ARTICLES

"DEVILISHLY UNCOMFORTABLE":

In the Matter of Sic — *The California Supreme Court Strikes a Balance Between Race, Drugs and Government in 1880s California*

BY MIKELIS BEITIKS*

On the evening of October 22, 1885, some 300 residents of Stockton showed up at the town's city hall for an "Anti-Chinese Meeting." The turnout was so large that officials had to relocate the meeting to the nearby Turn-Verein Hall to accommodate the crowd.[1] To read newspaper accounts of this event is to feel as though one is watching the raucous, conflict-establishing closing scene of a play's first act — a thunderous and irreversible event that will surely lead to something interesting after the intermission.[2]

Exhibiting a dynamic that had been playing and replaying in West Coast towns for several decades, Stockton's white residents were pacing, clenching their jaws and cracking their fingers over difficult economic times, and

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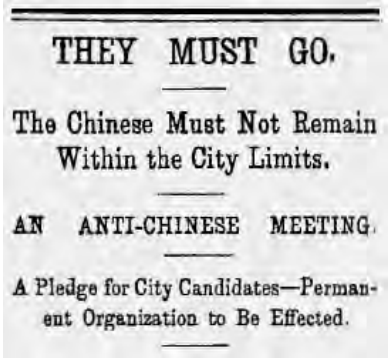
1 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885. (The Turn-Verein Hall was Stockton's German ethnic hall).

2 "They Must Go," *The Stockton Daily Independent*, October 23, 1885. See also, "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

then coming to a consensus that Chinese immigrants were to blame for their hardship.[3] Stockton's anti-Chinese meeting was reportedly called to "urge the necessity of excluding the Chinese from the city,"[4] but a headline describing the meeting in the *Stockton Mail* the next day captures the gathering's purpose more bluntly: "Law or no Law, John Chinaman Must Go."[5]



THEY MUST GO.

The Chinese Must Not Remain Within the City Limits.

AN ANTI-CHINESE MEETING.

A Pledge for City Candidates—Permanent Organization to Be Effected.

In an era of partisan politics, Stockton's anti-Chinese meeting was a collaborative event. Future governor of California, former U.S. congressman and Stockton resident James Budd was the featured speaker. Budd declared that if "healthy public sentiment" prevailed, every Democrat, Republican, Workingman, Socialist and Sandlotter "would put his shoulder to the wheel, and help to throw the Chinese to the other side of the Mormon slough." He assured those present that there was "no question" that the town could use the law to target the Chinese, and then went further, proclaiming that it was in fact "the duty" of local government to make life "so devilishly uncomfortable," for the Chinese as to make them "glad to leave." Budd informed the crowd that Stockton's City Attorney, Frank Smith, was already drafting ordinances to this effect — sanitary laws targeting the Chinese, similar to ones that had been recently adopted in San Francisco. His speech was followed with great applause.[6]

Stockton's chief of police then stood and spoke in "glowing language of the filth and corruption that met his gaze" in Chinatown, giving details

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[3] Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Chicago University of Illinois Press, 1991), 97. It is noteworthy that this 1885 action by Stockton was one of a series of many momentous anti-Chinese actions that were happening even within that very month in California. Sandmeyer lists over thirty California communities that were taking drastic action against their Chinese during this period of 1885, in a series of actions motivated by dissatisfaction with the implementation of preceding anti-Chinese legislation, and spurred by a murderous anti-Chinese riot in Wyoming.

[4] "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

[5] "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

[6] Id. The Mormon Slough was Stockton's southern border in 1885.

of conditions that could be targeted by sanitary laws. His account was received with "laughter and good-natured applause."[7]

With the substance and the color of the meeting's thrust sufficiently established, resolutions were drafted to support only anti-Chinese candidates in the upcoming election and to create a permanent anti-Chinese committee to ensure follow-through. As the resolutions were enthusiastically adopted by those in attendance, there was but one "No" vote cast in the hall — "a single voice, the voice of a woman."[8]

Mrs. Farrington, a landlord to some of Stockton's Chinese residents, rose amidst bustle and gavel-raps for order to attempt to speak in defense of the town's Chinese. She reminded the group that some of Stockton's Chinese residents had lived in town for three decades — longer than almost any of the whites in attendance — and that the Chinese were undeniably prompt and dutiful in paying their bills and their taxes. She attempted to continue her plea, but before she should say any more, the meeting's chairman aggressively cut her off, calling Farrington and people of her type a "curse to the city."[9]

The chairman's dismissal of Farrington was "drowned in uproarious applause." He rounded out his scorning by saying that Stockton would be better off if it could be rid of the Farrington-types of the town right along with the Chinese, and then shouted a motion to adjourn over her objection, abruptly closing the meeting.[10]

And just like that, with the downswing of the chairman's gavel, the curtain drops on the first act of the play, the lights go up in the house, and the crew begins to move furiously, re-setting the stage.

In the second act, less than a week after this dramatic meeting, the Stockton City Council would pass local sanitary ordinances "aimed at the Mongolians." These ordinances set penalties for various aspects of open cooking fires, gambling, operating laundry facilities in town, and opium smoking — penalizing practices unique to the town's Chinese residents.[11]

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7 "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

8 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

9 Id.

10 Id.

11 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

Within six months of the passage of these laws, an arrest of two Chinese residents of Stockton would be made under the opium-smoking ordinance. This arrest would lead the city to appear before the California Supreme Court and see the opium law struck down as in violation of the California Constitution of 1879.

The case is *In the Matter of Sic*, and the contextual history of the decision speaks volumes about California's anti-Chinese legislation in the late nineteenth century, America's earliest drug laws, and the wrinkles between federal, state, and local government law that needed ironing out as California settled onto its new constitutional foundation after 1879.[12]

ANTI-CHINESE LEGISLATION IN CALIFORNIA

> *"Diverse motives entered into the opposition of Californians to the Chinese. Fundamental to all of them was the antagonism of race, reinforced by economic competition. . . . In true frontier fashion, Californians attempted to solve the problems arising from the Chinese by local measures. . . ."*
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> — Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California*[13]

More or less from the moment they settled in California, Chinese immigrants were subjected to various local, state and federal laws explicitly aimed at unsettling them.[14]

These laws took countless forms. Laws levied heavier taxes on Chinese miners; prohibited Chinese from fishing; made requirements of laundry businesses that Chinese proprietors couldn't meet; prohibited traditional Chinese hairstyling; prevented companies and municipalities from hiring Chinese workers; hindered Chinese burial practices; outlawed the conditions in which the Chinese slept; banned the type of gambling practiced by Chinese men; denied the Chinese the right to vote; prohibited Chinese children from attending white schools; explicitly forbade Chinese

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12 *In the Matter of Sic*, 73 Cal. 142 (1887).

13 Sandmeyer, 109–10.

14 Hyung-chan Kim, *A Legal History of Asian-Americans, 1790–1990* (Westport: Greenwood Press, 1994), 47.

immigration; made the use of ceremonial firecrackers and gongs illegal; prohibited Chinese from marrying whites; and the list goes on.[15]

The California Constitutional Convention of 1879 was perhaps the legal pinnacle of the anti-Chinese movement in California. While the 1879 Convention was undoubtedly needed to redraft the original 1849 Constitution (which had been "hastily drawn up by men whose experience in California was measured only by months"[16]), one scholar has gone so far as to say that the Convention was "called almost exclusively to deal with the Chinese problem."[17] The number of Chinese immigrants in California more than doubled between 1860 and 1879. This influx seemed nowhere near diminishing, and the white citizens of the state were desperate to stop the deluge.[18]

In turn, it seems as though the primary debate at the Convention concerned the question of how to make the Constitution as anti-Chinese as possible without running afoul of the federal government. [19]

Ultimately, the 1879 Constitution was written with an entire article devoted to anti-Chinese governance that included provisions compelling the Legislature to legislate against the Chinese, provide means for their removal from the state, prevent their immigration into the state, and prohibit their employment by government agencies.[20]

Anti-Chinese legislation of the era was fervently supported by white labor interests (who saw the Chinese immigrants as competition) and loudly trumpeted by opportunistic politicians.[21] Occasionally, the legislative acts that resulted from the anti-Chinese movement were almost comically blunt in revealing their legally questionable motivations. For example, the 1862 California Supreme Court case of *Lin Sing v. Washburn* has at issue a

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15 For general discussions of the various laws passed against Chinese during this era including these, see: Sandmeyer; Kim; John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal* 3 (1996): 55; and Daina C. Chiu "The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism," *California Law Review* 82 (1994): 1053.

16 Sandmeyer, 66.

17 Kim, 56.

18 Sandmeyer, 17.

19 Sandmeyer, 68–73.

20 Sandmeyer, 71–72.

21 Sandmeyer, 41.

state legislative act that was *officially* titled "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and Discourage the Immigration of the Chinese into the State of California."[22] In declaring this act unconstitutionally discriminatory, the Court wrote: "The act applies exclusively to the Chinese, and there is no doubt that the object of the legislature in passing it is correctly expressed in the title."[23]

Legislative bodies were no doubt ruthless toward the Chinese in California, but the courts, such as the *Lin Sing* court, were generally more forgiving.[24] Most state and local legislation against the Chinese was found invalid upon reaching the judiciary.[25]

In many legal opinions coming out of the anti-Chinese movement, one can see thinly veiled frustrations of the judiciary in dealing with out-of-control legislative bodies. Those crowning achievements of the anti-Chinese movement — the anti-Chinese provisions of the 1879 California Constitution — were struck down less than a year after they were enacted in the federal case *In re Ah Chong*.[26] The *Ah Chong* opinion contains several long paragraphs detailing the faultiness of the anti-Chinese constitutional provisions before cutting directly to the bone of the matter in a brief penultimate paragraph that drips disappointed frustration:

> These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and

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22 *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

23 Id., 566.

24 I would be remiss not to qualify this sentence by saying, "barring at least one glaring exception." In 1854, the California Supreme Court released a white man accused of murdering a Chinese man because the testimony against him was provided exclusively by other Chinese men, who were determined to be unfit to give testimony against white people. The case is *People v. Hall*, 2 Cal. 399, and the language in the decision is a grade-A example of the distant and uncritical "logic" applied to the racial classifications of the time. Kim calls the *Hall* decision "not only discriminatory but irrational" (Kim, 48), and Torok notes that this decision "reinforced popular anti-Chinese sentiment and sanctioned the violence perpetrated with impunity by whites against Chinese immigrants" (Torok, 65).

25 Sandmeyer, 56.

26 *In re Ah Chong,* 2 F. 733 (1880).

> circumlocution, an unconstitutional purpose which they cannot effect by direct means.[27]

California's anti-Chinese legislative efforts didn't stand up particularly well even in presumably more friendly state courts, but in federal court, with cases like *Ah Chong,* the anti-Chinese movement takes real judicial browbeatings.[28]

The various federal court deaths of California's misadventures in legislating against its Chinese residents include the 1886 U.S. Supreme Court case *Yick Wo v. Hopkins,* a canonical work of American constitutional law that struck down a San Francisco ordinance regulating the types of buildings in which laundries could be operated because the ordinance was being applied discriminatorily in violation of the Fourteenth Amendment.[29] What should also be remembered about *Yick Wo,* though, is that it overturned the opinion of the California Supreme Court, which had upheld the same San Francisco laundry ordinance as within San Francisco's regulatory capacity under its police power.[30]

JOHN CHINAMAN MUST GO

Heavy Ordnance Aimed at the Mongolians.

City Laws Passed by the Council Last Night—Wash-Houses to be Forbidden Except in Specified Places.

Four ordinances, whose object is to drive the Chinese from the city, were submitted to the City Council last night. Three of them were passed and given to the Mayor to receive his signature. The fourth, referring to laundries, was referred to the Ordinance Committee, to be adjusted so that it would not prohibit laundries on a certain half of a lot upon which is now situated a white laundry belonging to [illegible] in which Councilman Eshbach is interested. Adjoining that laundry is a Chinese wash-house, and on the opposite side of the same block is another Chinese wash-house.

It was in the midst of this back-and-forth between legislatures and courts and between California and the federal government that City Attorney Frank Smith drafted Stockton's 1885 anti-Chinese ordinances. Aware of the thin line he had to walk to avoid litigation, *The Stockton Daily Independent* would praise Smith's wile in crafting the ordinances, noting, "They apply equally

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27 Id., 739–40.

28 For two quick state examples, see *The People v. Downer et al.*, 7 Cal. 169 (1857), in which a passenger tax on Chinese passengers was ruled "invalid and void," or *Tape v. Hurley,* 66 Cal. 473 (1885), which compelled the admission of Chinese students to San Francisco public schools.

29 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). See Sandmeyer, 76, for a general discussion of *Yick Wo*.

30 *In the Matter of Yick Wo*, 68 Cal. 294 (1885).

to white persons violating their provisions, but most of the offenses named are committed chiefly by Chinese."[31] *The Stockton Daily Evening Mail* would report that care was taken to delay the passage of the laundry ordinance (which aimed to prohibit the operation of any laundry business in town, thereby driving the Chinese operators out), so as to re-word it in such a way as not to affect a white laundry operation.[32]

However, despite this praise, Smith's laundry ordinance would gasp its last breath in a courtroom.

The case challenging Smith's laundry ordinance, *In re Tie Loy*, also called *The Stockton Laundry Case*, was heard in a federal district court.[33] It is possible that no court opinion in the field is as packed with vitriol at the audacity of an anti-Chinese ordinance than the *Stockton Laundry* opinion. The author of the opinion, former California Supreme Court Chief Justice Lorenzo Sawyer, unwaveringly discharges Tie Loy and does away with the Stockton law. Sawyer's dismantling of Smith's laundry ordinance is less like a careful surgeon scalpeling away at the cancerous elements of a body than it is like an indignant man with a sledgehammer swinging away at drywall. Some choice quotes from the opinion:

> This ordinance does not regulate — it extinguishes. It absolutely destroys, at its chosen location, an established ordinary business, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere. . . .[34]
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> Of course, no one can in fact doubt the purpose of this ordinance. It means, "The Chinese must go;" and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California — of the Caucasian race as well as upon the rights of the Mongolian. It should be remembered that the same clause in our Constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this

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31 "Passage of Important Ordinances Against the Chinese," *The Stockton Daily Independent*, October 27, 1885.

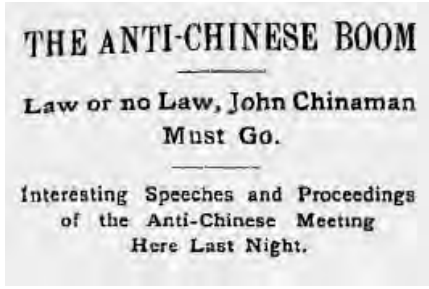
32 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

33 *In re Tie Loy*, 26 F. 611 (1886).

34 Id., 612.

barrier is broken down as to the Chinese, it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents. . . .[35]

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations, without regard to the manner of its pursuit, or the character of the appliances with which it is carried on, is not within the police power of the state. . . .[36]


THE ANTI-CHINESE BOOM

Law or no Law, John Chinaman Must Go.

Interesting Speeches and Proceedings of the Anti-Chinese Meeting Here Last Night.

It would appear from the *Stockton Laundry* opinion that the very same seemingly equal application and sneakily hidden intentions that won Smith praise for the laundry ordinance in the Stockton press also spelled its future downfall.

Smith, of course, was not some sort of isolated legal mad scientist, or some rogue city attorney recklessly crafting local government policy in the backwaters of California. The problems with Stockton's anti-Chinese ordinances are indicative of a coast-wide phenomenon of the era, in which laws were crafted against the practices of the Chinese in a political climate of "Law or no Law — John Chinaman must Go," [37] and little thought was given to the head-slapping complications inherent therein.

The opium ordinance at issue in *Sic*, anti-Chinese legislation that it was, sat squarely in this minefield of local government law that the State of California was trying to traverse safely in the 1880s, avoiding explosions of federal invalidation with one foot and explosions of mass anti-Chinese violence with the other.[38]

In dealing with opium, Stockton also stretched into another hot-button field of law, that of drug policy.

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35 Id., 612–13.

36 Id., 615.

37 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

38 Sandmeyer, 98. Sandmeyer takes a perspective that emphasizes great respect for the "strenuous efforts" that channeled anti-Chinese sentiment into legislation rather than letting it erupt into violence more often.

OPIUM: AMERICA'S FIRST PROHIBITED DRUG

> "*There can be no reasonable argument made against the enactment and enforcement of a rigid municipal law against a habit so insidious and deadly, so debasing and utterly destructive of all that goes to constitute manhood, as the habit of smoking opium. It is a practice than which no other evil against which municipal laws are enacted, can be worse in its effects on society.*"
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> —*The Stockton Daily Evening Herald*, Editorial, August 21, 1878[39]

On November 15, 1875, the City of San Francisco passed an ordinance prohibiting the operation of opium dens within city limits.[40] This law is considered America's first anti-drug legislation.[41] Ostensibly, the ordinance was passed to protect the welfare and morals of San Francisco's white men and women.[42] However, it primarily targeted Chinese opium den operators, and was undoubtedly anti-Chinese legislation, first and foremost.[43]

Following San Francisco's lead, similar anti-Chinese/anti-opium local ordinances and state laws proliferated up and down the West Coast, and into any state that had a significant Chinese population.[44] The California State Legislature enacted an opium ban in 1881, making various opium-associated actions misdemeanors under the section of its penal code reserved for crimes against religion, conscience, and good morals.[45]

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39 "The Opium Ordinance," *The Stockton Daily Evening Herald*, August 21, 1878.

40 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

41 See, for example, Stephen A. Maisto, Mark Galizio, Gerard Joseph Connors, *Drug Use and Abuse*, *Sixth Edition* (Belmont: Wadsworth, 2010), 33.

42 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

43 See Kathleen Auerhahn, "The Split Labor Market and the Origins of Antidrug Legislation in the United States," *Law and Social Inquiry* 24 (Spring 1999): 411, 417. For an in-depth look at the creation of opium laws and their close ties to the anti-Chinese movement, see Diana L. Ahmad, *The Opium Debate and Chinese Exclusion Laws in the Nineteenth-Century American West* (Reno: University of Nevada Press, 2007).

44 Richard J. Bonnie and Charles H. Whitebread II, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* (Charlottesville: University Press of Virginia, 1975), 14.

45 "An Act to Amend an Act Entitled 'An Act to Establish a Penal Code,' Approved February 14, 1872, by Adding a New Section Thereto, to Be Known as Section

Just as all anti-Chinese legislation of the era sought to do, opium ordinances targeted the lifestyle of the West Coast's Chinese in an effort to make them "devilishly uncomfortable." However, where the majority of anti-Chinese ordinances were either laws like the laundry ordinance in *Yick Wo* (targeting the way that specifically the Chinese made their living), or were like the cubic-feet-of-air ordinances for sleeping conditions (targeting the way that specifically the Chinese maintained themselves or their homes), legislation against opium was complicated by targeting something that white people were also actively participating in.

As a prime example of the unintended consequences of anti-Chinese opium laws, when, in 1878, Stockton itself passed an ultimately ineffective opium ordinance pre-dating the one at issue in *Sic*, *The Stockton Daily Evening Herald* called the ensuing arrests of some whites in opium dens to be "gross injustice" and felt it necessary to warn its readers to stay away from the dens for fear that the law would also apply to them.[46]

In addition to unintentionally snaring certain whites, anti-opium legislation also faced the complication of delving into an issue of substance control that resembled alcohol prohibition, which brought it closer to being a debatable issue than most anti-Chinese legislation was.

The potential hypocrisy of forbidding opium smoking while still allowing the seemingly equal evil of alcohol consumption did not go without discussion in opium debates.[47] For a time preceding opium ordinances, opium usage was considered no worse than alcohol in California, but rather simply different. In San Francisco in 1870, a *San Francisco Chronicle* article about smuggling considers the use of opium by the Chinese as a simple cultural quirk — just an item of commerce that the Chinese dealt in and white people didn't. The article shows remarkable empathy for the similarities between opium use for the Chinese and analogous practices of other American groups: "To a Chinaman, opium is as much a necessity as whisky to a

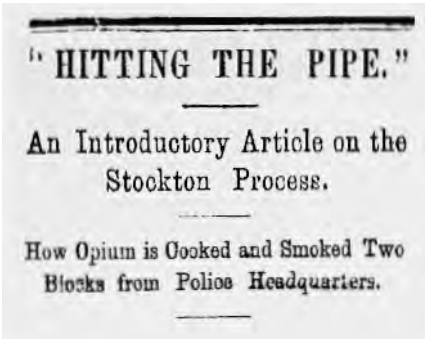
307, Relating to the Sale and Use of Opium," March 4, 1881, *The Statutes of California and Amendments to the Codes, 1881, 24th Session of the Legislature* (Sacramento: State Office, 1881), 34.

46 "Gross Injustice," *The Stockton Daily Evening Herald*, September 4, 1880.

