had formerly required only malice, whether express or implied, by 1959, the required mens rea had subtly increased to an "intentional inflicting of bodily injury . . . under circumstances likely to cause [the victim's] death."[139] This effectively combined the specific intent requirement (albeit only for injury) of express malice, with the objective danger required for an implied malice finding.

The Supreme Court more dramatically emphasized a specific intent requirement in *Carlos v. Superior Court*.[140] After the California Supreme Court had abolished the death penalty in 1972,[141] voters passed an initiative that authorized a penalty of death, or life imprisonment without parole, for killing in the course of an enumerated felony.[142] Although the law had traditionally deemed implied malice sufficient for full liability where the killer used especially dangerous means, the *Carlos* court read into the initiative a specific intent-to-kill prerequisite for maximum

136 *People v. Thomas*, 41 Cal.2d 470, 475 (1953); see also *People v. Brown*, 59 Cal. 345, 353 (1881).

137 See *With Malice Toward All*, *supra* note 8, at 263-68.

138 *People v. Anderson*, 47 Cal.3d 1104, 1145 n.8 (1987).

139 *People v. Atchley*, 53 Cal.2d 160, 175 n.2 (1959).

140 35 Cal.3d 131 (1983).

141 *People v. Anderson*, 6 Cal.3d 628 (1972).

142 *Carlos*, 35 Cal.3d at 140-141.

punishment.[143] The Court found intolerable a result where "some defendants who did not intend to kill [received] a minimum sentence of life without possibility of parole, while . . . others who killed deliberately [received] a maximum sentence that permitted parole."[144] Intent was the *sine qua non* of liability; the dangerousness of the means did not matter.

(d) Premeditation and Deliberation

Unlike the other first degree murder grounds, the premeditation and deliberation ground derives from the offender's maximum culpability, rather than a special public danger. Here too, however, the Court narrowed the ground's application. The Court had formerly minimized the additional mental state necessary to support first degree liability. "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind."[145] Therefore, it was "not essential that there should be any *appreciable* space of time between the intent to kill and the act of killing," — i.e., any interval "'capable of being appreciated or duly estimated.'"[146]

The subjectivist trend narrowed the premeditation and deliberation element. In *People v. Wolff*,[147] the Court held it encompassed a requirement that the "defendant could *maturely and meaningfully reflect* upon the gravity of the contemplated act."[148] *Wolff*'s requirement resembled *Conley*'s insistence upon an awareness of the obligation to abide by society's laws;[149] both facilitated mitigation due to incomplete mens rea.

People v. Anderson[150] further shifted the law. The *Anderson* defendant fatally stabbed his ten-year-old victim over sixty times, cutting her

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143 *Id*. at 135. Because only first degree murder convictions are punishable by death or life imprisonment without parole, the implied malice killer of even dozens of people was immune from either penalty.

144 *Id*. at 153.

145 *People v. Fleming*, 218 Cal. 300, 310 (1933), quoting *People v. Hunt*, 59 Cal. 430, 435 (1881).

146 *People v. Suesser*, 142 Cal. 354, 364 (1904).

147 61 Cal.2d 795 (1964).

148 *Id*. at 821.

149 *People v. Conley*, 64 Cal.2d 310, 322 (1966).

150 70 Cal.2d 15 (1968).

from her vagina to her tongue.[151] The Court relied upon the very magnitude and randomness of violence (which suggested a heightened public danger),[152] to preclude a first degree murder conviction.[153] *Anderson* became a staple of criminal law textbooks as an argument against exclusive reliance on premeditation in determining the degree of murder.

(e) Sentencing

The combined consequence of *Washington* and *Ireland* on the one hand, and *Wolff* and *Anderson* on the other, was the restriction of first degree murder liability to only the most subjectively culpable offenders. It was the nature of the offender's purpose and reflection, and not the danger presented or harm caused, which supported maximum punishment.

Sentencing changes magnified the effect of these tightened first degree murder requirements. Throughout the 1950s and 1960s, both first degree and second degree murderers could be imprisoned for life. After the enactment of the 1977 Determinate Sentencing Law, second degree murder was punishable by only five, six or seven years in prison,[154] which would be reduced by one-third for "good behavior."[155] In other words, had the *Anderson* defendant committed his crime a few years later, he could not have been imprisoned for even five years. A reaction was inevitable.

II. THE RETURN TO RESPONSIBILITY

A. The Shift in Philosophy

Starting in the late 1970s, the criminal law again recalibrated the balance between the individual conscience and social protection. From 1962 to 1974, the (national) murder rate more than doubled, the rape rate tripled,

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151 *Id*. at 19, 22.

152 See J.F. Stephen, History of the Criminal Law of England 94 (1883): "[A] disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders."

153 *Id*. at 33-34.

154 1977 Cal. Stat. ch. 316 § 5.

155 1976 Cal. Stat. ch. 1139 § 276. This could reduce the term to 40, 48, or 56 months.

and the robbery rate quadrupled.[156] These increasing crime rates produced new demands for social order, and reduced sympathy for defendants.[157] The trend toward attributing misconduct to external factors, and its consequent minimizing of offenders' liability, pushed too far, and met public resistance. When defendant Dan White successfully mitigated his homicides of San Francisco Mayor George Moscone and Supervisor Harvey Milk to manslaughter, due to emotional problems exacerbated by excessive sugar intake, public outrage ridiculed his "Twinkie defense."[158] Both the Legislature and the electorate soon restricted the basis for this defense.

Protecting the public, rather than rehabilitating the offender, became the new imperative. Increased fear of violent crime diminished public enthusiasm for individualized mitigation.[159] California voters passed Proposition 115, which declared the need "to restore balance . . . to our criminal justice system" so "society as a whole can be free from the fear of crimes in our homes, neighborhoods and schools." A Federal Sentencing Guidelines Committee Report likewise emphasized the need to "consider justice for the public as well as justice for the offender."[160]

Empirical evidence had discredited the subjectivist goal of rehabilitation.[161] Incapacitating rather than reforming offenders produced more reliable protection for the public. California thus introduced a new Determinate Sentencing Law, which largely abolished indeterminate punishment. The Legislature declared, "the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense . . . ."[162] Whereas rehabilitation demanded careful analysis of the offender's culpability, punishment warranted

156 Federal Bureau of Investigation, Uniform Crime Reports 11 (1974); Federal Bureau of Investigation, Uniform Crime Reports 3 (1963).

157 Crime and Punishment, *supra* note 35, at 305-306.

158 Jerome H. Skolnick, *In Memoriam, Dr. Bernard L. Diamond*, 78 Calif. L. Rev. 1433, 1435-36 (1990).

159 Crime and Punishment *supra* note 35, at 305-306.

160 Nagel, *supra* note 20, at 915.

161 Nagel, *supra* note 20, at 895-897; Currant & Renzetti, *supra* note 11, at 10.

162 1976 Cal. Stats. ch. 1139 § 273.

focus on the objective nature of the offense, and the danger/harm suffered by society.

Society's perception of intoxication also evolved; intoxication came to be seen as more voluntary, and dangerous, than it was a generation earlier. The United States Supreme Court recognized that alcoholics are not powerless to regulate their consumption,[163] and thus are not blameless when they fail to do so. Furthermore, the catastrophic consequences of excessive drug and alcohol use became so common, especially in traffic fatalities, that such harm could not be described as "bare chance." Courts thus re-emphasized the duty of sobriety.

> The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd, or doing any other act likely to be attended with dangerous or fatal consequences.[164]

The law again saw inebriated killers less as inebriates and more as killers.

The intoxicants themselves changed. For much of the century, many Americans enjoyed an occasional cocktail or glass of wine, and were thus loath to blame others who offended after doing so. Most Americans in the 1980s, however, did not indulge in crack cocaine, and thus found no hypocrisy in casting stones at its violent users.

The new cultural environment reshaped other criminal law doctrines. The law authorized full liability, not only for those who specifically intended the harms they inflicted, but also for those who intentionally engaged in dangerous conduct that produced unintended consequences. The priority of public safety reversed the "burden of injustice." It became preferable to hold an offender responsible for harms unintentionally but

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163 *Traynor v. Turnage*, 485 U.S. 535, 550-551, 564 (1988), citing Herbert Finagrette, *The Perils of* Powell: *In Search of a Factual Foundation for the Disease Concept of Alcoholism*, 83 Harv. L. Rev. 793, 802-808 (1970); see also Warren Lehman, *Alcohol, Freedom and Moral Responsibility*, 13 Int'l J.L. & Psychiatry 103, 111 (1990); Chester N. Mitchell, *The Intoxicated Offender — Refuting the Legal and Medical Myths*, 11 Int'l J.L. & Psychiatry 77, 96-97 (1988).

164 *State v. Vaughn*, 232 S.E.2d 328, 331 (S.C. 1977).

culpably inflicted, rather than to render the public vulnerable to offenders it could not deter or incapacitate.

This recalibration reflected the social cost of minimizing offenders' responsibility for harms imposed on others.

> The idea of individual responsibility has been submerged in individual rights — rights or demands to be guaranteed by Big Brother and delivered by public and private institutions. The cost of sloth, gluttony, alcoholic intemperance, reckless driving, sexual frenzy and smoking have now become a national, not an individual responsibility, and all justified as individual freedom. But one man's or woman's freedom in health is now another man's shackle in taxes and insurance premiums.[165]

An even worse product of alcoholic intemperance (and reckless driving) was the diminished physical safety and fear they produced.

Such fear helped generate focus on the "right to personal security and protection of crime."[166] A concurring opinion by Justice Elkington recalled that the federal Constitution guaranteed not only criminal defendants' rights, but also the "*right of the people* to governmental protection from crime and violence." Two decades later, in a gang injunction case, the California Supreme Court picked up the mantle of public safety. The Court emphasized the balance between the defendant's right to fair treatment and the community's right to safety, rejecting an exclusive focus on the rights of the defendant.

> Often the public interest in tranquility, security, and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual.
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> . . . .
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> . . . [t]he community's right to security and protection must be reconciled with the individual's right[s] . . . . Reconciliation begins with the acknowledgment that the interests of the

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165 Ajzenstadt & Burtch, *supra* note 19, at 129 n.8 (quoting John Knowles, the late President of the Rockefeller Foundation).

166 *Craig v. Superior Court*, 54 Cal.App.3d 416, 428 (1976) (Elkington J., concurring).

> community are not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests.
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> . . . .
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> . . . Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the . . . brutal that government was invented.[167]

The California Supreme Court thus recognized that an individual's rights cannot be safe when the person is not. This recognition coincided with a refinement of the above-described doctrines, which gave greater weight to social protection, and less to the "forum of conscience." On its own terms, the new focus succeeded; crime rates dropped significantly.[168] Increased punishment was one of several factors, including demographic trends and policing techniques, that contributed to the decline.[169]

B. The Shift in Law

The new focus led the Court and Legislature to narrow the mental state defenses that had rendered homicides as manslaughter rather than murder, and second degree rather than first degree murder. Greater objective danger was an adequate substitute for an intent to kill or other culpable mental state. The period also observed a renewed emphasis on deterrence, as offenders were deemed capable of making rational choices in response to threatened penalties.[170]

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167 *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1102, 1126 (1997).

168 From 1991 to 2000, the rape rate dropped by 24 percent, the murder rate dropped by 43 percent, and the robbery rate dropped by 47 percent. Federal Bureau of Investigation, Uniform Crime Reports, 13, 23, 27 (1991); Federal Bureau of Investigation, Uniform Crime Reports, 14, 25, 29 (2000).

169 Gary Lafree, *Explaining the Crime Bust of the 1990s*, 91 J. OF CRIM. L. & CRIMINOLOGY 269, 302-303 (2001).

170 Currant & Renzetti, *supra* note 11, at 11. Just as the "diminished estimate of the capabilities of the unaided individual" contributed to the expansion of governmental power in the subjectivist period (see Wiener, *supra* note at 338) the "return to responsibility" coincided with a contraction, or at least a slowing of the growth, of government's scope. Thus, in 1978, the electorate passed initiatives that expanded

1. MURDER VS. MANSLAUGHTER

Over the past three decades, California law has narrowed the grounds that mitigate a homicide to manslaughter. The Legislature rejected intoxication as a defense to implied malice (second degree) murder,[171] the Legislature (and the electorate) abolished the diminished capacity defense,[172] the Supreme Court tightened the definition of adequate provocation,[173] and the Court of Appeal restricted the application of unreasonable self-defense.[174] Furthermore, the Supreme Court broadened the definition of malice,[175] thereby impeding mitigation to manslaughter.

(a) Intoxication

In *People v. Whitfield*,[176] the California Supreme Court considered whether a defendant could introduce intoxication evidence as a defense to implied malice murder. *Gorshen* and its progeny had held a defendant could present intoxication evidence to show he did not intend to kill, as required for express malice murder or voluntary manslaughter liability.[177] Implied malice murder, however, required only a conscious disregard for human life.[178] With a blood alcohol count of .27, more than triple the legal limit, the *Whitfield* defendant drove into the oncoming lane of traffic and fatally crashed into another driver.[179] Unlike most drunk driving prosecutions, the *Whitfield* defense presented evidence *magnifying* the extent of the defendant's intoxication, to show he lacked not only an intent to kill (never alleged) but also a subjective awareness of the danger.[180] The trial court denied the defendant's request for an

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the punishment and responsibility of murderers for their crimes (Proposition 7, see *People v. Anderson*, 43 Cal.4th 1142-1143 (1987)), and reduced the taxation rate, and consequently, the scope of governmental activity (Proposition 13).

171 See Subsection (a).

172 See Subsection (b).

173 See Subsection (c).

174 See Subsection (d).

175 See Subsection (e).

176 *People v. Whitfield*, 7 Cal.4th 437 (1994).

177 *People v. Gorshen*, 51 Cal.2d 710, 733 (1959).

178 *People v. Dellinger*, 49 Cal.3d 1212, 1221 (1989).

179 *Whitfield*, 7 Cal.4th at 442-443.

180 *Id*. at 443.

involuntary manslaughter conviction, and the jury returned a second degree murder conviction.[181]

A divided Supreme Court affirmed the admissibility of intoxication evidence in murder prosecutions, whether based on express or implied malice murder.[182] The majority cited the extant version of Penal Code section 22, which permitted consideration of voluntary intoxication to determine whether the defendant acted with "malice aforethought" in cases alleging a "specific intent crime."[183] The majority rejected the argument that implied malice murder was not a "specific intent" crime, and that the 1981 amendment therefore intended to preclude the introduction of intoxication evidence in implied malice murder prosecutions, by noting that the Legislature had declared the 1981 amendment was "declaratory of existing law."[184] Since the 1950s, the law had authorized the admissibility of intoxication evidence in prosecutions for second degree murder.

If the majority correctly described the law, however, Justice Mosk's dissent persuasively expressed the policy for excluding intoxication evidence in implied malice murder prosecutions. The dissent recalled, "The Model Penal Code states that voluntarily becoming drunk satisfies the requisite *mental state* (although not the requirement of a highly dangerous physical act) for conviction of implied-malice murder, with its essential mental state of recklessness, unless some other factor such as sufficient provocation operates to negate malice."[185]

> [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created

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181 *Id*. at 445.

182 Consideration of the instructions as a whole, including the one for vehicular manslaughter, revealed that the jury found the defendant evinced implied malice. *Id*. at 456. The Court therefore affirmed the second degree murder conviction.

183 *Id*. at 448-449.

184 *Id*.

185 *Id*. at 475.

> by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.[186]

One year after *Whitfield*, the Legislature amended section 22 to reflect the policy advocated by Justice Mosk.[187]

The following year, the intoxication debate came to the United States Supreme Court. It held that a state could exclude intoxication evidence as a defense to *express malice* murder (with "purpose" or "knowledge"), or any other crime.[188] Justice Scalia's plurality opinion noted that many states found a bar on intoxication evidence to be a deterrent, both to drunkenness, and irresponsible behavior when drunk.[189] Justice Ginsburg's concurring opinion likewise permitted a more objective analysis than one that required liability solely in relation to the offender's mental state.

> [T]he State need not prove that the defendant "purposely or knowingly caused the death of another," Mont. Code Ann. § 45-5-102(a) (1995), in a *purely subjective sense*. To obtain a conviction, the prosecution must prove only that (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication."[190]

In other words, like the felony-murder rule, the law could impute malice from the culpable act of becoming severely intoxicated.

Since *Egelhoff*, several states have amended their law to exclude intoxication evidence in determining liability. They authorize the offender's

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186 Model Penal Code § 2.08, at 8-9 (Tentative Draft No. 9, 1959).

187 1995 Cal.Stat. ch. 793. The author of the *Whitfield* majority, then Associate Justice George, actually advised the Legislature on how to modify the statute: "[T]he Legislature did not state, as it easily could have done, that evidence of voluntary intoxication is admissible solely on the issue whether a defendant harbored express (but not implied) malice aforethought." *Id*. at 448-449.

188 *Montana v. Egelhoff*, 518 U.S. 37 (1996).

189 *Id*. at 49-50.

190 *Egelhoff*, 518 U.S. at 58 (Ginsburg, J. concurring), (italics added).

full responsibility for harms culpably inflicted, notwithstanding the absence of a specific intent to kill.[191]

(b) Diminished Capacity

The Legislature abolished the diminished capacity defense in 1981, in the aftermath of Dan White's manslaughter verdict. Penal Code section 28, subdivision (b), "abolishe[d] the defenses of diminished capacity, diminished responsibility, and irresistible impulse 'as a matter of public policy.'"[192] The public soon approved an initiative (Proposition 8), which confirmed this effect.[193] The 1981 revision also superseded *People v. Conley*[194]: "Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice."[195]

(c) Provocation

These new enactments foreclosed a subjective evaluation of provocation. In *People v. Spurlin*,[196] the defendant received a provocation instruction where he killed his sexually promiscuous wife.[197] *Spurlin*, however, rejected comparable instruction for his killing his nine-year-old son as he slept.[198] The *Spurlin* court emphasized the new law in rejecting the defense, and strongly implied a different result would have obtained if the crime had occurred two years earlier.[199]

Spurlin's distinction between killing an adulterous spouse and killing a helpless child contrasted sharply from the earlier decisions of *Kelley*[200] and *Chesser*.[201] Those decisions had disregarded the different contexts,

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191 See *Barrett v. State*, 862 So.2d 44, 46 (Fla. 2003), citing Fla. Stat. Ann. § 775.051; *Sanchez v. State*,749 N.E.2d 509, 511 (Ind. 2001), citing Ind. Code § 35-41-3-5.

192 *People v. Saille*, 54 Cal.3d 1103, 1112 (1991).

193 Cal. Penal Code § 25(b).

194 64 Cal.2d 310 (1966).

195 1981 Cal. Stats. ch. 404 § 6.

196 *People v. Spurlin*, 156 Cal.App.3d 119 (1984).

197 *Id*. at 127-128.

198 *Id*.

199 *Id*.

200 208 Cal. 387 (1929).

201 29 Cal.2d 815 (1947).

because liability depended exclusively on the "conscience of the individual." By the 1980s, however, the "social conscience" produced a fuller perspective. Although an adulterous spouse could create legally adequate provocation, an innocent child could not. The law now considered both the offender's mental state, as well as its (partial) justifiability.[202]

The Supreme Court later endorsed *Spurlin*.[203] The Court further rejected the subjective standard of provocation applied in *Gorshen*. Although "[d]efendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War . . . may have satisfied the subjective element," "it does not satisfy the objective, reasonable person requirement . . . ."[204] Insofar as the 1959 *Gorshen* court had inclined toward the subjectivist, Model Penal Code position in finding it "fair and reasonable that defendant should be allowed to show that in fact, *subjectively*, he did not possess the mental state or states in issue,"[205] the 2002 *Steele* Court unambiguously rejected that position.

(d) Unreasonable Self-Defense

The objective standard described in *Steele* precluded mitigation to manslaughter based on intoxication or diminished capacity. These grounds could not mitigate, either as independent doctrines, nor through a subjectivized provocation standard. The Court next considered how subjectively to apply the unreasonable self-defense claim: Could a defendant offer his intoxication or mental illness to establish that defense?[206]

Although the Court found it unnecessary to resolve the question, the concurring opinion of three justices quoted the *Blake* paragraph in denying any mitigating effect to such evidence.[207] The opinion inferred the requisite objective basis for the offender's fear from the *Best* case, cited

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202 Similarly, although self-induced intoxication is inadmissible in murder prosecutions, involuntary intoxication remains admissible. *People v. Chaffey*, 25 Cal. App.4th 852, 856 (1994).

203 *People v. Steele*, 27 Cal.4th 1230, 1253 (2002).

204 *Id*.

205 *People v. Gorshen*, 51 Cal.2d 710, 733 (1959) (italics added).

206 *People v. Wright*, 35 Cal.4th 964 (2005).

207 *Id*. at 975 (Brown, J., concurring).

by *Flannel*, which described as manslaughter, "an uncontrollable fear . . . *caused by the circumstances*."[208] The opinion also favored a logically consistent construction of the amended Penal Code section 22. Just as the non-perception of a real risk was murder, despite the defendant's intoxication, so too must be the defendant's perception of an unreal risk.[209] A Court of Appeal relied upon the concurrence in holding that an unreasonable self-defense claim could not derive solely from a delusion.[210]

(e) A Broader Definition of Malice

Over the past three decades, revised doctrines have facilitated the characterization of homicides as murder instead of manslaughter. Through case law, statute and initiative, California has abrogated or confined certain mental state defenses that had formerly mitigated homicides from murder to manslaughter.

It also became easier to prove malice. After the Legislature abrogated the "awareness of duty" element,[211] the Supreme Court construed malice more broadly than in past decisions. In *People v. Taylor*,[212] the Court held that a defendant who shot his ex-girlfriend could be guilty of implied malice murder against her fetus, even if he did not know about it. A defendant could evince malice by acting with a conscious disregard for life in general; no specific victim need be foreseen: "There is no requirement the defendant specifically know of the existence of each victim."[213] The Court has since applied the same standard for the express malice element of attempted murder: "The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being."[214]

People v. Knoller[215] further broadened the malice element. *Knoller* clarified the subjective requirements for malice in two ways, to defendants' detriment. The Court favored an implied malice definition that

208 *People v. Best*, 13 Cal.App.2d 606, 610 (1936) (italics added).
209 *Wright*, 35 Cal.4th at 985 (Brown, J., concurring).
210 *People v. Mejia-Linares*, 135 Cal.App.4th 1437, 1444 (2006).
211 1981 Cal.Stats. ch. 404 § 6.
212 32 Cal.4th 863 (2004).
213 *Id*. at 868.
214 *People v. Stone*, 46 Cal.4th 131, 134 (2009).
215 41 Cal.4th 139 (2007).

required a mental state of "conscious disregard for life" over the former formulation, whose terminology ("a base, antisocial motive and wanton disregard for life") suggested a more serious level of culpability.[216] Furthermore, *Knoller* found that the "high probability" language of the former instruction applied only to the objective requirement of danger, not to the defendant's subjective awareness thereof. In other words, malice required perception of only the *existence* of danger, not its full *magnitude*.

The doctrinal changes reemphasized the imperative of public safety. Malice now involves a more objective determination. Similar reform has reshaped the determination of the degree of murder.

2. FIRST DEGREE VS. SECOND DEGREE MURDER

The bases for first degree murder liability have also expanded. The Court has broadened the felony-murder rule's rationale and scope,[217] increased the potential of liability through the indirect causation and transferred intent doctrines,[218] and loosened the special means and special circumstances liability requirements.[219] Furthermore, statutory changes both facilitated first degree murder convictions (by broadening the definition of premeditation and deliberation),[220] and rendered them superfluous, by expanding the kinds of homicides subject to a comparable sentence.[221] These changes have produced greater punishment for objectively dangerous conduct, notwithstanding any lack of intent to produce the harmful result.

(a) The Felony-Murder Rule

The recognition of culpable, dangerous conduct as sufficient to show malice has broadened the California Supreme Court's conception of the felony-murder rule. In recent years, the Court has endorsed the *Washington* dissent concerning both of its points of dispute with the majority opinion.

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216 *Id*. at 152, 157 n.5. The shift also eliminated instruction on the objective need for a "*high probability* of causing death." *Id*. at 157.

217 See Subsection (a).

218 See Subsection (b).

219 See Subsection (c).

220 See Subsection (d).

221 See Subsection (e).

One, no longer must the killing be in furtherance of the felony to qualify as felony-murder; there need be only a logical nexus between the felony and the killing.[222] Two, the Court now recognizes that the rule's legitimate purposes encompass deterring both inadvertent killings during felonies and the commission of the felonies themselves.[223]

The Supreme Court also extended the reach of the felony-murder rule by curtailing its merger limitation. In *People v. Farley*,[224] the Court disapproved *People v. Wilson*[225] and authorized the application of the felony-rule when burglaries committed for the purpose of assault result in a victim's death.[226] *Farley* distinguished the second degree felony-murder rule (subject to judicial interpretation due to its ambiguity) from its first degree version, which is statutory and unambiguous.[227] *Farley* also emphasized "the purpose of deterring assaults"[228] as a legitimate role of the felony-murder rule, reflecting the rule's broadened purpose.[229]

Policywise, *Farley* emphasized danger (and social protection) over *Wilson*'s culpability rationale. The *Farley* court observed,

> Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault. (Citation.) Victims attacked in seclusion have fewer means to escape, and there is a diminished likelihood that the crimes committed against them will be observed or discovered.[230]

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222 *People v. Dominguez*, 39 Cal.4th 1141, 1162 (2006). This essentially restores the pre-*Washington* standard: "The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction." *People v. Chavez*, 37 Cal.2d 656, 669 (1951).

223 *People v. Chun*, 45 Cal.4th 1172, 1198 (2009).

224 46 Cal.4th 1053 (2009).

225 1 Cal.3d 431 (1969).

226 46 Cal.4th at 1119-21.

227 *Id*. at 1119. See also Ireland *at Forty*, *supra* note 105 at 10. *Wilson* had noted but rejected this distinction. *Wilson*, 1 Cal.3d at 441-442.

228 *Id*. at 1120.

229 *Chun*, 45 Cal.4th at 1198.

230 46 Cal.4th at 1120, citing *People v. Miller*, 297 N.E.2d 85, 87 (N.Y. 1973).

Unlike some of the prior era's decisions,[231] *Farley* found culpability considerations unpersuasive. "Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration [based on his mental state], but will be deemed guilty of first degree murder for any homicide committed in the course thereof."[232]

Farley also truncated the holding of *People v. Sears*.[233] *Sears* had objected on culpability grounds to felony-murder liability for the killing of an unintended victim (the stepdaughter), because there could not be felony-murder liability for the killing of the intended victim (the wife): "Where a defendant assaults one or more persons killing one, his criminal responsibility for the homicide should not depend upon which of the victims died . . . ."[234] *Farley* rejected as dicta the position that the intent to assault *one victim* precluded felony-murder liability for the unintended death *of a different victim*, as only three *Sears* justices endorsed it.[235] Post-*Sears* case law has distinguished between the killings of intended and unintended victims for liability purposes,[236] a distinction justified by the extra danger created when bystanders are subject to harm.[237]

Although the Court invalidated *Wilson*, it strengthened *Ireland*. In *People v. Chun*,[238] the Court precluded the use of any assaultive crime as the predicate for felony-murder liability, and thus disapproved its precedents that applied the felony-murder rule to shooting at an inhabited

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231 See *People v. Sears*, 2 Cal.3d 180, 189 (1970); *People v. Washington*, 62 Cal.2d 777, 783 (1965).

232 46 Cal.4th at 1121, quoting *People v. Burton*, 6 Cal.3d 375, 388 (1971).

233 2 Cal.3d 180 (1970).

234 *Id*. at 189.

235 46 Cal.4th at 1114-1115.