47 See, for example, "Rum and Opium," *The Stockton Daily Evening Herald*, May 24, 1880.

Californian, lager to a German, or poi to a Kanaka."[48] The same year that this article was printed, the *Chronicle* also reported that a white man was charged with selling a Chinese man "bogus opium" — the City was not only tolerating the Chinese opium practice before 1875, it was protecting it.[49]

In part, this is because the use of opium in non-smoking forms was actually rather common among white people of the era, so use of the substance itself was not unfamiliar. It has been shown that the most common users of opium at the time were white women.[50] However, most whites who used the drug were "opium eaters" and not "opium smokers."[51] Opium smoking remained foreign, and fascinating to white Americans unfamiliar with the drug as it grew in popularity. Newspaper accounts exploring the practice of smoking and opium addiction were frequently published,[52] and an entire book devoted to the matter was written in 1881 by a doctor.[53] These early accounts of the effects of opium smoking were, almost without fail, lurid and phantasmagoric.[54]



"HITTING THE PIPE."

An Introductory Article on the Stockton Process.

How Opium is Cooked and Smoked Two Blocks from Police Headquarters.

48 "Opium Smuggling," *The San Francisco Chronicle*, February 19, 1870.

49 "Police Court Record," *The San Francisco Chronicle*, January 11, 1870.

50 Edward M Brecher and the Editors of Consumer Reports, *Licit and Illicit Drugs* (Mt. Vernon: Consumers Union, 1972), 17.

51 Id., 5.

52 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or "Opium — A Fiend talks to a Reporter About It," *The Stockton Daily Independent*, August 28, 1883.

53 H.H. Kane, M.D., *Opium Smoking in America and China: A Study of its Prevalence, and Effects, Immediate and Remote, on the Individual and the Nation* (New York: G.P. Putnams's Sons, 1882). As an interesting aside on Kane's book in the context of this article, Kane writes on the fourth page of his book that he is "indebted for a great deal of information" on opium smoking to one Dr. G.A. Shurtleff, who was superintendent of the State Insane Asylum at Stockton.

54 For an example, Kane pulls no poetic punches in describing the drug's trappings:

> Upon the morals of the individual the effects are well marked. The continued smoking of this drug plunges the victim into a state of lethargy that knows no higher sentiment, hope, ambition, or longing than the gratification of this diseased appetite. It blunts all the finer sensibilities, and cases the individual

Opium smoking was a strange new drug habit that captured the imagination. When the wild descriptions of the seemingly mystical powers of the drug were coupled with the apocalyptic racial propaganda that came to be attached to the people it was most associated with, the laws that resulted from the regulation of opium smoking were destined for interesting interaction with the systematic and compartmentalized legal science mentality that permeated American jurisprudence in the 1880s.[55]

The judicial reactions that arose from these early opium laws are indicative of both the legal complications and the racial motivations behind the drug legislation. For example, in an 1886 federal case out of Oregon denying a writ of habeas corpus for a Chinese resident who allegedly distributed opium in violation of a state law, *Ex parte Yung Jon,* federal judge Matthew Deady delivers the opinion of the court and does not parse his words about the origins of the legislation he is reviewing:

> [T]he use of opium, otherwise than as this act allows, as a medicine, has but little, if any, place in the experience or habits of the people of this country, save among a few aliens. Smoking opium is not our vice, and therefore it may be that this legislation proceeds more from a desire to vex and annoy the "Heathen Chinee" in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.[56]

As frank as Deady is in his opinion on what he perceives as the limits of judicial review on the will of a possibly racist majority, a complementarily

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in a suit of vicious armor, that is as little likely to be pierced by the light of true morality as a rhinoceros hide by a willow twig. To him, Heaven is equivalent to plenty of the drug, Hell, to abstinence from it.

Once fastened upon the victim, the craving knows no amelioration; it is a steady growth with each succeeding indulgence, gaining strength as the huge snow-ball gains in circumference and weight by its onward movement. No wonder that laws have failed to blot it out. A man may wish to be free from it, as may a dove in the talons of an eagle, or a lamb in the embrace of a tiger, and with as little good result. The awakening comes too late. (Id., 128)

55 For a background on the Legal Science Movement see William P. LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (New York: Oxford University Press, 1994).

56 *Ex parte Yung Jon*, 28 F. 308 (August 14, 1886), 312.

frank federal case coming out of California and decided the very same month as *Yung Jon* reaches the opposite conclusion. The judge in the case *In re Ah Jow* is former California Supreme Court Chief Justice Lorenzo Sawyer again, and he discharges a Chinese prisoner charged with violating a Modesto ordinance penalizing any person visiting a place where opium is sold or given away by ruling, rather simply:

> The ordinance applies to all citizens, as well as aliens, and deprives them of rights and privileges secured by the constitution and laws of the United States. If directed only against Chinese, then it would be void under the fourteenth amendment as discriminating against them.[57]

Sawyer cites *Yick Wo* in his decision, a case that had been decided by the Supreme Court of the United States less than four months prior.[58]

Springing from the same questionable sources as other anti-Chinese legislation, opium ordinances faced difficulties in enforcement, as it was unclear what exactly the people were trying to prohibit besides the practices of the Chinese, generally. As mentioned before, the opium ordinance at issue in *Sic*, Stockton Municipal Ordinance 192, was not Stockton's first attempt to regulate the drug.[59] Indeed, concerns with police hesitance in enforcing Stockton's 1878 opium law led to an inclusion of explicit penalties for law enforcement officials who did not give full effort to their enforcement of Ordinance 192.[60]

As a further complication, Section 3 of Ordinance 192 seemed to not just prohibit opium dens (as was the normal practice for anti-opium laws), but went further and prohibited the gathering of two people anywhere to

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57 *In re Ah Jow*, 29 F. 181 (1886), 182.

58 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

59 See "Police as Judges," *The Stockton Daily Evening Herald*, January 27, 1880.

60 The relevant section of Ordinance 192: "It shall be the duty of the Chief of Police and of regular and special police officer of the city of Stockton to see that the provisions of this ordinance are strictly enforced, and any of such officers who shall knowingly and willfully neglect or refuse to diligently prosecute any person violating any of its provision, or who shall neglect or refuse to diligently investigate any alleged violation which may come to his knowledge, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment not exceeding three months, and shall be subject to removal from office." A draft of the ordinance was printed in full in *The Stockton Daily Evening Mail* on October 27, 1885.

smoke opium.[61] Since opium-smoking practices of the time necessitated at least two people, Ordinance 192 essentially banned opium smoking outright, even if one were to partake in the privacy of his own home.[62]

While *Sic* is ultimately decided on a state constitutional issue, some of the most jurisprudentially interesting language in the majority opinion comes in the discussion of the appropriateness of an outright ban like this, and the government's place in regulating personal intake of a substance this invasively. Writes majority opinion author Justice Jackson Temple:

> To prohibit vice is not ordinarily considered within the police power of the state. A crime is a trespass upon some right, public or private. The object of the police power is to protect rights from the assaults of others, not to banish sin from the world or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate. *In jure non remota sed proxima spectatur. . . .* Possibly this resulting injury to others and to society may justify the legislature in declaring these vices to be crimes. We are not required to pass upon that question, and we do not. It is enough to say that such legislation is very rare in this country. There seems to be an instinctive and universal feeling that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged.[63]

Justice Van Patterson's concurring opinion, while agreeing that the law is invalid, really slams this question home, focusing almost exclusively on invalidating Ordinance 192 for its overextension into a realm of "certain great principles that cannot be invaded" by legislation.[64] Namely, the right of every man to "eat, drink, and smoke what he pleases in his own house."[65]

Opium laws on the West Coast were America's first drug laws. They were carried into law books with fervent anti-Chinese sentiment, but when they arrived at the courts they posed individual liberty questions much

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61 From Section 3 of Ordinance 192. Quoted in *Sic* at 144.

62 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or Kane *supra* note 53 at 70.

63 *In the Matter of Sic*, 73 Cal. 142 (1887), 145–46.

64 Id., 150.

65 Id.

different from the typical "Can we discriminate against these Chinese or not?" question that most anti-Chinese legislation presented.[66]

In *Sic*, the California Supreme Court had the unique privilege of being able to avoid both the discrimination and individual liberty questions presented by opium laws, but it seems very likely that these deep auxiliary questions of *why* we make laws must have led the Court to examine *how* we make laws much more closely than it typically would have.

SIC, DILLON, AND THE RESTRICTION OF LOCAL GOVERNMENT

> "*The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one. . . .*"
>
> —Justice Jackson Temple, *In re Sic*

Article XI, section 11 of the original 1879 California Constitution states, "Any county, city or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."[67]

This is the provision of the 1879 Constitution at issue in *Sic*. The California Penal Code (part of "the general laws") contained Section 307, which prohibited certain opium transactions and opium dens. Stockton, for its local part, had Municipal Ordinance 192, essentially prohibiting opium smoking altogether. The question before the Court was whether under section 11 of article XI, Ordinance 192 conflicted with Section 307. If the two laws did conflict, Stockton's law would be invalidated.

Defending the validity of Ordinance 192 for Stockton was its drafter, Stockton City Attorney Frank Smith. Smith had been reelected to his office in no small part because of his role in drafting the anti-Chinese ordinances that included Ordinance 192, and because of the belief that he was the most qualified lawyer in town to defend Stockton's local governance

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66 For an excellent example of a court discussing the evolution of government at issue in the early opium cases, see *Territory v. Ah Lim*, 1 Wash. 156, (1890), 165–66.

67 For a discussion of this particular section of the 1879 Constitution in much more depth than I go into here (including a criticism of how the *Sic* Court read the commas in the section), see John C. Peppin, "Home Rule in California III: Section 11 of Article XI of the California Constitution," *California Law Review* 32 (1944): 341.

against state attacks like the one presented in *Sic*.[68] In a speech campaigning for his reelection after his 1885 anti-Chinese ordinances were adopted, Smith said, "[Y]ou will understand readily why a city attorney should not be forward in expressing opinions that might be misconstrued as evidence of prejudice against the Chinese, but if you want to know how I stand, I am strongly in favor of using every lawful means to get the Chinese out of Stockton's limits. . . . The city has and will continue to have my best efforts towards that end."[69]

Going into his defense of Ordinance 192, Smith had already seen one of his 1885 anti-Chinese ordinances struck down in federal court in the *Stockton Laundry* case.[70]

Attacking the validity of Ordinance 192 was Lyman I. Mowry, a San Francisco lawyer who had appeared many times before the California Supreme Court representing Chinese clients.[71] Mowry was the go-to lawyer for the Six Companies Chinese Association (one of the groups that funded Chinese challenges to anti-Chinese laws) during this era, and, as could be expected, this work made him infamous in the San Francisco press. In a newspaper article describing the theft of bread from the front porch of Mowry's San Francisco home, the opening paragraph reads "Lyman I. Mowry, the attorney who has assisted many Chinese to take bread from the mouths of white men and women, has recently suffered from the enforcement of the lex talionis. White men have

ATTORNEY LYMAN I. MOWRY, CHARGED WITH ONCE HAVING BEEN A HIGHWAYMAN.

68 "The City Attorney," *The Stockton Daily Independent*, October 29, 1885. Incidentally, Smith successfully defended several other ordinances he drafted from state preemption, including an anti-prostitution ordinance decided a month after *Sic* in which his opposing counsel was none other than anti-Chinese crowd rouser and future governor James Budd. See *Ex Parte Johnson*, 73 Cal. 228 (1887).

69 "They Are Sound," *The Stockton Daily Independent*, October 29, 1885.

70 *In re Tie Loy*, 26 F. 611 (1886).

71 A sampling of cases in which Mowry stood as counsel for Chinese clients: *People v. Wong Ah Ngow*, 54 Cal. 151 (1880); *Ah Jack v. Tide Land Reclamation Co.*, 61 Cal. 56 (1882); *Ex parte Young Ah Gow*, 73 Cal. 438 (1887); *People v. Lum Yit*, 83 Cal. 130 (1890); *People v. Chun Heong*, 86 Cal. 329 (1890).

been stealing his bread."[72] Other newspaper accounts paint him as a chain-smoker and an alcoholic,[73] raise questions as to whether he is a member of a Chinese secret society,[74] and tout his mastery of the feminine art of cooking.[75] His courtroom demeanor was described as overconfident and aloof.[76]

Mowry's petitioner's brief to the Court for Sic is handwritten in flat and fast cursive, complete with sloppy corrective marginalia, and cites to barely a half-dozen out-of-state cases the Court could refer to for support of state preemption.[77] Smith's respondent's brief for Stockton is neatly typed, underlined in places for emphasis, and cites to somewhere in the neighborhood of fifty cases for the Court to examine supporting Stockton's right to pass and enforce ordinances like 192.[78] As it would turn out, fortunately for Mowry, the case did not come down to presentation or precedent.

As Justice Temple's epigraph to this section shows, the Court looked at the authority preceding it, and decided that the conflict of opinions on the matter made no particular authority persuasive. The Court then decided to resolve the question raised by the interaction between Section 307 and Ordinance 192 as a matter of first impression. With the case law out of the picture, the Court was left to decide what exactly "conflict with the general laws" meant — how far Stockton could go with regulating opium intake in the town before their effort became necessarily a challenge to the authority of the state. Answering this question meant deciding between two contemporary competing schools of thought on the role of municipalities in governance. The two schools of thought are those of Michigan Judge Thomas Cooley and Iowa Judge John Dillon.

Cooley's was the perspective advocated by Smith and Stockton, and was a position of strong local governance.[79] His *Treatise on Constitutional*

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72 "Lyman I. Mowry's Bread," *The San Francisco Call*, August 23, 1892.

73 "Tobacco Smoke Annoyed Her," *San Francisco Chronicle,* September 13, 1899.

74 "Says Mowry is a Highbinder," *San Francisco Call*, August 21, 1896.

75 "Man in the Kitchen," *San Francisco Chronicle*, June 3, 1894.

76 "Fong Ching Shee," *San Francisco Chronicle*, January 6, 1888.

77 Petitioner's Brief. The court documents are available at the California State Archives by requesting the file either for *In the Matter of Sic*, 73 Cal. 142, or WPA #13791. By way of trivia, the original petition for the writ of habeas corpus for Sic is signed by a man named Lee Po and is signed in Chinese characters.

78 Id., Respondent's Brief.

79 Id.

Limitations declared that "the American system is one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority."[80] Cooley believed in the virtues of "local constitutionalism."[81] Rudimentarily summarized, Cooley's philosophy was that deference should be given to local governments whenever appropriate, as their grassroots structure and participatory nature made them better suited to discern a public purpose in legislation than state governments were.[82] So absolutely did he believe in the importance of a decentralized system that he once wrote in an opinion, "[L]ocal government is a matter of absolute right; and the state cannot take it away."[83]

Dillon's basic philosophy, on the other hand, can be rudimentarily summarized with the idea that local governments should not be given any more authority than they absolutely must be given — those powers expressly delegated to municipalities in state constitutions. Dillon simply didn't trust local government to make smart decisions. In a notably disdainful section of his *Treatise on Municipal Corporations* he wrote, "[T]he value of our municipal corporations has been impaired by evils that are either inherent in them or that have generally accompanied administration," and then went on to insinuate that locally elected officials lack "intelligence, business experience, capacity, and moral character," and that as a result, the "administration of the affairs of our municipal corporations is too often unwise and extravagant."[84]

Essentially, Dillon believed that local governments were filled with corrupt and unthinking fools. So low was his opinion of local government and high his preference for limiting their power that he enumerated only three circumstances where local governments could act:

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80 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1868), 189.

81 David J. Barron, "The Promise of Cooley's City: Traces of Local Constitutionalism," *University of Pennsylvania Law Review* 147 (1999): 487, 492.

82 Id., 521.

83 *People v. Hurlbut*, 24 Mich. 44 (1871), 108.

84 John F. Dillon, *The Law of Municipal Corporations, Third Edition* (New York: James Cockfort & Co., 1881), § 11, 19–20.

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words*; second, *those necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[85]

Naturally, Dillon's perspective was the perspective advocated by *Mowry* and *Sic*.

Both Cooley and Dillon are fruit from the same tree, growing as they did out of a singular root problem of widespread government malfeasance accompanying and following the industrial revolution. In some sense, their differing perspectives are simply two sides of the same coin.[86] The coin toss in *Sic* would land with Dillon's side facing up.

After discarding the case law in *Sic,* the Court scrambles over to Dillon, and points out that Stockton had no express authority to regulate opium under the state constitution.[87] It then settles the conflict issue by theorizing that legislating on the same matter and thus creating a situation where a citizen could be tried twice for the same offense, or where being tried for a local offense could preclude being tried under a state offense, is the type of conflict that article XI, section 11 is trying to prevent. Its authority for this is a loose analogy to the relationship between the federal government and the states.[88]

To be blunt, the Court's opinion is shaky. In part, this shakiness is precisely because they threw away the case law, which favored Stockton and would likely have dictated a different result. In considering the *Sic* ruling for a similar overlapping ordinance a few years after the decision, the Idaho Supreme Court would write:

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85 Id., § 89, 115–16.

86 For an article that delves more deeply into the differences between and fates of Cooley and Dillon, See Edwin A. Gere, "Dillon's Rule and The Cooley Doctrine," *The Journal of Urban History* 8 (1982): 271.

87 *In the Matter of Sic*, 73 Cal. 142 (1887), 148. While the opinion is not devoid of case law, there is only one case citation in the entire majority opinion, and that is to an Alabama case, not a California case.

88 Id., 148–49.

> In [*Sic*] the court says: "The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one," etc., and proceeds to consider it as a new one, and hold such ordinances void. After carefully considering the authorities on both sides of this question, I find that the clear weight of authority and reason is against the rule adopted by the supreme court of California. . . .[89]

As this 1894 Idaho decision shows, The *Sic* decision was not particularly influential even soon after it was decided (although it was applied semi-regularly in California for some time[90]). As of 2011, *Sic* has not been cited in a court opinion from any state for over forty years.[91] Part of the reason for this is exactly what the Idaho court says. It is no longer, and it probably never was, "good law."

However, if one can take a page from the *Sic* court and put the law aside for a moment, the virtue of the decision becomes more apparent.

In 1887, the California Supreme Court was in the center of a maelstrom of anti-Chinese political and legislative activity, assaulted on one side by out-of-control local uprisings and on the other side by heavy-handed federal slapdowns. Before the Court stood a Stockton ordinance clearly stemming from anti-Chinese sentiment. The same type of unhesitating anti-Chinese sentiment that had given rise to endless ill-advised legislation in California — legislation that was routinely embarrassingly crushed in the federal courts. In touching on opium, this same Stockton ordinance also infringed on potential individual liberties in a manner that was likely not fully considered in its drafting, and certainly in a manner that the Court had never previously considered.

To put the law aside and run to Dillon was a highly sensible decision for the *Sic* Court to make. In some ways, the story behind Stockton's 1885 anti-Chinese ordinances and opium ban could serve as a textbook example of why Dillon would have developed the philosophy that he did — a mob-like small-town meeting that resulted in overbearing and shortsighted policy.

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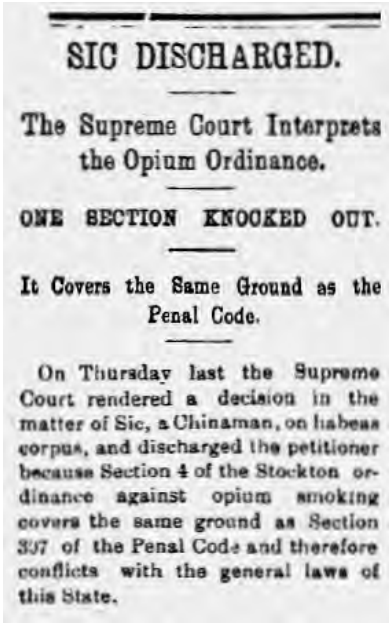
89 *State v. Preston*, 4 Idaho 215 (1894), 219.

90 A few examples: *Ex parte Christensen*, 85 Cal. 208 (1890); *Ex parte Taylor*, 87 Cal. 91 (1890); *Ex parte Hong Shen*, 98 Cal. 681 (1893); *Ex parte Mansfield*, 106 Cal. 400 (1895); *Ex parte Stephen*, 114 Cal. 278 (1896).

91 Most recent citation: *Bishop v. San Jose*, 1 Cal. 3d 56 (1969), 69.



SIC DISCHARGED.

The Supreme Court Interprets the Opium Ordinance.

ONE SECTION KNOCKED OUT.

It Covers the Same Ground as the Penal Code.

On Thursday last the Supreme Court rendered a decision in the matter of Sic, a Chinaman, on habeas corpus, and discharged the petitioner because Section 4 of the Stockton ordinance against opium smoking covers the same ground as Section 397 of the Penal Code and therefore conflicts with the general laws of this State.

Viewed in its historical context, as opposed to its legal context, the *Sic* decision makes perfect sense. It limits local power at a time when local power was proving to be disastrous and sends a message of "Please calm down and think about this a little more," in the least offensive way it can.

The *Stockton Daily Independent*, which consistently published anti-Chinese articles during this era, reacted rather benignly to the *Sic* decision, publishing a simple, matter-of-fact account of the decision remarkably free of any criticism of the Court.[92] Within a week of the decision, the paper would publish an article about *Sic* being applied to release a white Santa Cruz man who had been arrested under a local ordinance regulating bar and theater licenses. The headline for this Santa Cruz article is "SIC SEMPER: Makes a Santa Cruz Ordinance Sicker."[93] The tone of the article is not one of anti-state-power, "Look at what else this horrible decision is doing!" but rather a shoulder-shrugging tone of "Well, it looks like this silly ruling applies to everyone, and everything. Those are the breaks."

As the State of California struggled with the anti-Chinese movement and a related new field of drug regulation, the California Supreme Court struck a much-needed balance to settle down the whole system with its decision in *Sic*. It may not have settled the matter in a way that was particularly comfortable for local government, but it certainly took some fire out from under the movement for the "devilishly uncomfortable."

* * *

92 "Sic Discharged," *The Stockton Daily Independent*, June 17, 1887.

93 "Sic Semper," *The Stockton Daily Independent*, July 20, 1887.

NINE TREASURES:

California Legal History Research in the Bancroft Library, University of California, Berkeley

BY WILLIAM BENEMANN*

The streets were filled with billows of acrid smoke and dust, and every time a dynamite charge was detonated the earth would tremble and the horses would shy and pull at their reins. For three horrifying days dozens of separate fires raged, consuming block after block of homes and businesses. Over 3,000 people were killed, nearly one hundred times that number were left homeless, and the entire northeast quadrant of San Francisco was reduced to blackened charcoal. Every major library in The City was damaged or utterly destroyed — except for one.

In April 1906, housed safely in a fireproof building at the corner of Valencia and Army Streets and therefore outside the burned zone, sat the newest acquisition of the University of California: the Bancroft Library. The library was the life's work of Hubert Howe Bancroft, who had arrived in San Francisco in 1852 as an eager young man of twenty with a shipment of books to sell. Four years later he opened his own bookstore, eventually assembling a specialized collection of books, manuscripts and pictorial items documenting the entire West Coast from Alaska to Panama, and from the Rockies to

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The Bancroft Library at 1538 Valencia Street, San Francisco, circa 1890–1900.

Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1905.11574–FR).

the Pacific. At the core of his library was an unparalleled collection of Californiana, telling the story of the State from the very earliest period of its recorded history. Drawing on this superb collection, and augmenting it where needed by firsthand research, Hubert Howe Bancroft and his assistants over time produced a comprehensive thirty-nine volume history of the West.

On November 25, 1905, Bancroft sold his entire library to the University of California for a quarter of a million dollars, $100,000 of which Bancroft would donate himself. Having narrowly escaped complete destruction in the 1906 Earthquake and Fire, the collection was finally moved out of San Francisco in early May and onto shelves and into cabinets on the third floor of California Hall on the Berkeley campus. The treasures were transported in prosaic moving vans by the Bekins Van Company.

Today the collection is housed in a newly-renovated, state of the art facility at the center of the Berkeley campus, and for over a century now the

HUBERT HOWE BANCROFT

Bancroft Library has carried on Hubert Howe Bancroft's compulsive drive to document the history and culture of the Pacific Coast. Because of this academic obsession, anyone engaged in California legal history research will find a cornucopia of both core documents and unusual ephemera, rare manuscripts and online digital files, vintage photographs and raspy tape recordings, the quirkily odd and the astonishingly unexpected. This article

will focus on nine diverse (and somewhat random) items that demonstrate the variety of riches that await the researcher in the Bancroft Library reading room. It will attempt to place those items in their historical context, to demonstrate why they are significant to the legal history of California, and to suggest similar material for further research in the Bancroft's collections.

1. IGNACIO EZQUER. *MEMORIAS DE COSAS PASADAS EN CALIFORNIA: SAN LUIS OBISPO, CALIFORNIA, APRIL 29, 1878.*[1]

Realizing that a large portion of early California history was being lost as the elder *Californios* passed away, Hubert Howe Bancroft and his assistants traveled by carriage, stagecoach and horseback throughout the state conducting approximately 125 oral history interviews with Mexican and Anglo pioneers. The transcriptions of these interviews became known collectively as the Bancroft Dictations (or as the *Testimonios* or *Recuerdos*). While most of the dictations are in English, a few — such as that of Ignacio Ezquer — are in Spanish, and they provide eyewitness accounts of events in early California from the perspective of participants whose contributions would otherwise have been marginalized or entirely lost. They include first person narratives of some of the earliest governmental and legal landmarks in California history.

Ignacio Ezquer emigrated from Mexico in 1833 at the age of fifteen and settled in Alta California, eventually serving as Justice of the Peace in both Monterey and San Luis Obispo. In 1878 he was interviewed by Thomas Savage, one of Bancroft's research assistants. Savage wrote in an introductory statement, "The accompanying pages were taken down by me from [Ezquer's] lips in his own house in San Luis Obispo." Though hastily written as the old man spoke, with some deletions and insertions in the text, the narrative is still quite legible. (Scanned images of most of the Bancroft Dictations may be found on the University of California's website, called Calisphere.)

In his *recuerdo* the elderly Ezquer describes the secularization of the San Juan Capistrano Mission. He narrates in some detail the February 1845 revolt against the Mexican governor, Brigadier General Manuel

[1] Call no.: BANC MSS C-D 77.

Micheltorena, who had been appointed by Mexico City to oversee Alta California, but who was resoundingly unpopular because of the depredations of the army of criminals and misfits he brought with him to enforce his authority. Many *Californios* and *extranjeros* took up arms against Micheltorena, forced his abdication, and selected Pio Pico in his place.

Ezquer describes the arrival in 1846 of John C. Frémont, who was supposedly on "una comisión científica," but who instead rallied American settlers to rise up against Mexican rule in California. Ezquer speaks of his own relations with General Bennett C. Riley, the last military governor of California, who arrived in Monterey in April 1849 just as all governmental authority in the region began to splinter and collapse. Riley issued a proclamation calling for a convention whose delegates would write the first constitution for the State of California. Ezquer talks briefly about the events surrounding the Constitutional Convention, speaking from the point of view of a *Californio* whose government and culture were being supplanted by the new arrivals.

ALSO OF INTEREST: William R. Wheaton, *Statement of Facts on Early California History, 1878* (BANC MSS C-D 171); Joseph Webb Winans, *Statement of Recollections on the Days of 1849-52 in California, 1878* (BANC MSS C-D 178); Hiram C. Clark, *Statement of Historical Facts on California from 1851-1865, 1878* (BANC MSS C-D 59); John Currey, *Incidents in California: Statement by Judge John Currey for Bancroft Library, 1878* (BANC MSS C-D 63).

2. RICHARD B. MASON. *LAWS FOR THE BETTER GOVERNMENT OF CALIFORNIA = LEYES PARA EL MEJOR GOBIERNO DE CALIFORNIA.*[2]

Richard B. Mason arrived in California on May 31, 1847 to take up the position of Military Governor and Commander-in-Chief of the United States land forces. He found a territory in a state of flux and confusion, with an unstructured government loosely applying a vague system of legal control — part Mexican civil law, part English common law, part ad hoc reliance on

[2] Call no.: xF865.M375. Published as: Richard B. Mason, *Laws for the better government of California, the preservation of order, and the protection of the rights of the inhabitants, during the military occupation of the country by the forces of the United States* (San Francisco: S. Brannan, 1848).

whatever the particular situation seemed to require at the moment. No one was quite sure who or what constituted governmental authority. In the words of Military Secretary of State Henry W. Halleck, "In the absence of positive law, we must be governed by custom and general usage in this country, and in the absence of both law and precedent, the laws and usages of other States and Territories, in like cases, should be referred to, to guide our decisions."[3]

When Commodore John D. Sloat issued his proclamation *To the Inhabitants of California* the previous year, declaring that the territory of California was now officially under the control of the United States government, he had called for a temporary continuation of the status quo. "With full confidence in the honour and integrity of the inhabitants of the country, I invite the judges, alcaldes and other civil officials, to retain their offices, and to execute their functions as heretofore that the public tranquility may not be disturbed, at least until the Government of the territory can be more definitely arranged."[4] Nearly a year after that ringing proclamation, little progress had been made in establishing a more Yankee-style government, and public tranquility was rapidly waning.

Stepping into the breach, Governor Mason took the extraordinary measure of drawing up his own code: *Laws for the Better Government of California: "The Preservation of Order, and the Protection of Rights of the Inhabitants," During the Military Occupation of the Country by the Forces of the United States.* In his code Mason explicitly allowed for the continuation of Mexican or Spanish laws in California, but only "so far as they are in conformity to, and do not conflict with these laws." In other words, the Mason Code was in reality intended to supersede the mélange of laws and to provide a single, coherent and explicit legal code for the inhabitants of California.

The code is redolent with provisions that evoke vivid pictures of this period of California history. Take, for example, Article I, Section 4, which prescribes that "any person convicted of stealing any horse, mare, colt, filly, mule, ass, neat cattle, sheep, hog or goat, shall be sentenced to receive not less than twenty, nor more than fifty stripes, well laid on his bare back, and be imprisoned not more than six months."

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[3] Quoted in Myra K. Saunders, "California Legal History: The Legal System Under the United States Military Government, 1846-1849," *Law Library Journal* 88 (1996), 497.

[4] Quoted in Woodrow James Hansen, *The Search for Authority in California* (Oakland, Calif.: Biobooks, 1960), 72.

In recognition of the bilingual culture then prevalent in California, Mason asked William Edward Hartnell to translate the new code into Spanish. Hartnell was an Englishman who had learned the language while working for a British company in Chile. Arriving in California in 1822, Hartnell quickly integrated himself into *Californio* society, converting to Catholicism, marrying the sixteen year-old daughter of Don José de la Guerra y Noriega, and changing his own name to Don Guillermo Arnel. In a letter to Joseph Folsom mentioning that he has arranged for a Spanish translation of his code, Mason refers to Don Guillermo as "Mr. Hartnell, the government interpreter."[5] Hartnell/Arnel also provided the translation for the first California Constitution.

General Richard Barnes Mason, *photographed by the U.S. Army Signal Corps*

The Mason Code is perhaps the only codification of laws whose printer is more famous than its compiler. The code was printed by Samuel Brannan, the Mormon pioneer who first brought the news to San Francisco of the gold discoveries at Sutter's Mill, thereby launching the California Gold Rush. Brannan was the publisher of the *California Star*, the first newspaper in San Francisco, but Governor Mason later complained that he was unable to procure a complete print run of his code from Brannan "owing to the stopping of the presses upon the discovery of the gold mines, etc."[6]

With the arrival on August 6th of news of the signing of the Treaty of Guadalupe Hidalgo, and the ceding of Alta California to the United States, Governor Mason assumed that his interim code was no longer needed, and the code was never promulgated. It is unclear how many copies of the Mason Code were published. Given Mason's statement that he "did not succeed in getting [the code] printed" because of the gold discoveries, perhaps only proof copies were ever produced. The only other known copy of this code was acquired by the Huntington Library in 1923. The copy in the Bancroft Library is the sole known copy that includes both the English and the Spanish translation.

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[5] Quoted in Lindley Bynum, "Laws for the Better Government of California, 1848," *Pacific Historical Review* 2:3 (September 1933), 285.

[6] *Ibid.*

3. *DISEÑO DEL RANCHO SANTA ANA Y QUIEN SABE, CALIFORNIA.*[7]

Under the 1848 Treaty of Guadalupe Hidalgo, the United States acquired for a bargain payment of $15 million an expanse of territory totaling 525,000 square miles, including all of present-day California, Nevada and Utah, and much of what is now Colorado, Arizona and New Mexico. With the land came a perplexing problem: what should be done about the vast Spanish and Mexican land grants that already claimed prime real estate in the new territory? The treaty that was negotiated at the end of the Mexican-American War included a provision (Article X) that guaranteed recognition of those land grants, but the U.S. Senate deleted the article before ratifying the treaty. While it was customary to recognize existing property ownership arrangements when a new territory was acquired, many Americans believed that the Mexican land grants comprised the best — and perhaps the *only* productive — land in the new acquisition. The remainder was believed to be too mountainous or too arid to be of any real value, or was capable of supporting "only the weird life of the Apache, the cactus and the serpent."[8]

In the nation's capital a compromise was arranged that followed a middle ground between outright expropriation and maintenance of the status quo. The new senator from California, William M. Gwin, submitted a bill to Congress calling for the creation of a commission of three members to judge the validity of all Spanish and Mexican land grant claims. Under the Act of March 3, 1851, all claimants in the new territory were required to submit proof of ownership within two years. All lands not submitted to the commission within the two-year period would automatically be deemed in the public domain. On the West Coast the act was greeted with stiff opposition. In two cases argued twenty-three years apart before the California Supreme Court, *Minturn v. Brower* (1864) 24 Cal. 644, and *Phelan v. Poyoreno* (1887) 74 Cal. 448, the Court ruled that land grant holders could *not* be compelled to submit their claims to the Board of Commissioners, and that the United States Congress did *not* have the power to impair or destroy perfect titles for failure to submit them for examination and judgment.

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[7] Call no.: Land Case Map B-1301.

[8] William W. Morrow, *Spanish and Mexican Private Land Grants* (San Francisco, Los Angeles: Bancroft-Whitney Co., 1923), 9.

The issue landed in the U.S. Supreme Court, where in *Botiller v. Dominguez* (1889) 130 US 238, the Court ruled that the powers of the Commission were not only valid, but were a necessity given the circumstances. In *Botiller* the Court held that "the United States were bound to respect the rights of private property in the ceded territory, but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to land to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned."[9]

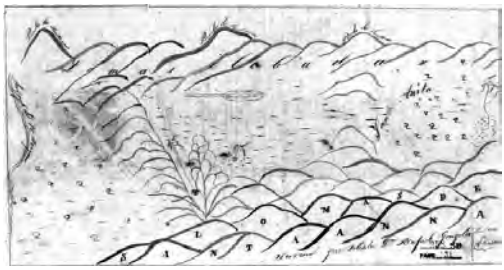
The U.S. Supreme Court recognized that the procedures under which the land had been originally granted left the claims necessarily vague, contradictory and ripe for fraud. The grants were free gifts of the Spanish crown or the Mexican government, usually with no money exchanged, and with little effort made to furnish the petitioner with unambiguous proof of title. Lands were rarely surveyed, or were surveyed using a method that could not yield an accurate, replicable result. By tradition, two men on horseback would take a lariat that was fifty *varas* in length (about 137.5 feet). One man would begin at a stated landmark — the old oak tree at the edge of the dry creek, the big red rock at the top of the third hill — and drive in a stake. The second horseman would ride until the lariat was drawn tight, and drive in another stake. The procedure would then be repeated. If the lariat was drawn through wet grass, it might be stretched and lengthened, or on a hot day, dried and contracted. As a result, no two surveys of the same area ever matched, and descriptions of the land were frequently so vague that it was not clear what should be measured in the first place.

When conflicting claims were submitted to the Board of Commissioners, the resulting disputes were heard in the U.S. District Courts of California (Northern and Southern Districts), and the decision might be appealed to the U.S. Circuit Court (9th Circuit). Litigation often dragged on for years, and generated many folders of petitions and sworn testimony. The litigation documents of the land grant cases were placed on permanent deposit in the Bancroft Library in 1961. Researchers may consult the collection titled *Documents Pertaining to the Adjudication of Private Land*

[9] Quoted in Morrow, *Spanish and Mexican Private Land Grants*, 14.

Claims in California to view this material. A finding aid is available via the Online Archive of California.

Among the documents are over 1,400 manuscript maps, or *diseños*, submitted as a visual representation of the property in dispute. Very few show high artistic merit (even trained surveyors seem to have made only a token attempt at aesthetic appeal), though some include careful hand-coloring and lettering. A typical example is the *diseño* for the Rancho Santa Ana y Quien Sabe in Southern California. The *diseño* is small — approximately 20 cm x 28 cm — and includes wave-like mountains sketched in with an almost child-like hand. Hills, streams and neighboring ranchos are indicated. The locations of natural springs (*ojos de agua*) are indicated with stylized representations of watering holes. These manuscript maps may also be viewed on the Calisphere web site, with a search on the term "diseno."



Diseño del Rancho Santa Ana y Quien Sabe, circa 1840s.

Courtesy of The Bancroft Library, University of California, Berkeley (call no. Land Case Map B-1300).

4. SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851. *SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851 PAPERS, 1851–1852.*[10]

Despite the new government's best efforts to provide for domestic tranquility, in the rough and tumble city of San Francisco violent crime was rampant — and it went largely unpunished. Robberies, arson and murders were committed on a regular basis with impunity. Finally, in June 1851 a group of San Franciscans formed a Committee of Vigilance to impose swift justice and restore order where the corrupt police and the inept courts had failed. On the evening of June 10th a man named John Jenkins

[10] Call no.: BANC MSS C-A 77.

allegedly committed a robbery. Before dawn on June 11th he was hanged. Far from slinking in the shadows after the lynching, the vigilantes — 183 of them in all — proudly published their names in the daily newspapers and announced their firm intention to continue to administer justice as needed.

For the next three months the executive committee met almost every day. In an effort to counter any suggestion that they represented mob rule, the Committee of Vigilance was punctilious about following highly formalized procedures, and they went to great lengths to preserve an accurate record of their activities. Minutes of meetings, reports of subcommittees, testimony and confessions were recorded and annotated with care, most of the proceedings handwritten on long sheets of heavy blue stationery.

The testimony was transcribed quickly as the witnesses were interrogated, and what the narratives lack in stylistic flow they more than make up for in raw immediacy. Take for instance part of the confession of James Stuart, a native of Brighton, England and one of the leaders of the so-called "Sydney Ducks," former residents of British penal colonies in Australia whose criminal activities were the prime target of the Committee of Vigilance. Stuart testified on July 8, 1851 at 10:30 in the evening:

> We then came to San Francisco — Edwards told us there was a vessel here with considerable money on board — Jim Burns alias Jimmey from town came down with us — Jimmey robbed a Spaniard of about 30 oz when we were coming down from Sac City — we divided the money between us — the same night we went on board the vessel and robbed her — I — John Edwards — Jim Brown George Smith, went on board — the vessel was the James Caskie — we had hard fighting the Capt became desperate — we left him nearly dead — in the fight the Capts wife came out with a sword I took it from her — I acted as Capt of our boys — we were all masked I left them in charge of Capt while I searched the Cabin — Capts wife gave me what money there was on board. . . . Capts wife begged of me not to take the Capts life I told her I did not want to do that if he would only be quiet — I then looked into the Cabin and saw a splendid Gold Chronometer Watch — she begged of me not to take it as her Mother gave it to her — I told her on those conditions I would not take it — the rest of my

"Vigilance Committee Hanging — Jas. Stuart, San Francisco, July 11, 1851."

Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1963.002:0304–B).

> Company kicked up a row with me for not taking the watch — I told them they had made me master and I would act as such.[11]

Despite his full confession — or perhaps as a result of it — James Stuart was hanged on the wharf at the foot of Market Street.

An idea of the conditions that led to the formation of the Committee of Vigilance may be gleaned from a letter written on July 8, 1851, by a man named Charles Marsh, who had appeared as a witness in one of the earlier proceedings. "Having been called on last night," Marsh reported, "and threatened by two of the City Police on account of my information concerning Goff, I wish to appear before Your Committee again and make a further Statement, and to claim your protection from the ruffianly intimidation to which I was last night subjected."[12]

In 1919 the University of California Press published *Papers of the San Francisco Committee of Vigilance of 1851*, edited by Mary Floyd Williams. Williams provided complete transcriptions of nearly all the manuscripts

11 *San Francisco Committee of Vigilance of 1851 Papers,* Box 2, folder no. 193.

12 *Ibid*., folder no. 190.

included in the collection, and consulted newspapers and other documentation of the period to enhance the reader's understanding of the proceedings. Her introduction and her annotations are particularly helpful in placing the documents in context, and in identifying partial names and obscure references. The index to the volume is extremely helpful if the researcher has a list of proper names to begin with; it is less helpful in tracking the prevalence of any particular crime.

While Mary Floyd Williams's transcriptions are a good place to start, the research process should not end there. The transcriptions are an excellent way to narrow down one's search and zero in on testimony of interest, but the blue sheets of paper should also be consulted. In some folders there are two versions of the testimony — one rough and colloquial, the other more polished. It appears that the first is an on-the-spot transcription complete with blots and insertions, and the second is a "fair copy" with some editorial smoothing. For the example given above of the confession of James Stuart, Williams chose to publish the more literary version. While the changes in the two transcriptions are minor (Stuart's "Sac City" becomes "Sacramento City"; his "her Mother gave it to her" becomes "it was a gift from her Mother"), the polished version loses some of the piquant flavor of contemporary speech.