236 See *People v. Scott*, 14 Cal.4th 544, 551 (1996) (defendant who killed unintended victim but missed intended victim could be convicted of both murder and attempted murder, although such dual conviction could not obtain if defendant killed only intended victim).

237 *Id*. "In their attempt to kill the intended victim, defendants committed crimes against two persons." See also Ireland *at Forty*, *supra* note 105 at 7-8; *With Malice Toward All*, *supra* note 9 at 275.

238 45 Cal.4th 1172 (2009).

dwelling,[239] and discharge of a firearm in a grossly negligent manner.[240] Justice Baxter's concurrence, shaped by *Ireland*'s concern with preserving consideration of the offender's mental state,[241] advocated a modified rule,[242] followed in Georgia[243] and Maryland,[244] whereby the felony's commission establishes malice, but the offender may still introduce mitigating evidence (e.g. provocation, imperfect self-defense).[245]

Chun showed not so much that the second degree felony-murder rule is too harsh, but that sentencing changes have rendered it superfluous. The prosecution did not really need a second degree felony-murder conviction (15 years to life imprisonment), because section 12022.53 ("10-20-Life")[246] now authorizes a 25-years-to-life enhancement (equivalent to *first* degree murder liability), on top of the 3, 5 or 7-year term imposed for the underlying section 246 offense. Moreover, section 12022.53, like the felony-murder rule, bars any mitigation due to provocation or imperfect self-defense.[247] Similarly, although the Court had formerly rejected second degree felony-murder liability based on a fatal child beating,[248] the subsequently enacted section 273ab also authorizes a 25-years-to-life sentence for anyone who fatally beats a child with "force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ." One defendant thus charged actually requested instruction on the *lesser included offense* of second degree felony-murder![249]

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239 *People v. Hansen*, 9 Cal.4th 300 (1994).

240 *People v. Randle*, 35 Cal.4th 987 (2005); *People v. Robertson*, 34 Cal.4th 156 (2004).

241 *People v. Ireland*, 70 Cal.2d 522, 539 (1969).

242 *Id*. at 1209-12 (Baxter, J. concurring).

243 *Edge v. State*, 414 S.E.2d 463, 465 (Ga. 1992).

244 *Christian v. State*, 951 A.2d 832, 847 (Md. 2008).

245 Ireland *at Forty*, *supra* note 105, at 26-32.

246 Section 12022.53 enhances a defendant's sentence by 10 years when he personally uses a gun during a predicate felony, by 20 years where he personally and intentional fires it, and by 25 years to life imprisonment where that firing proximately causes a victim's serious injury or death.

247 *People v. Watie*, 100 Cal.App.4th 866, 884-885 (2002).

248 *People v. Smith*, 35 Cal.3d 798 (1984).

249 *People v. Stewart*, 77 Cal.App.4th 785, 796-798 (2000).

The new sentencing law has emphasized public safety over subjective culpability. The felony-murder rule relies on the principle that certain predicate conduct is so dangerous that (1) neither intent to kill nor even conscious disregard is needed for (first degree) murder liability; and (2) no mitigating evidence should be admitted. This principle has met with mixed success in judicial decisions, but has prevailed in sentencing prescriptions.

(b) Indirect Causation and Transferred Intent

The return to objectivism reshaped the doctrines of indirect causation and transferred intent, too. The California Supreme Court broadened the capacity of each doctrine to support first degree murder convictions.

The Court facilitated convictions by declining to extend *Washington*'s direct causation requirement outside the felony-murder context. In *People v. Roberts*, the defendant fatally stabbed a fellow inmate, Gardner, who, after going into shock, himself fatally stabbed a prison guard, Patch.[250] To convict Roberts of two counts of intentional murder, the People needed to show that Roberts intended to kill Patch as well as Gardner, due to the *Birreuta* rule.[251] The subjectivist logic of *Washington* (and *Birreuta*) would have precluded two murder convictions where Roberts intended only one, as Roberts had no control over Gardner's reaction to the first stabbing. Double murder liability would thus "discriminate[] between killers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the killer's conduct happened to induce."[252]

The *Roberts* court, however, considered the objective harm and danger, as well as the offender's subjective intent. The Court upheld both murder convictions because a reasonable jury could have convicted the defendant for Patch's murder, too, as it was reasonably foreseeable.[253] Without mentioning *Washington* (but citing many of the authorities

250 2 Cal.4th at 294-295.

251 *People v. Birreuta*, 162 Cal.App.3d 454 (1984), *overruled by People v. Bland*, 28 Cal.4th 313 (2002).

252 *People v. Washington*, 62 Cal.2d 777, 781 (1965).

253 *Roberts*, 2 Cal.4th at 321-322. Instructional error compelled reversal of the count.

cited in *People v. Harrison*), *Roberts* restored the *Fowler/Harrison* standard, whereby objective proximate causation (even if indirect) sufficed to support murder liability.[254]

People v. Sanchez[255] rejected *Washington*'s implicit characterization of indirect causation as a lesser basis for liability. A gang shootout killed a bystander, though it was uncertain which gunman fired the fatal shot.[256] *Sanchez* held it did not matter, because "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder."[257] Both shooters could therefore be liable for first degree murder.[258]

The transferred intent case of *People v. Bland*[259] likewise emphasized public safety over subjective culpability. The Court considered the liability of an offender who intended to kill (only) the driver of a car, but unintentionally killed his passenger, too. The Court acknowledged the culpability reasoning of *Birreuta*: "There is some force to *Birreuta*'s argument that a person who intends to kill two persons and does so is more culpable than a person who only intends to kill one but kills two."[260] But *Bland* declined to consider the second death as merely bad luck. "When one intends to kill and does so, the killing is hardly an accident, even if the specific victim or victims are unintended."[261] In short, whereas "forum of conscience" reasoning would distinguish the two offenders, *Bland* emphasized that either's conduct was sufficiently culpable to justify full liability, which would better protect the public.[262]

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254 Subsequent Courts of Appeal followed *Roberts* in this regard: e.g. *People v. Brady*, 129 Cal.App.4th 1314, 1324 (2005); *People v. Schmies*, 44 Cal.App.4th 38, 47-48 (1996); *People v. Gardner*, 37 Cal.App.4th 481-483 (1995).

255 *People v. Sanchez*, 26 Cal.4th 834 (2001).

256 *Id*. at 838.

257 *Id*. at 845.

258 *Id*. at 854.

259 28 Cal.4th 313 (2002).

260 *Id*. at 322.

261 *Id*. at 322-323.

262 The Supreme Court has recognized that committing violent acts near bystanders enhances danger — and culpability.

> [A] person who engages in an urban gun battle is more *culpable* than one who fires a weapon at an isolated individual. The risk of injury to bystand-

Bland further analogized transferred intent law to the felony-murder rule. Both imposed murder liability[263] for additional, unintended victims, but could not support attempted murder liability.[264] (Some states reasonably consider murder to be one of the felonies that can generate felony-murder liability.)[265] The newly expanded purpose of the felony-murder rule supported the *Bland* conclusion. The extreme punishment generated by the felony-murder rule can deter not only unintentional killings during a felony, but also the (intended) felony itself. Likewise, imputing malice (and premeditation) from the intent to kill another victim can deter not only the unintentional killings of bystanders, but also the intentional killing itself.[266]

(c) Special Means and Special Circumstances

Bland, in imposing intentional murder liability for (additional) unintended killings, followed a trend that decreased the significance of the specific intent-to-kill requirement generally. The United States Supreme Court's description in *Tison v. Arizona*[267] of the danger (and depravity) of non-intentional killers provided the policy for loosening the intent requirements for severe punishment. In contrast to the *Carlos* court, the *Tison* court held an intent to kill was not an absolute prerequisite for full liability. Whereas some intentional killings may be justifiable, or mitigated due to provocation, "some non-intentional murderers may be among the most dangerous and inhumane of all."[268] Accordingly, a "reckless indifference to the value of human life may be every bit as shocking to

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> ers clearly is a risk arising from even one firing of the weapon. The more *culpable and dangerous* the behavior, the greater the need exists for effective deterrence. An increased sentence measured by the risk of harm to multiple victims reflects a rational effort to deter such reprehensible behavior.

In re Tameka C., 22 Cal.4th 190, 196 (2000) (italics added).

263 If the intent to kill the intended victim was premeditated, the defendant would be liable for first degree murder as to all victims. *Id*. at 324.

264 *Id*. at 328.

265 *State v. Jones*, 896 P.2d 1077 (Kan. 1995); *Millen v. State*, 988 S.W.2d 164 (Tenn. 1999).

266 Likewise, full liability for harms inflicted while intoxicated can deter both the harms and the predicate intoxication. *Just Say No Excuse*, *supra* note 19, at 509-510.

267 481 U.S. 137 (1987).

268 *Id*. at 157.

the moral sense as an "'intent to kill.'"[269] In several contexts, California courts responded by abandoning strict specific intent requirements.[270]

In 1987, the California Supreme Court disapproved *Carlos*'s requiring proof of a specific intent to kill to support a constitutional death sentence.[271] The Court noted that *Tison* itself had implicitly corrected *Carlos*'s misimpression that the federal Constitution mandated an intent-to-kill requirement.[272] The Court further explained that it was merely returning the law to the 1972 status quo ante.[273]

In 1993, the Court of Appeal dismissed as dicta the former intent-to-injure/kill requirement for lying-in-wait murder, described in the 1959 *Atchley* case.[274] All that was necessary was malice, implied or express.[275] An offender who perceived the natural and probable danger could be convicted of first degree murder.

Finally, this reasoning also led the Court to drop the specific intent-to-kill requirement for voluntary manslaughter. Just as *Tison* had observed that non-intentional (but depraved) killings could be as blameworthy as intentional ones, and just as Penal Code section 188 punished express malice and implied malice equally, the Supreme Court equated an intent-to-kill with such conscious disregard for human life where malice was absent, due to provocation[276] or imperfect self-defense.[277] The Court thus recognized that an objective danger, combined with a culpable disregard for life, warranted no less liability than an intent to kill.[278]

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269 *Id*.

270 These changes counteracted the prohibition against presuming an offender's subjective act from his objective conduct. *Sandstrom v. Montana*, 442 U.S. 510, 522 (1979). The *Sandstrom* rule may well have prompted the loosening of intent requirements, due to the added difficulty in proving them.

271 *People v. Anderson*, 43 Cal.3d 1104, 1138-1139 (1987).

272 *Tison*. 481 U.S. at 154, n.8

273 *Anderson*, 43 Cal.3d at 1145, n.8.

274 *People v. Laws*, 12 Cal.App.4th 786, 794-795 (1993).

275 *Id*. at 794.

276 *People v. Lasko*, 23 Cal.4th 101 (2000).

277 *People v. Blakely*, 23 Cal.4th 82 (2000).

278 See *With Malice Toward All*, *supra* note 8, at 263-268.

(d) Premeditation and Deliberation

California law has also moved away from the increased culpability requirements of *Wolff* and *Anderson*. A 1981 amendment to section 189 formally rejected *Wolff*: "To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."[279] The Supreme Court also lessened the meaning of *Anderson*, explaining that its guidelines were "descriptive, not normative," and did not warrant any particular weight.[280]

(e) Sentencing

Although the Court did not radically alter the definition of first degree murder, statutory changes substantially expanded first degree murder liability or its equivalent. For example, a 1993 amendment created a new ground for first degree murder liability: drive-by shootings committed with an intent to kill.[281] The extra objective danger of such shootings waived the need to establish the extra subjective culpability of premeditation.

Other statutory changes imposed the *punishment* formerly reserved for first degree (or special circumstance) murder, even though defendants committed less subjectively culpable offenses. Section 190 now authorizes sentences of 25 years to life in prison, or even life imprisonment without parole, where the offender commits second degree murder against a peace officer, even without an intent to kill. Similarly, drive-by shootings committed with an intent to inflict serious injury are punishable by 20 years to life imprisonment.[282] Furthermore, section 273ab now proscribes a sentence equivalent to that for first degree murder where the offender assaults and kills a young child "by means of force that to a reasonable person would be likely to produce great bodily injury." Neither an intent to kill nor conscious disregard for life is necessary for severe punishment when such objectively dangerous conduct results in death.

Probably the most important new statute was section 12022.53, which added 10, 20 or 25 years to life imprisonment, for the use, discharge, or

279 1981 Cal. Stats. ch. 404 § 7.

280 *People v. Perez*, 2 Cal.4th 1117, 1125 (1992).

281 1993 Cal. Stats. ch. 611 § 4.5.

282 Cal. Penal Code, § 190, subd. (d).

infliction of death or serious injury, respectively, with a firearm.[283] The added danger created by firearms produced sentences longer than those available for more culpable mental states. For example, an unpremeditated murder with a firearm is now punishable by a sentence of 40 years to life, far longer than the ordinary sentence for premeditated murder. In fact, a shooting at a vehicle or inhabited dwelling[284] without malice (e.g., with provocation or in imperfect self-defense) could generate a sentence of 27, 29 or 31 years to life imprisonment. No longer is premeditation or even malice necessary for the imposition of a sentence of 25 years to life imprisonment.

In fact, section 12022.53 does not even require the harm of death to justify a sentence greater than that imposed for first degree murder; a serious injury is enough.[285] The *danger* created by firearms compensates for the lesser harm. A similar provision (Penal Code section 12310) enhances punishment when an explosive device inflicts death or serious injury.[286]

The judicial application of Section 12310 perfectly illustrates the restoration of objective factors in determining liability. In 1983, the *Carlos* court invalidated a punishment scheme because some unintentional murderers could be punished more severely than some intentional ones.[287] "If the initiative were construed to impose a penalty of death or life imprisonment without parole for unintended felony murder, *it would punish more severely a defendant who did not intend to kill than one who did*. Such a distinction would create problems under both the Eighth Amendment and the equal protection clause."[288] The offender's intent was the only relevant determinant.

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283 1997 Cal. Stats. ch. 503 § 3.

284 Cal. Penal Code § 246.3.

285 Cal. Penal Code § 12022.53. The sentence of 25 years to life imprisonment combines with the sentence for the predicate violent felony.

286 Cal. Penal Code § 12310. The law prescribes a sentence of life imprisonment without possibility of parole when the offender kills through the willful explosion of a destructive device, and a sentence of life imprisonment with possibility of parole when the explosion results in serious injury or mayhem.

287 *People v. Carlos*, 35 Cal.3d 131, 153 (1983).

288 *Id*. at 151 (italics added).

Only eleven years later, the Court of Appeal justified that very distinction, by reference to the objective dangerousness to the public of the fatal conduct. The defendant in *People v. Thompson*[289] killed a victim by igniting a Molotov cocktail. The defendant, sentenced to life imprisonment without parole, raised the *Carlos* objection: if he had been convicted of murder with express malice, and premeditation, he would have been eligible for parole. The Court of Appeal, however, justified the Legislature's determination that section 12310 was a "more serious crime than premeditated murder," due to its objective dangerousness. "The use of destructive devices . . . which can inflict indiscriminate and multiple deaths, marks defendant as a greater danger to society than a person who premeditates the murder of a single individual."[290] Although the latter was more culpable, the former was more dangerous, and thus warranted greater penalty.

By the last decade of the twentieth century, the criminal law's priority was no longer punishment in accordance with the forum of conscience, but was, once again, protecting the public.

CONCLUSION

The determination of criminal liability is a cultural and political choice. Courts and legislatures must decide, inter alia, on the penal law's goals. Initially, California emphasized the "maintenance of personal security" and constructed its criminal law accordingly. Mitigation was difficult; the law needed to punish objectively harmful or dangerous conduct to protect the public.

A growing acceptance of biological and environmental determinism reduced liability for purportedly less culpable offenders in the twentieth

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289 24 Cal.App.4th 299 (1994).

290 *Id*. at 307. See also *People v. Morse*, 2 Cal.App.4th 620, 646 (1992), which noted the uniquely dangerous characteristics of bombs:

> In the first place, the maker often loses control over the time of its detonation . . . . In the second place, it may wreak enormous havoc on persons and property. In the third place, its victims are often unintended sufferers. And finally, considering its vast destructive potentialities, it is susceptible of fairly easy concealment.

century. Increased mitigation may have reflected greater fairness toward offenders, but increased the danger to everyone else. Less tangibly but no less significantly, a reduced conception of personal responsibility eroded the premises underlying citizenship and self-government.[291]

California, like other states, has revived the "social conscience" perspective in recent decades. Although the Supreme Court has retained some limits on the felony-murder rule,[292] the state has restored former constructions of doctrines that produce a more objective evaluation of liability. One may dispute the moral fairness of this trend, but not its contribution to the goal of a safer society. ✯

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291 See Mitchell Keiter, *From* Apprendi *to* Blakely *to* Cunningham*: Popular Sovereignty Enters the Courtroom*, 34 West. St. U. L. Rev. 111, 138-140 (2007). See also C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 228 (1953):

> To be 'cured' against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we 'ought to have known better', is to be treated as a human person made in God's image.

292 *People v. Chun*, 45 Cal.4th 1172, 1200-1201 (2009); *People v. Washington*, 62 Cal.2d 777 (1965).

THE FIRST CALIFORNIA STATUTE:

Legal History and the California State Archives

JOHN F. BURNS AND NANCY LENOIL*

INTRODUCTION AND CONTEXT

Nineteenth century statutes rarely appear in California's historical literature. Most have long been superseded, and they are seldom examined unless they deal with contentious contemporary issues such as extending civil rights. The first statute of the first California legislature should be lauded, however, as it required the Secretary of State to "receive . . . all public records, registers, maps, books, papers, rolls, documents, and other writings . . . and the titles to bonds within the territory, or to any other subject which may be interesting, or valuable as references or authorities to the Government, or people of the State . . . and to classify, and safely keep, and preserve the same, in his office."

With that law, the archives of the fledgling state were initiated, the first legislature recognizing the enduring importance of key documents to the state's governance. What was to become the California State

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Archives was thereby created, eventually ensuring the preservation of vital state historical documents and assembling the collection of what is now an unparalleled resource for the study of the state's legal history.

From the outset, the legal history of the state was intertwined with themes of great national import, including such matters as the extension of slavery, intercontinental communication and transportation, immigration, urban development, water rights and distribution, and a wide variety of other issues. To the extent law was involved — drafting it, enacting it, implementing it and interpreting it — records of those actions are found in the State Archives. The legal history of the state begins with the Constitutional Convention of 1849, assembled without a clear warrant of authority as Congress dithered over the question of California's admission to the Union. A vast national rift over extending slavery to formerly Mexican territories threatened to halt new states' admission.

The convention met in a climate of considerable urgency. The previous Roman-law based Spanish-Mexican legal system was regarded as arbitrary and un-American by the large numbers of sojourners from the eastern United States who pursued the lure of California gold to attain their dreams of riches and a better life. The state was nominally under

military governance in the aftermath of the Mexican-American War, but that was only considered temporary and there were too few troops remaining to have much effect.

Indeed, the system had been overwhelmed by the large number of migrants streaming into California from all corners of the world. In the gold-producing areas where most people headed, there had been little or no Mexican or military presence anyway. As a result, miners crafted their own community codes, generically called Miners Laws, to provide a semblance of order. But these only operated locally, and a statewide process of governance was becoming vitally necessary. Military governor Bennett Riley called for the convention in late 1849.

The 1849 California Constitution was centered in Anglo-American common law, in accord with the background of the delegates, principally from eastern states. It borrowed liberally from the constitutions of other states, but also incorporated a few suggestions of the small number of representatives of Mexican descent, such as permitting married women to own separate property and publishing government enactments in both English and Spanish.

Written and put into effect quickly, it went into effect by necessity in January 1850 even though Congress had still not acted on admission. An entire session of legislation followed, framing the structure and operation of California, which finally became an official state in September, after Congress reached the Compromise of 1850. The reader who wishes to more fully understand the early political and governmental development of California is encouraged to examine *Taming the Elephant: Politics, Government and Law in Pioneer California* (University of California Press, 2003) edited by John F. Burns and Richard Orsi.

The records of the first constitutional convention and its successor convention in 1879 can be considered the legal history foundation of the state. The constitutional records in the State Archives, along with thousands of cubic feet and millions of pages of other records, are an extraordinary resource for studying California's legal history. These papers and other material are primarily related to the process and results of legislation, the work of the executive branch in putting that legislation into practice, and the state courts' efforts to sort out disputes about it.

Yet knowledge about the extent and availability of these collections is not widespread, and research projects that beg to be initiated and that would extend understanding of the state's legal evolution have yet to be undertaken.

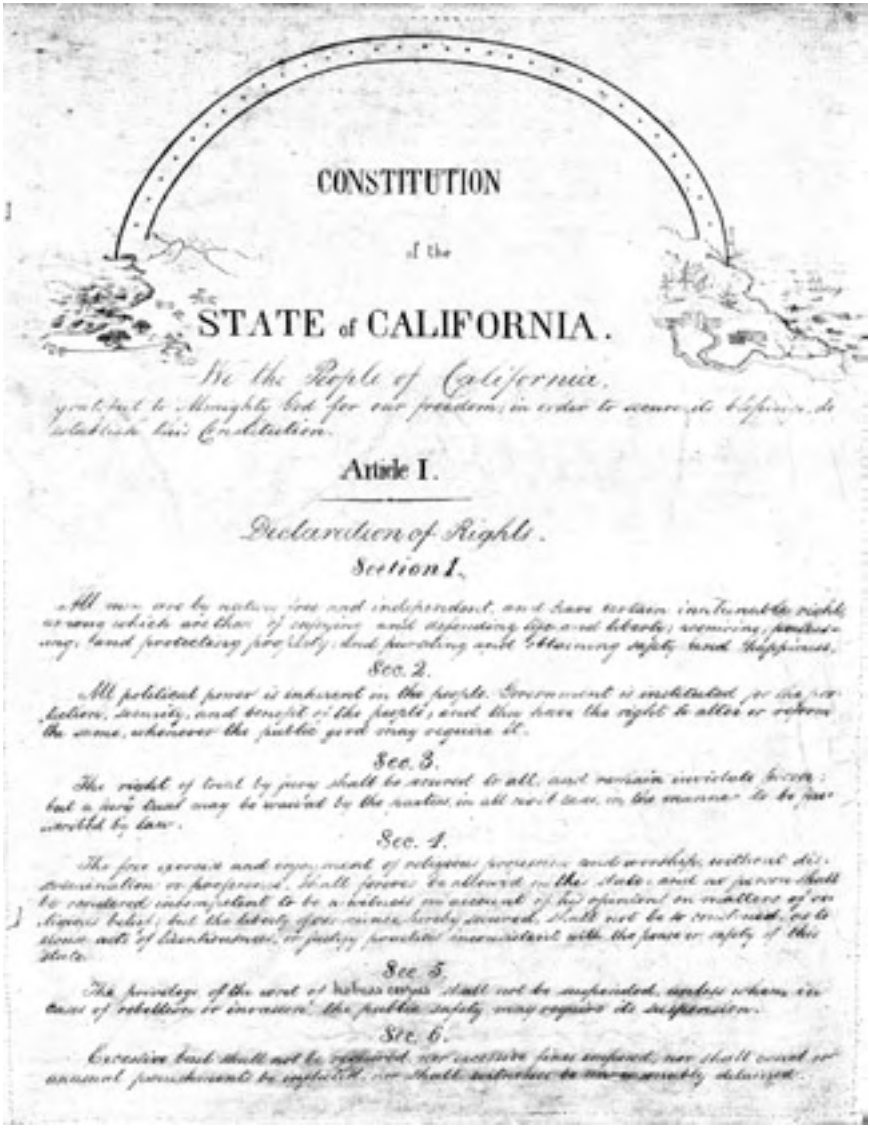
What follows in this article is a fairly expansive discussion of certain documents and other materials in the State Archives, but it is far from a comprehensive treatment. To write an entire and explicit guide to the State Archives holdings would take thousands of pages and be immediately outdated, as new collections are constantly added. What this article intends to accomplish is to highlight some of the most important and interesting record groups in the Archives, to provide some inkling of the breadth of subject matter that is represented, and to discuss research opportunities.

We have chosen to utilize descriptions of several important collections in some depth, rather than simply provide a long, and likely boring, list of short entries. Much of the information here is gleaned or directly excerpted from State Archives finding aids available at http://www.sos.ca.gov/archives/, and researchers are strongly urged to explore the site, which includes much more information than space permits us to describe here. Moreover, a substantial number of new collections or additions to existing collections are acquired and prepared for research use every year. That information is added to the Archives' online catalog, Minerva, so the site is highly dynamic.

STATE CONSTITUTIONS

Constitutional records are at the forefront of the state's legal history. The original 1849 and 1879 State Constitutions have been housed in the Archives along with constitution convention working papers since they were created. The working papers of the 1878-1879 Constitutional Convention are now available on the State Archives web site, with a user's guide, finding aid, and indices for searching by subject and type of material. Digitization of the working papers was accomplished thanks to a grant from the California Supreme Court Historical Society.

Constitutional revision efforts are also documented in the Archives. In 1959 the Legislature directed the Citizens' Legislative Advisory



CONSTITUTION

of the

STATE of CALIFORNIA.

We the People of California,

grateful to Almighty God for our freedom, in order to secure its blessings, do ordain and establish this Constitution.

Article I.

Declaration of Rights.

Section 1.

All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

Sec. 2.

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it.

Sec. 3.

The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law.

Sec. 4.

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Sec. 5.

The privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require its suspension.

Sec. 6.

Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

THE FIRST CALIFORNIA CONSTITUTION, ADOPTED IN 1849.

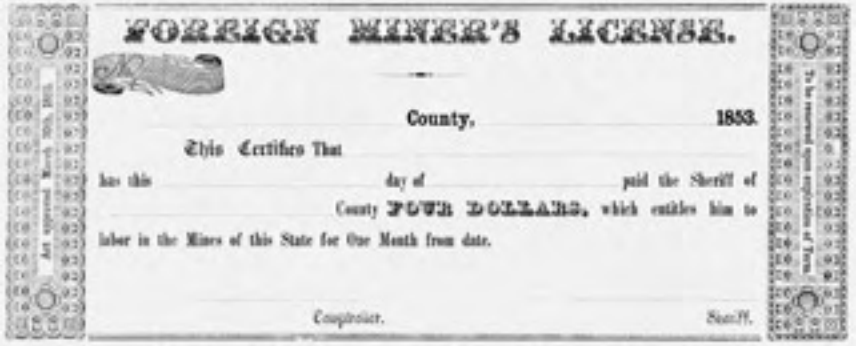
Commission to study the techniques and procedures necessary to secure a revision of the State Constitution. The Commission's final report recommended that the California Constitution be amended so that the Legislature could submit to the people a revised constitution, or a revision

of any part, and that a commission be established by statute to make recommendations for a total or partial revision.

Ultimately a Constitutional Revision Commission was created and these records are in the Archives. Papers of the Constitutional Revision Commission, comprising some twenty cubic feet, include meeting files, with transcripts and minutes of full Commission meetings and minutes of committee meetings about specific articles; committee files relating to their activities and recommendations about article revision; administrative files, with documentation relating to the activities of the Commission's staff; biographical data on Commission and staff members and their selection and/or appointment; and legislative files documenting the placement of revision proposals on the ballot for submission to the electorate.

As this essay is being written, calls for a new constitutional convention have become more frequent and the idea is gaining media attention. It would be prudent for those undertaking investigations into that subject to carefully examine the records of past constitution-making and revising to look at how this critical state governance issue was handled in the past.

Apart from statutory enactments and Supreme Court records, there are only scattered other documents associated with the Gold Rush and constitutional era in the State Archives' holdings. Government was very small and retained only official filings. Private diaries, letters and other materials of the period are found in the State Library in Sacramento, Bancroft Library at UC Berkeley, and the Huntington Library in San Marino. One particularly interesting series in the State Archives are records



FOREIGN MINER'S LICENSE.