Moreover, Williams performed silent blue-penciling of material she found inappropriate. "A few necessary expurgations have been made without further comment," she sniffs in her introduction. One wonders what was considered a necessary expurgation in 1919.

ALSO OF INTEREST: San Francisco Committee of Vigilance of 1856, *San Francisco Committee of Vigilance of 1856 Papers* (BANC MSS C-A 78).

5. UNITED STATES CIRCUIT COURT (9TH CIRCUIT). *U.S. CIRCUIT COURT (9TH CIRCUIT) RULE BOOK, 1855–1911.*[13]

The supplied title for this item is only partially accurate, given its date span. There was no Ninth Circuit in 1855. When this ledger was started, Congress had just established California as a separate, unnumbered circuit comprising

[13] Call no.: BANC MSS C-A 144.

two districts, the Northern and the Southern, having both original and appellate jurisdiction. In 1863 the Tenth Circuit was formed, which included California and Oregon, and then in 1866 the circuits were renumbered, with California, Oregon and Nevada composing the new Ninth Circuit.

Once a bound ledger, but now a stack of disbound sheets tied together in manila paper by a length of string, this so-called "rule book" provides a spotty but curious view of the court now known as the Ninth Circuit as it functioned during the first few decades of its operation. Most of the entries in the volume are notations of subpoenas issued or demurrers filed, but in among the routine instructions to the Clerk are manuscript copies of correspondence transcribed into the official volume. One of the more intriguing letters concerns litigation over a very small piece of property that would eventually loom large in the history of jurisprudence in California: Alcatraz Island.

The story of the island's ownership is tangled. According to official documents, on June 8, 1846, Mexican Governor Pio Pico granted the property to Julian Workman, a naturalized Mexican citizen. Workman was given Alcatraz (previously considered public property) on the condition that he erect "as soon as possible" a much-needed lighthouse to guide ships into San Francisco Bay. Workman did not build the lighthouse, but instead conveyed title to his son-in-law, Francis P. Temple, also a naturalized Mexican citizen. The following year Temple sold the island to John C. Frémont, who had been recently appointed as military commandant and civil governor of the territory. Frémont later explained that he had given "a bond for the purchase money in my official capacity as governor of California."[14] The unauthorized purchase of Alcatraz was merely one of many charges brought against Frémont when he was court-martialed for refusing to give up his governorship to Brigadier General Stephen Kearny. He was found guilty of mutiny, disobedience of a superior officer, and conduct to the prejudice of good order and military discipline, but Frémont eventually had his sentence commuted by President James K. Polk, and later resigned his commission.

The complicated legal history of Alcatraz, however, did not stop there.

In 1850 President Millard Fillmore included the island on a list of properties in California which were to be reserved from public sale (indicating

[14] Quoted in Erwin N. Thompson, *The Rock: A History of Alcatraz Island, 1847–1972* (Denver: Denver Service Center, National Park Service, [1979]), 7.

Picture postcard, "Alcatraz Island — San Francisco Bay," 1900.

Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1999.011:019).

that, as far as the president was concerned, Alcatraz at that point belonged to the United States government). Fillmore was perhaps relying on intelligence supplied by Major John Lind Smith, a surveyor sent to the Pacific Coast the previous year to reconnoiter the defense needs of the territory. Smith reported that all valid Mexican land grants included a provision that the grant could be rescinded if the property was later needed for public use. In the nimble and sometimes dubious juggling of Mexican and U.S. law in the new territory, here was a case where Mexican law apparently provided the President with exactly the justification he desired. In addition, the fact that Workman failed to complete the primary condition for his grant — the construction of a lighthouse — would seem to invalidate whatever rights he may once have held. But Frémont continued to insist that his purchase from Workman's son-in-law was indeed valid, and he subsequently paid Temple $5,000 of his own money. "The island consequently reverted to me," Frémont insisted, "and has ever since been held by me to be my property."[15]

[15] *Ibid.*

Meanwhile, the United States Army began the arduous and costly process of constructing defenses on Alcatraz. Frémont in retaliation hired the San Francisco law firm of Palmer, Cook and Co. to bring an action of ejectment against the Army engineers, an action filed in the District Court, Fourth Judicial District. The engineer in charge of the Alcatraz construction work, who bore the marvelous name of Major Zealous B. Tower, notified his superiors that he was being personally sued by Frémont for trespassing on the island. The Secretary of War advised Tower to turn to the U.S. District Attorney in San Francisco for assistance with the litigation.

Here the *Ninth Circuit Rule Book* records a small, perhaps previously unknown, episode in the protracted Alcatraz drama. Col. Samuel W. Inge, the U.S. District Attorney in San Francisco, contacted his counterpart in Los Angeles, the also magnificently-named Pacificus Ord. (Ord was the elder brother of Major General Edward Otho Cresap Ord, for whom Fort Ord would be named.) On July 23, 1855, Ord responded with his best counsel on the matter. Ord suspected that the Alcatraz grant was one of the flurry of questionable land transactions that flowed from Governor Pico's pen as it became increasingly clear that California was slipping from Mexican control. Ord advised Inge to return to the very beginning of this hopelessly entangled chain in order to establish a clear title for the U.S. government:

> From all the information I can gather about this and other suspected fraudulent grants made by Pio Pico, I believe that there is now but one Witness who can and will testify to the truth of these frauds, and that is C[ayetano] Arenas — son of Luis Arenas — living at the mission of San Buenaventura, Santa Barbara Co, who it is said acted as a Clerk for Pico, and wrote these antedated grants. Caution and tact are necessary to get this evidence. Father and Son are poor, and they are, like nearly all the Californians, averse to testifying against their Countrymen & friends, & in favor of the US. This Witness knows the value of his evidence to the U States, and I believe he would be, to say the least, a very slow one for the U States, unless he could be previously assured that he could in some way be the gainer, by appearing as a Witness for the Government, in this, and other very important heavy land claims.[16]

[16] Pacificus Ord to Samuel W. Inge, July 23, 1855, transcribed in *U.S. Circuit Court (9th Circuit) Rule Book, 1855–1911,* 26.

It is perhaps a matter for speculation whether Ord's suggestion that Cayetano Arenas be assured of being "the gainer" as a result of his testimony on the Alcatraz grant should be viewed as one U.S. District Attorney encouraging another to bribe a witness.

ALSO OF INTEREST: California Court of Sessions (Solano County), *Solano County Court of Sessions Minutes, 1850-1853* (BANC MSS 98/171 c); United States District Court (California: Northern District), *United States District Court, Northern District, California Sales Books, June 2, 1851–November 4, 1887* (BANC MSS C-A 133); California Justice Court (Santa Barbara). *Justice Court of Santa Barbara Docket, 1850-1855* (BANC MSS C-F 151); California Justice Court (Colfax). *California Justice Court (Colfax) Records, 1873-1930* (BANC MSS C-A 357).

6. CALIFORNIA STATE PRISON AT SAN QUENTIN. *DESCRIPTION OF PRISONERS RECEIVED AT THE CALIFORNIA STATE PRISON AT SAN QUENTIN, 1909–1912.*[17]

California's current prison system began with a single ship. On October 8, 1849, the San Francisco Town Council approved the purchase of the brig *Euphemia* to use as a prison hulk, and the ship was docked at the wharf near what is now the corner of Battery and Sacramento Streets. In 1851, James M. Estell and Mariano Guadalupe Vallejo converted a bark named the *Waban* into a second prison ship, and leased the labor of prisoners from the State of California for a period of ten years. The ship was docked at Angel Island for one year, until prison inspectors ordered Estell and Vallejo to locate a permanent land-based prison site. The two men purchased twenty acres on Point San Quentin, and the institution we know today had its first incarnation.

The Bancroft Library's collections includes San Quentin prisoner registers from as early as 1851, but among the most fascinating records are four boxes of disbound pages covering the period 1909–1912. These records represent most of the tenure of Warden John Hoyle, who was appointed in 1907, and served until 1913. Warden Hoyle was an adherent of the Progressive

[17] Call no.: BANC PIC 2008.060–ffALB.

Movement, the social revolution that swept through California in the early decades of the twentieth century, reaching its apex with the 1910 election of Governor Hiram Johnson. Hoyle was successful in improving the living and working conditions at San Quentin, doing away with striped prison uniforms and instituting a program of vocational education to ready inmates to become productive citizens upon their release. Despite supervising conditions that might be considered by most modern observers as decidedly grim, Warden Hoyle at the time was widely criticized for "coddling" his prisoners with his progressive reforms. Female inmates (it was alleged) were released for springtime walks to pick wildflowers on Mount Tamalpais.

The registers for the years 1909–1912 contain detailed information about each prisoner admitted, including most notably an evocative mug shot. The entry includes name, prison serial number, date of admission to San Quentin, the type of crime for which the individual was incarcerated, the county in which the crime was committed, and the number of years of the sentence. Biographical details include age, state or country of birth, and occupation. Physical descriptions include height, weight, eye and hair color, complexion type, shoe size and hat size. A free-text field titled "Marks, scars, moles" frequently gives a quite colorful and detailed description of the prisoner's tattoos. Take, for instance, Harvey Wilson, who was booked on June 11, 1909. Wilson's tattoos include an arrow piercing flesh on his left arm, "H.H." and the outline of a star, bracelets inked on both wrists, a dagger piercing flesh on his right arm, the word "Pugh," a star and moon on his left foot, and "Anna" on his right foot. Wilson had evidently had a rough life before reaching San Quentin: the entry notes that his broken nose leaned to the right and the middle finger of his left hand had been chopped off at the third joint. (In the following decade the prison physician at San Quentin would use plastic surgery to correct "flat noses, cauliflower ears and other criminal stigmata."[18])

The youngest prisoners in the ledgers were sixteen (two of them); the oldest was seventy-five. Most prisoners were white, and the race or

[18] Quoted in Benjamin Justice, "'A College of Morals': Educational Reform at San Quentin Prison, 1880–1920," *History of Education Quarterly* 40:3 (Autumn 2000), 297. See also Ethan Blue, "The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary, 1913–1951," *Pacific Historical Review* 78:2 (May 2009), 210–41.

nationality of non-whites was specifically noted: Negro, Indian, Chinese, Japanese, etc. In among the men are included photographs of perhaps two dozen women. While female prisoners were segregated into a separate Women's Building at San Quentin, they appear in chronological order among the men in the registration ledgers' mug shots, oddly incongruous in their huge Victorian hats.

Only one famous person was admitted to San Quentin Prison during this three-year period: San Francisco's infamous "Boss" Abe Ruef. In the ledger his crime is listed as "Offering a Bribe," with a sentence of fourteen years. Perhaps nowhere else may one learn that Ruef was five feet, six and half inches tall, weighed 160 pounds, and wore size 6½ shoes. His occupation is listed as "Lawyer."

ALSO OF INTEREST: California State Prison at San Quentin, *Descriptive Registers of Prisoners, 1851–1940* (BANC MSS 79/18 c); August Vollmer, *Prisoner Portraits, 1895–1900* (BANC PIC 1957.022–PIC); San Francisco (Calif.) Police Dept., *San Francisco Police Dept. Records of Folsom Prison Convicts, 1924–1930* (BANC MSS 2007.244); Maynard P. Canon, *Folsom Prison Notebook, 1881–ca. 1949* (BANC MSS 2004/204 c); San Francisco (Calif.) Police Dept., *Wanted Posters Received, 1921–1925* (BANC MSS 91/146 c).

7. MARY E. GALLAGHER. *AN INTERVIEW WITH MARY GALLAGHER ON THE I.W.W. [AND] TOM MOONEY: ORAL HISTORY TRANSCRIPT.*[19]

The Bancroft Library's collection is strong in labor history, especially the history of the radical labor movements in California during the early twentieth century. Of particular interest is material concerning the California Criminal Syndicalism Cases, including the extensive Thomas J. Mooney Papers (82 cartons, 84 volumes and 37 scrapbooks, plus miscellaneous subcollections), which document the central figure in the syndicalism trials.

On April 30, 1919, the Legislature passed the California Criminal Syndicalism Act which declared guilty of a felony anyone who "organizes

[19] Call no.: BANC MSS C-D 4011.

or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage or persons organized or assembled to advocate, teach or aid and abet criminal syndicalism." Aimed primarily at the Industrial Workers of the World (I.W.W.), the measure was a panicked response to a wave of labor actions that ranged from factory slow-downs to fatal bombings, and political organizing that included both opposition to U.S. involvement in World War I and support for the Bolshevik Revolution in Russia. From 1919 to 1924 there were 94 criminal syndicalism trials in California, involving 264 defendants.

Among the more interesting of the many resources available concerning the trials is an interview with Mary Eleanora Gallagher recorded in 1955 as part of the Regional Cultural History Project. Mary Gallagher had been working for the I.W.W. in Chicago, and closely following newspaper reports of the California trials, when she was surprised to read that she herself had been named in one of the proceedings. W.E. Townsend, a former member of the Chicago chapter of the I.W.W., had been called as a prosecution witness. In Gallagher's estimation Townsend was "a stool-pigeon" — a government agent who had infiltrated the organization in order to collect incriminating evidence. Townsend claimed on the witness stand that Gallagher had instructed him in methods of industrial sabotage. When alerted to the allegation, the I.W.W. sent Gallagher to California to refute Townsend's testimony.

During his time in Chicago, Townsend had shared many details of his personal life, and as a result of his indiscretion, Mary Gallagher was able not only to contradict his allegation that he had received instruction in violent labor tactics from her, but also to provide damaging details about his own past in an attempt to impeach his testimony. In her oral history Gallagher explains:

> [F]or six different trials I tried to get this testimony in, that he had deserted from the Army and Navy nine different times and had also been in the insane asylum in Elizabethtown outside Washington, D.C. [*Gallagher here confused St. Elizabeth's Hospital in Washington, D.C. with Elizabethtown, an earlier name for Quincy, California.*] I could never get that onto the record because his attorney would object. That never went into the record until I had made about six attempts at different trials.[20]

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20 Mary E. Gallagher, *An Interview with Mary Gallagher: Oral History Transcript*, 57.

Not until Townsend was called to testify in a case held in Quincy, California, was Gallagher's damaging information admitted. Townsend's response was simply to agree to the accuracy of her statements. "He got up on the stand," Gallagher recalled, "and said, 'Why yes, I was as crazy as a coot. She's right.' And still they used him. It was most astonishing."[21]

Gallagher's oral history provides the type of personal anecdotes about the syndicalism trials that frequently are lost in the winnowing of historical detail. She recalls that during the various trials in California she was entitled to witness fees and transportation, hotel and meal reimbursements. "We had to turn in a bill and have it certified by the judge at the end of each trial so that we could collect our expense money. . . . The judge in each case always went over our expense accounts very carefully to see that we were not eating two-dollar meals when we should have been eating fifty-cent meals."[22]

ALSO OF INTEREST: Mary E. Gallagher, *Photographs Relating to American Socialism and Labor* (BANC PIC 1955.005 – PIC); Joe Murphy, *Industrial Workers of the World: Interview* (Phonotape 1557 C); Harold Haynes, *The Life History of Harold (Red) Haynes: Interview* (Phonotape 1388 C); Patrick Cush, *Patrick Cush Interviews and Songs* (Phonotape 3069 C:1-5); Cottrell Laurence Dellums, *International President of the Brotherhood of Sleeping Car Porters and Civil Rights Leader: Oral History Transcript* (BANC CD-236:1-7); Helen Valeska Bary, *Labor Administration and Social Security: a Woman's Life: Oral History Transcript* (BANC CD 612:1-12).

8 JOHN ALFRED SUTRO. *A LIFE IN THE LAW: ORAL HISTORY TRANSCRIPT.*[23]

Most histories of law firms are written to commemorate a particular milestone in the firm's history, or to acknowledge a significant partner upon his or her retirement or death. These publications tend to be puff pieces, intended to celebrate the law firm's many notable accomplishments. Among the extensive collection of oral histories available through the Bancroft Library is a group focusing on law firms in California. While these interviews were recorded with the full cooperation of the attorneys

21 Gallagher, *An Interview*, 58.

22 *Ibid*., 58-59.

23 Call no. BANC MSS 87/243 c.

involved — and at times at their own behest — and while they are certainly not in the category of rigorous exposés, the oral histories do explore the behind-the-scenes dramas of some high-profile California cases, discussed in a forum in which a neutral interviewer can ask probing questions and challenge questionable statements. In many cases they capture vignettes about the practice of law in California that would otherwise have been irretrievably lost.

John A. Sutro, Sr.

The venerable firm of Pillsbury, Madison & Sutro was founded in 1905, but its roots stretch back to 1874, when Evans S. Pillsbury opened a law practice in San Francisco. By the 1890s, Frank D. Madison and Alfred Sutro had been hired as associates in the firm, setting the stage for one of the oldest and most prestigious law firms in California.

In 1985, John A. Sutro, Sr., son of one of the founders, was interviewed for a series of oral histories focusing on PM&S. The senior Sutro was asked about beginning as an office boy in his father's firm, and he related a story that is almost Dickensian in its archaic detail of how a law office in California once functioned:

> That was back in, let's see, 1916 or '17. I think it was after the Panama-Pacific International Exposition, which was in 1915. . . .
>
> One interesting thing, I don't know if I told you about this, but Mr. E.S. Pillsbury was very conscious of security and the lawyers keeping their relations with their clients confidential. The library of the firm, on the top floor of the 200 Bush, had a fireplace in it. Mr. Pillsbury required the office boys to go to every office before they went home in the evening, empty the wastebaskets and take the trash in and burn it up in the fireplace.[24]

After graduating from Harvard Law School in 1929, Sutro joined his father's firm. In his stories about his early years in practice he reveals

[24] John A. Sutro, Sr., *A Life in the Law: An Interview*, conducted by Sarah Sharp (Regional Oral History Office, UC Berkeley, 1985–1986), 11.

colorful anecdotes about the law profession in California during the Depression and World War II. In one case that he handled, the California Artichoke Growers had hired the distinguished Philadelphia advertising firm of N. W. Ayer & Son to help promote the consumption of California artichokes nationwide. The campaign was effective, but the growers in the Monterey region felt that Ayer had favored growers in the San Francisco region over their own, so they blocked payment of the company's bill. Ayer hired Sutro to represent the advertising firm. It was necessary to serve each grower individually in order to give notice of the litigation, but all the growers simply ignored the summons and complaint. As a result, Sutro was able to get a default judgment in the United States District Court. Enforcing the judgment, however, proved to be another matter.

> There was no practical way to collect the judgment by going to the individual growers. It would have been an impossible job, just to collect a few thousands of dollars. It occurred to me that most of the artichoke growers being Italian probably had a bank account at the Bank of America, which had been founded as you know by Mr. A. P. Giannini as the Bank of Italy.
>
> I got a writ of execution and served it on the Bank of America to tie up the accounts of the artichoke grower defendants. In those days, if you served the principal office of a bank you attached or executed upon accounts at all the branch offices. That isn't true any longer today. So I served the headquarters office with a writ of execution. It turned out that I tied up several millions of dollars and the judgment was only for a few thousand. I was called upon by scores of artichoke growers who were really mad. I also got a call from the Bank of America, whose headquarters at that time was on the corner of Powell and Market Street. Would I please come out, because we had all the artichoke growers' accounts tied up?
>
> So I went out there and they gave me a cashiers check for the amount of the judgment with interest and costs.[25]

The Pillsbury, Madison & Sutro Oral History Series includes eleven separate interviews with attorneys from that firm.

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25 Sutro, *A Life in the Law*, 23-24.

ALSO OF INTEREST: Herman Phleger, *Sixty Years in Law, Public Service and International Affairs: Oral History Transcript* (BANC MSS 80/67 c); Edgar Sinton, *Jewish and Community Service in San Francisco, and Family Tradition: Oral History Transcript* (BANC MSS 79/28 c); Leon Thomas David, *California Lawyer and Judge: Oral History Transcript* (BANC MSS 90/118 c); Sharp Whitmore, *California Lawyer: Oral History Transcript* (BANC MSS 90/117 c). Ruth Church Gupta, *Oral History Transcript* (BANC MSS 87/251 c). George Yonehiro, *California Lawyer and Judge: Oral History [transcript]* (BANC MSS 90/119 c).[26]

9. ROSALIE RITZ. *ROSALIE RITZ COURTROOM DRAWINGS, 1968–1982.*[27]

When cameras were routinely barred from the courtroom, artists such as Rosalie Ritz provided the only visual record of some of the country's most important trials. Ritz began her career as a court artist in the 1950s working for the Associated Press, the *Washington Post* and CBS. She covered Senate and House Congressional hearings, including those of the House Un-American Activities Committee.

By the mid-1960s she had relocated to California, where she sketched a majority of the most significant California trials of that very turbulent era. A list of the defendants whose trials she illustrated is a Who's Who of the most important political and social figures of the time: Eldridge Cleaver, Juan Corona, Angela Davis, Bill and Emily Harris, the Hell's Angels, David Hilliard, Sara Jane Moore, Patricia Hearst, Daniel Ellsberg, the San Quentin Six, Sirhan Sirhan, the Soledad Brothers, Dan White, Wendy Yoshimura and Huey Newton.

ROSALIE RITZ

In 1966 Bobby Seale and Huey Newton formed the Black Panther Party for Self Defense. In much the same way that the San Francisco Committee of Vigilance had been formed over

[26] Editor's Note: The last four oral histories are published in the present volume of *California Legal History* (vol. 6, 2011).

[27] Call no.: BANC PIC 1991.012–B.

a century earlier to counter perceived corruption in the criminal justice system, the Black Panthers were founded to counteract perceived racism in the Oakland Police Department — and like their Vigilance predecessors, the Panthers' high ideals soon led to excesses. One of their most controversial activities was to institute armed citizens' patrols to intervene in encounters between the police department and African Americans. When on the evening of October 28, 1967, Oakland Police officers John Frey and Herbert Heanes attempted to disarm Newton during an encounter on the street, the incident led to gunfire. All three men were wounded, Frey fatally. In his initial trial Newton was convicted of voluntary manslaughter, but his conviction was overturned by the California Court of Appeal. Two subsequent proceedings ended in mistrials.

Rosalie Ritz was present for all three of Huey Newton's trials for the murder of Officer Frey, and her courtroom sketches present the most complete rendering of the proceedings — 151 drawings in ink and colored pencil. One of the most striking images from the first trial shows two separate sketches of Newton on the witness stand, appearing cool and composed, while Judge Monroe Friedman sits scowling, framed by the red and white stripes of an American flag. Another drawing gives a detailed portrait of each member of the jury. Ritz sometimes added captions to the verso of her work describing the event being depicted. A few suggest the compressed poetry of a haiku: "Emergency Room nurse testified Newton wasn't bad off with bullet hole in stomach."[28]

The Rosalie Ritz drawings have been recently digitized; a finding aid is available via the Online Archive of California.

ALSO OF INTEREST: Walt Stewart, *Walt Stewart Collection of Courtroom Drawings, ca. 1970–ca. 1990* (BANC PIC 2004.133).

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The collections of the Bancroft Library span the entire breadth of California history, and contain documentation in all imaginable formats. An intensive program of digitization is making large portions of the collection available online for remote research, and many users will find they can already pull

[28] Rosalie Ritz. *Rosalie Ritz Courtroom Drawings, 1968–1982* [digital file], image cubanc_39_1_00303530a.

up unexpected riches on their own laptop. Yet nothing can quite match the experience of sitting in the elegant Bancroft Library reading room, inhaling the musty scent and touching the rough sheets of blue paper on which, transcribed in faded, spidery penmanship, a poor soul in 1851 San Francisco pleads for his life before an unsympathetic panel that listens patiently, rope in hand.

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THE HISTORY OF LOS ANGELES

As Seen from the City Attorney's Office

BY LEON THOMAS DAVID

EDITOR'S NOTE

The publication of Leon Thomas David's oral history in this volume of *California Legal History* provides the opportunity to present his "History of Los Angeles as seen from the City Attorney's Office," which he completed in 1950. It is one of several works occasioned by his service as an assistant city attorney, a position he held from 1934 until his appointment to the bench in 1950, except for his period of active duty during World War II.

In addition to the legal, academic, and military careers discussed in his oral history, Judge David enjoyed a fourth public career as a pioneering legal historian. In this role, he gave special attention to the legal history of California. His service in the City Attorney's Office led to studies that combined the historical and substantive aspects of that office. For example, one of his earliest and best known works is a series of articles published in 1933–34 that discuss the development of municipal tort liability in California.[1] Many of his works in the field of legal history predate the creation

[1] Leon Thomas David, "Municipal Liability in Tort in California," published in five parts in *Southern California Law Review* 6 and 7 (1933–34); revised and expanded edition published as *Municipal Liability for Tortious Acts and Omissions with Particular Reference to the Laws of the State of California* (Los Angeles: Sterling Press, 1936). A procedural work arising from his city attorney service was *The Administration of Public Tort Liability*

in 1956 of the American Society for Legal History, of which he became an active member. At the time he first recorded his recollections in 1977, he was also the chair of the State Bar Committee on History of Law in California. His final published work is the article titled, "California Cities and the Constitution of 1879," which appeared in 1980.[2]

Judge David's history of the Los Angeles City Attorney's Office is today both a "history" and a documentary source on the viewpoints and attitudes of a prominent lawyer in mid-twentieth century Los Angeles. It was serialized in the *Los Angeles Bar Bulletin* from April to December, 1950.[3] Chapter I, covering the Spanish-Mexican period, reappeared in Judge David's doctoral dissertation of 1957 (a three-volume work of 1470 pages on the role of lawyers in government from William the Conqueror to America of the 1950s).[4]

The complete ten-chapter history of the City Attorney's Office has been reedited for publication here, but without alteration of the content. Comments in [brackets] have been added by the editor. Citations of cases and sources have been checked and expanded. The spelling of names, particularly in Spanish, has been corrected wherever possible. The photographs that accompany the article have been newly obtained for this publication.

— SELMA MOIDEL SMITH

in Los Angeles, 1934–1938, coauthored with John F. Feldmeier, published by the Committee on Public Administration of the Social Science Research Council in 1939.

[2] Leon Thomas David, "California Cities and the Constitution of 1879: General Laws and Municipal Affairs," *Hastings Constitutional Law Quarterly* 7 (Spring 1980): 643.

[3] A verbatim reprint, without indication of publisher, date, or copyright, was distributed by Judge David to selected law libraries in California. The copy in the UCLA Law Library bears a handwritten note indicating that it was received from Judge David on October 4, 1951.

[4] Leon Thomas David, *The Role of the Lawyer in Public Administration*. Dissertation, University of Southern California, 1957; Chapter IX(M)4, "Spanish-Mexican City Government: Los Angeles," pp. 261–71.

THE HISTORY OF LOS ANGELES

As Seen from the City Attorney's Office

LEON THOMAS DAVID*

The fabric of history is an endless web of cause and effect, but one may choose some bright thread and follow it through the pattern, and note the cyclic recurrences of the pattern itself in the fabric.

The transition of our Spanish-Mexican city to an American metropolis, still in population and interests the second largest Mexican city in the Hemisphere, has involved cyclic recurrences of major problems: organization, housing, land, water, transportation, immigration and integration of the newcomer.

That Los Angeles is the third city of the United States testifies that the community has solved such problems, and in many a major battle, the solution has been due in large measure to the work of the city attorney and his staff.

The office itself dates at least to 1822. In the roster of the thirty-one men who held the office since 1850, and of their deputies and assistants, we

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* The original author footnote reads: "Judge, Municipal Court, Los Angeles 1950. A.B., J.D., Stanford University; M.S. in Pub. Adm., U. of So. Calif.; Deputy City Attorney, Palo Alto, 1926–1931; Director, League of California Municipalities, 1931–1932; Faculty, U.S.C. Law School, 1931–1934; Lecturer, School of Government, 1934–1940; Assistant City Attorney, Los Angeles, since 1934; Colonel, F.A., U.S. Army, 1942–1946. Admitted California Bar, 1926."

recognize old friends whose legal careers are well known to the bench and bar. There are others whose tradition should not remain unknown, whose labors antedated the American occupation and conquest. Here we can but note briefly some data, which at a later time may be worthy of more detail, concerning a number of able and interesting men.

In this centennial year [of the State of California], we lawyers who consider these items may feel impelled to consider further, by reading from numerous works readily available. Some of these are indicated in the notes on the sources of the writer's information. Pictures of these leaders of the bar in times past and present are found in a number of works, and in the Los Angeles Public Library.

CHAPTER I
A CONTRACT FOR SETTLEMENT

In the development of California jurisprudence, and the growth of a large and learned bar in the State of California, men's quest for gold did not give rise to the major legal problems which taxed the abilities of lawyer and the patience of litigants for many a year. Land — land and water — these more than gold, were to instigate many a bitter battle in politics and at law.

Philip II of Spain, contemporary of Queen Elizabeth, was known as "the prudent."[1] Master of almost all of the New World, he established the *Leyes de los Reynos de las Indias* for the establishment and government of colonies. Therein it was provided that a pueblo or town might be established by a contract for settlement,[2] in which ten married men agreed to establish it with their families, within a time therein specified. Dwellings were to be provided for each family, a church established, and a prescribed list of livestock was to be maintained by each settler on the common lands allotted for the settlement. If the conditions had been met, within the time specified, the reward was the official establishment of the town or pueblo and a grant to the settlers in common of four square (Spanish) leagues of

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[1] Though the loss of his Armada in 1588 was to start the decline of Spanish power, which culminated in Mexican independence in 1821, [this is not] pertinent to our story.

[2] *Recopilación de leyes de los Reynos de las Indias, Ordenanzas del Rei Don Felipe II,* Libro IV, título V, leyes VI, X; "Ayuntamiento," in Joaquín Escriche, *Diccionario Razonado de Legislación y Jurisprudencia* (rev. ed., Paris: Librería de Rosa, Bouret y Cia., 1854), 336–38.

land, laid out in a square if topography permitted without infringing upon any other pueblo or Indian town. The pueblo gained political status.

It would be under the eye of the prefect, representing the crown, but with its *alcalde* or mayor, and its *regidores* or councilmen formed into the *ayuntamiento* or council, it would have considerable self-government, and the council would assign and administer the pueblo lands. The waters, minerals and forests likewise were to be so administered.

The *alcalde*, as mayor, exercised the general functions of a justice of the peace, a feature retained in later municipal law in the American regime taking over Spanish-Mexican cities (see 1 Cal. Reports, original ed., appendix).

In October, 1781, Lord Cornwallis surrendered, and English dominion of the Atlantic colonies ceased. Only a month before, on September 4, 1781, twelve unpromising colonists began building rush huts for themselves and families at an Indian village called Yang-Na, to hold the Pacific Coast for Spain. They had come from Sonora and Sinaloa to fulfill their contract of settlement under Philip II's *ordenanzas*, which settlement was blessed as the Pueblo de Nuestra Señora la Reina de los Ángeles de Porciúncula, in ceremonies conducted by the San Gabriel Mission. "Porciúncula," the name given to the present Los Angeles River by Portola, was derived from the Franciscan festival day on which Portola, in 1769, had paused at the spot.

The launching of this settlement, under the laws of the Indies, had involved some legal difficulty. The requirements of the *ordenanzas* of Philip II were not well adapted to this new land. For instance, Law VI required settlers, among other things, to have blooded Castilian livestock, obviously difficult on such a faraway frontier.

A decree was drawn up by Don Filipe de Neve, governor, close to the problem, for the government of Alta California, of which the 14th Title treated of settlements and pueblos on a more realistic basis.[3] Promulgated at Monterey, this decree was referred to the King of Spain, who approved the decree on October 24, 1781. De Neve already had given instructions for the establishment of the new settlement, which was well under way before the royal approval was given.

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[3] A translation appears in John W. Dwinelle, *The Colonial History of the City of San Francisco: being a synthetic argument in the District Court of the United States for the Northern District of California, for four square leagues of land claimed by that city* (San Francisco: Towne & Bacon, 1863), Addenda IV.

Galindo Navarro, as the *procurador* or attorney general of the Four Interior Provinces gave a legal opinion to Don Pedro Fages, governor of Alta California, that he might legally lay out the pueblo lands of four square leagues for each pueblo, and that other grants should not be made to the disparagement of such lands,[4] in reliance on the *ordenanzas*.

So, from 1781 to 1786, the inhabitants worked, while Vicente Félix, the royal commissioner, watched. By 1783, a chapel, a guard house or jail, and a town house were built. In 1786, the nine remaining settlers complied with their bargain; a survey of the pueblo lands was made, each of the settlers was allotted a house lot, four fields for cultivation, and a branding iron.

The town *ayuntamiento* was established, with its *alcalde* (mayor, who acted as justice of the peace or recorder), and its *regidores* (councilmen).

Under the Spanish Constitution, the Spanish Cortés, on May 23, 1812, provided for the election of the Common Council, pursuant to the Spanish Constitution,[5] in each pueblo. A decree of the Cortés, of June 22, 1813, established the number of *alcaldes*, *regidores*, and other officers in each pueblo or city, according to population. In 1822, it appears that the Los Angeles Council was expanded by the addition of a *síndico-procurador*. After Los Angeles was made a city and capital of Alta California in 1835, the proceedings of the City Council or *ayutamiento* indicate it was entitled to two *alcaldes*, four *regidores* and one *síndico-procurador*.

The *síndico-procurador* was the city attorney. He had a combination job. Under the Spanish and the Mexican law, he was defined as the person "who in the common council is charged with promoting the interest of the pueblos, defending their rights, and complaining (remedying by suit) public injuries when they occur,"[6] and he was also *fisc* or treasurer. The most substantial of those tangible rights and interests of the pueblo were the lands, waters and minerals of the town, and the revenues derived from the lands; plus excises on liquors. Besides its four square leagues, the pueblo of Los Angeles had other lands allotted to it for administration and grant.

The earliest volumes in the Los Angeles City Archives, treasured by City Clerk Walter C. Peterson, are largely composed of petitions concerning land. The settler petitions for an allotment, or urges that the allotment

4 Ibid., Addenda VI.

5 Ibid., Addenda X.

6 Escriche, *Diccionario,* "Ayuntamiento"; Dwinelle, *op. cit*., par. 12.

of another has lapsed, or that there are encroachments by others. Lanes are opened, and some are closed. There are numerous matters relating to the *zanjas* or water ditches from the river.

The petition, carefully written on special paper, bearing the documentary excise tax stamp or seal, was presented to the *ayuntamiento*. Upon many a petition, there is endorsed the report of a Council committee to which it was referred; and then, a few lines record the action of the Council on the report, signed by the *ayuntamiento* members, and the *síndico* frequently signs as such. Where lands are allotted, one may find he was on the allotment committee that viewed the land; and after 1834, he drafted the documents given the allottees to evidence their possessory right.

For several decades after 1850, the California Supreme Court, the federal courts and the U.S. Supreme Court were filled with litigation over California grants. The pueblo grants of San Francisco fill the early reports.[7] Those of Los Angeles do not. The local authorities had done their work relatively well. The transition to American rule was expedited in Southern California and eased by the fact that a considerable number of Americans had settled in the region and had become naturalized Mexican citizens, receiving grants of land, from 1832 to 1850.[8] In the years following 1850, there were a number of judges in the district who were familiar with the pueblo land system. The bulk of the immigrants did not at that time come to Southern California. The mines were in the north.

The *síndico* made many reports to the *ayuntamiento* concerning the city finances, and they are found in the present city archives for a considerable number of fiscal years.[9] The city funds were derived from rentals involving city lands and licensing.[10] For handling this revenue, the *síndico* was allowed a commission.

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[7] *Hart v. Burnett* (1860), 15 Cal. 530, involved the question of whether or not San Francisco had any pueblo rights. Los Angeles pueblo land cases primarily concern water rights: *Feliz v. City of Los Angeles* (1881), 58 Cal. 73; *Vernon Irrigation Co. v. City of Los Angeles* (1895), 106 Cal. 237.

[8] In 1836 alone, there were petitions presented to the *ayuntamiento* for naturalization of Moses Carson (brother of Kit Carson), Dr. John Marsh, William Chard, Nathaniel Pryor, James Johnson, Samuel Carpenter, and William Wolfskill (who later began orange culture here): I Archives, City Clerk, 245, 281; II, 150, which are examples.

[9] An example is the report for 1834: I Archives, City Clerk, pp. 669–73.

[10] The lands were divided into several classes. There were *solares* or single house lots; the *suertes* or fields, assigned by *suerte* or luck in drawing lots; *ejidos*, vacant

On November 19, 1836, Narciso Botello, *síndico*, prayed for an allowance of commissions at the rate of ten percent. The *ayuntamiento* committee recommended three percent. The committee of the council kept watch over the financial affairs by periodic checkups, as on March 15, 1838, when an account of the [1837] *síndico*, Ignacio M. Alvarado, was audited and found correct.[11]

But the city was always having financial troubles. The *ayuntamiento* was always in the middle between the demands of rival claimants of the governorship, as that involving Alvarado and Carrillo.

Sometimes the *síndico* was hard pressed to collect his salary. This was true in 1837 when Alcalde Ybarra reported that he had had to receive eight colts, some hides and several bushels of corn in lieu of fines. The *síndico* claimed the colts on account of his past-due salary. The *alcalde* counterclaimed for money advanced to pay the secretary of the *ayuntamiento* and for board of the colts. The Council determined that the *sincido* should pay out the colts on claims against the city. Then it was discovered that the colts had eaten the corn and two had run away.

Not all those elected to the office of *síndico* desired it, in spite of the penalties imposed for not accepting public office. Thus in December, 1838, Vicente Sánchez refused the office, which occasioned some concern to the *ayuntamiento*.[12]

There was in that year a war going on between rival claimants for the governorship, Don Carlos Carrillo and Juan Bautista Alvarado. Vicente de la Osa, a forceful member of the *ayuntamiento,* had been captured along with fellow councilmen and Alcalde Louis Arañas by Alvarado's forces, and imprisoned in General Vallejo's *castillo* at Sonoma. Osa and Regidor José Palomares eventually made their way back, and Osa became *síndico.* The *síndico* returned and claimed his accrued allowances, but there were no funds.

Vicente de la Osa (1838)

commons; *dehasas* or pasturage; and *propios*, or proprietary lands leased out, whose revenue was a principal municipal finance item.

11 I Archives, City Clerk, p. 53.

12 Ibid., pp. 581–686.

Faced with the practicalities of the situation, a petition had been presented to the Council by citizens, requesting the Council to withdraw support from Carrillo. The *síndico*, Osa, ruled that the petition was not legal, as it was not presented on the official stamped paper. This did not daunt the citizens, who the following day presented one fully legal in form. So the "recall" succeeded, as the *ayuntamiento* recognized Alvarado.

The military occupation of the city of Los Angeles by United States forces from 1846 to 1850 involved numerous legal problems for the *síndico*. The city records today contain copies of military regulations sent from General Winfield Scott's headquarters in Mexico, authenticated by William Tecumseh Sherman, lieutenant of artillery, as adjutant general, providing rules for military government.

The citizens of the state at an election in November, 1849, ratified a constitution promoted by the United States Army commander in California. In 1850, an act was passed in the Legislature for the incorporation of Los Angeles, and a general act also passed providing for government of cities. The 1850 charter was nothing more than legislative recognition of the existing city government, and defined its boundaries, very important to the city.

Under the treaty of Guadalupe Hidalgo, its citizens became American citizens, and their collective property in the form of the pueblo lands was protected by the treaty obligation.

The machinery of city government at the time was carried over from its Mexican organization. There was little need to do otherwise, for the powers of the Council and the scope of the municipal administration were little changed. However, it is interesting to note that the *ayuntamiento* had exercised jurisdiction over a considerable area outside the pueblo boundaries. Pending the creation of county government, it was the county government.

CHAPTER II
BENJAMIN IGNATIUS HAYES

Early in 1850, a number of lawyers arrived in Los Angeles. These included Benjamin Hayes, J. Lancaster Brent, William G. Dryden and Lewis Granger, all of whom became city attorneys and had notable legal careers.

Benjamin I. Hayes was a college graduate, born in Baltimore in 1815, who came overland from Missouri, arriving February 3, 1850. He met and

formed a partnership with Jonathan R. Scott, for many years thereafter a leader at the bar. Hayes arrived with total assets of three mules, which he proceeded to sell. On April 1, less than two months after his arrival, he was a candidate for the office of city attorney, at the municipal elections to fill city offices for the first time under the new constitution, and he was elected. Fast work for a newcomer!

Benjamin Ignatius Hayes (1850–1851)

Hayes took the oath of office as city attorney on July 3, 1850, and the salary set was $500 per annum.[13] Apparently the City Council did not make too frequent demands upon him. In August 1850 Benito Wilson, who was already the elected county clerk, was elected to the City Council. Hayes ruled there was no incompatibility in office. (Hayes himself, at the same moment, was county attorney.[14]) Antonio Coronel served at this time as assessor.

When Coronel was about to make his first *ad valorem* assessments, he wished to know what lands to assess. Many "city" lands, claimed by it were outside the four square leagues to which its first American charter had trimmed it. So he was told to confer with the city attorney. No report was made for eight months.[15] The absence of adequate surveys made the task difficult.

The city passed its first general licensing ordinance, which imposed fees on a gross receipts basis. When the city wished to auction off some of its lots, the treasury being low, Hayes pointed out that the auctioneer would have to pay the tax.[16]

On May 1, 1851, the salary of the city attorney was cut to $300 per year, the Council reserving the right to allow extra compensation for special services. On May 7, W.G. Dryden was elected city attorney. Hayes, as partner of his fellow Missourian, Jonathan Scott, may have been no longer interested in the city job. At least, in February, 1851, Lewis Granger (later

13 I Records, City Clerk, pp. 9–10.
14 Ibid., p. 73.
15 Ibid., p. 77.
16 Ibid., p. 116.

a city attorney) billed the council for $10 for services in a suit, and was told to settle his claim with the city attorney.[17]

In 1852, Hayes was elected the first district judge. On January 1, 1864, the district was enlarged by adding San Luis Obispo and Santa Barbara counties, and Don Pablo de la Guerra of Santa Barbara became his successor.