County. 1853.

This Certifies That

has this day of paid the Sheriff of County FOUR DOLLARS, which entitles him to labor in the Mines of this State for One Month from date.

Comptroller. Sheriff.

A blank receipt for payment of the California Foreign Miner's License Tax for the year 1853.

related to the Foreign Miner's License Tax, an onerous levy imposed primarily on non-white miners from other countries, especially China and Mexico. It was intended strictly to preserve access to the goldfields for white Americans only.

STATE LEGISLATURE

Legislative records are one of the most significant groups in the State Archives, and legislative intent research is the most dominant type of research currently undertaken at the Archives. California is one of only a few states where the courts have given weight to determination of the intent of the Legislature when a particular bill was enacted. The working bill files of state legislators, legislative committees and caucuses are a heavily used resource; also available are videotapes of selected floor sessions and committee hearings from the Senate and Assembly, as well as the Governors' Chaptered Bill Files.

This type of research illustrates the application of recent history. The bill files provide information about the problem a particular piece of legislation was intended to solve and the history of the bill. Typical bill files include bill analyses, reports, background information, press releases, newspaper clippings, and letters of support and opposition. Often when there is a legal dispute over some aspect of legislation, researchers will use the bill files to resolve the dispute. Legislative staff members have also relied on the bill files when seeking to amend existing legislation or when introducing new legislation

The files of 231 assembly and senate committees have been deposited in the Archives. A few detailed examples of especially interesting material follow:

California Un-American Activities Committees Records, 1935-1977

The California Un-American Activities Committees (CUAC) files represent one of the most significant collections for studying modern California history and politics in respect to civil liberties. Indeed, given the scope and breadth of the materials, the collection has importance for

both American and world history. One might note that California's attention to un-American activities predates McCarthyism by a decade. As the files reveal, however, there was a close and ongoing relationship between state and federal efforts. The research potential and significance of this collection is enormous, and it is an untapped resource since the last restrictions on public access to the records were lifted in 2008.

The collection contains the investigative files, hearing transcripts, and working papers of several committees (Assembly Relief Investigating Committee on Subversive Activities, Joint Fact-Finding Committee on Un-American Activities in California, and Senate Fact-Finding Committee on Un-American Activities) created by the California Legislature to investigate subversive activities.

CUAC records span the period 1935-1977 and consist of 80 cubic feet. Over this period, the Committees produced or received thousands of documents, including fifteen published reports, unpublished reports and studies, newspaper clippings, photographs, hearing transcripts, correspondence, publications (books, magazines, and pamphlets), depositions and audio tapes and Dictaphone discs, with approximately 125,000 index cards tracking an estimated 20,000 individuals or organizations.

The files are especially rich in certain subjects. Topics of major focus include: labor and labor unions; public schools and education; Hollywood and the motion picture industry; civil rights; universities and colleges, in particular, the University of California-Berkeley, the University of California-Los Angeles, and San Francisco State University; political parties, including the California Democratic Party, the American Communist Party, the Los Angeles County Communist Party, and the Black Panther Party; the Soviet Union and Soviet-American relations; communism in China and Vietnam; fascist and Nazi movements in America; and the anti-war and peace movements.

Particular events that attracted the Committees' attention include the Alger Hiss trial, the Watts riots, the King, Ramsey, and Connor cases, and the Sleepy Lagoon event. Substantial attention was lavished on a number of ethnic and occupational groups in society, including students, teachers, scientists, women, African Americans, lawyers, clergy, musicians, writers, actors, Jews, Hispanics, Japanese, reporters, union activists, and public

employees. Well-known people are found throughout the files, including Cesar Chavez, Henry Wallace, Harry Bridges, Paul Robeson, Richard Nixon, Martin Luther King, Jr., and Earl Browder.

Other significant elements include records that relate to the development of the American labor movement and its activity in party politics, the role of the motion picture industry in shaping public perceptions, the growth of militant activities in universities during the 1960s, in particular as related to protests against the Vietnam War, the development of the farm labor movement in California, life in the Soviet Union in the 1950s and Soviet-American relationships during the Cold War, the emergence of civil rights politics as a response to the investigations, and the evolution of anti-Semitic thought and practice and its relationship to public perceptions of Jewish life and culture.

Unfortunately, little is known about the structure of the Committees and how they operated. In addition to legislators, two other figures dominated the work of the Committees for most of the period of activity. Richard E. Combs, chief counsel, directed the investigations and conducted most of the questioning during depositions and public and non-public hearings. Thomas L. Cavett, chief investigator, was the "eyes and ears" of the body, and gathered information from a wide network of local operatives, mostly unnamed.

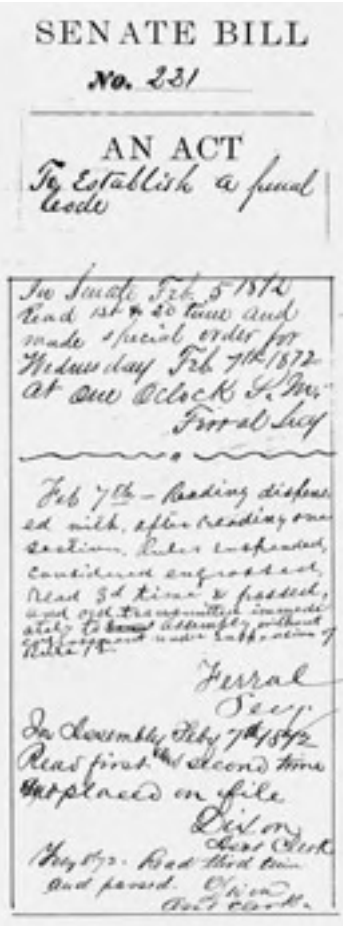
Senate Public Safety Committee, 1997-2006

The Senate Public Safety Committee Records consist of 64 cubic feet of bill files covering the years 1997-2006; hearing files, 1997-2006; and subject files, 1999-2005. The bill files pertain to criminal law and general public safety issues, including drug enforcement, sex crimes, and "three strikes" laws. This committee received many sex crime bills, including recidivism, child molestation enhancements, Jessica's Law, Megan's Law, Internet pornography, child pornography, predator activity, and stalking. Many sex crime bills were concerned with child safety and the Internet.

The Senate Public Safety Committee heard several bills on identity theft and privacy in the late 1990s and early 2000s. Bill and hearing topics included Social Security number protection, limiting credit card

solicitations, and criminalizing identity theft. This committee and the legislature as a whole struggled over privacy, gang membership and public safety issues. In order to curb the influence of gangs, the committee saw many bills relating to gang membership and association, gangs in prisons, and sentence enhancements for committing a crime while associated with a gang. Freedom of association and community-level approaches to gang reduction often conflicted with traditional approaches to policing, such as mass arrests and profiling, in the bills the committee reviewed.

The California Department of Corrections and Rehabilitation (CDCR) and the Division of Juvenile Justice (DJJ), formerly known as the California Youth Authority (CYA), occupied much of the Senate Public Safety Committee's time. Specific issues include prison reform, prisoner rehabilitation and recidivism, overcrowding, the building of new prisons and private prisons, free speech and press access to prisons, prisoner abuse, holding prison guards accountable, medical care for inmates, gangs in prison, racial discrimination, and county jail regulations.


SENATE BILL

No. 231

AN ACT

To Establish a penal Code

In Senate Feb 5 1872
Read 1st time and made special order for Wednesday Feb 7th 1872 at one Oclock P. M.
Ferral Secy

Feb 7th – Reading dispensed with, after reading one section. Rules suspended, considered engrossed, Read 3d time & passed, and ordered transmitted immediately to Assembly without ... Ferral Secy

In Assembly Feby 7th 1872
Read first & second time & ordered on file
Dixon
Asst Clerk

Feby 8th. Read third time and passed. Dixon Asst Clerk.

"AN ACT To Establish a penal Code" — Notes by the secretary of the Senate and assistant clerk of the Assembly recording three readings and passage of the bill by each house, February 1872.

Victims' rights became both a national and California concern in the 1990s. The Public Safety Committee heard numerous bills concerning victims' rights, from integrating video conferencing into criminal hearings to increasing access to restitution funds. The status of victims in the criminal process was controversial as the state

struggled to ensure that both the victim and the accused were represented equally in court.

Gun control was often a contentious issue in the committee. Bill topics included gun shows, assault weapon categories, pistols and "Saturday night special" quality regulation, bullet serial numbers, concealed firearms permits, and sentencing enhancements for crimes committed with a firearm. One emphasis was on finding a cost-effective method of regulating firearms and preventing criminals and children from acquiring illegal and dangerous firearms. After the September 11, 2001 attack, terrorism became a national concern, and the committee received bills and held hearings pertaining to protection against terrorism.

Contemporary research projects related to the formulation of public safety and incarceration policy would be well served through careful examination and use of these files. The subjects are volatile and generate substantial public and media response. As such, they open a window into some of the seamier aspects of our current civilization, and how as a society we attempt to balance protection of vulnerable individuals, the rights of those accused, and the greater good of the people.

Senate Business and Professions Committee, 1962-2004

The Senate Business and Professions Committee Records consist of 71 cubic feet of records reflecting the activity of the committee in handling legislation related to the California Business and Professions Code. The records cover the years 1962-2004, with the bulk from 1970-2004, and are composed of bill files, hearing files, subject files, investigation files, chronological correspondence files, and office files. Although the committee began in 1940, records from the first twenty years are lacking in the Archives' holdings.

A strength in the collection is information regarding the California Department of Consumer Affairs and the professional boards and other entities administered by this agency. Of particular interest to the researcher are files concerning licensing and treatment of foreign medical school graduates and complaints about people masquerading as licensed doctors. Inconsistent licensing practices for qualified doctors led to an ongoing committee investigation of the Board of Medical Quality

Assurance (BMQA). Hearing files, bill files, and subject files all offer insight into this problem and proposed solutions. As a whole, the records clearly demonstrate how constituent concerns can directly impact legislation, and they offer a view of the practices involved in the process of reviewing and creating legislation.

Assembly Transportation Committee, 1956-2004

The Assembly Transportation Committee records consist of 116 cubic feet of records reflecting the committee's activities studying and analyzing transportation-related legislation and general transportation issues. The standing committee, as well as interim and subcommittees, are included.

The bulk of the collection consists of bill files, which date from 1968 through 2004. Second in size to the bill files are the hearing files, which make up a substantial portion of the collection, covering 1956-1987. The collection's large volume and date range of hearing files provide researchers with strong insight into the concerns and issues being addressed by the committee and its predecessors throughout their history. Transportation is an integral part of California culture and American society. The legislation addressed by this committee materially affects everyone, from large industries and government agencies to small businesses and citizens.

A wide range of agencies, boards, commissions, and industries interact with the Transportation Committee. Some of these groups are the California Air Resources Board, California Energy Commission, California Highway Patrol, California Department of Transportation (CalTrans), California Transportation Commission, Department of Motor Vehicles, various transportation districts, and the trucking industry.

The records reflect the close involvement of the committee in a variety of important subjects. They document the committee's involvement in and continuing commitment to mass transportation, its efforts to combat transportation-related pollution and smog, efforts to improve vehicle and traffic safety through regulation, cell phone use in vehicles, and driver licenses for illegal aliens.

Because of its far-reaching scope of influence on society and the role it often plays as leader in the field of transportation related solutions,

the legislation before the Assembly Transportation Committee captures the attention of a large variety of groups and individuals. The interest of not only state residents in California's transportation, but also Americans and the world community, makes these records valuable to those researching California's transportation history and its transformative influence. The records might also be helpful to those elsewhere looking for guidance on the future of their own transportation endeavors.

Assembly Environmental Safety and Toxic Materials Committee, 1980-2004

The Assembly Environmental Safety and Toxic Materials Committee Records consist of approximately 40 cubic feet of textual records and audio-visual materials. The records cover the years 1980-2004 and are composed of bill files, hearing files, subject files, and correspondence.

These records may be of considerable interest to researchers looking at environmental regulation in the 1980s and 1990s. When environmental failures like the Love Canal, Chernobyl, and the Exxon Valdez oil spill gained global attention, California's legislative response reflected different approaches to growing concerns about chemicals and their awesome potential for damage to natural resources.

The majority of records consist of bill files that cover the years 1980-2004. Committee hearing files spanning 1980-2000, and subject files from the years 1993-2000 that contain records on specific toxic materials like asbestos and polychlorinated biphenyls, compose the balance of the collection. Files also deal with toxic material storage, transportation, and cleanup, Superfund sites, standards for industries, especially those involved in fire protection, pipeline safety, and waste disposal, marine pollution, toxic air contaminants, ground use for hazardous waste storage, and the Wilco dump site in Los Angeles.

Legislators' Papers

A growing number of legislators deposit their papers in the State Archives. There are now almost 400 of these collections. A few that are representative of the more extensive collections and that offer examples of what these papers can contain are:

Randolph Collier Papers, 1939-1976

Senator Randolph Collier's papers offer one example of the extent of legislative papers. Collier's papers document his career in the State Senate. He focused on the concerns of the constituents he represented as well as the interests of the general public. Many of the bills he drafted were preceded by extensive background research and hearings. They are arranged in three parts: 1) Author Bill Files, 2) Subject Files, and 3) Highway and Transportation Files.

Among the legislation in the Author Bill Files is the Collier-Burns Highway Act of 1947. It provided revenue to meet critical highway deficiencies by taxing the user on the basis of the user's demands on the highway system. It further defined the administrative functions for street and highway work by the state's counties, cities and counties, and cities.

One of the research strengths in the Subject Files pertains to water. A highly controversial issue of supply and demand developed between the less populated areas in the north which had 70 percent stream flow and the heavily populated urban areas in the south. After a ten-year study, the California Water Plan was proposed in 1957 by the California Water Resources Board. It became the largest American program ever undertaken to deliver water to central and southern California. The plan also fostered many water development projects along the Eel and the Klamath Rivers. These projects provided water for domestic, industrial and agricultural use in addition to flood control, water quality, hydroelectric power generation, recreation and enhancement of fish and wildlife habitat.

The Highways and Transportation Files contain information on transportation policy, regional plans, rapid transit, toll crossing, weight and size limitations for trucks. An underlying issue is the process of obtaining and distributing transportation funds.

Patrick Johnston Papers, 1973-2000

The Patrick Johnston Papers consist of 38 cubic feet primarily representing Johnston's activities during his service in the California State Legislature. The records contain bill files, subject files, savings and loan law regulation files, Delta Protection files, Japanese redress files, and correspondence.

The Savings and Loan Law Regulation Files primarily contain information related to the 1989 Lincoln Savings and Loan scandal, junk bond investments, and real estate speculation that led to a comprehensive bill increasing regulation of state chartered savings and loan associations. The Delta Protection Files contain a significant amount of data on the Sacramento-San Joaquin Delta related to the Delta Protection Act of 1992.

The Japanese Redress Files largely consist of papers created by the State Personnel Board between 1942 and 1946 and used as background material to enact legislation making California the first state to grant Japanese-Americans redress for actions taken against them during World War II. The series also contains additional files containing information related to the series of bills on Japanese Redress authored between1982 and 1992.

Jean Moorhead Duffy Papers, 1979-1982

The Jean Moorhead Duffy Papers consist of bill files documenting most of her legislative activity. She successfully sponsored legislation that made reporting child abuse simpler. Foreshadowing the "three strikes legislation," she was unsuccessful in passing legislation that would have required a life sentence without parole for individuals convicted of three violent crimes. She was successful in obtaining two bills that increased the penalties for drunk driving significantly. Winning passage of the bills resulted, in part, from her working closely with the new organization, Mothers Against Drunk Driving. As chair of the Assembly Committee on Aging and Long-Term Care in 1984, she introduced a number of bills that increased training for caregivers of the elderly and funded research into Alzheimer's Disease.

GOVERNOR AND EXECUTIVE BRANCH

Executive branch records are the most voluminous category in the Archives, as they comprise both the records of the governor's office and those of the incredible array of agencies the governor manages. The records of the governor's office itself document not only the day-to-day transactions of that office but reflect to a considerable degree the overall

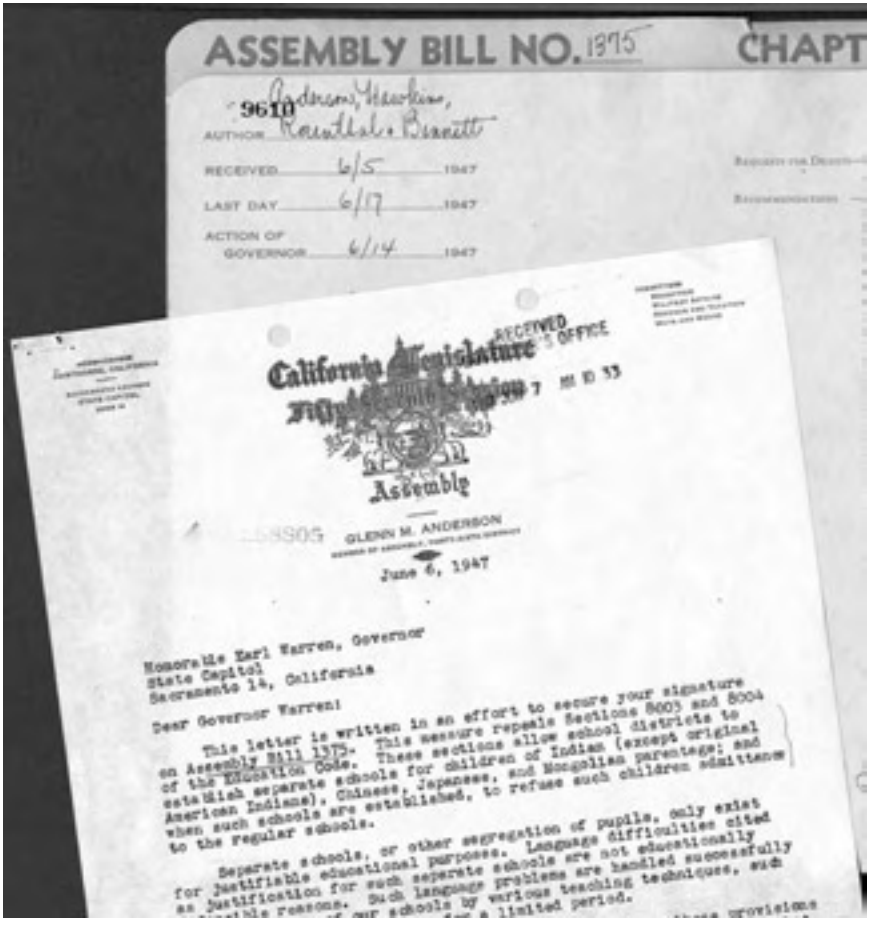
operations of the state government. Only in recent decades, however, have substantially complete collections of governor's office files been preserved, although documentation of the governor's primary official acts has been carefully maintained in its original form throughout the entire period of the state's history.

Until quite recently, California law did not make provision for the disposition of the governor's administrative papers, that is, the correspondence, memoranda, and other records that flow between the governor's office and the other branches of state, federal, and local government as well as to and from the general public. Consequently, the administrative records of many of California's governors have been scattered to various private and public institutions or destroyed.

Despite the haphazard disposition practices of the past, a considerable amount of governor's records do exist in the Archives. Many of these records constitute separate series reflecting specific functions, programs, and operations. Records in such categories include the original laws, appointments and commissions, notary public papers, petitions to the governor, prison papers (including those relating to the pardoning process and extraditions), proclamations, directives, executive orders, and offers of rewards.

Major collections of administrative records remain for only several of California's 38 governors (to date). Hiram Johnson, George Pardee, Culbert Olson, and Pat Brown placed their administrative papers in the Bancroft Library at UC Berkeley; Henry Haight and Henry Markham left theirs to the Huntington Library in San Marino; Earl Warren and Goodwin Knight placed their papers in the State Archives in Sacramento; Jerry Brown sent his papers to the University of Southern California; and George Deukmejian sent his papers to the Hoover Institution Archives at Stanford University. Ronald Reagan's papers from his term as governor initially were given to the Hoover Institution Archives and were later transferred to the Ronald Reagan Presidential Library.

Beginning with the administration of Pete Wilson, the law now requires the placement of all governors' records in the State Archives, although they can be restricted for fifty years. Governors' administrative papers are quite voluminous; even those of Earl Warren, who served in



ASSEMBLY BILL NO. 1375 CHAPT

9610 Anderson, Hawkins, Rosenthal & Brazetti

AUTHOR

RECEIVED 6/5 1947

LAST DAY 6/17 1947

ACTION OF GOVERNOR 6/14 1947

California Legislature

Assembly

GLENN M. ANDERSON

June 6, 1947

Honorable Earl Warren, Governor
State Capitol
Sacramento 14, California

Dear Governor Warren:

This letter is written in an effort to secure your signature on Assembly Bill 1375. This measure repeals Sections 8003 and 8004 of the Education Code. These sections allow school districts to establish separate schools for children of Indian (except original American Indians), Chinese, Japanese, and Mongolian parentage; and when such schools are established, to refuse such children admittance to the regular schools.

Separate schools, or other segregation of pupils, only exist for justifiable educational purposes. Language difficulties cited as justification for such separate schools are not educationally sustainable reasons. Such language problems are handled successfully in our schools by various teaching techniques, such

Ending legalized segregation in California's public schools — Letter from Assembly Member Glenn M. Anderson sending AB 1375 to Gov. Earl Warren for his signature, June 6, 1947 (seven years before the U.S. Supreme Court, led by Chief Justice Earl Warren, decided *Brown v. Board of Education*).

the mid-twentieth century, encompass about 600 cubic feet. The papers of the last governor to leave office, Gray Davis, grew to 2504 cubic feet, although they are not yet open for public research. It is anticipated that those of Arnold Schwarzenegger may approach 6000 cubic feet.

Prior to 1996 the State Archives was housed in a decrepit printing plant and could not have accommodated and adequately protected the

large volume of important gubernatorial material. The state-of-the-art and commodious Archives building constructed in the mid-1990s solved that problem at the time, although space issues may again become a concern before 2018 if planned improvements for more compact storage are not made to the building.

The myriad operations of state agencies are documented in a vast array of materials in the Archives. Organized by agency, these records demonstrate how units of government attempted to implement legislation. With rare exception, agencies are only permitted to engage in those activities explicitly authorized by legislation. The gamut of human endeavors is reflected in these records, as virtually every type of possible human action is treated at one time or another legislatively, and agencies are obligated to execute the terms of the legislation. Descriptions of some of the most particularly interesting or informative agency record groups follow. Many other notable collections of agency records also exist in the State Archives.

Department of Corrections

The Department of Corrections was organized in 1944 under the Prison Reorganization Act. The department incorporated the former Department of Penology, the State Board of Prison Directors, the Bureau of Paroles and the California Crime Commission. It included State Prisons at San Quentin and Folsom, the California Institution for Men at Chino, and the California Institution for Women, Tehachapi.

The stimulus for the reorganization stemmed from the recommendations of the Governor's 1943-1944 Special Committee on Penal Affairs, which held extensive hearings on California's prison system. Major subsequent changes in the organization and structure of the department included creation of a Correctional Industries Commission in 1947 to aid in the development of work programs, creation of the Youth and Adult Corrections Agency in 1961, creation of a Narcotics Addict Evaluation Authority in 1963, and the expansion, especially in the last twenty years, of the number of state incarceration facilities. Some architectural drawings and blueprints of state prisons are available for study.

Inmate case files are a rich source of information about criminal activity and criminal law. Case files span the period from 1890-1978. Case files prior to 1958 generally give an inmate's name, aliases, commitment number, crime, county sent from, sentence, date received, age, nativity, education, religion, military service record, family names and addresses, occupation, past employers, habits, health, marital status, number of children, date and place of trials, transcript of proceedings, prior convictions, probation officer's report, type of prison employment, and prison punishment, and they include photographs, statements, reports, letters and newspaper clippings relating to superior court proceedings, applications for parole, and Parole Board action. More recent inmate case files typically include a summary of the sentence and crime, clinical evaluation of the inmate, mug photo, education record, registers of visitors, summary of activities, and movement within the system and discharge certificate.

In addition, many significant records pertaining to correctional institutions are found in the Governor's Prison Papers, which are composed of a number of record series, several of which are duplicated by near-identical series maintained by the Department of Corrections. The record series include: San Quentin and Folsom Prison Registers (1851-1943), Applications for Pardon (1872-1903), Commutation of Sentence (1876-1944), Pardons (1856-1966), Executive Pardons (1872-1903), Prison Discharges (1868-1886), Executive Orders to Release (1883-1891), Restoration to Citizenship (1887-1897), and Extradition Case Files (ca. 1856 to date).

Military Department — Indian Wars

The Indian War Papers, 1850-80, originated in the Adjutant General's Office. Encompassing 2-1/2 cubic feet, the records deal with attempts to suppress Native Americans in California, partially documenting a disturbing element in the state's early history. Local militia groups were usually formed to eliminate what was called "the Indian Menace," and to pacify the frontier in specific areas of the state. This record group includes militia muster rolls, field reports, claims, correspondence and two

volumes of *Expenditures for Military Expeditions Against Indians During the Years 1851-59.*

The first volume, 1850-52, arranged chronologically by date of expedition, contains an alphabetical index of members including warrant number, warrant member's date, name, whether a horse was furnished, military rank, number of horses purchased and amount paid, amount of supplies, amount of service, total amount, to whom delivered, by whom received, receipt number, and remarks. Lists of warrants returned to the Controller's Office and recapitulation for each expedition are also included. The second volume, 1854-59, includes company payrolls and duty rosters in no particular order.

Photographs

The photographic collection of the State Archives constitutes a rich and varied source of information about the history of California state government and of the state as a whole. Portions of the collection have been used extensively, but most of it remains untapped. Descriptive information about photographs, which most often are an integral part of much larger groups of documentary records, is not easily accessed. Familiarity with the structure and functions of state government is often necessary to know where to start looking for photographs. Cataloging of collections by subject, which would allow researchers to locate the specific images they seek, is not extensive.

A guide is available to give users of the State Archives an overview of the photographic collection. The guide gathers together in one place information about photographs which already exists, for the most part, in other State Archives finding aids. Although the guide is not comprehensive, it does include the largest and most significant photographic series in the collection.

The collection consists primarily of twentieth-century, black and white prints and negatives. Its strengths are in the documentation of state highways and state buildings. Some 185,000 images are described, about one third of which pertain in some way to the "public works" theme. But there are many other interesting items, including images documenting the efforts of law enforcement officials to solve crimes and incarcerate

and rehabilitate the guilty, the post-World War II expansion of the state's educational system, the management of the state's natural and agricultural resources, state officials, politicians and political campaigns, and the celebration of the state's bounty at state and local fairs.