Hayes, as judge, found murders a major judicial concern, there being about one a day in Los Angeles at that time. He was very sensitive to the need of counsel for the accused, and his diaries show him praying in the church for one he had sentenced to hang.

In 1850, as prosecuting attorney, he tried the Lugos, sons of a prominent citizen, for the alleged murder of two men who had misdirected Lugo's party, pursuing Indian cattle thieves, into an ambush. The Lugos were defended by another newcomer, J. Lancaster Brent, who secured their acquittal. At the preliminary hearing, outlaws packed the courtroom, and their leader, Irving, an ex-cavalryman renegade, threatened to "get" the Lugos if they were admitted to bail. The marshal was hard put to maintain order, and later, an assassin shot at Hayes, putting a bullet through his hat.

As judge, in January 1855 he sentenced two men to hang. These were Alvitre and Brown. Through the efforts of his counsel, Cameron E. Thom (who later was city attorney), Brown secured a stay of execution from the Supreme Court. A similar stay was requested for Alvitre. It was granted, but before it was known of or received, Alvitre was executed. The rope broke, and the job had to be done over. A crowd then formed, designed to lynch Brown. Stephen C. Foster, Yale graduate, superintendent of schools and mayor, resigned as mayor to take part in the lynching. Brown was seized from the sheriff, and asked if he had any last word. He stated he wanted "none of the greasers" — Mexicans were numerous in the crowd — to pull on the rope. So he had an all-American hanging.[18] Perhaps Brown's request was induced by the Alvitre disaster.

Hayes protested in 1854 when the sheriff offered $500 for delivery of two murderers, alive or dead, and they were delivered dead, as this seemed productive of more violence.

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[17] Ibid., p. 137.

[18] Harris Newmark, *Sixty Years in Southern California, 1853–1913, containing the reminiscences of Harris Newmark, edited by Maurice H. and Marco R. Newmark* (editions of 1916, 1926, 1930, 1970, 1984), pp. 139–40.

In his diary, Hayes noted that he attended a ball, given by two gentlemen "lately admitted to the bar," at the Gila House at San Diego. One was Mr. Nichols, a preacher, and the other a Dr. E. Knight. These two had been brought before his court for admission. He had some doubts as to their study of the law, not removed a whit when the investigating committee moved their admission. On the motion it was stated that "one had studied the law of God, the other being a physician was reading the laws of nature. Their studies in the statutes and common law etc."

In 1857, he recorded with evident condemnation that the U.S. district judge had spent a portion of last election day at the polls, challenging voters and giving opinions on election laws, and that the county judge was inspector of elections. In 1858, the Los Angeles vote for the district judgeship he held was 363 votes, San Gabriel 170, San Pedro 38, and San Bernardino 135.

When Hayes resigned as county attorney in 1851, he was succeeded by Lewis Granger, who became city attorney in 1855.

Hayes was an eager collector of the early history of the area, and in 1876, published a county history with two other early pioneers, J.J. Warner and J.P. Widney.[19]

Hayes's sister married Benjamin S. Eaton, who was the first district attorney in the county, and another sister taught in the first public school in the city.

Ignácio Sepúlveda, himself a judge of Los Angeles County, stated of Hayes: "He made an upright judge. As a lawyer he was learned. As a man, he was unassuming, gentle and good."

CHAPTER III
THE GOLDEN ANTE-BELLUM DAYS: 1850-1860

In the golden decade of 1850–1860, breathing space between two wars, the sleepy pueblo still waited for the prince's kiss to wake it to its destiny. The rancheros herded their cattle, reaped their grain. In the autumn sun, bare-legged Indians danced their bacchanalia in vats of purple grapes,

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[19] J.J. Warner, Benjamin Ignatius Hayes, and J.P. Widney, *An Historical Sketch of Los Angeles County, California from the Spanish occupancy, by the Founding of the Mission San Gabriel Archangel, September 8, 1771, to July 4, 1876* (Los Angeles: Louis Lewin & Co., 1876; reprint, 1936).

that the new minerocracy of San Francisco might drink to their ascendant fortunes.

Once a week, in the evening, the Americanized City Council would meet. Half or more of its members bore the old familiar Mexican names, and they strove valiantly to understand English; while the others tried to understand Spanish, and occasionally postponed consideration of important documents, until each had a translation he could understand. Progress there was, for Lieutenant E.O.C. Ord was hired to make a map of the city lands. This progress was limited by the failure of the Council to provide permanent stakes to mark the survey; and the hangers-on at the Plaza scarcely paid attention to Ord as he waved to his slow-moving chainmen along the irregular *Calle Principal*, not yet translated to Main Street.

By 1850, the arrival of wagon trains was an old story to the somnolent peons of the Plaza. Occasionally, they were stirred into a flash of interest, when the unusual occurred. On one day, they witnessed an entire family arriving, and little boys made haste to tell the other two American families in the town that the gringo lawyer, Lewis Granger, had brought his wife and children.[20]

Or it might have been the arrival on another day of lawyer Joseph Lancaster Brent, whose wagons disgorged a library of well-worn law books, bound in calf, with other countless volumes on a variety of subjects. This man spoke Spanish like a native. The *Mexicanos* who had unloaded his goods thought he was *muy simpático*. Soon he was known as Don José.

One wonders what Stephen C. Foster, mayor, and a Yale graduate, said to lawyer James H. Lander when Lander arrived in 1852 to start his practice with Joseph R. Scott.[21]

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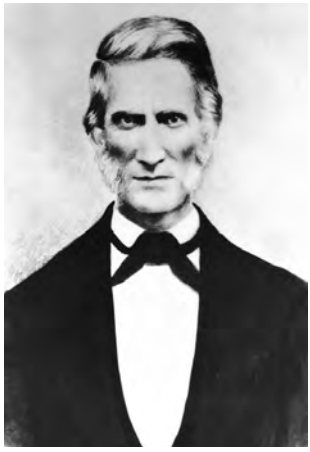
[20] Thus it was natural that Granger should have become a member of the first school board, formed in 1853. His fellow-lawyer, J. Lancaster Brent, was made superintendent. Stephen C. Foster, mayor, was the third member of the board, and succeeded Brent as superintendent in 1854. Miss Louisa Hayes, sister of Judge Benjamin Hayes, was the first teacher. Granger was elected to the City Council in 1854, and as city attorney in 1855.

[21] James H. Lander was born in New York City in 1829, and was a graduate of Harvard College. In Los Angeles, the year of his arrival, he married Margarita Johnson, who not only was the daughter of Don Santiago Johnson, prominent citizen, but also was the niece of Mayor Manuel Requena. Soon he was a court commissioner, and

One day in 1850 the placid onlookers at the Plaza chattered about another unusual newcomer. He was not a young man like the others. His muttonchop whiskers already were gray, and bobbled up and down as he erupted words with incredible rapidity, inquiring with delightful profanity the way to the hotel, the Bella Union. From his arrival, until his death in 1869, Los Angeles was always to be conscious of the genial impetuousness of electrically-charged William G. Dryden. Twice he would become allied by marriage with substantial families of the town.[22] His appointment as secretary of the City Council (city clerk) was almost simultaneous with his first days of law practice in the pueblo.[23]



WILLIAM G. DRYDEN (1851–1852)

Courtesy California Historical Society — USC Digital Archive

Within a few months he was elected city attorney and also continued to serve as the secretary of the Council.[24]

In 1853 he knew, as men following him half a century later knew, that irrigation was the alchemy required to make the bunch of grapes on the City seal symbolic of the promised land. The dream of 1853 became the reality of 1857 when Dryden was granted a franchise for a water system. Its small tank, standing in the Plaza, the wooden pipes leading to the premises of a few consumers, would seem ridiculous today. But they were monuments of change, prophetic of the city that was to be.

Dryden practiced law assiduously for a time, then was elected police judge, county judge, and district judge in turn. A judge was a great man in

partner of Joseph R. Scott. He was the first notable "office lawyer" in Los Angeles, and specialized in land titles. He died June 10, 1873. Lander was city attorney in 1858–59.

22 Dryden, though older than most of the single men arriving in town, soon married. Señorita Dolores Nieto was his first wife, and on her death, he again married into the old aristocracy of the town, espousing Señorita Anita Dominguez.

23 Dryden began as secretary of the City Council on November 6, 1850, when Vicente del Campo resigned (l Archives, City Clerk, p. 97).

24 Dryden was elected city attorney on May 7, 1851, but continued to serve as city clerk. As city attorney he received a salary of $200 a year, plus allowances for extra services as determined by the Council (I Archives, City Clerk, p. 163).

this small town. Judge Hayes had the majesty of Jove upon the bench, somewhat humanized by frequent afternoon adjournments due to overdoses of non-Olympian nectar. With equal indulgence, the public made legend of the peppery profane fireworks engendered in tight moments in Judge Dryden's court. When opposing counsel drew pistols on each other, during a heated argument before the court, Dryden yelled, "Court's recessed. Fire way and both of you be damned," as he dropped behind the protecting dais.

As city attorney his labors were not arduous. Some consideration was given to a Thanksgiving proclamation. A number of citizens proposed to form a volunteer police force.[25] This action was proposed on January 8, 1851, and resulted in the formation of a volunteer force under Dr. A.W. Hope.[26]

When rumors reached the Council that the town was to be invaded by a band of armed Indians, the question arose whether the city could borrow money to provide for its defense. An ordinance was passed providing that householders should bring out and set their garbage at their doors.[27]

The City Council drew an ordinance in September, 1851, relating to sale of liquor to Indians, there having been many gatherings of drunken Indians on the city streets. An astute councilman asked whether or not this ordinance could be enforced as the Legislature had passed an act dealing with the subject matter. Upholding the rights of the city to municipal home rule, Dryden held that the city had ample power.

On October 7, 1851, lawyer J. Lancaster Brent was elected as councilman to fill the vacancy left by the resignation of David Alexander. Of this lawyer, more is to be written.

The ordinances drafted by City Attorney Dryden and the Council Minutes which he kept are careful and precise, albeit that when Manuel Requefia acted as substitute secretary in Dryden's absence the minutes always were shorter.

Dryden, the second city attorney of Los Angeles, still is one of the legal immortals of Southern California. One of his contemporaries called him "audacious." Another said that despite all of his nervous eccentricities, he was genial.

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25 I Archives City Clerk, p. 126.

26 Ibid., p. 179.

27 Ibid., p. 136.

CHAPTER IV
THE WAR CLOUDS GATHER WHILE CALIFORNIA LAWYERS LITIGATE LAND TITLES: 1850-1860

On July 4, 1848, President Polk proclaimed the Treaty of Guadalupe Hidalgo with the Republic of Mexico. Article VIII made inviolate the individual property rights of Mexicans in California under the new flag. Nevertheless, to new settlers flocking into California, the ownership of the land they occupied was frequently immaterial. When land had been abundant, and Mexican governors generous, the marking of rancho boundaries had been most informal. At San Francisco, an army officer, purporting to act as a *de facto alcalde*, granted away the lands of the pueblo of San Francisco.

As to these *alcalde* grants, the battle raged through fifteen volumes of *California Reports*, debating whether San Francisco had ever been a pueblo, whether it had ever had any pueblo lands, whether an *alcalde* could grant them away, and whether the army officer grantor in question had ever been an *alcalde*. Successive courts reached contrary conclusions. Speculators wagered as to which decision would remain unreversed long enough for *stare decisis* to freeze it into law.

Cameron E. Thom (1856–1858)

Bound by solemn treaty to guarantee the preexisting titles, John C. Frémont and William M. Gwin, the first senators from California, brought action from Congress. Pursuant to statutory authorization, a Land Commission was appointed and came to California. In five years' time, the commission confirmed 604 titles and rejected 190, and all but 19 of its decisions were appealed to the United States district courts.

Captain Henry Halleck, the mainspring of the California Constitutional Convention and military secretary of state, resigned from the Army, and the firm of Halleck, Billings, Peach & Park leaped into prominence in the land litigation. The name of Judah P. Benjamin was heard frequently in San Francisco, where most of the sessions of the Land Commission were held. Cameron E. Thom arrived in Los Angeles in 1852,

representing the government as land commissioner. He established himself at the Bella Union Hotel (until the rains of 1855 caused the flat roof to cave in), and found time to be elected city attorney.

Isaac Hartman also arrived in 1852, and was special assistant attorney general, representing the government in land case appeals through 1861. In 1854–55, he also served as city attorney of the town of Los Angeles. Samuel F. Reynolds arrived to practice law, but after serving as city attorney from 1859 to 1862, moved on to San Francisco, where he became district judge. Charles E. Carr held the office in 1853–54, and then served as state assemblyman.

Outside of the short session of the Land Commission in Los Angeles in 1852, the legal frenzy over titles found in San Francisco did not materialize in Los Angeles. The *rancheros* quietly sought to have their titles confirmed, and lawyers kept busy, particularly J. Lancaster Brent. In May, 1851, W.C. Jones petitioned the City Council for an appointment to present the city land claims. But it was Brent who secured the contract, $3,000 to be paid him for representation before the Land Commission, $3,000 more for appeal to the district court, and another $3,000 if the litigation went to the Supreme Court. Brent, who also had served as city councilman and city attorney, secured confirmation of the city's right to the four square leagues of pueblo lands.

The new state Supreme Court saw little of Los Angeles lawyers. Murder trials were frequent, in the city of the angels, but capital sentences were speedily executed and minor offenses did not count. Few litigants appealed civil judgments. Whether Los Angeles was a blissful arcady or whether the distance, time and expense involved were major deterrents, the fact is that only thirteen cases in the first eight volumes of *California Reports* originated in Los Angeles.[28]

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[28] *Keller v. Ybarru* (1853), 3 Cal. 147, breach of contract to supply grapes; *Domingues v. Domingues* (1854), 4 Cal. 186, action to set aside conveyance, Scott & Granger, and H.P. Hepburn, counsel; *Isaac Hartman v. Isaac Williams* (1854), 4 Cal. 254, breach of oral contract, Scott & Granger, counsel; *De Johnson v. Sepulveda* (1855), 5 Cal. 150, ejectment, Scott, Granger & Brent, of counsel; *Martinez v. Gallardo* (1855), 5 Cal. 155, appellate procedure, Norton and Hartman, Scott and Granger, counsel; *Keller v. De Franklin* (1855), 5 Cal. 433, probate appeal, J.R. Scott, counsel; *Stearns v. Aguirre* (1856), 6 Cal. 176, prom. note, J.L. Brent and J.R. Scott, counsel; *People v. Carpenter* (1857), 7 Cal. 402, bail bond forfeiture; *People v. Olivera* (1857), 7 Cal. 704, perjury; *Dominguez v.*

It is also entirely possible that the local judges and their decisions enjoyed high popular repute.

During this period, Los Angeles was Democratic in its national politics. There were rumblings and distant echoes of great political controversy raging between North and South. California's admission to the Union had been part of Henry Clay's Compromise of 1850. California's Supreme Court had decided that although California was a free state where slavery was prohibited by the Constitution, slaves brought into the state by their masters were to be delivered up to him as his property, when he sought to repossess them.

Had California not been so remote from the remainder of the United States this decision might well have become the rallying point of the abolitionists.[29]

The issue of "North" versus "South" was localized in California. The southern part of the state in 1859 still strongly represented the Mexican-Californian influence. The immigrants outweighed all others in the north. The Tehachapi Mountains were a formidable barrier between the sections. Gold was the quest of the northerner. The southern Californian predominantly remained a rancher and agriculturist.

Beginning in 1855, members of the Legislature led a movement for division of the State of California into three states. In 1859, a bill passed both houses of the Legislature and was signed by the governor, providing for the division of California.[30]

At the general election of 1859, the proposition carried, and was forwarded to Congress. The area south of San Luis Obispo was to constitute the new State of Colorado.

Congress took no action to recognize the division. The Congress had maintained equilibrium between the northern and the southern states by the Compromise of 1850. The Kansas-Nebraska question was generating threats of disunion. To divide California would have added fuel to the mounting flame.

Dominguez (1857), 7 Cal. 424, to set aside sale of realty, Sloan & Hartman, and J.L. Brent counsel: *McFarland v. Pico* (1857), 8 Cal. 626, presentment and demand on commercial paper, J.R. Scott, counsel.

29 *In re Perkins* (1852), 2 Cal. 724.

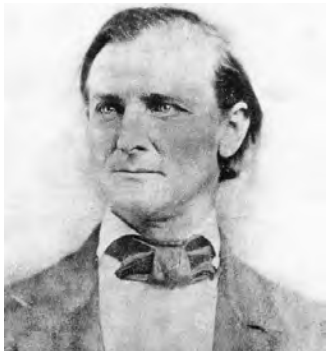
30 Cal. Stats. 1859, Chap. 288, p. 310.

CHAPTER V

DISUNION AND WAR: 1861

When J. Lancaster Brent arrived in Los Angeles in 1850, he soon became the unofficial political leader of the town. He addressed the Mexican population in fluent Spanish, and it was said he could nominate any candidate at will. A councilman in 1851, he became city attorney in 1852 and served until 1853. In 1855–56, he succeeded Charles E. Carr as state assemblyman.

In 1851, he joined the Rangers, which were to Los Angeles almost what the Vigilantes were to San Francisco. In 1853, he was the first superintendent of schools. He was regarded a scholar, having both a personal library and a law library. He acquired the famous Indian library accumulated by Hugo Reid. His friendship with Judge Benjamin Hayes ended over the trial of William B. Lee for murder, in which Brent was defense counsel. Lee was convicted in spite of a motion for change of venue on the ground he could not have a fair trial in Los Angeles County.



Joseph Lancaster Brent (1852–1853)

Courtesy Special Collections Room, Glendale Public Library, Glendale, California

Brent appealed the case. The Supreme Court reversed the conviction, the decision stating that the failure to grant the motion for change of venue was error, in that "over one hundred citizens united in employing counsel to prosecute the defendant. Without any opposing affidavits tending to show a fair trial could be had, we think that a sufficient case was made to entitle the person to a change of venue. . . . It would be a judicial murder to affirm a judgment thus rendered, when the reason of the people of a whole county was so clouded with passion and prejudice as to prevent mercy, and deny justice."[31] Judge Hayes took this as a personal affront, not lessened by a movement which was started for his impeachment.

In the golden years of 1850 to 1860, California was still Indian country. The statutes of 1859 list various Indian wars still recurrent, and the

[31] *People v. Lee* (1855), 5 Cal. 353.

Legislature was seeking to be reimbursed by the federal government for state expenditures in repression of Indian outbreaks. Indians congregated in Los Angeles streets, some seeking the source of contraband liquor, and others clearly showing they had found it. In Los Angeles, and about the state, there were many people soon to become famous in the war between the states.

After pursuing Indians into Oregon, Captain U.S. Grant whiled away his time at Eureka, fishing and drinking. Forced to resign from the Army in 1854, Grant made his way to San Francisco. Penniless, Colonel Simon Bolivar Buckner at the Presidio loaned him money with which to return to Illinois. Jefferson Davis, secretary of war, established Fort Tejon in the pass of the Tehachapi, to control the Indians. General Frémont, whose forces had taken Los Angeles from the Mexicans, had turned to mining in California, and was living in Paris following his term as United States senator. Halleck, the army engineer who had engineered the statehood of California, had resigned from the Army and was practicing law in San Francisco. At Wilmington, Captain Winfield Scott Hancock was in charge of Drum Barracks, which was the army supply installation that served the string of frontier forts throughout the Southwest. Judah P. Benjamin was considering returning to Louisiana, and entry into the race for United States senator.

A colonel of rare military attainments, Albert Sidney Johnston commanded the Department of the Pacific, and on the site of Pasadena built a new homeplace called Fair Oaks to commemorate his wife's home in Virginia.

Could any of these men foresee what the future so shortly was to hold for them? Jefferson Davis, the president of the Confederacy; Judah P. Benjamin, his secretary of state; Frémont fumbling the command of Union forces in Missouri; General U.S. Grant demanding and receiving the unconditional surrender of General S.B. Buckner at Fort Donelson; H.W. Halleck recalled to the Army to be Lincoln's chief of staff throughout the Civil War, known far-and-wide as "Old Brains." Soon, Winfield Scott Hancock would be flinging his division against Marye's Heights at Fredericksburg; soon he would turn back Pickett's charge at Gettysburg. E.O.C. Ord, who made the Los Angeles city survey, would become a famous general of the Army and a right-hand man to Grant.

Shortly, Johnston would be opposing Halleck in the Confederate campaign in the West, and Jefferson Davis would be saying, "If Johnston is not a soldier, we have no soldiers." Soon, Albert Sidney Johnston would be lying

dead on the battlefield of Shiloh (1862), and Confederates everywhere would say, "The South could better have spared an army." Soon, Johnston's son would also lose his life, in the explosion of a vessel in San Pedro Harbor named after Hancock's wife, and the California plantation of Fair Oaks, so beautifully begun, would mournfully close.