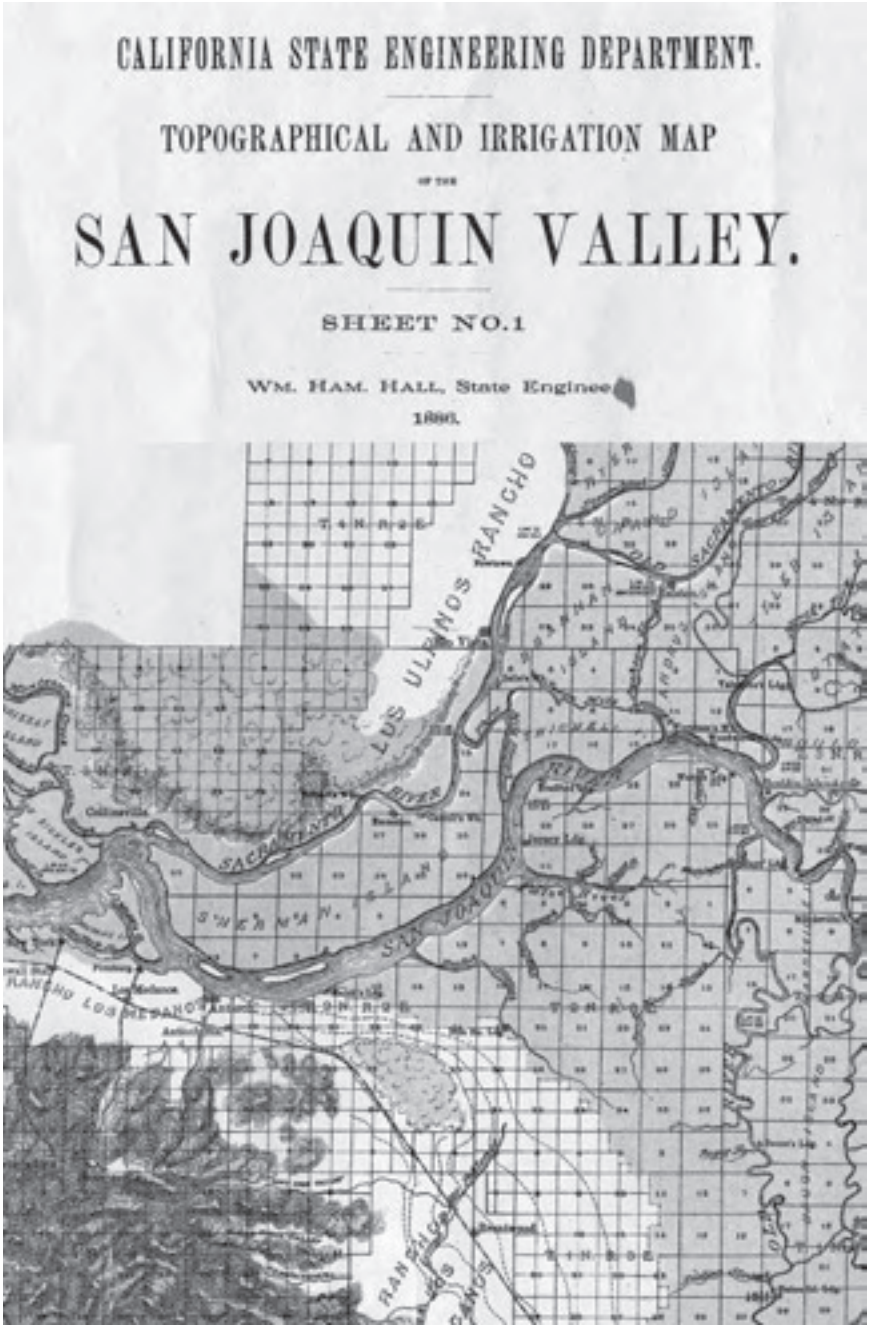
Land Grants and State Lands

The State Archives has two collections of Spanish and Mexican land grant records from the Office of the United States Surveyor General for California. The Spanish Archives collection includes copies of the title papers and sketch-maps found at Monterey that were transcribed and deposited in the Archives in 1871 at the request of the Legislature.

In 1937 or soon after, the State Archives also acquired drafts and copies of 665 maps from surveys by the U.S. Surveyor General between the late 1850s and mid-1880s, covering California's many missions, ranchos, and pueblo lands, together with a few miscellaneous maps, including surveys of Indian reservations and government lands. The maps show the boundaries on land grants as defined in mid- to late 1861, when they were created. The researcher should note that for some of these maps, the boundaries were altered during the final survey of the exact boundaries. Therefore, they should not be presumed to be the official boundaries for the land grant — only boundaries as of 1861.

The Mexican land grant system has had a profound influence on the history of California, shaping settlement patterns and land ownership. These maps are some of the earliest in California, and therefore are invaluable in understanding the complex system of land ownership in the Golden State today.

The State Land Office Records consists of 47 cubic feet of records created and collected by the State Land Office, and arranged into 28 series. The collection reflects the cooperative relationship between administrative bodies in the disposal of public lands and includes records generated by the State Land Office, the Board of Swamp Land Commissioners, the Board of Tide Land Commissioners, the University of California Regents, county boards of supervisors, federal district land offices, and the General Land Office under the U.S. Department of the Interior. In addition there is correspondence created between 1929 and 1932 by the



1886 State Engineer's Survey of the San Joaquin Valley

Department of Finance, Division of State Lands. This collection represents only a small portion of the records created by the State Land Office. Most of the records of the former State Land Office remain in the custody of the State Lands Commission.

The disposal of state public lands was a significant activity in California's early history. It enabled the reclamation of millions of acres of swamp and overflowed lands, allowing the state to become a national agricultural leader. In addition, the revenues received from the sale of school lands supported the early development of the state's public education system.

Most of the records in this collection were created during the nineteenth century, largely in the 1860s and 1870s, when land sales and legislation concerning land disposal were at a peak. In addition to their historical value, many of the records have legal value, filling gaps that exist in the State Lands Commission's historical records, and are used as evidence in cases related to chains of title.

Department of Agriculture

Agriculture is one of California's principal industries and has been since the Gold Rush. Department records extend from its creation in 1919 to 1973 and comprise over 250 cubic feet. The Department was formed by placing the operation of a number of agriculturally oriented boards, bureaus, and commissions under the jurisdiction of a Director of Agriculture. These agencies included the Commission of Horticulture, the State Board of Horticultural Examiners, the State Dairy Bureau, the State Veterinarian, the Stallion Registration Board, the State Board of Viticultural Commissioners, the Board of Citrus Fruit Shipments, and the Cattle Protection Board.

The duties of the Department were originally divided between two divisions: Plant Industry and Animal Industry. On July 1, 1920, the Division of Chemistry was organized. In 1921, the Legislature changed its name to the Division of Agricultural Chemistry and created the Division of Markets and the Division of Weights and Measures. A major reorganization in late 1939 consolidated departmental activities into

four divisions: Administration, Animal Industry, Plant Industry, and Economics.

Topics covered in the records include a cross-section of some of the most important issues of the early and mid-twentieth century, such as labor boycotts, the Bracero program, the displacement of the Japanese agricultural labor force during World War II, housing for farm laborers, illegal workers, regulation and use of pesticides like DDT, wetlands conversion, fruit fly infestations, loss of agricultural land and water policy.

In 1969, the Department was placed within the Agriculture and Services Agency, and in 1972 its name became the Department of Food and Agriculture. The majority of the surviving records of the Department date from the period after the 1939 reorganization.

Public Utilities Commission

The records of the Public Utilities Commission and its predecessor, the California Railroad Commission contain a large amount of information on the facilities and operations of railroad companies, gas and electric companies, water companies, and telephone and telegraph companies in California. The collection thus bears significantly upon the social and economic history of the state.

A substantial portion of the described material consists of selected formal complaints and formal applications acted on by the commission between 1908 and 1932. Complaint and application files relate to particular companies. They contain correspondence, memoranda, reports, legal documents, statistical data, hearing transcripts, exhibits, and engineers' valuations that often provide in-depth documentation of various aspects of company operations.

Constitutional Officers

California has an uncommonly high number of independently elected constitutional officers — secretary of state, lieutenant governor, controller, treasurer, insurance commissioner, attorney general and superintendent of public instruction. Although not completely free of gubernatorial control over state budgets and personnel, these agencies do have latitude that other agencies do not possess. Most of them have existed since the

nineteenth century and perform very specific functions. All have records to some extent in the State Archives. A particularly strong collection is that of the secretary of state.

From the outset of state government, the secretary of state, as required by the state Constitution, has kept "a fair record" of the official acts of the governor and certifies many of the governor's official acts and transactions. In the late 1850s and early 1860s the governor's office itself began to maintain a record of its official acts, but in certain instances both the governor and the secretary of state maintained parallel and sometimes duplicate records, with the surviving records of the secretary of state being more complete as the secretary was also charged with keeping the state's archives. Historic functions of the secretary include registering corporations and trademarks, but the office is best known for administering state elections.

On August 1, 1849 the first election was held in California, with the purpose of electing delegates to the convention that quickly moved to draft a state Constitution. A second election followed on November 13, ratifying the convention's labors and electing California's first governor, lieutenant governor, members of the Legislature, and two members of Congress. Returns from the first two elections, together with the documents and papers of every succeeding election to the present, are filed with the secretary of state and compose the Elections Record Group in the State Archives. This group now consists of over 1,000 cubic feet of primary source materials relating to elections in California.

Election papers have many research values. Election returns reflect local voting patterns, which may or may not be representative of national trends and moods. Statistical or selective sampling of precinct returns can be used to determine voting tendencies of ethnic groups, economic classes, and even the party faithful. Divisions of the electorate along urban and rural lines as well as by geographical sections are also discernible. Election returns further serve as an index to population growth and shifts, and for some periods the precinct lists provide a unique register of contemporary place-names.

For many years the major television networks have employed selective sampling of key precincts to develop profile analyses in order to

predict the outcome of specific races. For the individual researcher, a key to this type of voting analysis is the availability of precinct maps. Legislation passed in 1971 established in the State Archives a precinct map library, with official filings commencing as of the 1972 general election. Precinct maps for the entire state are thus available in one depository.

An area of increasing research and political interest is the candidates' and committees' campaign statements of receipts and expenditures. Campaign statements reflect many of the costs of political campaigns and show, to a degree, the sources of receipts. The complex operations of a large campaign are often reflected in the number and variety of committees set up to handle campaign finances. The long-term trend of federal and state laws in this area is in the direction of ever more detailed reporting, providing even greater data for researchers to explore.

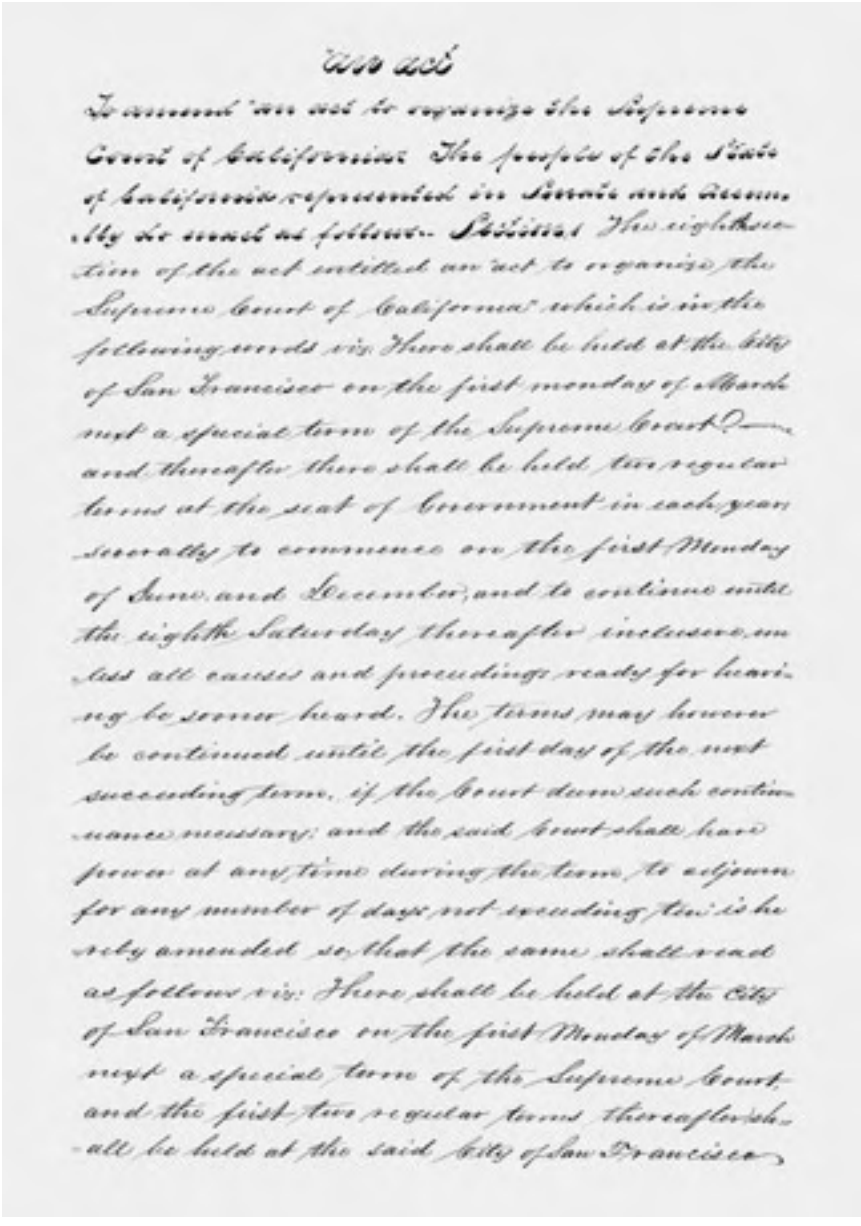
Ballot measures are valuable sources for study of prominent and often volatile public issues at a particular time. Important to an understanding of such issues are the ballot arguments prepared in support of or in opposition to the measures and filed as part of the official record.

STATE COURTS

Supreme Court

The 1849 California Constitution provided for a Supreme Court consisting of a chief justice and two associate justices, any two of whom would constitute a quorum (Constitution of 1849, art. VI, sec. 2). On February 14, 1850, the first Legislature passed an act to organize the Supreme Court. The act incorporated the relevant provisions of the Constitution, specified the terms of the justices, and outlined the Court's powers. The Supreme Court was given appellate jurisdiction in all cases where the matter in dispute exceeded $200; in all cases wherein the legality of any tax, toll, or impost, or municipal fine was in question; and in all criminal cases amounting to felony, on questions of law alone. Original jurisdiction was limited to the power to issue writs of habeas corpus.

In 1862, by constitutional amendment, the membership of the Court was increased to a chief justice and four associate justices. The same law



An act
To amend an act to organize the Supreme
Court of California. The people of the State
of California represented in Senate and Assem-
bly do enact as follows. Section 1. The eighteen-
th section of the act entitled an act to organize the
Supreme Court of California which is in the
following words viz. There shall be held at the City
of San Francisco on the first monday of March
next a special term of the Supreme Court—
and thereafter there shall be held two regular
terms at the seat of Government in each year
severally to commence on the first Monday
of June and December, and to continue until
the eighth Saturday thereafter inclusive, un-
less all causes and proceedings ready for hearin-
g be sooner heard. The terms may however
be continued until the first day of the next
succeeding term, if the Court deem such contin-
uance necessary; and the said Court shall have
power at any time during the term to adjourn
for any number of days not exceeding ten is he-
reby amended so that the same shall read
as follows viz: There shall be held at the City
of San Francisco on the first Mondays of March
next a special term of the Supreme Court,
and the first two regular terms thereafter sh-
all be held at the said City of San Francisco,

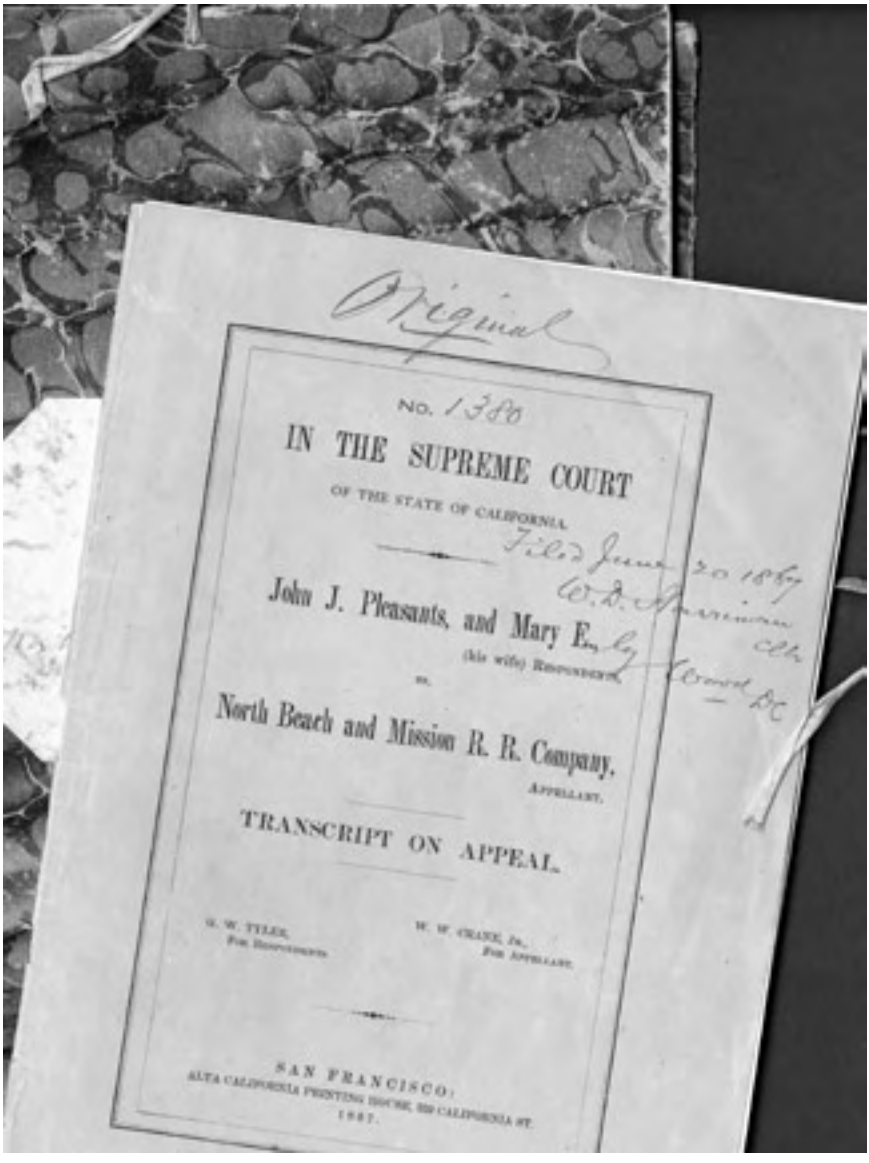
California Supreme Court —
To change the dates for Supreme Court sessions specified in the first organizing act (Feb. 14, 1850), the Legislature adopted a revised act on April 13, 1850, titled: "an act To amend 'an act to organize the Supreme Court of California.'"

provided that the justices be elected at a special judicial election. The 1879 Constitution increased the number of justices to seven, at which number it has remained. In addition, the court was empowered to sit either in department or en banc. The two departments, designated Department 1 and Department 2, were each composed of three associate justices. The use of departments allowed the Court to handle the increasing work load.

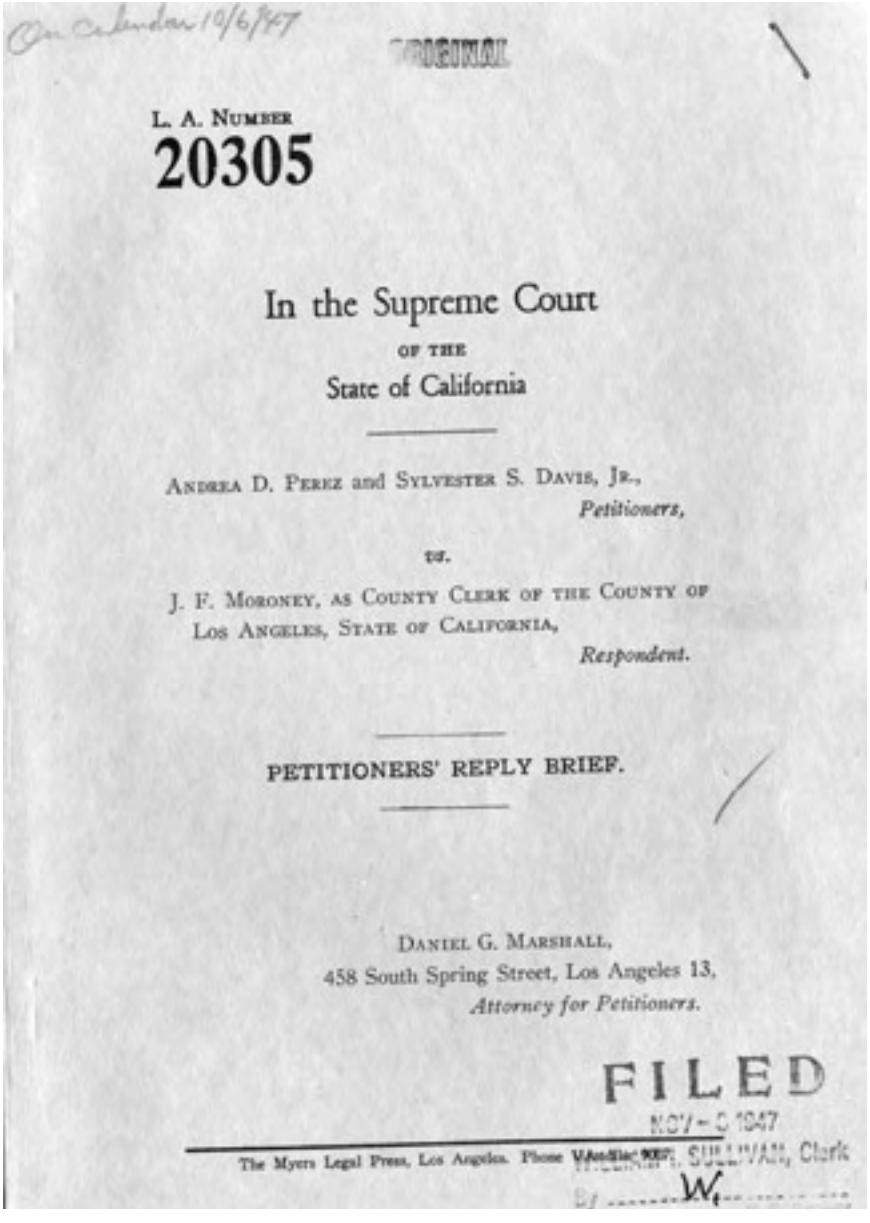
Since 1905 the basic structure of the Supreme Court has remained unchanged. As the highest court of record, the court has original jurisdiction in habeas corpus proceedings and proceedings for extraordinary relief in the nature of mandamus, prohibition, and certiorari. The court has appellate jurisdiction only in cases involving the death penalty. All other appeals from the superior court are taken to the court of appeal. The Court can transfer to itself, on petition or on its own motion, a cause in a court of appeal. It can transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The Court also admits applicants to the bar who have been qualified by the Committee of Bar Examiners of the State Bar, and it passes upon disciplinary recommendations of the Board of Governors of the State Bar.

The case files of the Supreme Court present a rich treasure trove of research opportunities. The Supreme Court records begin in 1850 and include civil and criminal case files, minutes, registers of actions, opinions, calendars, clerks' correspondence, and other administrative records of the court. The collection includes case files for such historic, landmark cases as *People v. Gold Run Ditch and Mining Co.,* 66 Cal. 138 (1884), and *Lux v. Haggin,* 69 Cal. 255 (1886), important decisions that helped to shape the state's water and environmental laws. Also included in the collection are cases concerning contract law and tort law such as *Colton v. Stanford,* 82 Cal. 351 (1890) and *Seely v. White Motor Co.,* 63 Cal.2d 9 (1965).

Other prominent cases in the collection concern civil rights. The case of *Pleasant v. North Beach and Mission Railroad Company* is a landmark case that outlawed racial discrimination on San Francisco's public trolleys (*Appeal of North Beach & M.R.R. Co.*, 32 Cal. 499 (1868)). One prominent case receiving current attention is *Perez v. Sharp,* 32 Cal.2d 711 (1948) that overturned the state law prohibiting interracial marriage.



Pleasant v. North Beach and Mission Railroad Company — the landmark case brought by Mary Ellen Pleasant, "the mother of civil rights in California," that outlawed racial discrimination on San Francisco's public trolleys: transcript for *Appeal of North Beach & M.R.R. Co.*, 32 Cal. 499 (1868), filed June 20, 1867.



On calendar 10/6/47

ORIGINAL

L. A. NUMBER
20305

In the Supreme Court
OF THE
State of California

ANDREA D. PEREZ and SYLVESTER S. DAVIS, JR.,
Petitioners,

vs.

J. F. MORONEY, AS COUNTY CLERK OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,
Respondent.

PETITIONERS' REPLY BRIEF.

DANIEL G. MARSHALL,
458 South Spring Street, Los Angeles 13,
Attorney for Petitioners.

FILED
NOV - 8 1947
[illegible] SULLIVAN, Clerk
By [illegible]

The Myers Legal Press, Los Angeles. Phone [illegible]

Perez v. Sharp —
THE 1948 CALIFORNIA SUPREME COURT
DECISION THAT OVERTURNED THE STATE LAW
BANNING INTERRACIAL MARRIAGE:
PETITIONER'S REPLY BRIEF,
FILED NOV. 8, 1947.

Parallels have been drawn between the *Perez* case and the prohibition of same-sex marriage.

Appellate Courts

The courts of appeal were established by constitutional amendment in 1904. They are California's intermediate courts of review and have jurisdiction when superior courts have jurisdiction and in certain other cases prescribed by statute. They exercise mandatory review of any appealable order or judgment from a superior court, except in cases in which the death penalty is imposed, over which the Supreme Court exercises mandatory appellate jurisdiction. There is no constitutional right to an appeal, and the Legislature has the power to determine and change which matters are appealable, as decided in *Powers v. City of Richmond* 10 Cal.4th 85, 108 (1995).

California has six appellate districts, each organized into at least one division. Each division is headed by a presiding justice and has two or more associate justices. Justices are appointed by the governor after review by the Commission on Judicial Nominations. The Constitution requires that the governor's appointments must be approved by the Commission on Judicial Appointments, which consists of the chief justice, the attorney general, and the presiding justice of the court of appeal of the affected district. The Constitution prescribes a term in office of twelve years for justices of the courts of appeal, subject to retention by the public at the next general election following appointment and confirmation, and at the conclusion of each term.

Appeals from superior court judgments in both criminal and civil cases must be decided on the merits of the case based upon the record on appeal. The courts of appeal do not hear testimony, retry the case or reconsider the factual findings of the judge or jury. They review the final judgment or appealable order for prejudicial errors of law. Courts of appeal have original jurisdiction in habeas corpus, mandamus, certiorari and prohibition proceedings. In most writ proceedings, the court has discretion whether to decide the merits of the claims set forth in the petition.

Decisions of the courts of appeal are subject to discretionary review by the California Supreme Court, but the scope of review by the Supreme Court differs from that by the courts of appeal. The Court of Appeal's primary function is to review the trial court's judgment for legal error. The California Supreme Court's review is to decide important legal questions and maintain statewide uniformity of decisions. In addition to review by the Supreme Court, the decisions of the courts of appeal are subject to certain types of review in the federal courts based upon federal constitutional and statutory grounds.

The California State Archives collection contains records from all six appellate courts: San Francisco, Los Angeles and Sacramento (created by election on November 8, 1904), Riverside/San Bernardino (Statutes 1929, c. 691), Fresno (Statutes 1961, c. 845) and most recently, San Jose (Statutes 1981, c. 959). The records consist primarily of appellate case files and registers of action. Due to the volume of appellate cases, only a sampling of case files have been retained by the Archives, using a process developed through research at the National Archives.

OTHER COLLECTIONS OF NOTE

Los Angeles Police Department Records of The Robert F. Kennedy Assassination Investigation

Robert F. Kennedy, then a candidate for the Democratic Party's nomination for President of the United States, was killed by an assassin in June, 1968. Sirhan Sirhan was prosecuted and convicted in Los Angeles Superior Court. Despite the fact that Sirhan was captured at the scene, gun in hand, and the investigation concluded Sirhan had acted alone, there was continuing speculation that there had been a conspiracy. The City of Los Angeles, ultimately weary of handling demands to open the records, transferred the police investigation files to the State Archives for processing and public research.