In the election of 1860, Los Angeles voted predominantly for Breckenridge, and there were strong sympathies for the South. When Albert Sidney Johnston resigned his command, and started for the Confederacy, some hundred left Los Angeles to volunteer with him. Others tried to intercept the movement. Among those who reached the Bonnie Blue Flag were Joseph Lancaster Brent and Cameron E. Thom.

As a brigadier general of the Confederate States, Brent is said to be the last Confederate officer to have finally surrendered his sword. He never returned to Los Angeles. Cameron E. Thom, late captain, C.S.A., was to reach Los Angeles penniless at the conclusion of the war. Within twenty years, he was to be mayor of Los Angeles, and he was to live for fifty years more to see Los Angeles fulfill its destiny, and to fulfill his own as a servant of the people, commenced when he once served as city attorney.

CHAPTER VI
GONE WITH THE WIND: 1865-1870

The emaciated Confederacy, drained of the life-blood of its army at Gettysburg, starved by the scorched earth policy of Sherman and Grant, faltered, stopped, then fell, never to rise again. Only the women were left to mourn. But more than the Confederacy was dead. Southern agricultural feudalism had "gone with the wind," and the ex-slave and carpetbagger succeeded to the ruin.

The agricultural, stock-raising feudalism of Southern California had been on the wane since 1850. The paid guest had succeeded the free hospitality of the *rancho* before 1860. It was not war that brought it to an end in 1860–65. It was drought, three years of it in succession. Fifty thousand cattle at a time would storm a meager water hole, and fifty thousand rotting carcasses resulted, month after month. The land-poor ranchers tried to hold their land. They borrowed, and borrowed, and were unable to repay. Mortgage foreclosures, or financial stringency, broke up the vast estates.

James H. Lander, Myer J. Newmark, and A.B. Chapman, leading members of the bar, saw this happen. In 1863, the corner of Fourth and Spring Streets sold at a tax sale for less than two dollars. City lands went for a song. In a few more years, Westlake Park would be established on city lands that did not produce the minimum twenty-five cents a lot. The war brought other problems to Los Angeles. The attorneys of the city always had sponsored the school system. City Attorneys Hayes, Brent and Lander all had served on the school board. Now, there was a fight over the allegiance of the teachers, North and South. Half of the pupils in the school were withdrawn, and gained knowledge, if at all, from private schools or private tutors. Sentiment was so divided that it was thought expedient to forego the traditional Fourth of July celebrations.

We already have noted something of the career of James H. Lander, Harvard graduate, office lawyer *par excellence*. Myer J. Newmark came to Los Angeles with Joseph Newmark, merchant. He read the law with E.J.C. Kewen, and was admitted to the bar. He formed a partnership with Howard and Butterworth in 1862, the year he was elected city attorney. But law was not to be his career. He went to New York, and later returned to San Francisco and Los Angeles, known throughout the country as a leading merchant, businessman, and civic leader of the West.

Myer J. Newmark (1862)

While in Los Angeles, Newmark lived at the corner of Seventh and Spring Streets. He sold his residence at this location to I.N. Van Nuys in 1879 for $6,500.

Alfred B. Chapman was city attorney from 1862 to 1865, and lived here throughout his legal career. He died on January 16, 1915, and many members of the bar still remember him. His great-grandfather was president of North Carolina University, at which he studied for a time. He was graduated from West Point in 1854, and served at Benicia Arsenal and Fort Tejon. General Robert H. Chapman was his brother. A.B. Chapman resigned from the Army, married the daughter of Jonathan R. Scott, and went to study law in Scott's office. Scott's office was the law school for many lawyers commencing practice

in Los Angeles. Hayes, Landers and Granger had been in partnership with Scott during their early careers, as well as Chapman. Chapman served as district attorney for two terms, commencing in 1868, and for twenty years practiced with Andrew Glassell. He settled at Santa Anita, and became one of the first to grow and market citrus fruit on a large scale.

The gold that was to gild the Southland from the Tehachapi to Mexico was found by A.B. Chapman. At Newhall and in Los Angeles, oil, black gold, had been found.

The next episode of legal-civic importance to Los Angeles was to be "The Fight for the Railroads."

ALFRED B. CHAPMAN (1862–1865)

CHAPTER VII
THE FIGHT FOR THE RAILROADS

In the years 1870 to 1880 the City of Los Angeles, with a population of approximately 10,000 souls, had no claim to prominence. The development of oil and of citrus groves was rudimentary. The only commodity of which there was any surplus for export was wine. Weekly steamers left San Pedro for San Francisco. A telegraph line to San Francisco had just been completed. Stock raising had been dealt a death blow by drought. The city had been forced to issue scrip in discharge of its municipal indebtedness.

In spite of all this, there were those who believed Los Angeles had a future. That future depended on the development of roads and railroads to the outer world.

The opening chapter of such development was the construction of a railroad line, the Los Angeles & San Pedro Railroad, from its Los Angeles terminal at Alameda and Commercial Streets to San Pedro. The voters of the city and of the county authorized the issuance of bonds in aid of the venture, and took stock in return. Contrary to predictions, the line did not go bankrupt. The fare for a passenger going to San Pedro was $2.50, and freight rates were somewhat in proportion. With this venture started, the Los Angeles & Independence Railroad was organized. It was planned that

it should go from Santa Monica to Inyo County and thence to Salt Lake. The road reached Los Angeles.

The year 1869 marked the driving of the last spike on the transcontinental railroad, the Union Pacific. The Texas & Pacific Railroad was surveying a route into San Diego. The Atlantic & Pacific Railroad was considering a link from Santa Barbara to San Francisco. None of the plans included Los Angeles.

The problems connected with the locations of the railroads were to engage the attention of a number of men who served the city as city attorney. These were Andrew J. King (1866–68), Colonel Charles H. Larrabee (1868–69), Frank H. Howard (1870–72), A.W. Hutton (1872–76), and Colonel John F. Godfrey (1876–80).

In addition to these men one of the prominent figures in the controversies was H.K.S. O'Melveny. On the minutes of the City Council his signature as president stands out large and bold. As revealed by the city records, it was he who earnestly contended that Los Angeles should not temporize with branch-line connections, but should demand to be included on the transcontinental lines.

So far as the railroads were concerned, there was every indication that Butterfield's transcontinental stages, leaving Los Angeles three times a week, would continue to be the main link with the outside world. But the city fathers and citizens generally had other ideas. Emissaries of the famous Big Four — Crocker, Stanford, Huntington and Hopkins — consulted with the local governmental bodies. These sessions were stormy. Crocker, after one session with the City Council, walked out, stating that so far as he was concerned, grass could grow in the streets of Los Angeles.

To build a railway line into Los Angeles, the Southern Pacific Railroad demanded a contribution amounting to approximately five percent of the assessed valuation of the county, a right of way, a sixty-acre depot site, and the stock in the Los Angeles & San Pedro Railroad as well. At first blush it is no wonder that Crocker was received in rather a rude manner. To any demurrer to the proposal, the railroad pointed to the existing plan, which called for a direct line across the Mojave Desert into San Bernardino and thence north, and to the mountain ranges through which long and costly tunnels would have to be constructed to link Los Angeles and San Francisco.

Charles H. Larrabee
(1868–1869)

Opinion was divided but finally the voters accepted the proposition and agreed to turn over the railroad stock, while the city provided a depot site. Colonel Charles H. Larrabee, who had purchased much realty in the town, took the stump in support of the acceptance of the railroad's proposition. Chinamen began to toil on the tunnels in the San Fernando mountains. A branch line to Anaheim was constructed. Los Angeles would not continue to be an insignificant pueblo.

By 1878 the Southern Pacific absorbed the Los Angeles & Independence Railroad. By 1875 the Santa Fe arrived in the city and in 1905 through-service to Salt Lake began over the Los Angeles, San Pedro & Salt Lake Railroad, which was later purchased by the Union Pacific, in 1921.

In this era of expansion, the city attorneys were called upon increasingly by the City Council to assist in the collection of delinquent taxes, to help secure legislation in Sacramento, to assert the water rights of the city in the Los Angeles River. It must also be said that their advice was sought to stave off the city's creditors, who, in view of tax delinquencies so prevalent, frequently were considerably delayed in receiving their due.

On February 17, 1870, a claim was made for a reward for highway robbers captured by Colonel Chipley. At another time the Los Angeles & San Pedro Railroad had run an extension from Commercial to Aliso Streets and it was necessary to order the company to remove it for want of authority. The growth of the city and confusion concerning its records required that the city attorney search out the records in the U.S. Land Office. Suits over water rights were frequent. Ordinances were so numerous that William McPherson was hired to codify the same for $400 in gold coin.

Andrew Jackson King (1866–1868)

Andrew J. King, city attorney, had a varied career. He served as undersheriff of the county and likewise became district judge, succeeding Judge Dryden on Dryden's death.

As undersheriff, King, in 1866, fell into an altercation with Carlisle over the outcome of a murder trial. The next day King's brothers, Frank and Huston, saw Carlisle at the Bella Union Hotel and a gun fight ensued. Carlisle shot and killed Frank King, and in turn was riddled with bullets

by Huston King, who likewise fell from Carlisle's shots. Huston King was tried for Carlisle's murder but was acquitted. In the fight, another early city attorney, J.H. Lander (1858–59) of Los Angeles was accidentally wounded. During Civil War days, King was arrested by the U.S. marshal, who apparently had some doubt as to his Union loyalties. King had been a member of the state legislature in 1859 and 1860. He published the *Los Angeles News*, which was the first daily south of San Francisco, from 1865 to 1872.

Frank Howard was the son and partner of General Volney Howard and the brother of Charles Howard, who was killed in a fight in 1869 by Dan Nichols, son of ex-mayor Nichols. Frank Howard's father had been United States senator from Mississippi, a representative in the California Constitutional Convention, and a judge of the superior court. When his father came to Los Angeles, Frank Howard was a doctor practicing in Mexico. He came to Los Angeles, studied law and formed the well-known partnership of Smith, Howard and Smith.

John F. Godfrey (1876–1880)

From the Collections of the Bangor Public Library

A.W. Hutton is still remembered by many Los Angeles lawyers. A native of Alabama, he and three brothers saw service with the Confederacy. He came to California in 1869 and entered the office of Glassell and Chapman. For forty-six years he had offices in the Temple Street Block situated on the site of the present City Hall. In 1874, as city attorney, he personally drafted the first special charter of the city. In 1887 he was appointed to the superior bench. Later he served as U.S. district attorney. In 1901 he was a member of the Board of Freeholders to prepare a new charter for the city.

Colonel John F. Godfrey served during the Civil War. In 1876 he became city attorney, and was marshal in the big centennial parade on July 4, 1876. In 1884, one Hunt killed his neighbor, Gillis, at El Monte. Godfrey returned from a visit to the widow of Gillis and children, to find a

crowd gathered to lynch Hunt. Godfrey addressed the crowd, stating that charity for the widow and orphans should be considered before justice for the killer. So saying, he passed his commodious hat. With this, the crowd dispersed.

None of these gentlemen, eminent in law and public affairs, was able to stop the local tong war and massacre of Chinese, which had international repercussions. Of that we will write later.

CHAPTER VIII
THE INTERNATIONAL SCENE: THE CHINESE MASSACRE AND THE FIGHT FOR THE HARBOR

Los Angeles made the international limelight in sensational fashion in 1871. One October day, twenty-two or more Chinamen were seized, beaten and hung near Los Angeles and Commercial Streets by an infuriated mob of over a thousand persons which surrounded Nigger Alley, bashed in roofs, and engaged in a frenzied orgy of lawlessness.

It had started with a tong war between Chinese, excited over abduction of a woman, and flared high when wrathful San Francisco Chinese arrived as reinforcements.

City policeman Jesús Bilderrain, with a group of citizens, sought to break up the tong war disorders and tried to arrest armed tong members. Bilderrain and his brother were shot, and Robert Thompson, who assisted them, was shot and killed.[32]

A mob quickly formed as the news spread. Sheriff Burns sought to form a posse to handle the riot and demanded that it disperse, but no one responded.

Andrew J. King, undersheriff and later city attorney, in rushing to arm himself, shot off the tip of his finger. Henry T. Hazard — another who served as city attorney — stood on a barrel to harangue the crowd. Friends rescued him also from the enthusiastic lynchers. Judge R.M. Widney, and Cameron Thom — another who later was city attorney and mayor — tried

[32] An account of the episode is given in *Wing Chung v. Los Angeles* (1874), 47 Cal. 531, 532–33.

to quell the riot and did succeed in rescuing some of the Orientals. Thom mounted a barrel and harangued the crowd, and so did Sheriff Burns. Harris Newmark, eyewitness, tells how the barrel collapsed under Burns, ending his speech ludicrously.[33]

The verdict of the coroner's jury was ludicrous, also, finding the victims met death by strangulation at the hands of parties unknown.

But there were meetings all over the nation, protesting the indignity. The Chinese ambassador made serious matter of the episode and indemnity was paid by the United States government.

City Attorney Frank H. Howard, O'Melveny, and Hazard then had to defend suits brought against the city under the unique statute making cities responsible for damage done by mobs and riots.[34] The claim of the Chinese for injury to their property was defeated on the ground they failed to notify the mayor of the impending riot and that their conduct had precipitated it.[35]

New Era

The attention of the citizenry was diverted to other matters. The bandit, Vásquez, operating between Bakersfield and here, was captured, taken on a change of venue to San José, tried and executed. In a shaft, sunk by pick and shovel, E.L. Doheny found oil — a new era had commenced.

Electric lighting came to Los Angeles in December, 1882. The telephone was contemporaneous. In 1885 the first cable railway began operations, and the Santa Fe reached the city. Thereupon began a rate war. Roundtrip tickets from the Midwest went down to fifteen dollars, then a dollar, and tourists began to pour into Los Angeles in a stream which has not stopped yet.

Legal notables passed by. Erskine Ross, nephew of City Attorney C.E. Thom, was elected in 1879 to the state Supreme Court, and in the late eighties, Ross and Stephen J. Field sat here in the United States Circuit Court,

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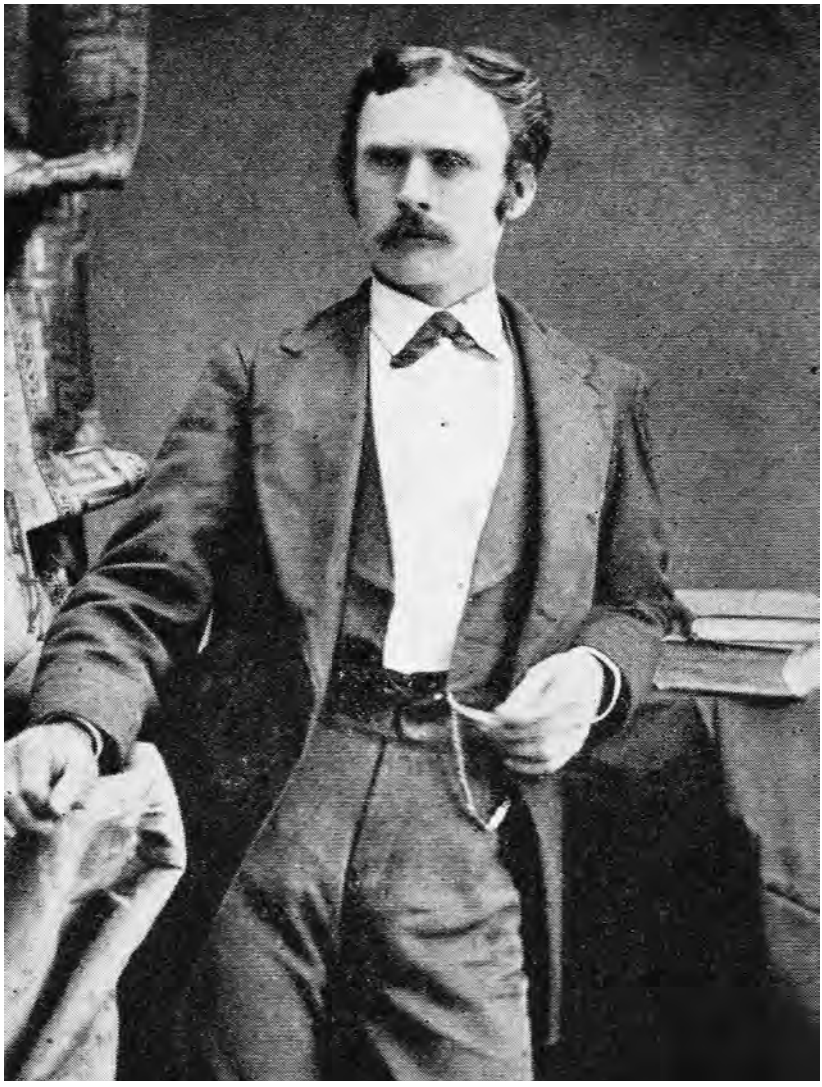
33 Newmark, *op. cit.*, pp. 434–35.

34 Cal. Stats. 1867–68, p. 418.

35 *Wing Chung* v. *Los Angeles* (1874), 47 Cal. 531, 535. Thereafter, the mobs and riot statute was to lay dormant for three generations until invoked in reference to another riot over foreigners *(Agudo* v. *Monterey County* (1939), 13 Cal.2d 285.



HENRY T. HAZARD
(1880–1882)

holding sessions over the Farmers and Merchants Bank at Main and Commercial Streets.

The boom was on. In 1888, the project for a separate state received momentary attention. It was determined to be a necessity, but "the time is not ripe."

In 1889, the first Tournament of Roses was staged.

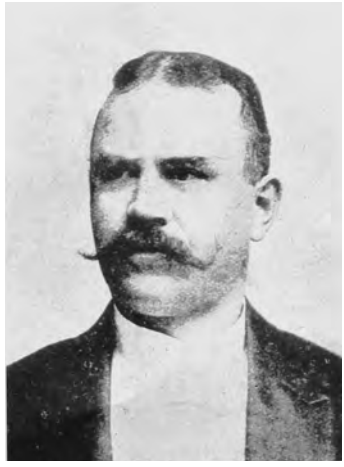
Such material developments called for civic expansion. There were dreamers who saw Los Angeles as the capital of the Western Sea with argosies coming and going from the four corners of the earth.

The long fight for federal appropriations and Congressional approval for the development of a municipal harbor to be located at San Pedro involved civic organizations, lawyers and local officials for a generation. Charles H. McFarland, William E. Dunn, Walter F. Haas, William B. Matthews and Leslie R. Hewitt, as city attorneys from 1888 to 1910, profoundly influenced the course of this municipal development.

Henry T. Hazard, ex-city attorney and mayor (1889–92), actively began the free harbor campaign. Hazard was a member of the firm of Hazard and Gage. Gage, later became governor of California. They had an office in the Downey Block on Temple Street. Hazard succeeded John Bryson as mayor in 1888, being elected at a special election held under the new Charter.

Hazard was a member of the first Park Commission, appointed in 1888. During his second term as mayor in 1892, Doheny discovered oil in Los Angeles. Vigorous Council action was necessary to prevent the spread of oil drilling to the Westlake Park region. In 1894 Hazard was a member of the Fiesta Committee. In 1899, upon the successful conclusion of the fight for the Los Angeles harbor, Hazard made the presentation speech at a ceremony in which a plaque was awarded the *Los Angeles Times* for its support of the fight. Hazard died in 1921.

Billy Dunn was known to many lawyers. He was the Dunn of Gibson, Dunn & Crutcher. He studied law at the University of Michigan. As assistant city attorney and city attorney, he won his first fame in the suits over the purchase by the city of the Los Angeles Water Company. In 1898 he became the city's special counsel for water litigation; he became counsel later for the Huntington and other utility interests.



William Ellsworth Dunn (1894–1898)

Walter F. Haas, who later resided at Alhambra, became a member of Haas & Dunnigan, and was regarded as an authority on water law, derived in good measure from his municipal experience in helping set up the Los Angeles City system.

Walter F. Haas
(1898–1900)

William B. Mathews as city attorney (1900–06), and later special counsel for the city in water and power matters, is regarded affectionately as one of the fathers of Los Angeles's highly successful utility system, and served as well on the Library Board.

From 1850 until 1870, goods and passengers were lightered ashore to San Pedro and Wilmington. Terminal Island was a thin wraith of sand called Rattlesnake Island. The inshore channel, where there was one, had a maximum depth of 17 feet. In 1881 a jetty was completed to prevent the small channel from filling up, and reclamation of Terminal Island commenced. Following these improvements Wilmington was regarded as the main harbor.

Congress, in 1890, caused a board to be appointed to examine this locality and to report on the best location for a deep water harbor. It reported in favor of San Pedro, but in 1892 another board was constituted. Santa Monica Bay was the competitor and rival railroads fanned the fires concerning the ultimate selection. The second board reported for San Pedro, but the report gathered dust in the halls of Congress. In 1896, a third board reported but a bill was introduced in Congress to build a $2,900,000 seawall at Santa Monica.