When the California State Archives received the Kennedy assassination investigation records in August 1987, it was apparent that the records would require special treatment, in part due to the magnitude of the investigation and the size and types of records generated by it. Among the

50,000 pages created by Special Unit Senator (SUS) are a card index of over 8,200 entries, over 4,800 interviews, nearly 2,900 photographs, and 155 items of physical evidence.

The records are divided into four distinct groups. The largest group by far consists of the records of Special Unit Senator, 1968-1969, which conducted the investigation. The bulk of the SUS records relate to the interview process — including interviews, transcripts, or tape-recorded interviews. Other large series exist on conspiracies — in the Conspiracy Investigation Files, and in the Final Reports.

The second group is relatively small in comparison, but significant. These are the Re-investigative Files, 1974-1978, which focus on many of the "second-gun" theories that surfaced after Sirhan's trial. The third body of materials comprise the exhibits presented at and prepared for Sirhan's trial. The fourth group of records is the Wolfer Board records that constitute an internal investigation by the Los Angeles Police Department into allegations against DeWayne Wolfer related to the ballistic studies he conducted in the case.

Research potential for this collection is enormous, as it speaks to issues of executive protection, media-police relations, management of highly sensitive crime collections, police investigative procedures, legal handling of notorious cases with high media interest, the viability and persistence of conspiracy theories, and many other topics.

Oral History Collection

Over 400 oral histories in the State Archives supplement the written historical record, offering insights into actual workings of the legislative and executive processes. Interviewees include such important public figures as Ronald Reagan, Edmund G. Brown, Sr., long-time legislator Ralph Dills, Proposition 13 champion Paul Gann, California author Carey McWilliams, former Superintendent of Public Instruction Wilson Riles, and many others. As a large number of the oral histories were done with individuals who experienced the same historical events, it is possible to consider the sharply different perspectives of these individuals, and what motivated them. This can lead to a more incisive understanding of the state's recent political and legal history.

CONCLUSION

What is written above constitutes only the "tip of the iceberg" of the broad and diverse array of the Archives' holdings. There are few limits on the scope of potential legal history research that can be conducted at the State Archives, and the Archives' reference staff is happy to discuss possible topics and available resources. Books, articles, dissertations, theses and other studies remain to be done on a wide number of subjects that are important to an understanding of the state, and that may be consequential for its future direction.

A small sampling of books wherein the writers made use of the Archives' collections is illustrative: John Boessenecker, *Badge and Buckshot: Lawlessness in Old California* (1988); Edmund (Pat) Brown and Dick Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* (1989); Neal Harlow, *California Conquered: The Annexation of a Mexican Province, 1846-1850* (1982); Albert H. Hurtado, *Indian Survival on the California Frontier* (1988); Philip H. Melanson, *The Robert F. Kennedy Assassination: New Revelations on the Conspiracy and Cover-up* (1991); Dan E. Moldea, *The Killing of Robert F. Kennedy* (1995); Gerald D. Nash, *State Government and Economic Development: A History of Administrative Policies in California, 1849-1933* (1964); William B. Secrest, *Lawmen and Desperadoes* (1994); and James C. Williams, *Energy and the Making of Modern California* (1997). ✯

CALIFORNIA'S "LIBERAL MOMENT":

The 1849 Constitution and the Rule of Law

JOSÉ-DANIEL M. PARAMÉS*

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* Member of the California Bar; J.D., Boston College Law School, 2008 (articles editor, *Boston College Law Review*); B.S., Santa Clara University, 2005. I would like to thank Daniel Coquillette (Boston College) for introducing me to legal history and George Fisher (Stanford) for his invaluable comments and advice as this article was being written. In addition, I would like to thank my colleagues Christoffer Lee and Matthew Weyand for their thoughtful comments and suggestions.

INTRODUCTION

November 13, 1849, was a wet and dreary day in California.[1] But on that day, California voters braved muddy roads and pouring rain to ratify a constitution that had been debated for a month and a half in a convention held at Monterey.[2] In that moment when the proposed constitution was ratified, something momentous though not apparent happened: a liberal society was born. It was California's "liberal moment." Once Spanish, then Mexican, now American, California witnessed more than a changing of the guard with the ratification of the 1849 Constitution. It witnessed the emergence of a society based on the *rule of law*.

The convention that drafted the 1849 California Constitution and the election that ratified it were monumental events given the territory's history and the circumstances that crystallized during that history. Indeed, the 1849 Constitution appears as a climax of events and developments that began before California was known to the Western mind. In particular, when one considers the legal institutions and jurisprudence that developed in the Iberian Peninsula, and which were later imported to the New World and eventually California, then modified by Mexican rule, and eventually adapted by American conquerors, one realizes that

[1] The *Alta California* informed its readers, "The day of the election was very disagreeable. Several showers of rain fell, and the mud, which was unfathomable before, suddenly disclosed a 'lower deep.'" ALTA CALIFORNIA (San Francisco), November 15, 1849.

[2] The Constitution was formally adopted by the voters on November 13, 1849 by a margin of 12,061 to 811. KENNETH STARR, CALIFORNIA: A HISTORY 94 (2007); Myra K. Saunders, *California Legal History: The California Constitution of 1849*, 90 L. LIBR. J. 447, 466 (1998).

the 1849 Constitution is a singularly important moment in the legal *progression* of California; it represents a fundamental change in the legal foundation of a society.

This realization becomes all the more meaningful when one explores why the 1849 California Constitution happened at all. In some ways, the 1849 Constitution was a product of its circumstances. Americans flooded the state after the American conquest and the discovery of gold, turning the tide of demographics toward the numerically dominant foreigners. However, despite the sudden rush of humanity, the native Californians (known as *Californios*) and their massive landholdings stood as a bulwark, frustrating the intentions of the Americans to settle and develop their new acquisition. While the Americans chafed under the oppression of Mexican laws and legal institutions maintained by their military governors and the *Californios* stood in anxiety about what was to become of them and their posterity, the United States Congress became mired in the question of slavery as it took up the task of providing a government for California.

Eventually, the Californians, as the natives and foreigners alike now called themselves, shook themselves free of the respectful bounds of patience and adopted the mantle of self-determination to realize the formidable promise inherent in the people and the land. Eventually, the military government of California, after several attempts to impose a satisfactory solution, realized they could not deprive the people of their desire to organize a civil government. The military government, hoping to bridle the energy and momentum of existing movements for local government and prevent future and conflicting assemblages, sanctioned the election of delegates to a convention charged with the duty to draft a constitution. After several warm debates and careful attention, a constitution was endorsed on October 11, 1849 and ratified on November 13, 1849.

The 1849 California Constitution itself was a peculiar instrument for the time. California's first Constitution preserved the Hispanic legal institution of community property, a concept foreign to most of the delegates. And, though it became a major issue in the United States Congress upon California's petition for statehood, the delegates readily prohibited

slavery in the new state without much debate or quarrel. On its surface, this result is especially surprising since much of the delegation was from the American South. However, less liberal motives played out to produce this progressive result. And, perhaps most importantly, the delegates, who all knew the oppression of governments that had complete power over them, granted to the new legislature the broadest powers, resting assured its republican form would serve to check abuse.

The 1849 California Constitution is significant not simply because it happened. It is significant too because of what it replaced. I hope to show that the legal system which came before the 1849 California Constitution was a natural precedent. More importantly, I hope to show that the 1849 Constitution was part of a process; it marked the beginning of a new era whose significance can only be fully understood when examined in the light of previous eras. Seen in this way, the 1849 Constitution is a major fulcrum in a larger, comprehensive process which ties modern California's legal systems to its earliest origins.

California's "liberal moment," as I call the ratification of the 1849 California Constitution, was one step in the progress of legal history. It included the ratification of the 1849 Constitution and the start of not just a new government, but a government different from any before. The 1849 Constitution ushered in a society based on the rule of law where there had been a bureaucratic state maintained under Spanish, Mexican, and American military regimes. In explaining this theory, I borrow from the work of Roberto Unger.[3] Unger theorizes that the rule of law is the product of a social process that forms a cycle, a microcosm of a larger procession of historical-legal events. As society develops, the character of its law also changes.[4] Unger posits that society, and the law it promulgates, progresses in four stages: customary, bureaucratic, liberal, and postliberal. California's early social and legal history indeed progressed from

[3] For Unger's theories, this article draws exclusively from Roberto Unger, Law in Modern Society (1976).

[4] *Id.* at 47. Unger writes that "one should also expect to find that the character of law changes from one form of social life to another. Each society reveals through its law the innermost secrets of the manner in which it holds men together. Moreover, the conflicts among kinds of law reflect different ways of ordering human groups." *Id.*

the customary stage to the bureaucratic and then took a dramatic turn to the liberal stage.

The customary stage of California legal history need not delay us long. For that stage took place not in California, but in the Iberian Peninsula, the place where Hispanic jurisprudence was born.[5] The customary stage can be found in the first civilizations of the Iberian Peninsula: the Celts and Iberians,[6] who were governed largely by customs and societal expectations of conduct.[7] Their law was not written, nor did it distinguish between private and public spheres.[8] It was altogether different from the bureaucratic legal system to which it gave rise and from which California took its dramatic turn to the liberal stage in the nineteenth century.

I. THE BUREAUCRATIC STAGE IN SPANISH & CALIFORNIA LEGAL HISTORY

A. Origins of Bureaucratic Law in Spain

The bureaucratic stage of California legal history began in Spain with the Roman conquest in 250 B.C. To govern their newly conquered Iberian

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[5] As discussed *infra*, indigenous Native Americans had lived and thrived in California for millennia before the arrival of Europeans. However, to begin the analysis with the native population would be inaccurate as the polity from which modern-day California has its genesis, the endpoint of this paper's analysis, was composed of Europeans, Americans, Mexicans, mission Indians, and an odd assemblage of various foreigners. It is from this polity in which modern California had its birth, and, consequently, it is this polity's legal history that will be analyzed here.

[6] The Iberians appear to have emigrated from North Africa sometime prior to the sixth century B.C. The Celts came from north of the Pyrenees, crossing that frontier in the seventh and sixth centuries B.C. The ethnicity of the Peninsula was further supplemented by the Phoenicians, Carthaginians, Romans, Visigoths, and, eventually, Moors. KENNETH L. KARST & KEITH S. ROSEN, LAW AND DEVELOPMENT IN LATIN AMERICA 20 (1975).

[7] *Id.*

[8] *See* Unger, *supra* note 3, at 49 (defining custom as "any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied").

subjects, the Romans imported their civil law, which sharply distinguished state and society. Though the civil law both created and occupied the field of public law, the Romans permitted the native customary law of the Celts and Iberians to persist in prescribing the rules of private law.[9] Unger's transition from the customary stage to the bureaucratic stage requires such a distinction between state and society. In the bureaucratic stage, customary law is often still present, governing much of everyday life and the areas where the public law does not reach.[10]

The Romans also imported positive law, a development necessary for the transition to the bureaucratic stage. The civil law was composed of various edicts and orders by the local prefects, governors, the Roman senate, and the emperor. They fit the mold of "explicit prescriptions, prohibitions, or permissions, addressed to more or less general categories of persons and acts" that Unger describes as composing positive law.[11]

The Visigoths who replaced the Romans as rulers in the fifth and sixth centuries A.D. maintained the law as both a public and positive institution. The great legal work during this period, the *Fuero Juzgo*,[12] was both a statement of the public law and a work of positive law. It incorporated Roman civil law, ancient Gothic custom, and the edicts of Visigoth

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[9] One legal historian has concluded, "The impression remains that, during Spain's Roman period, Roman private law was the 'official law,' but that *de jure*, by the measure of its recognition of native law, and *de facto*, by the tenacity with which the population clung to its traditional usages, the importance of old customary law remained." Ángel R. Oquendo, Latin American Law 90 (2005) (quoting Eelco Nicolaas van Kleffens, Hispanic Law Until the End of the Middle Ages 39-40 (1968)).

[10] Unger, *supra* note 3, at 52.

[11] *Id*. at 51.

[12] Seeking to unify his nation, the Visigoth king Chindasvinth (641-652) enacted a unified legal code that combined both Roman and Gothic law in an effort to reconcile the interests of both peoples. The work, published during the reign of Chindasvinth's son Reckesvinth (652-672), was initially titled the *Liber Judicorum*. In its final revision, promulgated in 694, it was published as the *Fuero Juzgo,* the first great monument of original Spanish jurisprudence. Rejecting the direct validity of Roman law, it, at the same time, drew heavily from it. Furthermore, it drew upon ancient Gothic custom, acts of ecclesiastical councils, and edicts of the Visigoth kings. It thus represented the contributions of the entire Hispanic legal tradition up to that point. Oquendo, *supra* note 9, at 91.

kings. Like the Romans, the Visigoths maintained a legal distinction between themselves and their conquered subjects, permitting the Hispano-Romans to abide by their previous customs and laws.[13]

The Muslim conquest in 711 A.D. divided the Iberian Peninsula into Christian and Muslim regions. The resurgence of the Christian kingdoms in northern Spain and the burgeoning *Reconquista* resulted in the disintegration of any remnants of a monolithic society and heralded the creation of a hierarchical one. This new hierarchical society had its origins in the *fueros* which developed and became institutionalized during this period, as follows:

Medieval Spanish society was composed of several distinct corporate estates: the nobility, military, clergy, merchants, and guilds. In time, these distinct groups became exempt from the jurisdiction of the king's courts and were governed by their own judicial institutions and legal codes, known corporately as *fueros*. These specialized and limited *fueros* "were the juridical expression of a society in which the state was regarded not as a community of citizens enjoying equal rights and responsibilities, but as a structure built of classes and corporations, each with a unique and peculiar function to perform."[14]

With the development of the *fueros*, society was split into its constituent elements, with the king being the nominal head of a heavily bureaucratized state.[15] However, there was no effective hierarchy. The nobility was

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[13] *Id.*

[14] *Id.* at 93 (quoting Karst & Rosen, *supra* note 6, at 20-30) (citing Lyle McAllister, The *Fuero Militar* in New Spain 5 (1957)).

[15] *Id.* at 93. The development of *fueros* was further accompanied by the regularized practice of granting special legal privileges, also known as *fueros*, in the charters of newly liberated municipalities. These particular *fueros*, made between kings and the people of the municipality, were contractual in nature, setting forth the rules for self-governance, codifying local customs, and articulating restrictions on the king's power (such as limits in the realm of taxation). *Id.* at 94. A particularly interesting reflection of this institution is that, as part of their coronation, the kings of the various Spanish kingdoms were usually obliged to take an oath to respect the *fueros*. This oath was no formality: "In Spanish law, the oath created the power, and violation of the *fuero* effectively freed the subjects of their duty to obey. When a sovereign violated the *fuero* revolt almost always ensued, and sometimes the prince who had thus broken his covenant with this people was dethroned." Oquendo, *supra* note 9, at 94 (quoting Karst & Rosen, *supra* note 9, at 20-30) (citing Elena De La Souchere,

sovereign in many areas, with its broad privileges and rights confirmed in the *Fuero Vieja de Castilla* (eleventh century) and the *Fuero de Nájera* (twelfth century). The cities and clerical orders governed themselves under their own *fueros*. And, following the tradition of the ruling race, Jews, Mudejars, and Mozarabs were governed under different legal regimes.

When Alfonso X, known as *El Sabio* (the Wise), ascended the throne of Castile and León in 1252, an effort was made to rein in the diversity of Spanish law in the interest of national unity and consolidation of royal power. Alfonso X's greatest contribution in this regard was the composition of the *Fuero Real*, a "royal" compilation borrowing from the *Fuero Juzgo*, the *fueros* of the various municipalities, and elements from Roman law. The main purpose of the *Fuero Real* was to consolidate royal power and unify the country under one head.[16]

However, royal power was solidified only with the enactment of the *Siete Partidas* (seven-part code), also developed during the reign of Alfonso X. The *Siete Partidas* was heavily influenced by the newly rediscovered *Corpus Juris Civilis* of Justinian and represents a positive transition from custom to *ratio scripta* (written reason). [17] Several factors moved Alfonso to "update" Spanish law with the ancient *Corpus Juris*. The technically superior Roman law simplified his effort to unify the oppressive legal diversity prevailing across Spain. The Roman law also facilitated

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An Explanation of Spain 41-42 (First Vintage Ed., 1965)). Additionally, the *Reconquista* institutionalized the granting of the *encomienda*, "a temporary grant of territory, cities, towns, castles, and monasteries, with powers of government and the right to receive the revenues, or a stipulated part thereof, and the services owed to the Crown by the people of the area concerned under fuero and custom." *Id.* at 94 (quoting Karst & Rosen, *supra* note 6, at 20-30) (citing Robert S. Chamberlain; *Castilian Backgrounds of the Repartimiento — Encomienda, in* Carnegie Institution, 5 Contributions to American Anthropology and History 21, 35 (No. 25, 1939)). In its most basic expression, the *encomienda* was a charge of government, with the *encomendero* exercising the authority of the crown in the area involved. *Id.* at 94.

16 *Id.*

17 The *Siete Partidas* has been described as "one of the most remarkable monuments of legislation of the Middle Ages, and which the Spaniards regard with the highest veneration, and as a model of both style and precept." Myra K. Saunders, *California Legal History: A Review of Spanish and Mexican Legal Institutions*, 87 Law. Libr. J. 487, 493 (1995) (quoting Gustavus Schmidt, The Civil Law of Spain and Mexico 28-29 (1851)).

the analogy of the Spanish king to the emperor of Rome, a move calculated to expand royal power. But, because it centralized power in the king, the *Siete Partidas* was resisted by the estates who viewed it as an abrogation of their *fueros*. As a result of this tension, Alfonso's attempts to promulgate the *Siete Partidas* never met with success.

Rather, it lay with Alfonso's great-grandson, Alfonso XI, to enact the *Siete Partidas*, albeit it under a different guise and in an inferior form. In 1348, the *Ordenamiento de Alcalá* was enacted. Rather than representing a replacement of the then-discordant Spanish law with a new unified legal code based on Roman law, the *Ordenamiento* established a rank-ordering of sets of juridical norms with the king as the ultimate arbiter of conflicting laws and the source of all new ones.[18] The various *fueros* governing the nobility, clergy, and communities were to remain in force, with any conflicts to be decided by interpretation of the Siete Partidas.[19] Most importantly for the expansion of the king's power, it prescribed that the king could decide issues of law.[20]

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18 Oquendo, *supra* note 9, at 97.

19 The *Ordenamiento* prescribed that "proceedings and disputes which cannot be determined by the laws of [the *Fuero Real*], or by the said *fueros*, *be decided by the laws of the Siete Partidas* which King Alfonso our great-grandfather ordered to be put in proper order." Oquendo, *supra* note 9, at 97 (quoting Karst & Rosen, *supra* note 6, at 20-30) (quoting from the *Ordenamiento de Alcalá*, Title 28, Law 1 (1348), emphasis added). Importantly, because the *fueros* did not cover every contingency or address every possible case, the *Siete Partidas* was often the basis for judicial decisions. This reliance on the *Siete Partidas* was reinforced by the fact that Spanish lawyers were trained in civil law, a necessary result considering that the universities were religious institutions and the canon law taught there was based on the Roman civil law. *Id.* Later, in 1505, certain gaps left by the *Ordenamiento* were filled in by the enactment of the *Leyes de Toro*. Thus, in the lacunae of the law the Spanish king found his power.

20 The *Ordenamiento* provides, in relevant part:

> [W]e decree that if in the said *fueros*, or in the book of the *Partidas*, or in this [the *Fuero Real*], or in one or more laws contained therein there is need of explanation or interpretation, or of amendment or deletion or alteration, it should be done by us [the king]; and if any contradiction should become apparent in the aforesaid laws *inter se*, or in the *fueros* or in any one of them, or if any doubtful point should be found in them, or any fact because of which no decision based on them can be taken, that we be notified thereof, in order that we may give an interpretation and decision or an amendment

Viewed in light of Unger's theory, the *Ordenamiento de Alcalá* is a paradigm of an instrumental measure designed to enforce the positive rules that preserve a hierarchy. The *Ordenamiento* brought the different *fueros* (i.e., the clergy, nobility, and guilds) under the authority of the king, yet preserved an area of sovereignty for the *fueros* that the king could not reach.[21] But, the *Ordenamiento*, and the later *Leyes de Toro*, are probably best seen as enforcing the public nature of the law. They instituted the king, or state, above the conflicting groups in the Spanish kingdom. By creating a central authority, they necessarily limited the powers of the different *fueros* vying for power. Thus, the *Ordenamiento* and *Leyes de Toro* preserved the system and enforced the law as a cohesive agent necessary for the bureaucratic system to thrive.

Lastly, the primacy of religion in the *Reconquista* and Spanish legal development represents Unger's observation that a bureaucratic state

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as we may deem appropriate, or give a new law as we may deem appropriate for the case concerned, so that justice and law be safeguarded.

Id. (quoting Karst & Rosen, *supra* note 6, at 20-30) (quoting from the *Ordenamiento de Alcalá*, Title 28, Law 1 (1348).

[21] While the hierarchy of the Spanish legal system was firmly established by the *Ordenamiento*, the clarity of the law was ever in doubt. To find the applicable law, one had to follow the hierarchy, beginning with "sift[ing] through a mass of unindexed royal letters and ordinances, the *Leyes de Toro*, the *Ordenamiento de Alcalá*, the municipal *fueros*, the *Fuero Real* (to the extent that one could prove it was in use), the *Fuero Juzgo*, and, the *Siete Partidas*." *Id.* at 106 (quoting Karst & Rosen, *supra* note 6, at 33-42 (1975)). In a futile attempt to remedy the confusion, the *Nueva Recopilación de las Leyes de España* ("New Recompilation of the Laws of Spain") was promulgated in 1567 with the goal of unifying "all existing compilations and subsequent legislation and decrees." Saunders, *supra* note 17, at 493 (quoting John Thomas Vance, The Background of Hispanic-American Law 131 (1943)). This new compilation failed in its goal because it was "badly organized, and made no effort to do more than gather together the most important laws, leaving earlier compilations in force." Oquendo, *supra* note 9, at 105 (quoting Karst & Rosen, *supra* note 6, at 33-42). Yet, sadly for Spanish lawyers, it remained in force and was updated regularly. The *Nueva Recopilación* went through 10 editions over the next 110 years. Oquendo, *supra* note 9, at 106. These amendments were known as *Autos Acordados*. Saunders, *supra* note 17, at 493 (1995). Finally, the *Nueva Recopilación* was recompiled in 1805 and published as the *Novísima Recopilación* ("Newest Recompilation"). Conforming to the apparent tradition, this newest recompilation was again poorly compiled, leaving many gaps and doubts as to which laws should apply. Saunders, *supra* note 17, at 493.

characteristically adheres to religious precepts. The Spanish king claimed a divine right to authority as God's representative on earth.[22] In time, the theory of divine right evolved to prescribe the king's duty as dispensing justice on earth.[23] Eventually, the Spanish state became "a federal unity of the diverse yet interconnected interests of men, directed and held together by the sovereign who was to be the arbiter to resolve their conflicts and the dispenser of justice which should define the order in which they were to function."[24] Thus, as Unger predicted, the laws came "to embody some inherently right or necessary order . . . treated by both the rulers and the ruled as standards that government cannot or should not disturb."[25]

B. The Extension of the Bureaucratic Stage into Colonial Latin America

The advent and development of the Spanish legal system in the New World represents the continuation of the bureaucratic stage, but in a strengthened form. The Spanish colonies belonged to and were under the direct authority of the crown through the Council of the Indies;[26]

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22 The "divine right" theory had been developing since the Middle Ages and matured into a notion that the king was God's representative on earth, with disobedience being sinful and not just unlawful. Oquendo, *supra* note 9, at 83.

23 With the advent of an absolute monarchy under Ferdinand and Isabella, the king became "the head, chief, father, representative of God on earth, supreme dispenser of all favors, and rightful regulator of all activities, even to all the personal and individual expressions of his subjects and vassals." Oquendo, *supra* note 9, at 83 (quoting Karst & Rosen, *supra* note 6, at 20-30).

24 *Id.* at 106 (quoting Karst & Rosen, *supra* note 6, at 30-33).

25 Unger, *supra* note 3, at 65.

26 Though Ferdinand and Isabella were restricted in their prerogatives by the *fueros* of the various estates, they did not face such restrictions in the New World. Rather, the New World was legally defined as the hereditary domains of the sovereigns of Castile. Edward G. Bourne, Spain in America: 1450–1580 221 (Barnes & Noble: 1962) (1904). In other words, the New World was the exclusive property of the crown, immune from control by the other estates:

> [F]rom the outset the Indies were treated as the direct and exclusive possession of the crown . . . .
>
> . . . The king possessed not only the sovereign rights but the property rights; he was the absolute proprietor, the sole political head, of his American dominions. Every privilege and position, economic, political, or

they were not subject to the authority of the *cortes* (legislature) which circumscribed the king's power in the Iberian Peninsula.[27] A strict hierarchical structure was imposed in the New World, consisting of the Council of the Indies at the top[28] and the viceroyalties and

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religious, came from him. It was on this basis that the conquest, occupation, and government of the New World were achieved.

CLARENCE H. HARING, THE SPANISH EMPIRE IN AMERICA 5 (Harbinger Ed. 1963).

[27] As personal possessions of the crown, the New World colonies were not presumptively governed by any Peninsular laws. Indeed, the municipal *fueros* and the *cortes* of Castile, the legislative bodies of the Iberian provinces, had nothing to do with the New World. Their jurisdiction was limited to the conglomeration of medieval kingdoms that formed the domain of the Catholic Monarchs as of 1492, the year the Moors were conquered and the *Reconquista* deemed complete. To govern their new dominions, the Spanish monarchs enacted a large body of special legislation through the Council of the Indies that tended to reinforce the geographical division of governmental, judicial, and legislative powers between the royal councils of Castile and the Council of the Indies. Oquendo, *supra* note 9, at 101 (quoting RUDOLF B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA, & PETER E. HERZOG, 1994 SUPPLEMENT, COMPARATIVE LAW 35-39A (Fifth Ed.) (1994)). This division was cemented by a royal decree of December 15, 1614 which provided that Peninsular legislation became effective overseas only if reenacted by the Council of the Indies. *Id.* (citing Schlesinger et al, *supra*, at 35-39A).

[28] The Council of the Indies was the final form in an evolution of rudimentary institutions created to oversee the Spanish king's increasingly large and complex overseas dominions. In 1493, after Columbus's first voyage, colonial administration was placed into the hands of a single minister, directly appointed by Ferdinand and Isabel and selected from the members of their immediate council. The initial role of this first minister was to help plan a second voyage to the New World. However, as commerce increased and emigration became more popular, the workload of this first minister of the Indies soon became unmanageable. In 1503, the *Casa de Contratación* was established at Seville as a response and putative solution to this increased workload. This institution, quintessentially described as being "at once a board of trade, a commercial court, and a clearing-house for the American traffic," was the long-arm by which the Spanish crown governed its flourishing possessions in the New World. Bourne, *supra* note 26, at 222. As political questions arose in the Indies, King Ferdinand sought the creation of a new royal council devoted to Spain's New World possessions that would be a peer with the other royal councils. In 1507, the officials of the *Casa de Contractación* were ordered to confer with the king's secretary in Indian affairs. By 1509, the decisions of this *ad hoc* council were recorded as those of the Council of the Indies. *Id.* at 224. On August 4, 1524, the Council of the Indies (*Real y Supremo Consejo de las Indias*) was formally organized as a permanent and

captaincies-general,[29] *audiencias* (combined district and court),[30] and

independent council, a far cry from a varying group of temporary advisers on Indian affairs. *Id*. By 1542, the Council of the Indies became consolidated as the supreme legislative, executive, and judicial body of Spanish America, subject only to the king. Oquendo, *supra* note 9, at 104. In its legislative role, the Council of the Indies was responsible for preparing and dispatching, subject to the king's approval, "all laws and decrees relating to the administration, taxation, and police of the American dominions." Haring, *supra* note 26, at 98. In its executive role, the Council proposed the names of colonial officials, held them accountable, and considered and approved all colonial expenditures and local schemes for government. Lastly, in its judicial capacity, the Council was the court of last resort in important civil suits that were appealed from the colonial *audiencias*, heard the final appeal of civil and criminal cases from the judicial chamber of the *Casa de Contractación*, and served as the court of first instance in cases involving *encomiendas* of Native Americans. *Id*. *See also* Bourne, *supra* note 26, at 226.

29 By 1574, it became conventional to describe the Spanish-American world as consisting of two "kingdoms": New Spain and Peru, both governed by a viceroy. The vast distances between points in Spanish America and the need for prompt, informed action led to the carving out of new viceroyalties from the territories of New Spain and Peru: New Granada (1717) and Buenos Aires (1778). Eventually, smaller captaincies-general were created in, Cuba (1764), Venezuela (1777), and Chile (1778). The viceroy was the personal representative of the king and his basic mission was to improve the welfare of the king's subjects and vassals as the king would do if he were governing in person. In his *audiencia* district, the viceroy served as governor and as commander-in-chief of the military. And, in the *audiencia* itself, he served as its presiding officer. Oquendo, *supra* note 9, at 111. In the *Recopilación de Leyes de Los Reynos de las Indias*, there are over seventy laws devoted to specifying the viceroy's duties. Bourne, *supra* note 26, at 229. But, in brief, the viceroy was expected to be:

> the father of the people, the patron of monasteries and hospitals, the protector of the poor, and particularly of the widows and orphans of the conquerors, and the old servants of the king, all of whom would suffer were it not for the relief afforded them by the viceroy.

Id.

30 The *audiencia* was both a district and a court composed of magistrates appointed by the king. Interestingly, the *audiencia* was both the viceroy's council (his "viceregal audience") and the highest court of appeal in its jurisdiction. The main officer, the governor or captain-general, was the *ex officio* president of the *audiencia*. In its conciliar role, the *audiencia* would regularly meet with the viceroy or its president in an *acuerdo* to discuss the pressing and important issues of government at hand. The viceroy or president could not vote in matters of justice, but he had the important power to screen a question as being one of justice or politics in character. *Id*. at 232-233. If there was no viceroy or captain-general in the district, the *audiencia* assumed his political functions. *Id*. at 235.

cabildos (councils)[31] as the successive lower echelons. This hierarchy reinforced the king's power over American affairs. Furthermore, the laws governing the colonies were stated in positive terms, with the *Recopilacion de Leyes de los Reynos de Las Indias* (1680)[32] and later versions being the heart of a vast body of law and practices designed to strengthen the king's hold over his overseas dominions, verify suspicions of corruption,[33]

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31 The *audiencias*, in turn, were divided into *gobiernos*, *corregimientos*, and *alcaldias mayores*, all headed by a *cabildo*, or town council. *Id.* at 234, 236. The *cabildos* had power to legislate local laws, enforce sanitary regulations, and create and supervise other social programs. They also appointed a *procurador* to represent their interests in the Council of Indies. Bourne, *supra* note 26, at 237. Originally, the officials of these local governments were appointed by the crown or viceroy. By 1523, citizens of new towns were granted the opportunity to elect *regidores* (city councilmen) to form a *cabildo*. *Id.* at 236. Fearing that the *cabildos* were the germ for representative assemblies in the colonies, the crown moved to restrict their powers of self-government. Beginning with Philip II in 1557, *cabildo* offices were regularly sold to the highest bidder. *Id.* at 237-238. Interestingly, this practice was approved by Montesquieu. *Id.* at 238 (citing L'Esprit des Lois, liv. V, chap. XIX).

32 This supreme compilation was composed by selecting and systematically arranging all of the major relevant texts up to the year 1680, incorporating the above-mentioned rule that Peninsular law applied in the New World only if enacted by the Council of the Indies. Oquendo, *supra* note 9, at 107 (citing Karst & Rosen, *supra* note 6, at 33-42).

33 The Spanish crown's deep-seated suspicion that the king's far-off representatives would abuse their authority resulted in a confusing colonial administration that included various institutional checks. At the end of their term, the viceroy and all administrative officers had to undergo a *residencia*, an inquest into their conduct in office. As part of the *residencia*, one or more commissioners were appointed to open a court, at which all persons with grievances or injustice to complain of against the outgoing viceroy or officer could present their charges. At the end of the court session, which was limited to six months, the commissioner prepared a report and forwarded it to the Council of the Indies for a final decision. Bourne, *supra* note 26, at 230-232. The *residencia* embodied the Spanish notion that the viceroy is ultimately a servant of the king and that abuses against the king's subjects and vassals would not be tolerated nor condoned by silence. But, in practice, the *residencia* did not seem to be a very effective check against the arbitrary powers of the viceroy or other administrative officials. Indeed, it appears that the *residencia* was more effective in bringing subordinate officials to justice. *Id.* at 232, n. 2. As applied to viceroys, one viceroy of Peru compared the *residencia* "to the whirlwinds which we are wont to see in the squares and the streets, that serve only to raise the dust, chaff, and other refuse and set it on our heads." *Id.* at 232. And, in certain cases, if a viceroy had enough favor at court, he could be exempted from a *residencia*. *Id.*

and root out disloyal officers.[34] Thus, the legal and governmental structures developed to govern Spain's American colonies grandly exhibited the distinctive features of the bureaucratic stage: positive law coupled with a dominant state.

C. The Bureaucratic Stage of California Legal History

The bureaucratic stage was extended into California[35] by the Sacred

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[34] Other checks on abuse included the *visita* and direct appeal to the king. The *visita* was simply a secret inquiry by a special magistrate into the performance of a particular official. Oquendo, *supra* note 9, at 110. Usually, the aim of the *visita* was to prod colonial officials into fulfilling their obligations or remedying a situation which upset the crown. *Id*. Unlike a *visita*, which was action by the king, an appeal to the king was the avenue of relief open to every subordinate officer. Subordinates were encouraged to appeal to the king if they disagreed with a superior order. The appeal to the king followed the Spanish legal formula of "I obey but do not execute," which reflected the Spanish legal notion that "royal provisions and decrees which are issued contrary to justice and in prejudice of suitors are invalid and should be obeyed but not executed . . . and the reason for this is that such provisions and mandates are presumed to be foreign to the intention of the Prince, ..." Haring, *supra* note 26, at 122-123 (quoting the Spanish jurist Castillo de Bavadilla). The main virtue of this principle was that it afforded colonial administrators flexibility and autonomy, something needed in far-off provinces. It is no surprise, then, that the Spanish crown sought to enforce this principle as a matter of prudent governance. As a last measure, the crown also made it a practice to appoint *peninsulares* (persons born in Spain) to government posts over local born *créoles*. As one historian notes, "In the long list of over seven hundred and fifty viceroys, governors, and presidents of *audiencias*, less than twenty *créoles* appear." Oquendo, *supra* note 9, at 113 (quoting Karst & Rosen, *supra* note 6, at 33-42) (citing Cecil Jane, Liberty and Despotism in Spanish America 7 (1929)).

[35] California appeared in the Western consciousness not by discovery, but by fantasy. In 1510, Garci Ordóñez de Montalvo published a fantastical sequel to the epic Amadis of Gaul called Las Sergas de Esplendian. In it, Queen Califia, the beautiful Amazon queen of California, saves Christian forces from annihilation during a fictional siege of Constantinople by the strength of griffins and the prowess and strength of beautiful Amazon warriors. 13:77 The Atlantic Monthly 265 (March 1864), *available at* http://cdl.library.cornell.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABK2934-0013&byte=250391002 (click "Queen of California"). Montalvo describes Queen Califia as "very large in person, the most beautiful of all of [the Californians], of blooming years, and in her thoughts desirous of achieving great things, strong of limb and of great courage, ..." *Id*. at 266. But, it is Montalvo's description of California that draws the most interest:

Expedition of 1769.[36] The entire colonization effort was a state-sponsored

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> Know, then, that, on the right hand of the Indies, there is an island called California, very close to the side of the Terrestrial Paradise, and it was peopled by black women, without any man among them, for they lived in the fashion of Amazons. . . . Their island was the strongest in all the world, with its steep cliffs and rocky shores. Their arms were all of gold, so was the harness of the wild beasts which they tamed and rode. For, in the whole island, there was no metal but gold.

Id. at 267. It is amazing to think that, before any Western eyes gazed upon the rocky shores and towering sea cliffs of the California coast, or put their tin pans in the golden ravines of the Sierra Nevada, such an amazing place could only be thought of as fantasy. In 1533, a Spanish expedition under the command of Fortún Jiménez discovered what we now know as Baja California. Thinking that they had discovered an island, the Spanish named the peninsula "California" in the belief and hopes that they would find there the gold and precious stones described by Montalvo. Starr, *supra* note 2, at 6. Later, after Juan Rodriguez Cabrillo's exploration of the coast of modern-day California in 1542, the concept of Alta (upper) and Baja (lower) California emerged. For a much longer and more detailed account of the theories of how California received its name, *see* Charles E. Chapman, A History of California: The Spanish Period 55-70 (1921).

[36] Though explored intermittently by the Spaniards, the settlement of Alta California was largely the product of the reform experienced after the succession of Carlos III to the Spanish crown in 1759. In 1765, Carlos III sent José de Gálvez as Inspector-General to New Spain with a mission: suppress the Jesuits, reform colonial administration, and organize the settlement of Alta California. Starr, *supra* note 2, at 32. In 1768, Gálvez expelled the Jesuits from Baja California and replaced them with Franciscans from the College of San Fernando in Mexico City, whose father-president was the now-famed Junípero Serra. *Id.* Gálvez then appointed Gaspar de Portolá to serve as governor of the Californias. Finally, under the guidance of this unusual group — Gálvez, Portolá, and Serra — the settlement of Alta California was organized. The principal reasons for this northward expansion of Spanish territory were two-fold. First, rumors that the Russians and English were making incursions along the Northwest coast with the intent to plant a colony and stifle Spanish expansion prompted the king to take action. Irving B. Richman, California under Spain and Mexico: 1535–1847 64 (1911). Second, observations by Spanish missionaries of the lack of civilization among the Native Californians required an ecumenical presence. It is these two institutions, military and religious, that would come to define the Spanish presence in California. In January of 1769, a meager land and sea expedition, known to history as the "Sacred Expedition," left from Mexico to plant a mission and presidio at San Diego and Monterey. After a long and arduous passage, described by one as a "phantasmagoria of physical hardship, deprivation, suffering, and death," the four divisions of the Sacred Expedition were finally united at the end of May 1770 in Monterey. *Id.* at 88. To inaugurate the colony, a solemn mass and

enterprise with the backing of the Catholic Church. The same laws[37] and bureaucracy[38] that existed in the other American colonies were extended to California, making the California enterprise no different in nature from the colonial experience in the rest of Spanish America.

However, there were some peculiar modifications in the Spanish colonial system as it applied to California. Before 1781, Spanish secular

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ceremony was celebrated on June 3. To formalize possession by the state, "grass and stones were wrenched from the earth and scattered to the four winds." *Id.* The end of these ceremonies symbolized the successful end of the Sacred Expedition and the beginning of Spanish colonization in California.

37 The California provinces, both Alta and Baja California, were governed by the Laws of the Indies, subject to the Viceroy in Mexico City, who was subject to the Council of the Indies and, ultimately, the Spanish king. But, from the beginning, California was envisioned as a missionary enterprise supported by the military — "the man with the crucifix to be backed by the man with the musket." *Id.* at 122. The 1769 Sacred Expedition to found a mission and presidio at San Diego and Monterey exemplified this mentality and foreshadowed the frequent political conflicts between the secular and religious elements in Alta California.

38 Until 1768, the viceroy of New Spain was formally charged with the newly settled areas of northern Mexico. But he was overburdened with matters much closer to home. As Gálvez himself wrote of the northern provinces, because

> of the distance of more than six hundred leagues from this capital at which they are situated; and the great mass of occupations and cares, near at hand, which weigh upon the attention of a viceroy of New Spain; since, destitute of subaltern aids [sic], it is impossible that either his active dispositions or the influence of his authority should reach to the remote confines of an empire almost illimitable.

Id. 122 (citing Mexican Archives, Arch. Genl., *Prov. Int.* 154). The king responded and created a new *comandancia-general* (military department) that encompassed the *Provincias Internas* (internal provinces) of Sonora, Sinaloa, Nueva Vizcaya, and eventually Alta and Baja California. Richman, *supra* note 36, at 122. The *comandante-general* was invested with substantial autonomy from the viceroy of New Spain, but was dependent directly on the king and orders received from the Council of the Indies. *Id.* at 430. He only owed the viceroy of New Spain the obligation of making regular reports and asking for aid when deemed necessary. *Id.* at 122. The *comandante-general* independently supervised the *Real Hacienda* (treasury) of the *Provincias Internas* and was invested with the *patronato real* (royal patronage) over the religious institutions within his jurisdiction. *Id.* at 430. All judicial appeals were to be made to the *audiencia* at Guadalajara. But in matters military or financial, the *comandante-general* exercised exclusive jurisdiction. *Id.*

society in California consisted only of the Spanish military headed by the *jefe military* (army chief), also called the *comandante de armas*, appointed by the *comandante-general* resident in New Spain.[39] While civil government was formally introduced with the establishment of the first *pueblos* (towns) of San José (1777) and Los Angeles (1781), these settlements were governed by a direct military representative of the *jefe militar* known as a *comisionado*.[40] The *alcalde* (mayor) and the local *ayuntamiento* (council, as the *cabildos* were called in California) were subordinate to the *comisionado*, who could annul the acts and decisions of these officials.[41] This system characterized early Spanish government in California[42] and persisted until Mexico separated from Spain in 1821.[43] In the beginning, the offices of *jefe militar* and civil governor (*jefe político*) were united in the same person, Felipe de Neve. This was a matter more of fact than law because de Neve, as an exercise of his authority as *comandante de armas*, founded the pueblos to support the *presidios* (forts). *Pueblos* were supposed to be headed by *alcaldes* and *regidores* (aldermen) according to Spanish law and custom. But, because the *pueblos* serviced the *presidios*, the military closely governed their affairs.[44] Indeed, later *jefes militares* thought it farcical for them to occupy the office of civil governor given the military nature of secular society in California.[45] This system gave too much power to the military over the civil affairs of California.

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39 Richman, *supra* note 36, at 140.

40 David J. Langum, Law and Community on the Mexican California Frontier 32 (2d ed. 2006). The *comisionado*'s responsibilities included conferring titles to land, collecting local taxes, carrying out the governor's decrees, and guarding the pueblo from physical and moral threat. Theodore Grivas, *Alcalde Rule: The Nature of Local Government in Spanish and Mexican California*, 40 Cal. Hist. Soc'y Q. 11, 12 (1961).

41 Grivas, *supra* note 40, at 12.

42 Richman, *supra* note 36, at 285.

43 Langum, *supra* note 40, at 32; Grivas, *supra* note 40, at 12-13.

44 The representatives chosen by the military governor were empowered to annul acts of the town councils and the decisions of the *alcaldes*. Langum, *supra* note 40, at 32.

45 Richman, *supra* note 36, at 140. *See also id.* at 285 (stating how this was the case with Governor José Arrillaga).

It was during the Spanish period in which the office of the *alcalde* was first introduced to California.[46] Though it was not a universal aspect of Spanish government, the office of *alcalde* was recognized as an efficient unit of government for Spanish colonies.[47] Consequently, it was incorporated into the governmental structure of the Spanish colonies through its inclusion in the *Recopilación de Leyes de los Reynos de Las Indias*.[48] Eventually, the *alcaldes* were taken for granted in New Spain and Mexico, and they became part of local legal institutions in the various Spanish colonies.[49] When California was first colonized in 1769, *alcaldes* were not provided for, in large measure due to the military nature of Spanish colonization. *Presidio* commanders assumed the traditional roles of *alcaldes* up until the founding of the first *pueblos* of San José and Los Angeles, and the founding of the *presidio* of San Francisco (1776), which had a large civilian population. At this point, *alcaldes* were formally introduced as part of the governmental apparatus by Governor Don Felipe de Neve.[50] In Spanish California, the *alcaldes* also presided

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46 The office of the *alcalde* traces its origins to the Arabian and Moorish *Cadi*, or "village judge." One historian provides the following description of the duties of the traditional Spanish *alcalde*:

> As the office evolved in Spain the alcalde was a locally elected community official who served as both a mayor and a town judge. Additionally, he had some legislative duties and often presided over municipal councils. Almost always that town's alcalde was the most respected figure in the community. He was usually a revered village elder, and his administration of justice was paternalistic and benevolently dictatorial. In municipal matters and local disputes the alcalde's word was literally the law itself, unfettered by substantive standards (legal rules) for the resolution of conflicts. He could decree as he thought fit, confined only by the cultural and religious mores of the local village in which he sat.

Langum, *supra* note 40, at 30.

47 *Alcaldes* were a popular institution because they "offered a locally controlled justice system with extremely easy access, and it was not burdened by legal technicalities. Any peasant could feel comfortable relating his viewpoint of a dispute to the alcalde." Langum, *supra* note 40, at 30.

48 Grivas, *supra* note 40, at 11.

49 Langum, *supra* note 40, at 31.

50 Gov. Felipe de Neve, Regulations for the Government of the Province of California, Title 14, § 18, *in* H.W. Halleck, *Report on the Laws and Regulations Relative to Grants or Sales of Public Lands in California*, H.R. Exec. Doc. No. 17, 31st Cong.,

over the local *ayuntamiento* and eventually evolved to become the head officials of the *pueblos*, deciding local cases with direct appeal to the governor.[51] The military government even sought to introduce the system of *alcaldes* and *regidores* among the Indian populations resident at the many missions.[52] The *alcalde* has been described as "[d]oubtless, the most important single officer in the administration of local government in California, both before and after the American conquest."[53]

A particular challenge in understanding California's history under Unger's theory is how to characterize the Native American experience. Before 1769, California was inhabited exclusively by Native American peoples, whose numbers and diversity of languages and societies made the region a center of Native American culture.[54] Unger's theory would most likely characterize Native American society as existing in the customary stage of legal development. The Native Americans neither wrote their law down, nor made any distinction in their customs between the private sphere and a state.

The impetus for progress into the bureaucratic stage among this population came with Spanish settlement and institution of the mission system. Immediately, the Spanish missionaries tried to "reduce" the Native Americans to Spanish settlements and habits, exposing them to new beliefs, systems, and a hierarchy.[55] Their subjugation and enculturation

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1st Sess. at 139-140 (1849) [hereinafter *Halleck Report*]. Under de Neve's regulations, the *alcaldes* were to be appointed by the governor for the first two years. After two years, *alcaldes* were to be elected. *Id*. But, military governors used the *comisionado* to directly and indirectly influence local affairs. Langum, *supra* note 40, at 32.

51 *Id*. at 39.

52 Lands of Promise and Despair: Chronicles of Early California, 1535–1846 217 (Rose Marie Beebe & Robert M. Senkewicz eds., 2001).

53 Grivas, *supra* note 40, at 151.

54 The historical record is replete with the cultural and political accomplishment of the native population. For a general account, *see* Starr, *supra* note 2, at 12-16.

55 The purpose of the missions, besides religious doctrines of salvation and redemption, was "to secularize the Indian; to municipalize him by reducing him to a condition of pueblo life." Richman, *supra* note 36, at 285. In these mission societies, the *padres* were to be supreme. Indeed, the legal relationship between mission *padres* and the natives was the same as that between father and son (*in loco parentis*). *Id*. at 95, 412. While this secularization and reduction to *pueblo* life was occurring, the mission *padres* would be the legal owners of the land and its produce, holding it

were thought essential if the Spanish were to turn the remote region into a genuine bulwark against Russian, British, and American advances. California was not to be a repeat of Texas.[56]

The product of this effort was a large population of neophytes accustomed to Spanish culture and practice. To be sure, the mission *padres* were the heads of their congregations, directing their development and law, thereby enforcing the conclusion that, during this time, the "reduced" Native Americans were in the bureaucratic stage. With the abolishment of the mission system in 1845,[57] the Native Americans associated to the secularized missions were subject to Mexican law to the fullest degree. But, secularization did not signal a transition out of the bureaucratic stage — it only signaled a change in government.

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in trust for the natives until the mission became a civil *pueblo*. During the mission phase, the natives would be taught religion, agriculture, and simple industry. It was expected that this transition from religious outpost to civil settlement would occur after 10-15 years of religious and practical instruction. At the transition from mission to *pueblo*, so the theory went, the lands would be parceled out to the natives, a settlement christened, and the mission converted into a parish. In practice, the result was, as history has shown, a "violent intrusion into the culture and human rights of indigenous peoples." Starr, *supra* note 2, at 41.

56 In practice, however, the military authorities found that they could not rely on the missions to support their efforts. To fulfill their mission of evangelization, the *padres* took great care to minimize contact with the presidios and the corrupting influences that regular contact with the soldiery was thought to engender. Richman, *supra* note 36, at 127. Strictly speaking, the mission *padres* were the executives of the missions, subject only to the superior authority of their president, the College of San Fernando in Mexico City and the pope himself. *Id.* at 114-115. As a result, the missions enjoyed an autonomy that drew the suspicion of the presidio commanders and resulted in a tension that swayed in favor of the military or missions depending on the views of the current governor. On May 6 or 9, 1773, after intense lobbying by Father Serra, Viceroy Antonio Bucareli issued instructions securing the autonomy of the missions and the superiority of the *padres* over the soldiery at the missions. *Id.* at 94. Later, in 1785, the "division between State Sacerdotal and State Secular" was affirmed in a decision by the *audiencia* and *comandante-general* of the *provincias internas*. *Id.* at 152.

57 Decree of the Departmental Assembly (May 28, 1845), *in Halleck Report*, *supra* note 50, at 163.

II. THE RULE OF LAW IN CALIFORNIA

A. Mexican Independence & Continuation of the Bureaucratic Stage

Mexico gained its independence from Spain and assumed government over California in 1821. In 1824, the Mexican republic adopted a new constitution reflecting the principles and structure of the federal Constitution of the United States. Indeed, Mexico's first constitution was intended to reflect the contemporary Enlightenment ideas prevailing in Europe and North America. However, a strong federal government failed to emerge under the 1824 Mexican Constitution. The government's weakness fueled a contest for power that eventually led to its overthrow in 1835 and to amendment of the 1824 Constitution by the conservative *Siete Leyes* (1835) and the 1836 Constitution Laws. These reforms created a strong central government whose main goal was simply to preserve independence. During this period, California was not recognized as a constituent state in the Republic of Mexico and was under the direct government of the central government.[58]

Representing Unger's prediction that the liberal stage is a rare historical phenomenon, the Mexican constitutions during this period *failed* to spark the transition of California out of the bureaucratic stage. These constitutions were highly protective of the Catholic Church and did not allow for the legal recognition of any other religion.[59] Although the 1824 Constitution reflected principles of liberty and freedom, its impotency prevented any realization of a society where such values were enforced. And, the reforms of 1835 to 1836 had as their main goal preservation of Mexican sovereignty. This Catholic protectionism and the utilitarianism

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[58] Under the Constitution of 1824, upper and lower California, along with Colima, were gathered together into one political unit, *id.* at 469, and were put under the control of the central Mexican government and subject to its supreme executive authority. The CONSTITUTIVE ACT OF THE FEDERATION [Mex.] (January 31, 1824) provides in Article 7 that "The Californias . . . will for the present be territories of the Federation and directly subject to its supreme power." Translated in J.A. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES 375 (1839).

[59] Richman, *supra* note 36, at 256.

of government prevented the development of a truly pluralistic society that would eventually culminate in a liberal society.

The political instability that was felt in Mexico City was also felt in California. The liberal government which prevailed in Mexico at independence appointed liberal-minded José María Echeandía as governor of California in 1825. His arrival in the territory created excitement and hope that liberal ideas would be instituted in local government.[60] Echeandía's major impact in this regard was the establishment of a representative assembly (known as a *diputación*) for both Alta and Baja California. However, as Mexico fell into faction and discord, so, too, did California. Liberals and conservatives rose, to and fell from, power in California in much the same procession as they did in Mexico City. Californians fought each other and the stability of the territory was ever in doubt. But, during this period, there was always a lingering desire for liberal reform and the abolishment of the military's power over civil affairs. One California delegate to the Mexican national congress, Carlos Carrillo, argued that, from the military's control over civil affairs,

> has flowed the accumulation of evils upon the unhappy population [of California], governed as they are at the discretion of Military Commanders great and small who hold in their hands all executive and judicial powers, the exercise of which no one is able to dispute. It is easy to imagine, under such conditions, the tortures endured day after day by those wretched people for lack of courts of justice. They must accept unalterable decisions

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60 One contemporary resident of Alta California wrote:

> With respect to Sr. Echeandía, . . . when we arrived in California in 1825 he came speaking of the republican and liberal principles which filled the heads of Mexicans in those days. He was a man of advanced ideas, enthusiastic and a lover of republican liberty. Certainly he put these ideas into practice; in fact, he had been sent to California to implant the new regime. Up until then, during the administration of Arguello, the regime of government had been the same as existed under Spanish domination except for the constitutional *Diputación* and the *Ayuntamiento*.

Angustias de la Guerra, *Occurrences in Hispanic California* in Beebe & Senkewicz, *supra* note 52, at 344.

> from which there was no appeal, usually imposed unjustly by men who are absolutely ignorant of the simplest ideas of law.[61]

Reflecting this brewing liberalism, in 1833, the citizens of San Diego petitioned the governor to grant them the right to elect an *ayuntamiento* to govern local affairs complaining that "in this port alone one has to submit his fate, fortune, and perhaps existence to the caprice of a military judge who, being able to misuse his power, can easily evade any complaint that they might want to make of his conduct."[62]

The centralist Mexican government that prevailed only made one substantive attempt to reorganize civil life in California through legislation. In 1837, the Mexican government replaced the existing laws in California with two pieces of legislation — the laws of March 20, 1837, and May 23, 1837.[63] These laws erected a hierarchical government rooted in Mexico City[64] and a judicial system more sophisticated than the local *alcalde* system originally instituted by the Spanish.[65] While most of

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61 *Id*. at 388 (from a speech by Carlos Carrillo, October 18, 1831).

62 *Id*. at 392 (from a petition by citizens of San Diego, February 22, 1833).

63 Jabez Halleck & William E. P. Hartnell, *Translation and Digest of Such Portions of the Mexican Law of March 20 and May 23, 1837 as Are Supposed to Be Still in Force as Adapted to Present Conditions*, *in* J. Ross Browne, Report of the Debates in the Convention of California, On the Formation of the State Constitution, in September and October, 1849 app. XXVI (University of Michigan 2006) (1850). The first statute, that of March 20, summarily declared that "the laws which organized the economic-political government of the Department are abolished." *Id*. at § VIII, art. 4.

64 Under the new governmental structure created by the Law of March 20, 1837, California government was divided into three basic levels: department, district, and local. At the head of the government of the department was a governor elected by the Mexican congress. As provided by the statute, the governor's cabinet consisted of a secretary of state, prefect, and commander-in-chief. Additionally, the department was granted a departmental legislature. At the district level, a sub-prefect was placed at the head of the district, with a secretary being his cabinet. At the local level, there were two forms which the government could take based on whether the locality was urban or rural. If urban, the locality would be granted an *ayuntamiento*, or town council, headed by an *alcalde* and ultimately subject to the sub-prefect and the departmental government. *Id*. at § V, arts. 1 and 10. If the locality were rural, it would be under the direct control of a prefect with justices of the peace providing for the execution and enforcement of the laws. *Id*. at § V, art. 1.

65 Under the new judicial structure created by the Law of May 23, 1837, the judicial system was divided into three levels: a Superior Court, Courts of First Instance,

the reforms heralded by these laws were delayed or never materialized,[66] they remained ostensibly in force until the American conquest.[67] Thus, the military dominated civil affairs during the Mexican period much as it had done during the Spanish period.[68]

The consensus is that the Mexican period did not bring about any significant changes in California and that Spanish law, in all manner of practices, remained in force.[69] This conclusion is corroborated by the fact that the Spanish law was officially codified in the first Mexican Civil

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and *alcaldes*. The Superior Court was to be constituted with four judges and one attorney general. *Id.* at app. XXXV § I, arts. 1 and 10.. The three senior judges were to sit as the first bench (called a *sala*) and the remaining junior judge was to act as the second bench. The second bench was to hear the first appeals (*segunda instancia*) and the first bench heard the second appeals (*tercera instancia*). Halleck & Hartnell, *supra* note 63, at app. XXXV, § I, art. 7. Each chief town would have a Court of First Instance, consisting of one or more judges, who would exercise criminal and civil jurisdiction in that district. *Id.* at app. XXXVI, § II, art. 1. In places with more than one thousand inhabitants, *alcaldes* exercised conciliation jurisdiction, a general verbal process jurisdiction, and exercised jurisdiction when necessity demanded. *Id.* at app. XXXVIII, § III, arts. 1-3. In those places with less than one thousand inhabitants, justices of the peace would exercise jurisdiction when there was not enough time to refer the case to the nearest respective authority. *Id.* at app. XXXVIII, § III, art. 4.

66 The prefecture system was not organized until 1839 and the hierarchical court system provided by the Law of May 23, 1837 was never established. Langum, *supra* note 40, at 39. The *Tribunal Superior* did not convene for the first time until 1842. *Id. See also* Richman, *supra* note 36, at 288. As a result, the Mexican government issued a decree in 1843 authorizing *alcaldes* and justices of the peace to act as judges of the first instance. Langum, *supra* note 40, at 40.

67 Halleck & Hartnell, *supra* note 63, at app. XXV, as follows:

> The laws of March 20th and May 23d, 1837, are regarded as the laws in force in California up to the time of the conquest. The Mexican Constitution of 1844, partially adopted in Mexico, was never regarded as in force in California, nor was it known here that these laws were materially modified by any decrees or orders of the Mexican Congress.

68 Langum, *supra* note 40, at 32; Grivas, *supra* note 40, at 12-13.

69 Saunders, *supra* note 17, at 495; Herman Belz, *Popular Sovereignty, the Right of Revolution, and California Statehood*, 6 Nexus 3, 4 (2001); Dana V. Kaplan, *Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and their Effect on Mexican-American Women*, 26 Women's Rts. L. Rep. 139, 151 (2005).

Code of 1837, which remained unaltered during Mexico's brief rule over California.[70] One historian has gone so far as to declare:

> Strictly speaking, there was no Mexican period of California history. During a quarter of a century the sovereignty of [Mexico] was more or less continuously acknowledged, but the actual intervention of Mexico in the affairs of its distant province consisted in little more than the sending of governors and a few score of degraded soldiery.[71]

Notably, the Americans who came after the American conquest were frustrated by this apparent lack of law. Justice Nathaniel Bennett, one of the first justices of California's Supreme Court, expressed the sentiments of many:

> Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region, — in Southern California, perhaps to less extent.[72]

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[70] W. S. McClanahan, Community Property Law in the United States (1982) at 8-9, n. 14.

[71] Chapman, *supra* note 35, at 455. Similar opinions have been expressed:

> California was transferred from Spanish imperial to Mexican republican rule in the Revolution of 1824. Scholarly opinion concurs that the change was nominal, and that government in the remote province remained that of "petty military despotism." Mexican sovereignty was practically nonexistent. The existing government was indistinguishable from chronic disorder and revolutions, where one set of rulers frequently replaced another. According to historian Frederick Merk, "To the outside world California seemed a derelict on the Pacific . . . considered likely to be towed soon into an American port."

Belz, *supra* note 69, at 4.

[72] Orrin K. McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 Cal. L. Rev. 359, 368 (1914-1915) (citing to 1. Cal. Preface (1852)). Another justice of the California Supreme Court, Justice Hugh C. Murray, agreed with his colleague:

> California . . . had long been looked upon as one of the outposts of civilization. Its commercial, agricultural and mineral resources undeveloped, it

In particular, the Americans suffered from the lack of a legal means of effecting commercial transactions. As a result, they routinely disregarded Mexican law and employed the common law to carry on their business:

> As the great population poured into California in 1849, commercial transactions in an immense amount, and large transactions in real estate, were entered into under the common law as modified and administered in the United States and without regard to the unknown laws of the Republic of Mexico and the equally unknown customs and traditions of the Californians.[73]

The Americans did have reasons to complain. A scarcity of legal materials and the long distances such materials would have to travel made it difficult for the people of California to ascertain the laws in force.[74]

> was considered of little importance by the Mexican government. The body of Mexican laws had been extended over it, but there was nothing upon which they could act, and they soon fell into disuse. The system of government was a patriarchal one, and administered without much regard to the forms of law, which were scarcely alike in any two districts.

Id. at 367 (citing to 2 Cal. 47-48 (1852)).

[73] Charles S. Cushing, *The Acquisition of California, Its Influence and Development Under American Rule*, 8 Cal. L. R. 67, 74 (1919-1920). Justice Murray also wrote:

> Emigration brought with it business, litigation, and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark, and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language, and justice was administered by American judges, without regard to Mexican law.

McMurray, *supra* note 72, at 368 (citing to 2 Cal. 47-48 (1852)). For a study of commercial transactions in Mexican California *see* Karen Clay, *Trade Without Law: Private-Order Institutions in Mexican California*, 13 J. L. Econ. & Org. 202 (1997).

[74] The historical record contains several testaments to the lack of written legal materials in Spanish and Mexican California. One author has written:

There were few lawyers in Mexican California.[75] The *alcaldes*, who were the only available adjudicators in the *pueblos*, did not look to positive law for guidance in coming to a decision.[76] And, it was not uncommon "for an *alcalde* to apprehend and arrest a person, preside over his trial, pass sentence, and finally execute the sentence."[77]

This legal chaos was a natural incident of the tumultuous American conquest.[78] Nor did blame lie with the Mexican government. Because

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> In order to ascertain what was the law in California, it was necessary to examine the codes of Spain; the royal and vice-royal ordinances and decrees; the laws of the Imperial Congress of Mexico; the laws of the later Republican Congress of Mexico; presidential regulations; decrees of dictators and acts of pro-consular governors. Many ordinances and decrees claimed to have the force of law had not been printed even in Mexico, and they, as well as other books upon Spanish and Mexican law, could be procured only with great difficulty and much expense. Many of these laws had never, as a practical matter, been enforced in California, and particularly in northern California.

Cushing, *supra* note 73, at 74 (1919-1920). Another has written:

> The country possesses no written law book, with the exception of the Laws of Spain and the Indies, published in Spain a hundred years ago, and a little pamphlet, setting forth the duties of various judicial officers, which was published by the Mexican government since the revolution.

McMurray, *supra* note 72, 363 (citing to Oszwald, Californien und seine Verhaltnisse 71 (Leipzig, 1849)).

75 Langum, *supra* note 40, at 45.

76 Grivas, *supra* note 40, at 26. This was the traditional approach of the *alcaldes* since their advent in the Iberian Peninsula. *See* Langum, *supra* not 40, at 30 (stating that *alcaldes* were traditionally unfettered by substantive standards (legal rules) for the resolution of conflicts). When *alcaldes* were introduced into California under de Neve's regulations, they similarly were not guided to use any substantive standards to come to a decision in a case before them. *Halleck Report*, *supra* note 50, at 139. And, under the Laws of 1837, the *alcaldes* were given, by statute, full discretion in making a decision that was within their geographic and subject matter jurisdiction. *Report of the Debates in the Convention of California* app. XXXVIII at § III, arts. 9 and 16. As Langum quotes, the traditional *alcalde* system has been aptly described as "a formalistic administration of law that was nevertheless based on ethical or practical judgments rather than on a fixed, 'rational' set of rules." Langum, *supra* note 40, at 30 (quoting Douglas Hay, *Property, Authority and the Criminal Law*, *in* Albion's Fatal Tree 40 (Douglas Hay ed. 1985)).

77 Grivas, *supra* note 40, at 15 (citing to Stephen J. Field, Personal Reminiscences of Early Days in California 30 (Washington, D.C.)).

78 Some Americans clearly recognized this. On January 22, 1848, the *California Star* wrote that "since the United States flag was hoisted over it, [California] has been

international law demanded that California had to be governed under the laws of the ousted regime until its conqueror organized a new civil government, Mexican law properly prevailed.[79] Blame for lack of enforcement of Mexican laws during the American military government, therefore, lay with the Americans, who failed to enforce the Mexican laws.

This fact did not stop Americans from complaining of the burden imposed by the Mexican laws and in particular by the *alcaldes*. Americans perceived that the *alcalde* combined the powers they normally ascribed separately to a mayor, arbitrator, justice of the peace, trial judge, *and* legislator.[80] In 1848, as the era of Mexican law was drawing to a close in California, an American observer in Monterey eloquently summarized the roles and duties of the *alcalde*:

> By the laws and usages of the country, the judicial functions of the alcalde . . . extend to all cases, civil and criminal . . . He is also guardian of the public peace, and is charged with the maintenance of law and order, whenever and wherever threatened or violated; he must arrest, fine, imprison, or sentence to the public works, the lawless and refractory, and he must enforce, through his executive powers, the decisions and sentences which he has pronounced in his judicial capacity. His prerogatives and official duties extend over all the multiplied interests and concerns of his department, and reach to every grievance and crime from the

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in a sad state of disorganization; and particularly as regards the judiciary. Indeed, sir, we have had no government at all during this period, unless the inefficient mongrel military rule exercised over us be termed such." Cardinal Goodwin, The Establishment of State Government in California 64 (1914). With regard to the *alcaldes* in the post-conquest environment, Justice Stephen Field wrote in his memoirs:

> Under the Mexican law Alcaldes had, as already stated, a very limited jurisdiction. But in the anomalous conditions of affairs under the American occupation, they exercised almost unlimited powers. They were, in fact, regarded as magistrates elected by the people for the sake of preserving public order and settling disputes of all kinds.

Stephen J. Field, California Alcalde 27 (BioBooks 1950).

79 *See infra* at note 105.

80 Saunders, *supra* note 17, at 489. *See also* Langum, *supra* note 40, at 51.

> jar that trembles around the domestic hearth to the guilt which throws its gloom on the gallows and the grave.[81]

Another contemporary American, perhaps capturing the sentiment of his fellow compatriots, claimed that the *alcaldes* exercised an "authority far greater than any officer in our republic — the president not excepted — uniting in their persons executive, legislative, and judicial functions. The grand autocrat of all the Russians . . . is the only man in Christendom I know who equals him."[82] One American *alcalde* was so disturbed by his grant of power that he voluntarily petitioned the governor to divorce the *alcalde* from the town council so that the *ayuntamiento* could function independently.[83]

Because of the *alcalde*'s nearly plenary power within his jurisdiction, Americans saw the Spanish-Mexican legal system as inadequate, primitive, and unsuccessful in administering justice.[84] *Alcaldes* did not preside over courts, but held informal arbitration hearings guided by equity and local custom.[85] And lawyers could not effectively challenge their authority, for Mexican law "permit[ted] lawyers as counsel, but preclude[d] their pleas. They may examine witnesses, sift evidence, but not build arguments."[86] One observer wrote of a trial before the *alcalde* that the "plaintiff and defendant simply appeared before the *alcalde*, and stated their case on either side, produced their witnesses, if they had any, and the *alcalde* decided the case speedily; generally on the spot, without delay."[87] Imagine the reaction of those familiar with the common law

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81 Walter Colton, Three Years in California 230-31 (1850).

82 Goodwin, *supra* note 78, at 64. Similarly, Walter Colton, appointed *alcalde* of Monterey by Commodore Stockton, wrote, "There is not a judge on any bench in England or the United States whose power is so absolute as that of the alcalde of Monterey." Colton, *supra* note 81, at 55.

83 Grivas, *supra* note 40, at 18.

84 Goodwin, *supra* note 78, at 495.

85 Saunders, *supra* note 17, at 489. *See also* 6 Hubert Howe Bancroft, History of California 258, n. 8 (San Francisco, The History Company 1884-1890). However, the American *alcaldes* made efforts to emulate common law procedures. Grivas, *supra* note 40, at 22-23 (describing how the empanelling of juries became well-established in *alcalde* courts).

86 William H. Davis, Sixty Years in California 106 (1889).

87 *Id.* at 104.

tradition, as were the American merchants who made up much of the American population at the time. The *California Star* told its audience in 1847, "We have *alcaldes* all over the country, assuming power of legislatures, issuing and promulgating their *bandos* [decrees], laws, and orders, and oppressing the people. . . . The most nefarious scheming, trickery, and speculating have been practised by some that was ever discovered to the light of heaven."[88]

Thus, the American view of the law in California up until the time of the American conquest is paradoxical. Americans complained there was no law, and there was too much law, in the *alcaldes*' hands. More confusingly still, the military government embraced the *alcalde* system,[89] and American communities elected their own *alcaldes*.[90] *Alcaldes* presided in places that were not entitled to *alcaldes* under Mexican law[91] and in places beyond traditional Spanish and Mexican jurisdictions, as in the mining camps and other impromptu American settlements.[92] What is

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88 Goodwin, *supra* note 78, at 63.

89 The American military governors appointed Americans as *alcaldes* in many localities. Grivas, *supra* note 40, at 19; Bancroft, *supra* note 85, at 258. One explanation for this phenomenon is that

> [i]t was expedient for the military commanders of the United States to continue the office of alcalde and to retain as many loyal Californians in the office as was practicable. The combination of legislative, executive, and judicial duties in one man, although odious to many American immigrants in California, was nonetheless advantageous to the military governor in California. The conflicts that would necessarily arise with the division of these functions in separate individuals was prevented by the adoption of the alcalde system by the Americans.

Theodore Grivas, Military Governments in California, 1846-1850 at 165 (1963).

90 Bancroft, *supra* note 85, at 281.

91 Under the Law of March 20, 1837, only the capital, coastal towns with at least 4,000 people, interior towns with at least 8,000 people, and towns that had *alcaldes* prior to 1808 were entitled to *alcaldes*. Halleck & Hartnell, *supra* note 63, at app. XXXI § V, art. 1. This meant that only San José, Monterey, Villa de Branciforte (Santa Cruz), and Los Angeles were entitled to *alcaldes*. Grivas, *supra* note 40, at 13.

92 Susan Scafidi, *Native Americans and Civic Identity in Alta California*, 75 N. D. L. Rev. 423, 440 (1999) (writing, "On every bar, and in every gulch, and ravine, where an American crowd was collected, there an American Alcalde was elected"). *See also* Grivas, *supra* note 40, at 15 and 24.

more, is that this system was described as "wildly efficient."[93] Americans' disdain of the Mexican and Spanish system therefore seems cynical, contrived to bolster the movement to adopt a legal system rooted in the common law tradition. As we will see a bit later, their motives became especially clear in debates at the constitutional convention in 1849.

The lesson from the historical narrative is that, despite American protestations to the contrary, there was some kind of law in California during the Mexican period. While it was not what the Americans knew, it was suited to the values and needs of the native Californian population.[94] In most disputes, one or another form of Spanish law prevailed, and the officially constituted state hierarchy was that outlined by the laws of 1837.[95] The most significant legal institution during this period was the *alcalde*, the only broker of justice known to most native Californians.[96] Californians during this period lived under a legal regime substantially similar to the militaristic regime (*comisionado*) brought by the Spanish. That regime resisted substantive change because of Mexico City's distance and lack of attention to California and the lack of a large population necessary for a meaningful civil society.

The law which existed during the Mexican period was surely bureaucratic. As the Spanish law and a hierarchical regime was in place, much of what is said here of the Spanish period in California legal history

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93 Scafidi, *supra* note 92, at 440.

94 In other words:

> The rude institutions that served well enough for a pastoral people living in a sparsely settled community, whose disputes, if any arose, the *alcalde* or justice of the peace, administering a patriarchal justice, summarily adjusted, were wholly unsuited for Americans, accustomed to regularly constituted courts and statutory law.

McMurray, *supra* note 72, at 360.

95 *See* Antonio María Osio, The History of Alta California: A Memoir of Mexican California (Rose M. Beebe and Robert M. Senkewicz, eds.) (1996).

96 William Writ Blume, *California Courts in Historical Perspective*, 22 Hastings L. J. 121, 124. Justice Bennett is quoted as having said "that judges of First Instance were never appointed and never held office in California under the Mexican regime, but the Alcaldes possessed the powers and jurisdiction of judges of First Instance." *Id.* Professor Blume has hypothesized that the conflation of *alcalde* and judge of First Instance may explain why the *alcaldes* were able to legitimately exercise almost unlimited judicial power. *Id.*

properly applies to the Mexican period. While there may have been some semblance of law and order at the local level, California was a fractured territory during this period. Disparate factions constantly fought each other, with no group emerging as the superior, or prompting the factions to unify under a liberal government.[97] There was no time when any "group occupie[d] a permanently dominant position."[98] Thus, the bureaucratic stage persisted through the Mexican period of California history.

B. American Conquest and the Road to the 1849 Constitutional Convention

The American conquest of California was the true prelude to the establishment of a liberal state in California. Since the beginning of the Mexican period, Americans became an increasingly significant part of California politics and society.[99] Americans played a role in the stifled 1836 bid for California independence, and were engaged in the hide and tallow trade that sustained the missions and the ranchos during their isolation in the Mexican period. And American participation in

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97 Chapman, *supra* note 35, at 473. See Chapters 12 and 13 of Richman, *supra* note 35, for a narrative of these events. In 1836, the Native Californians actually attempted to secede from the Mexican republic. Osio, *supra* note 95, at 157; Goodwin, *supra* note 78, at 8-12; Starr, *supra* note 2, at 46; Richman, *supra* note 36, at 258.

98 Unger, *supra* note 3, at 66.

99 The United States had long been interested in California. In 1804, William Shaler, captain of the merchant ship Leila Bird, observed, "It would be easy to keep California in spite of the Spaniards as it would be to wrest it from them in the first place." Goodwin, *supra* note 78, at 2. Later, in 1835, President Jackson ordered the charge d'affaires in Mexico to purchase the Bay of San Francisco for $5 million. The plan failed because of British opposition. *Id.* at 7. Finally, a veritable dress rehearsal for the eventual Mexican-American war took place on October 19, 1842 when Commodore Thomas Catesby Jones captured the *pueblo* of Monterey under the mistaken impression that war had begun between the United States and Mexico. After being convinced that no such war had begun, he restored the Mexican flag, withdrew his troops, and sailed away. Finally, on the eve of the war with Mexico, President Polk authorized the U.S. minister to Mexico to purchase Alta California and New Mexico for $15-20 million (he was authorized to offer as much as $40 million). *Id.* at 16. This plan was interrupted by the Mexican-American War.

the California polity helped lead to the creation of a pluralistic society in which several constituencies vied for, but were unable to gain, superiority.

The native Californians were the dominant landholders in California, owning almost all of the real property in the territory. This result was reinforced by the Mexican government's policy of restricting the sale of land to foreigners.[100] After the American conquest of California, the Treaty of Guadalupe Hidalgo preserved the titles of the native Californians to their lands.[101]

The American conquest of California was precipitated by the Mexican-American War. On May 13, 1846, the United States declared war on Mexico. Shortly thereafter, on June 14, 1846, Ezekial Merritt, a pioneer trapper, successfully led a rag-tag band of volunteer American frontiersmen who captured General Mariano Vallejo and the Mexican barracks at Sonoma and immediately declared the "Bear Flag Republic."[102] This Bear Republic was short-lived. Commodore Sloat captured Monterey in an amphibious assault on July 7, 1846, raised the American flag over the customs house, and proclaimed California annexed to the United States. The native Californians led an armed uprising against the Americans, but were ultimately unsuccessful. On January 13, 1847, the Capitulation of Cahuenga was signed by the American and Mexican leaders, closing the California Theater of the Mexican-American War. On February 2, 1848, the Treaty of Guadalupe Hidalgo was signed

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100 Decree of August 18, 1824, *in Halleck Report*, *supra* note 50, at 140; Goodwin, *supra* note 78, at 7.

101 Section 8, Treaty of Peace, Friendship, Limits and Settlements with the Mexican Republic, May 10–May 30, 1848, U.S.-Mex., 9 Stat. 922, 926 (1851) [hereinafter *Treaty of Guadulupe Hidalgo*]. Of course, most of the Mexican-Californians were stripped of their land grants by the federal Land Commission and the courts in the fifty years following the American conquest. W. W. Robinson, Land in California 91-110 (University of California, 1979).

102 Goodwin, *supra* note 78, at 13; Starr, *supra* note 2, at 67-68. This new republic promised to secure civil and religious liberty, "insure security of life and property; detect and punish crime and injustice; encourage virtue, industry and literature; foster agriculture and manufactures, and guarantee freedom to commerce." Goodwin, *supra* note 78, at 13.

between the United States and Mexico, ending the Mexican-American War.[103]

Although the United States was in firm possession of California after the ratification of the Treaty of Guadalupe Hidalgo, it was understood that Mexican law and governmental structures prevailed until a new civil government could be erected. The United States and its military governors were limited by the principle of international law that "a military governor might *suspend*, but could not simply by virtue of his office, *abolish* any law of the country by military authority."[104] The consequence was that preexisting Mexican law continued to be in force until the United States, as the country that would permanently hold California, should pass any laws to the contrary.[105] Despite popular beliefs prevailing at the time, the laws and Constitution of the U.S. did not presumptively apply because of the fact of conquest.[106]

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103 *Treaty of Guadalupe Hidalgo*, *supra* note 101. Under the treaty, Mexico ceded all territories north of the Rio Grande in return for $15 million in cash and $3.25 million in claims by Mexican citizens against the United States. *Id*.

104 Myra K. Saunders, *California Legal History: The Legal System Under the United States Military Government, 1846–1849,* 88 L. Libr. J. 488, 492 (1996) (citing to Gregory Yale, Legal Titles to Mining Claims and Water Rights in California 17 (San Francisco, A. Roman & Co. 1867)); Henry Wager Halleck, Halleck's International Law, or Rules Regulating the Inter-course of States in Peace and War 450 (Sir Sherston Baker ed., C. Kegan Paul & Co. 1861). Halleck provides that

> [t]he municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. . . . On confirmation of the conquest by a treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest.

Id. *See also* Leon Thomas David, *Our California Constitutions: Retrospections In This Bicentennial Year*, 3 Hastings Const. L.Q. 697, 706 (1975-1976).

105 Governor Kearny issued circulars that notified the population, "The country was to be held simply as a conquest, and as nearly as possible under the old laws, until such time as the United States should provide a territorial government." Bancroft, *supra* note 85, at 260.

106 *Id.* Governor Mason wrote that "many of my countrymen in California labor under a mistake in believing that, because we are in possession of the country, we are under the constitution and laws of the United States." Saunders, *supra* note 104,

Almost immediately, efforts were made to reestablish the pre-conquest legal regime. After the conquest of Monterey, Commodore Sloat issued a proclamation that invited the existing civil officials to return to their offices until the United States instituted a new government.[107] Commodore Sloat transferred power to Commodore Robert Stockton in July 1846 and departed from California. During his brief governorship, Commodore Stockton made the bold move of declaring California a territory of the United States and drafted a constitution for the territory modeled on the Mexican Laws of 1837.[108] However, Stockton's legal regime was never realized.[109] Stockton appointed General John Frémont as governor of California in January 1847 and left the territory shortly thereafter. Fremont's appointment was problematic, as his superior, Brigadier General Stephen Kearny, was in California at the time. Any confusion was cleared up a month later when, in February 1847, Colonel Richard Mason arrived in California with clear orders from the United States government appointing Kearny as governor.[110] Kearny began immediately to undo Stockton's work. On March 1, 1847, Kearny issued a

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at 494 (citing Letter from R.B. Mason to John Grisby (June 2, 1847), *in* H.R. Exec. Doc. No. 17, *supra* note 50, at 318-319. Saunders compares this approach with that used by General Kearny after his occupation of New Mexico in 1846. In that case, Kearny had issued a constitution and laws for the territory of New Mexico with the idea of establishing a permanent government while the United States and Mexico were still at war. This was disapproved of by President Polk who only approved of those regulations which preserved order, protected the inhabitants, and denied any military advantages to the enemy. *Id.* at 493. Perhaps Kearny was more conservative in his approach in California as a result of his actions in New Mexico.

107 *Id.* at 491 (1996) (citing Proclamation of John D. Sloat (July 7, 1846), *in* Documents from the State Department on Relations with Mexico, S. Exec. Doc. No. 1, 29th Cong., 2d Sess., at 644 (1850)). A proclamation similar to the one made at Monterey was made after Stockton conquered Los Angeles on August 17, 1846. *Id.* (citing Occupation of Mexican Territory, H.R. Exec. Doc. No. 19, 29th Cong., 2d Sess., at 109-110 (1847)).

108 *Id.* Under Stockton's Constitution, all municipal officers of cities, towns, departments, or districts formerly existing in the territory were to continue and be regulated by the preexisting laws of Mexico. Goodwin, *supra* note 78, at 32.

109 David, *supra* note 104, at 707 ("In August 1846, Commodore Stockton transmitted to George Bancroft, Secretary of the Navy, a proposed constitution for the territory of California. It died an administrative death.").

110 Goodwin, *supra* note 78, at 38. *See also* Saunders, *supra* note 104, at 491.

proclamation that promised the residents of California that self-government was forthcoming, that Mexican laws were to remain in force for the time being, and that the government implemented by Stockton would not continue.[111] Kearny resigned on June 1, 1847, appointing Colonel Mason in his stead.

Governor Mason made it clear to the inhabitants of California that they would not enjoy the promised civil government. Rather, under the principles of international law, the Mexican laws previously in force prevailed until the United States government provided a civil government. In defining the laws to be enforced, Mason designated only those laws implemented in California at the time of the American conquest.[112] Consequently, Mason ordered the *alcaldes* to continue their functions, reasoning that

> no civil officers exist in the country, save the alcaldes appointed or confirmed by myself. To throw off upon them or the people at large the civil management and control of the country, would most probably lead to endless confusions, if not absolute anarchy; and yet what right or authority have I to exercise civil control in time of peace in a Territory of the United States? . . . Yet, . . . I feel compelled to exercise control over the alcaldes appointed, and to maintain order, if possible, in the country, until a governor arrive, armed with instructions and laws to guide his footsteps.[113]

During the one and one half years of Mason's military rule, *alcaldes* were the only civil officers in the entire territory.[114] As stated, their combination of powers and the fact that *alcaldes* decided cases without looking to positive law provoked consternation and criticism from the inhabitants. The American military governors responded by appointing

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111 Goodwin, *supra* note 78, at 38; Saunders, *supra* note 104, at 492 (citing Proclamation to the People of California from S.W. Kearney (Mar. 1, 1847), *in* Presidential Message Transmitting Information on California and New Mexico, H.R. Exec. Doc. No. 17, 31st Cong., 1st Sess., at 288-289 (1849)).

112 Saunders, *supra* note 104, at 494.

113 Goodwin, *supra* note 78, at 49.

114 Governor Mason did not recognize or establish any of the other courts or other governmental offices outlined in the Laws of 1837. Saunders, *supra* note 104, at 494.

Americans as *alcaldes* in many localities.[115] These American *alcaldes* resorted to common law-inspired legal values and infused them into the Mexican legal system.[116] Ironically, American *alcaldes* had the power to import common law values only because Mexican practice allowed *alcaldes* to use their own sense of justice and legal values.

Governor Mason and his successor refused to make any land grants and invalidated any transfers that were made.[117] Their policy provoked immense dissatisfaction among those Americans who had come west with the expectation that there would be freely available land. They arrived instead to find much of the arable land held as huge ranches by native Californians. Americans responded by using the Mexican laws in their favor. They established towns or redesigned existing towns and parceled out land to themselves according to Mexican laws. But, this system failed to address the native lock-up of arable land.

Dissatisfaction with the *alcaldes* and with the land transfer eventually prompted the Americans to push toward a new government that they had a hand in creating. At the same time, native Californians began to lose political dominance. By 1849, native Californians were outnumbered roughly seven to one[118] and no doubt felt dependent on their conquerors' goodwill. Because their land titles remained valid in the new regime, they exercised some power in local affairs, but no longer claimed dominance. Their legal recognition and political power was weakened further following the 1848 gold finds, when the influx of Americans and foreigners made native Californians a minority.

This tension between the native Californians and Americans led to a pluralism characterized by group interests. Neither group was powerful

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115 *See supra* at note 89.

116 Saunders , *supra* note 104, at 496; Grivas, *supra* note 40, at 27.

117 Mason argued, "Emigrants coming into the country who wish their own rights respected should not violate the rights of others — the natives and adopted citizens." Saunders, *supra* note 104, at 504 (citing Letter from R.B. Mason to Alcalde William Blackburn (June 21, 1847), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 332-333).

118 Bancroft wrote in 1849, "The population of California at this period was estimated at 107,000; the number of Americans in the country 76,000; of foreigners 18,000; of natives 13,000." Bancroft, *supra* note 85, at 305-306.

enough to assert complete dominance over the other, hence the *modus vivendi* of pluralism. Because the legal systems of both the native Californians and the Americans were products of the Enlightenment, there existed between them a common notion of a higher universal or natural law founded in human dignity and human rights. Their proclivity toward abstract and uniform law was reinforced by their major religious belief systems, Catholicism and Protestantism — both transcendent religions. These two features, pluralism and a common philosophy of natural law, were necessary elements to move California into the liberal stage of legal development.

The remaining element that catalyzed California's movement into the liberal stage was the perceived ambivalence of the United States Congress. The United States federal government was at odds about what to do with California. It obviously endorsed Mason's military government as a stopgap measure, reasoning that

> [t]he consent of the people [for military government] is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.[119]

The U.S. government communicated to the people in California that "termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion."[120] But, the issue of slavery prevented the Congress from reaching a consensus on how to organize California or provide laws for its people. Californians grew increasingly upset with the lack of real progress in organizing a new government.

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[119] *Id.* at 509 (citing Letter from James Buchanan to William Vorhies (Oct. 7, 1848), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 7-8).

[120] *Id.*

Some began to voice a theory of government by which the *de facto* military government led only at the will of the people. Senator Thomas Benton of Missouri expressed this view in the *Alta Californian*: "Having no lawful government, nor lawful officers, you can get none except by your own act; you can have none that can have authority over you except by your own consent. Its sanction must be in the will of the majority."[121]

In December 1848 and January 1849, mass meetings were held in San José, San Francisco, and Sacramento to address the state of the law in California. On February 12, 1849, the people of San Francisco took action under this theory of *de facto* government. A convention of the people resolved that the circumstances "had forced the people to conclude that Congress had been trifling with them in delaying the long proposed constitution — that there was no more time to wait — and therefore that instant steps should be taken to establish a form of government for themselves."[122] At the same meeting, a plan of government was adopted and officers elected. The first meeting of the San Francisco assembly took place on March 5, 1849.[123] On March 27, 1849, General Smith (the military officer in charge of the U.S. forces at San Francisco) issued a reply refusing to support the San Francisco assembly on the grounds that the military regime had been recognized by the President as a *de facto* government, and must be so recognized until Congress should organize another.

Hopes for congressional action were dashed on May 28, 1849 when the steamer *Edith* brought news that the Congress had adjourned for the year without providing for a territorial government. The politics on the issue of slavery had kept Congress from arriving at a consensus. Responding to the people's despair, Governor Bennett Riley (who succeeded Governor Mason on April 12, 1849) issued a proclamation that emphasized respect for the laws in force at the time of the conquest: "[T]here can be no question that the existing laws of the country must continue

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121 Thomas H. Benton, *United States*, Alta Californian (San Francisco), Jan. 11, 1849, at 2.

122 Goodwin, *supra* note 78, at 72.

123 *Id.* at 67-68.

in force till replaced by others made and enacted by a competent power. That power, by the treaty of peace, as well as from the nature of the case, is vested in Congress."[124]

But, the volatile situation caused by Congressional inaction and the growing American dissatisfaction with *alcalde* rule prompted Governor Riley to make one very important concession. In his proclamation reiterating the need to abide by Mexican law, Governor Riley gave the people an opportunity to frame their own government. The proclamation ended with a call for a convention to "frame a State constitution, or a territorial organization, to be submitted to the people for their ratification, and then proposed to Congress for their approval."[125] On August 1, 1849, the people elected delegates to a constitutional convention.

C. The Constitutional Convention of 1849

The constitutional convention and its delegates convened as scheduled.[126] As the convention was prompted by the perceived ambivalence of the U.S. Congress and the inadequacy of prevailing Mexican law to meet the needs of Americans, many delegates predictably aimed to abolish those institutions that caused them the most inconvenience. Many American delegates expressed the popular sentiment that so long as the *alcalde* system persisted, there was no law. "We have no laws here," Delegate Myron Norton argued. "It has been impossible to ascertain

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124 Proclamation of B. Riley (June 3, 1849), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 776.

125 *Id.*

126 Though Governor Riley's proclamation for an election to send delegates to the convention only called for 37 delegates, the proclamation allowed for districts to elect more delegates if they wished to seek a larger representation at the convention. In the end, the Committee of Privileges and Elections admitted 48 members, with the white mining districts admitting most of the additional delegates at the expense of the Hispanic delegations from the South. Browne, *supra* note 63, at 16. *See also* Saunders, *supra* note 2, at 451. In general, the convention's members have been described as "young . . . , white . . . , and almost equally balanced between proslavery and antislavery contingents." Starr, *supra* note 2, at 92. Though there was some representation by the Hispanic population of California, the majority of the delegates were white and American, reflecting the recent change in demographics brought on by the Gold Rush.

what the law is, or to enforce it. The Mexican system, as retained in the existing civil government, is repugnant to the feelings of American citizens."[127]

Despite the animosity toward the Mexican law and native Californians, the American delegates understood the political need to win the natives' support. Their participation was viewed as an essential indicator of political stability, a feature that would have made the U.S. Congress more amenable to granting California statehood — something the American delegates deeply wanted.[128] As a result, compromises were made.

On voting rights, the Hispanic delegates won at least in principle. The original language proposed by the Standing Committee on the Constitution denied the franchise to Native Americans.[129] Many native Californians balked at the proposal, as the Mexican system permitted propertied Native Americans to vote and there were not more than two hundred such people in the territory at the time.[130] And the proposal was an embarrassment because its passage would require Manuel Dominguez, a *mestizo* delegate from Los Angeles, to sign a Constitution that would disenfranchise him.[131] In the end, the delegates offered an amendment granting Native Americans the franchise if two-thirds of the Legislature approved.[132]

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127 Browne, *supra* note 63, at 26. *See also* Saunders, *supra* note 2, at 451. Another delegate, Edward Gilbert, added, "It is notorious that the laws now in force are repugnant to the feelings, education, and habits of the great majority of the people." Browne, *supra* note 63, at 79. Lastly, one delegate went so far as to preclude any purpose for the presence of the eight Hispanic delegates. Mr. W.M. Gwin said, in open debate, "It was not for the native Californians we were making this Constitution; it was for the great American population, comprising fourth-fifths of this country." *Id.* at 22. Not surprisingly, it was thought that the Hispanic delegates came to prevent the "too liberal Americanizing of the country." Saunders, *supra* note 2, at 453 (citing Elisha O. Crosby, *The First State Election in California*, 5 Soc'y Cal. Pioneers Q. 65, 69 (1929)).

128 Saunders, *supra* note 2, at 453.

129 *Id.* at 461.

130 Browne, *supra* note 63, at 306-307.

131 Saunders, *supra* note 2, at 461, n. 94.

132 Browne, *supra* note 63, at 63; Cal. Const. of 1849, art. II, § 1.

Some historians have focused on the community property system as being a significant legacy of the 1849 constitution.[133,134] However, community property was not preserved because native Californians wished to perpetuate a familiar system, nor did Hispanic delegates rush to defend community property in the constitutional debates.[135] And, while it may be easy to characterize adoption of community property as a victory of the civil law against the common law, the system probably survived because of a progressive streak in the convention and as a recognition that the common law would ultimately prevail in the new state.[136] Indeed,

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133 *See*, *e.g.*, Walter Leowy, *Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. R. 32, 33 (1912-1913). Loewy writes, "The community system may, in consideration of its influence upon the legal and economic development of the State, be regarded as one of the most important landmarks of Spanish civilization in California." *Id.*

134 The relevant section in the 1849 California Constitution provides: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." Cal. Const. of 1849, art. XI, § 14.

135 However, the Hispanic delegates did find an advocate in Henry A. Tefft, a delegate from San Luis Obispo, who supported the civil law. Tefft argued:

> It is our duty to give a favorable consideration to any proposition which does not do marked and radical wrong to any class in California, and which deeply concerns the interests of the Native Californians. It would be an unheard of invasion, not to secure and guarantee the rights of the wife to her separate property; and of all classes of California, where the civil law is the law of the land, where families have lived and died under it, where the rights of the wife are as necessary to be cared for as those of the husband, we must take into consideration the feelings of the native Californians, who have always lived under this law.

Browne, *supra* note 63, at 258.

136 McMurray, *supra* note 72, at 379. *But see* W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, 106-109 (1st ed. 1943) (arguing that there is conclusive evidence that it was the clear intention of the drafters to adopt the Spanish system of community property). Compare de Funiak's views with that of Dana V. Kaplan, who believes that the community property system was adopted as an expedient solution to minimize political instability in the wake of recent conquest. Kaplan, *supra* note 69, at 154.

one commentator notes that the convention's adoption of a provision for community property was peculiar because some of the delegates saw it as a change in the existing law. They thought the common law, not the civil law, was the law of California.[137]

The passions roused by the community property system traced in part to the divisive choice between a common law and civil law system.[138] Some American delegates opposed community property, mostly on the grounds that the convention should draft what is best for the majority.[139] Both sides rose to the occasion and marshaled their arguments to their fellow delegates.[140] The majority, however, voted to adopt

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137 McMurray, *supra* note 72, at 369.

138 One delegate, Francis Lippett from San Francisco, stated the issue in no uncertain terms:

> The general rights of property must be considered with reference to the great mass of the population, the Americans; the smaller party, the Californians, must yield. *But the right of property in reference to man and wife and a thousand other matters are totally different at present. The Americans have been living under the common law: the Californians have been living under the civil.* It is useless to disguise the fact that in course of a few months, the question has to be settled under what code of laws the people are to live.

Browne, *supra* note 63, at 260. McMurray, *supra* note 72, at 371.

139 To this end, Mr. Lippett argued, "The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority." Browne, *supra* note 63, at 260-261. Mr. Lippett went on to state that the common law provides, in the form of ante-nuptial contracts, the same benefit as community property in preserving ownership over property brought to the marriage. *Id.* at 261. Mr. Charles Botts, a representative from Monterey, argued, "All distinctions should be lost among us; I consider that we are all Californians. The question then is, what is best for the great majority of the people of California?" *Id* at 259.

140 Kimball Dimmick, a delegate from San José and staunch defender of the common law, argued:

> The common law and no other law, is the law under which nine-tenths of the people not in California were born and educated; it is the only law which is known, the only law which her lawyers and judges know, and which we have access to. For this reason it must be the law of the land hereafter, whether it is established this month or next, this year, or next . . . .

Id. at 260. Another delegate, Mr. J. M. Jones from San Joaquin, took a road which led him to attack the common law:

the community property system as the best choice for the inhabitants of California.[141]

Another often discussed aspect of the 1849 Constitution has been its effect on the national slavery debate. The instrument declared, "Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State."[142] With ratification of the 1849 constitution, California statehood became an immediate national issue. One author has noted that the

> anti-slavery clause, which in our constitution had been so easily adopted, at once became a national question and threatened to disrupt the entire country. The demand of California to be admitted to statehood brought about what is called the 'Compromise of 1850,' and the controversy over the same resulted in one of the greatest battles ever waged in our national congress.[143]

Hubert Howe Bancroft charged, "Such was the fateful character imputed to the instrument draughted at Monterey by men of all sections . . . . [T]he admission of California as a free state led to the war of the rebellion."[144] Although the 1849 Constitution therefore precipitated the movement toward statehood and the ensuing national debate on

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> Where is this common law that we must all revert to? Has the gentleman from Monterey got it? Can he produce it? Did he ever see it? Where are the ten men in the United States that perfectly understand, appreciate, and know this common law? I should like to find them. When that law is brought into this House — when these thousand musty volumes of jurisprudence are brought in here, and we are told this is the law of the mass — I want these gentlemen to tell me how to understand it. I am no opponent of the common law, nor am I an advocate of the civil law. Sir, I am an advocate of all such law as the people can understand.

Id. at 264.

141 Browne, *supra* note 63, at 269; Cal. Const. of 1849, art. XI, § 14. Ironically, early judicial interpretation of community property leaned on common law property principles. Allan Pedlar, *The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy*, 63 Cal. L. R. 1610, 1613 (citing to William Simmons, *The Interest of a Wife in California Community Property*, 22 Cal. L. R. 404 (1934)).

142 Cal. Const. of 1849, art. I, § 18.

143 Cushing, *supra* note 73, at 72.

144 Bancroft, *supra* note 85, at 344.

slavery, there is no apparent evidence that the slavery debate prompted the 1849 convention.

Nor does the 1849 Constitution merit praise for its ban on slavery. Consider the politics in play at the California constitutional convention. While most of the delegates to the convention arguably had sympathies with the South,[145] the body settled quickly and without objection to prohibit slavery. Bancroft reports that this outcome was the result of the Southern faction's attitude that if California became a free state there would be no harm to their cause. After all, "out of the remainder of the territory acquired from Mexico half a dozen slave states might be made."[146] To put it in another way, the significance of California's prohibition of slavery was not in the prohibition, but the extent of the territory to which such prohibition extended:

> After all, California, as ceded by Mexico, embraced a vast area extending to the Rockies. There was enough territory for several states, and it was not seen as politically probable that Congress would approve a constitution making all that territory free of slavery. . . . The southerners in the 1849 convention assented to the boundary adopted, believing that another part of the territory could still be established as a slave state if economic conditions justified it.[147]

Unsurprisingly, the debates on the state's boundaries proved to be the most heated and contested of the convention.[148]

After a month and a half of open debate and committee meetings, the convention finished its business on October 11, 1849, approving the production of copies of the first Constitution of the State of California in

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145 Bancroft writes, "The convention was not lacking in talent. It was not chosen with regard to party proclivities, but was understood to be under the management, imaginary if not real, of southern men." Bancroft, *supra* note 85, at 286.

146 Bancroft, *supra* note 85, at 291. Bancroft also intimates that another reason why none of the delegates who were from the southern states stood against the prohibition on slavery was because they feared it would cost them future public office. *Id.*

147 David, *supra* note 104, at 713.

148 For a general discussion of the arguments presented at the convention, *see* Bancroft, *supra* note 85, at 290-296.

both Spanish and English.[149] A copy was forwarded to Governor Riley and, on October 13, the delegates gathered together one last time in the morning for the solemn and happy ceremony of signing the Constitution.[150] On November 13, 1849, the people of California voted in favor of their first constitution and elected their own government for the first time.[151] Governor Riley proclaimed the Constitution ratified on December 12, and turned over the government to civil authorities on December 20. The state operated on a *de facto* basis until California was admitted as a state on September 9, 1850. The Constitution created at the 1849 convention served the state for thirty more years. The Bill of Rights lasted even longer; its main part forms the heart of the current Constitution of the State of California.[152]

D. California's 1849 Constitution and the Shift to the Liberal Stage

The 1849 California Constitution ratified by the people of California reflects in many ways the process of compromise and the liberal spirit that drove the delegates. This spirit of compromise was not just between Hispanics and the American delegations. Rather, the American delegation was divided on several topics that had a profound effect on the Constitution's final outcome. This tension in the convention's chamber reflected tension building among varying factions in the territory since the American conquest. The 1849 constitution stands as evidence that the people, despite their differences, agreed to be governed under a collectively embraced instrument. One historian remarks, "The fact that the convention was held at all demonstrated an irrepressible urge for self-government

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149 Browne, *supra* note 83, at 462.

150 After signing, a 31-gun salute thundered from the nearby presidio, and an English ship in the harbor raised the Stars and Stripes in celebration. Starr, *supra* note 2, at 94. In the afternoon, the delegates walked over to the gubernatorial adobe in Monterey and personally presented the first Constitution of the State of California to Governor Riley, who wept at receiving it. *Id*.

151 *See supra* at note 2.

152 Reiner and Size have written, "Most of the provisions of our present California Declaration of Rights go back to our original state constitution, drafted in Monterey in 1849." Ira Reiner & George Glenn Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights*, 23 Pac. L. J. 1183, 1185 (1992).

and a legal order to maintain it."[153] The Constitution's preamble states, "We, the People of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution."[154] Besides expressing a belief in a transcendent order, the preamble appeals to the need for "a minimum of freedom and security," which Unger believes drives the liberal compromise.[155] This was certainly not lost on the people.[156]

The Hispanic delegates, and the population they represented, were probably wary of the new Constitution.[157] They were accustomed to a bureaucratic system and had little to do with most of the provisions in

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153 David, *supra* note 104, at 712.

154 Cal. Const. of 1849, Preamble.

155 Unger, *supra* note 3, at 75-76. The convention's "Address to the People of California" reflected this element when they wrote:

> It cannot be denied, that a difference of opinion was entertained in the Convention, as to the policy and expediency of several measures embodied in the Constitution; but looking to the great interests of the State of California, the peace, happiness, and prosperity of the whole people, individual opinions were freely surrendered to the will of the majority, and with one voice we respectfully but earnestly recommend to our fellow-citizens, the adoption of the Constitution we have the honor to submit.

Browne, *supra* note 63, at 474.

156 The *Placer Times* promoted the Constitution to its readers, noting:

> It is liberal in its protections of the rights of conscience; it is enlightened in its provisions for the spread of education: it is free from in exclusion of slavery; it is republican in its assertion of the inherent political power of the people; it is democratic in its prohibition of banking; and it is in keeping with the progressive spirit age by making all officers of the government elective. We say, then, to those who desire to see public order, public rights, and public justice established upon the sure foundation of a written "Magna Carta" — "Stand by the Constitution."

Placer Times (Sacramento, CA), November 3, 1849, as quoted in the Alta California (San Francisco, CA), November 20, 1849.

157 Bancroft writes, "These native delegates were averse to the change about to be made. They feared that because they were large land-owners they would have the burden of supporting the new government laid upon their shoulders, and naturally feared other innovations painful to their feelings because opposed to the habits of thought. These very apprehensions forced them to become the representatives of their class, in order to avert as much as possible the evils they foreboded." Bancroft, *supra* note 85, at 284-285.

the 1849 Constitution. The delegates to the convention recognized the possibility that Hispanics would see the new Constitution as an alien institution. They therefore drew special attention to this minority population in their "Address to the People of California":

> It is to be remembered, moreover, that a considerable portion of our fellow-citizens are natives of Old Spain, Californians, and those who have voluntarily relinquished the rights of Mexicans to enjoy those of American citizens. Long accustomed to a different form of government, regarding the rights of person and of property as interwoven with ancient usages and time-honored customs, they may not at once see the advantages of the proposed new government, or yield an immediate approval of new laws, however salutary their provisions, or conducive to the general welfare. But it is confidently believed, when the government as now proposed, shall have gone into successful operation, when each department thereof shall move on harmoniously in its appropriate and respective sphere, when laws based on the eternal laws of equity and justice shall be established, when every citizen of California, shall find himself secure in life, liberty and property — all will unite in the cordial support of institutions, which are not only the pride and boast of every true-hearted citizen of the Union, but have gone forth, a guiding light to every people groping through the gloom of religious superstition or political fanaticism . . . .[158]

The Americans outnumbered the Hispanic population in striking measure. Yet, as demonstrated above, the Americans understood that the Hispanic population and their political contentment held the key to the legitimacy of the new government. One wonders how this view might have been different if the Hispanic population were not in control of so much real estate. Recognition of their holdings by the United States prevented the American delegates from simply ignoring Hispanic interests. While much of the Hispanics' land-based security would be eroded in the next fifty years by the federal Land Commission and the courts,[159]

158 Browne, *supra* note 63, at 474-475.

159 Robinson, *supra* note 101, at 91-110.

it was an essential feature of the *status quo* that catalyzed the creation of a society based on the rule of law in California.

Another important feature of the liberal state is that it be erected in a way that "prevent[s] any class of persons from imposing a dictatorship on all other classes."[160] In other words, in the liberal state, the government must be limited. The 1849 Constitution of the State of California reflects a theory of limited government by granting civil liberties to citizens and by separating the powers of government into separate branches. The Constitution expresses the theory that "Government is instituted for the protection, security, and benefit of the people, and they have the right to reform the same, whenever the public order may require it."[161] Unger observes that the liberal state also requires that the laws be applied uniformly.[162] This notion is incorporated in the 1849 California Constitution in Article I, Section 11, which provides that "all laws of a general nature shall have a uniform operation."[163]

In the end, the 1849 Constitution of the State of California established for the first time a liberal state in California. From that point on, the rule of law has prevailed. Vestiges of the bureaucratic stage, especially in the form of the *alcaldes*, would no longer be formally recognized in the law. The pluralism that led to the calling of the constitutional convention would continue as California became more populous and its people engaged in ever more diverse professions and activities. The year 1849 should forever be remembered as California's "liberal moment," when California attained that rare status as a liberal society.

III. WHAT DOES IT ALL MEAN?

California has a short history, but a long *legal* history. We must now give meaning to that legal history. An understanding of California's legal history as a progression in a cycle (which is the path taken by this article) is meaningless without placing it in a structure that gives it overarching

160 *Id.* at 69-70.

161 Cal. Const. of 1849, art. I § 2.

162 Unger, *supra* note 3, at 80.

163 Cal. Const. of 1849, art. I § 11.

significance. To this end, it is worthwhile to consider Unger's cycle of legal history as a theoretical framework for describing the progression of human freedom and its reflection in the relationship between the forms of law and society.[164] In this progression, the liberal stage is the one in which human freedom flourishes most. This would be one reason to celebrate the 1849 California Constitution — it was the moment California entered the liberal stage, and human freedom in society was realized to a degree greater than any known before. This interpretation also gives meaning to the plurality of interests that characterized the state in 1849 and which characterizes California today.

But, this view celebrates the singularity of a moment and ignores the span of the history that preceded it and that proceeds from it. This article has described California's legal history according to a particular theory from its earliest origins and has ended the historical description with the 1849 Constitution. To understand the importance of California's legal history as part of a process in which the 1849 California Constitution is an important moment, a look to the future gives California's "liberal moment" its greatest significance.

In addition to the three stages previously described, Unger describes a fourth stage known as the post-liberal stage. While a fuller discussion of the post-liberal stage is beyond the scope of this article, its main characteristics are the overt intervention of government in areas previously regarded as beyond the proper reach of state action and the gradual merging of state and society and of public with private.[165] This first characteristic, described by Unger as the "welfare function," is most visible where the state engages in overt redistribution, regulation, and planning.[166] The second characteristic is found when the state ceases to be the "neutral guardian of the social order" and when "private organizations are increasingly recognized and treated as entities with the kind of power that traditional doctrine viewed as a prerogative of government."[167] This

164 Unger, *supra* note 3, at 47.
165 *Id.* at 192-193.
166 *Id.* at 193
167 *Id.*

second characteristic is related to the first and is described by Unger as the "corporatist tendency."

But, it is what happens beyond the stages in Unger's cycle that gives meaning to the entire span of any society's legal history. Unger provides that "there are two main ways in which one can interpret the significance for law of the tendencies at work in modern, and particularly, in post-liberal society."[168] The first interpretation is that of a genuine cycle, or a closed circle, which "would present the entire history of law as one of movement toward a certain point, followed by a return to the origin."[169] Whether a society in the liberal stage reverts back on its own to previous stages or follows the post-liberal pattern of instituting a welfare function that undermines the uniformity of the laws and culturing a corporatist tendency that abrogates the autonomy of the government, the necessary result would be the decline of the rule of law.[170] In other words, society can lose its grip on the rule of law ideal and slip backward or "slip forward" by allowing the post-liberal tendencies to erode the rule of law. And, in any decline of the rule of law, the greatest loss to the individual and society is incurred — the destruction of individual freedom.[171]

Unger posits a different possibility for society that is less dire. Here we must view the cycle of legal history as an upward spiral which returns to its starting point but at a higher level compared to the previous iteration of the cycle. The essence of this view is "to see and to treat each form of social life as a creation rather than as a fate" with each stage refining the relationships between the individual and the state and between the individual and others.[172] This possibility would entail the decline of the rule of law as would the first possibility, but the decline would not be so ominous for individual freedom because such freedom will "survive the disintegration of public and positive law and be reconciled with a sense of an immanent order in society."[173] This possibility is optimistic. It argues that society and law can develop so as to preserve individual

168 *Id*. at 238.
169 Unger, *supra* note 3, at 238.
170 *Id*. at 238-239.
171 *Id*. at 238.
172 *Id*. at 239.
173 Id.

freedom and to harmonize it with societal concerns and to lessen the need for a legal apparatus to sustain this balance.[174] The eventual outcome of this form of historical-legal progression is a society that is more free yet requires less government.

While Unger admits that neither possibility now can be proved true or false,[175] it is also possible that neither possibility may occur at all. In which direction are *we* headed? In seeking to answer this question, we can see that California's 1849 Constitution marks a truly significant moment. In that moment California achieved the rare status of a liberal society with a foundation built on a rule of law. As we look back upon the moment, we should ask ourselves whether the challenges that have faced California since then have created a legal history that suggests one of the possible futures laid out above. If so, we must evaluate whether that is the direction in which we choose to go. For it is, ultimately, our choice.

CONCLUSION

In its relatively short history, California experienced a diversity of law and government possibly unmatched in American history. It was once part of a kingdom, ruled by dynasties of Spanish, Austrian, and French origin. It was first settled by zealous missionaries supported by hardened Spanish frontiersmen. Later, under Mexico, California experienced a time of tumult where factions within the state waged wars across the land. During this time, the Mexican government experienced first federalism and then centralism. A sure government in California was always in doubt.

While the Californians and Mexicans fought to decide their future, the Americans did not wait. They came to California seeking fortune and a new beginning, integrating into the local culture and society. With the American conquest, the stage was set for a new liberal state. After a convention that unified the Hispanic and Anglo-American elements in the state, a constitution was ratified that established a rule of law that has persevered to today.

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174 Unger, *supra* note 3, at 239.

175 *Id*. at 238.

The particular legal history of California is not merely interesting. When one steps back and looks to understand what the total sum of it all means, one sees that its significance is as a progression of events leading to the institution of the rule of law. First, in the Iberian Peninsula, where the people and ideas that would arrive in California were born, there initially existed a society based on customary law. In time, this society evolved into a bureaucratic stage that would extend its reach into the New World and eventually to California. The bureaucratic stage persisted until 1849, when it was peacefully and swiftly replaced by the rule of law. With that, California existed thereafter as a liberal society. And this is the true significance of California's "liberal moment." ✯