William B. Mathews
(1900–1906)

The contest was long and bitter. C.P. Huntington and his associates were the adversaries. Huntington had established Port Los Angeles, northwest of Santa Monica, and built the long wharf — six thousand six

hundred feet long. He also controlled the entire ocean frontage. The threat of such a monopoly did much to crystallize sentiment against such a development. Stephen M. White, U.S. senator, led the fight in the Senate. The victory for San Pedro was the beginning of the decline of the railroad political machine in California, reaching a climax in 1911, the real beginning of the development of our municipal harbor department for all the people.

Even after the Harbor victory was won, two years more were consumed in forcing the secretary of war to call for bids for the first ocean breakwater, completed in 1907. Thirty years later, the federal government, at the instance of the Navy, sought to condemn the major part of Terminal Island ocean frontage for naval uses, alleging ownership by the United States. This was after the Congress, through the War Department, had spent millions to develop the commercial harbor. After two years of preparation for trial and negotiations in which it was clear that such an action would damage the city, some $22,000,000 on account of loss of its investment and the cost of necessary relocations, the suit was dismissed.[36]

This was a prelude to *United States v. California*, whose repercussions have not yet died down in Congress.

CHAPTER IX
LOS ANGELES COMES OF AGE AND LAW PRACTICE BECOMES METROPOLITAN: OUR MODERN LEGAL TITANS

John W. Shenk is serving his twenty-sixth year as an associate justice of the Supreme Court of California. This is the longest period of service of any of the justices, the next longest being that of Chief Justice William H. Beatty. John Wesley Shenk was born in Vermont, received his schooling in Omaha, Nebraska, and at Ohio Wesleyan University. He left college in his junior year to serve with Company A, 4th Ohio Volunteer Infantry, and saw service in Porto Rico [as it was then known]. The Spanish-American War concluded, he was graduated from the law school at the University of Michigan in 1903, and then came to Los Angeles.[37]

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[36] U.S. Dist. Court, *U.S. v. 338.6 Acres of Land* #1102B Civil.

[37] For further details of the life of this eminent jurist, consult: *Boyle Workman's The City that Grew / as told to Caroline Walker Workman* (Los Angeles: The Southland

LESLIE R. HEWITT
(1906–1910)

In 1906, he became a deputy city attorney under W.B. Mathews. In 1909, he was promoted to assistant city attorney by City Attorney Leslie R. Hewitt, taking the place of Lewis R. Works, who became a judge of the superior court and later a justice of the District Court of Appeal. In 1910, when Leslie Hewitt resigned as city attorney to become special counsel for the Board of Harbor Commissioners, John W. Shenk became city attorney and held the post until 1913, when he was appointed judge of the superior court.

When Shenk entered the City Attorney's Office in 1906, there were three deputies; when he left, there were sixteen. On his staff, and still active on the bench or at the bar were Edward R. Young, assistant city attorney, followed in 1912 by George E. Cryer, who later served three terms as the mayor of Los Angeles. Emmet H. Wilson was his chief deputy, soon to become a judge of the superior court, and now a justice of the District Court of Appeal. Among the other deputies were Howard Robertson; S.B. Robinson, who remained in the legal division of the City Attorney's Office for the Department of Water and Power for many years; Jess E. Stephens, who was later city attorney (1921–29) now judge of the superior court; and Charles E. Haas, now judge of the superior court.

It was during this period that Los Angeles came of age, and the framework of Its municipal institutions took form in the fashion we now know them. Certainly, it was a period rich in legal experience, for perhaps in no other incumbency were so many fundamental legal problems first encountered and decided by the courts.

Wilmington and San Pedro were annexed. Necessary contiguity was furnished by the famous "shoestring strip." Time was short and opposition great, and Justice Shenk recalls a midnight trip amidst irate farmers and sharp-toothed watchdogs as he hurriedly listed polling places and secured

Publishing Co., 1936), p. 243; Rockwell D. Hunt, ed., *California and Californians*, vol. V (Chicago, New York: The Lewis Publishing Co., 1926), pp. 339–40.

His son, John W. Shenk II, is now in practice in Los Angeles with Edward R. Young, with whom Mr. Justice Shenk himself had planned to practice.

names of election officers for the required ordinance, calling the annexation election.[38]

Los Angeles was attempting to develop the harbor, and to secure a water supply. The city was expanding, and there was need of new public buildings, parks, and all the other adjuncts of a metropolis.

For years, the basic water supply of the city had been the waters and underground waters appurtenant to the Los Angeles River. By virtue of the pueblo rights of the old Spanish city, Los Angeles claimed these in the entire San Fernando Valley. Shenk's major assignment in 1906–09 was the adjudication of these rights, the city vindicating its claims.[39] At this time the valley area was undeveloped. Land could be purchased in the vicinity of the present city of Burbank for $35 an acre. In 1907, a bond Issue of $23,000,000 was voted for the Owens Valley project, and the major attention of the city was thenceforth turned to the Sierra Nevadas in procuring of adequate water.

While this was a live issue, there was a perplexing "dead" one. The Los Angeles City School District wanted a school site on property used as a cemetery.[40] Unfortunately, the lots had been deeded in fee to many who no doubt had long since been interred in their supposedly final resting place. Shenk persuaded Judge Nathaniel P. Conroy[41] that he had made "due and diligent search" for the owners and could not find them, and hence was entitled to an order for publication of summons.

In 1909, the city was deeply engaged in litigation concerning the validity of tide and submerged land grants in the harbor area. To reach the so-called Miner concession, owned by the Huntington interests, whose title was challenged by the city, the Pacific Electric Railway was laying a spur which had to cross First Street in San Pedro. This required a franchise, said Los Angeles. The company speedily replied. Over the Labor Day holiday and weekend it installed the track over the street, relying on the holiday to disperse the judges and thus prevent the granting of an injunction.

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38 Litigation followed, terminating favorably in *People v. City of Los Angeles* (1908), 154 Cal. 220.

39 As in *Los Angeles v. Los Angeles Farming and Milling Company* (1908), 152 Cal. 645; *City of Los Angeles v. Hunter* (1909), 156 Cal. 603.

40 The Old Masonic Cemetery, owned by Los Angeles Lodge No. 42, F.&A.M. [Free and Accepted Masons]. The bodies were removed and reinterred, and the site used for an addition to the high school on Ft. Moore hill.

41 Afterward, a justice of the California Supreme Court.

But City Attorney Shenk paid the railway back in its own coin. On his advice, the Board of Public Works on the following weekend took horses and equipment to the harbor, removed the railroad's empty cars from the Miner concession, and took possession of the property for the city. The legal burden having passed to the Huntington interests, there was an abandonment of the claims made in their behalf. Thus the city took over the site of our present Outer Harbor development.

On October 1, 1910, the *Times* Building was dynamited, and City Attorney Shenk was called from bed by David M. Carroll, deputy city clerk and minute clerk of the City Council, asking if a reward could be offered legally for the arrest and conviction of those responsible. The advice was that the city did not have such authority. Later, the Charter was amended to authorize the posting of rewards, but the Charter was repealed. The question arose again, and it was held that the present city government did not have the power to offer rewards for the apprehension of those committing felonies.[42]

JOHN W. SHENK
(1910–1913)

To develop the city's electrical system and harbor, the electors voted unprecedented bond issues. Sale of bonds depended upon securing an adjudication that the bonds were valid. Mr. Justice Shenk relates that James G. Scarborough of Scarborough and Bowen came to the rescue with a client who then litigated the validity of these bond issues, the Supreme Court having refused to pass upon the question in a mandate proceeding brought for the purpose.[43]

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42 Despite Shenk's advice, the Council offered the rewards, and in later litigation before amendment of the 1889 charter, it was held the city did not have the power.

In connection with the famous Hickman murder case, the Council again offered a reward. There was a change of administration and it was not paid, and in *City of Los Angeles v. Gurdane* (1932), 59 F.2d 161, it was held that there was no power under the present Charter to offer such a reward.

43 *Los Angeles v. Lelande* (1909), 157 Cal. 30; but later holding the issues valid, after legislative validation: *Clark v. Los Angeles* (1911), 160 Cal. 30 and 317.

Then, as now, the city urgently needed to secure and maintain an adequate sewer system. A main line sewer was under construction in 1909, to carry effluent to Hyperion and into the Pacific Ocean. In the midst of the operation, the contractor defaulted. The City sued for a forfeiture of $125,000 on his bond. The bondsmen offered to settle for $75,000, which exceeded the expectations of the City Council. After the motion to accept had been carried, a member of the Council congratulated City Attorney Shenk, and asked if the City Attorney's Office was not in need of something. Shenk replied that the office was in need of an adequate library. The Council then authorized the city attorney to procure a good library for the city attorney's staff, and this was the beginning of the present working library of that office.

Then there was the Griffith Park case. The Rancho Los Feliz was granted to Verdugo in 1843 and patented to him by the United States in 1871. It was acquired by Griffith J. Griffith, who deeded a large part of the rancho to the city for park purposes in 1898. There was considerable controversy when the grant was offered, on the ground that Griffith was attempting to lighten his tax load by unloading the property on the city. While negotiations were pending, the first Monday in March passed. The city cancelled city taxes, but forgot that there were county taxes liened against the property. In 1905, J.H. Smith bought a portion of the rancho, comprising 800 acres in the center of the tract, at the county tax sale for $80 or less. Offer after offer was made to Smith, all of which were refused. In the meantime, the city brought a quiet title action against the tax deed, on the ground the boundaries described did not meet. While an offer of $5,000 was pending, the Supreme Court held the tax deed invalid, and the property was saved to the city.[44]

Much more could be written, and undoubtedly more will be written, about this remarkable city attorney and the remarkable era in which he served the city as such. As a world port, Los Angeles owes much to City Attorney John Wesley Shenk, in whose administration steps were undertaken to perfect the harbor land titles, thus making harbor development

[44] *Smith v. City of Los Angeles* (1910), 158 Cal. 702. Chief Justice Beatty, who dissented, later remarked to City Attorney Shenk that "it was a good thing for you that one member of the court is from Los Angeles. If It had not been for Mr. Justice Shaw you would have lost that Griffith Park case." This was Mr. Justice Lucien Shaw, only member on the Court from Southern California from 1903 to 1918.

possible.[45] Public utility law still reflects the impact of his lawyership.[46] Through his business ability and persuasiveness, citizens underwrote the city so that it might acquire the present central library site, originally for a city hall (then the Normal School site).[47] Water development by Los Angeles was accelerated by the Shenk Act, the Water District Law of 1913;[48] and Shenk's career as city attorney closed with the annexation of the San Fernando Valley to Los Angeles.

No wonder, after such experiences, that Mr. Justice Shenk of the California Supreme Court as a jurist today is considered one of the foremost American authorities on municipal corporation law.

CHAPTER X
THE LAST FORTY YEARS: 1910-1950

When John Wesley Shenk was appointed to the Los Angeles Superior Court in 1913, his successor as city attorney was Albert Lee Stephens, the first graduate of the law department of the University of Southern California to hold that office. Born in Indiana in 1874, City Attorney Stephens was already known in civic circles, since from 1911 to 1913 he had served on the Civil Service Commission, which

ALBERT LEE STEPHENS (1913–1919)

45 Numerous suits were started or pending or carried to completion during the time Mr. Shenk was city attorney, including: *San Pedro R.R. Company v. Hamilton* (1911), 161 Cal. 610; *People v. Banning Co.* (1913), 166 Cal. 630; *People v. California Fish Co.* (1913), 166 Cal. 576; *People v. Banning Co.* (1914), 167 Cal. 642; *Patton v. Los Angeles* (1915), 169 Cal. 521; *People v. Southern Pac. R.R. Co.* (1915), 169 Cal. 537: *People v. Banning Co.* (1915), 169 Cal. 542; *Spring Street Co. v. Los Angeles* (1915), 170 Cal. 24.

46 As in *Pomona v. Sunset Tel. & Tel. Co.* (1911), 224 US 330.

47 The city did not have $600,000 required for the purchase. Joseph F. Sartori raised the money in a local syndicate, with approval of Senator Rosebeery who organized a corporation and took title. The city purchased the land on installments. How the library was built on the property is another story.

48 Cal. Stats. 1913, p. 1049.

was then pioneering in municipal personnel matters. His career from city attorney to superior court judge, to judge of the United States District Court, to justice of the U.S. Circuit Court of Appeals for the Ninth Circuit, is well known,[49] and will deserve an individual biography at a later time. Appointed to the bench in 1919, Albert Lee Stephens was succeeded as city attorney by Charles Burnell, who had served in the City Attorney's Office since 1913, and for a brief period in 1918 had been counsel for the Los Angeles Flood Control District.[50]

JESS E. STEPHENS
(1921–1929)

As City Attorney Burnell made his way to the superior court bench, he was followed by another illustrious member of the Stephens family, Jess E. Stephens.[51] During his administration of eight years, the expansion of the city involved millions of dollars expended for public improvements; thousands of special assessment matters were handled by the office; the utility departments grew apace; the city built and occupied the new City Hall. William H. Neal, legislative representative *par excellence* and now assistant city attorney, came on the scene.

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[49] Consult Willoughby Rodman, *History of the Bench and Bar of Southern California* (Los Angeles: W.J. Porter, 1909), p. 234; Rockwell D. Hunt, ed., *California and Californians*, vol. IV (Chicago, New York: The Lewis Publishing Co., 1926), p. 322. As will hereinafter appear, his brother, Jess Stephens, became city attorney and superior court judge, and his son, Clarke Stephens, is now judge of the municipal court, Los Angeles.

[50] Judge Burnell was born in Elko, Nevada, 1874; was graduated with the pioneer class at Stanford University in 1895. He practiced with Seward Simons, Kemper Campbell, and Frank Doherty, before entering the City Attorney's Office. He became judge of the superior court, an office which he held at the time of his death last year [1949].

[51] His biography is given in William A. Spalding, *History of Los Angeles City and County, California, Biographical*, vol. 2 (Los Angeles: J. R. Finnell & Sons Publishing Co., 1931), p. 315, to which any reader unfamiliar with Judge Jess E. Stephens is referred. [A note inserted by the editor of the *Los Angeles Bar Bulletin* reads, "Due to the official relationship now existing between the author and Judge Stephens, many complimentary characterizations of his administration as city attorney have been omitted, lest such comment be misconstrued."]

EDWIN P. WERNER
(1929–1933)

Public improvement matters still were in the fore during the administration of E. "Pete" Werner as city attorney.[52]

Werner was succeeded as city attorney by Ray L. Chesebro in 1933. At this moment, Ray L. Chesebro has served the City of Los Angeles as its city attorney for a longer period than any other incumbent during the city's one hundred seventy years of existence.

Born at Mazeppa, Minnesota, on August 28, 1880, Judge Chesebro was bereft of his parents at an early age, and at eighteen was earning his living as a telegrapher on the Minneapolis & St. Louis Railway. For a year and a half, he worked in a wholesale commission house in St. Paul, Minnesota. Along the way, he learned shorthand and typing. This paved the way for his next advancement, in which he served H.M. Pearce, general freight agent of the Northern Pacific Railway, as private secretary. This railroad secretarial experience brought him to Los Angeles in 1904 as a stenographer in the offices of the Santa Fe Railroad.

In 1907, while John W. Shenk was working on the annexation of San Pedro and Wilmington by means of the "shoestring strip," Ray L. Chesebro, then living in San Pedro, became secretary of the Consolidation Commission. He stepped from this to another public service, when he became secretary of the Los Angeles County Highway Commission, then engaged in securing highways adequate for the new-fangled motor buggies which were making their appearance in the city.

He then decided to make the law his profession. With the same determination and intensity of purpose which had won him an enviable reputation as secretary of the commissions, he laid out a rigorous routine for himself which bore fruit in his admission to the bar in 1909.

[52] E.P. Werner was born at Eau Claire, Wisconsin, in 1893; is a graduate of the University of Southern California. He served in the 91st Division in World War I, and from 1921 to 1929 was chief counsel, State Inheritance Tax Department. In 1929, he was elected city attorney, and was defeated for reelection by Ray L. Chesebro in 1933.

In 1911 he was appointed judge of the police court, and thereafter was twice reelected. His experience in dealing with public prosecutions and penal ordinances has an important bearing on his excellent administration of the prosecuting division of the City Attorney's Office.

When he left the police court bench, Chesebro had decided that the highest aim of any lawyer was the successful private practice of the law. In 1933, when he was "drafted" by citizens to be a candidate for the office, he probably considered it only a protest at the then state of affairs. When he was elected, no one was more surprised than he; and he certainly did not foresee that he would be in office longer than any other city attorney before him.

He steadily has maintained his basic premise: the private practice of the law is the goal to be desired. As one and another of his staff during these sixteen years has found some opportunity out of public service, he cheerfully has urged him to take it, and wished him God-speed; and has set about to readjust his staff as best he can. Now there are dozens of persons in the general practice who prize their days in his office, and who assist it in its smooth administration of public business from their vantage points in the community.[53]

Though the City Attorney's Office in Los Angeles is one of the largest law offices in the United States, it apparently lacks the administrative

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[53] Some of those who have left the city attorney's office in recent years for private practice are: Marvin Chesebro, son of the city attorney; W. Joseph MacFarland, assistant city attorney, who headed the Prosecuting Division; Robert Moore; Alfred C. Bowman, now on duty with the Army; former military governor of Trieste, Edward L. Shattuck, candidate for office of attorney general; Ellsworth Meyer, judge of the superior court, and grand master F.&A.M. [Free and Accepted Masons] of California; Don Kitzmiller; Jerrell Babb; Clyde P. Harrell; Frank Ferguson and Robert Patton, of the Fox Studio legal staff; Walter Bruington; Carl H. Wheat, public utilities counsel of Washington, D.C.; Al Forster; Milton Springer of the Southern California Gas Company staff; Grant Cooper, later of the district attorney's staff and now in criminal law practice; W. Turney Fox, former assistant city attorney in the Water and Power Division, now superior court judge.

Some splendid lawyers died while serving in the office, including Thatcher Kemp; Frederick von Shrader, gentleman, scholar, and accomplished trial lawyer; Newton J. Kendall, colorful assistant who headed the Prosecuting Division; James M. Stevens, who headed the Water and Power Division; and Cecil Borden, well-known trial lawyer.

S.B. Robinson, Robert L. Todd, Moresby White, and Fairfax Cosby are among those who retired from the office.

framework which public administrators these days might consider typical, if not essential. Ray Chesebro has maintained that each lawyer in his office, particularly in the civil departments, has full responsibility for the cases or matters assigned him. He gets help but not detailed supervision. If the individual lawyer is not equal to such a responsibility, he therefore is not adapted to the office. Yet very few men have failed to meet the requirement. Judge Chesebro is a swift and accurate judge of men's capabilities, and when he and his assistants concur on the choice of personnel, it has been almost always a highly satisfactory choice. He personally directs the work of the office on a lawyer-to-lawyer basis.

Ray L. Chesebro
(1933–1953)

As a city attorney, Ray L. Chesebro maintains that civil service would stultify the usefulness of the office to the people. It is certain that the approval of the voters given his administration has permitted him to maintain a judicial independence from political factions. At times, he has been able to personally give impetus to public matters, as would be expected from counsel in big corporate enterprises, and he has refused to assent to a view that the chief law officer of the country's third largest city should remain silent unless spoken to, when public matters needed attention.[54]

Offered an official car, he refused it and drives his own. When the city prosecutor's office was consolidated, he found that courtesy special investigator's badges had been issued by that office, far and wide, and were being misused. So badges of any kind were abolished in the city attorney's department.

[54] Some examples which come to mind are the improvement of the rapid transit system with new equipment; the inauguration of weekly passes thereon; his insistence that the city must make provision for new sewage disposal works; and his early insistence that the city prosecutor's office be consolidated with the city attorney's. Most dramatic, perhaps, was the seizure of the offices of the civil service department, by which corruption therein was disclosed and, on account of which, the department was reorganized and is one of the best in the country.

At the outbreak of World War II, twenty-three of his men were called into service. Despite all of the demands made upon the office and still further depletions by the armed forces, he carried on the office under a heavy load and reduced personnel throughout the war period. Yet in that period he found time to endear himself to city attorneys all over the United States in the National Institute of Municipal Law Officers, and was elected to its presidency.

It is not possible in the compass of this article to explore the achievements of the City Attorney's Office in these latter years, which deserves a special chapter of its own; nor to name all of those assistants, deputies and secretaries, typists, investigators, clerks and accountants, who compose the firm of "Ray L. Chesebro, City Attorney," and to whom he never ceases to pay generous tribute.

Ray L. Chesebro, the incumbent city attorney, who has served the people the longest of any in that capacity, fittingly epitomizes the honor, the dignity, the high degree of selfless public service, the impartial administration, personal integrity, and professional excellence that have characterized this office throughout the one hundred seventy years of our city, Los Angeles.

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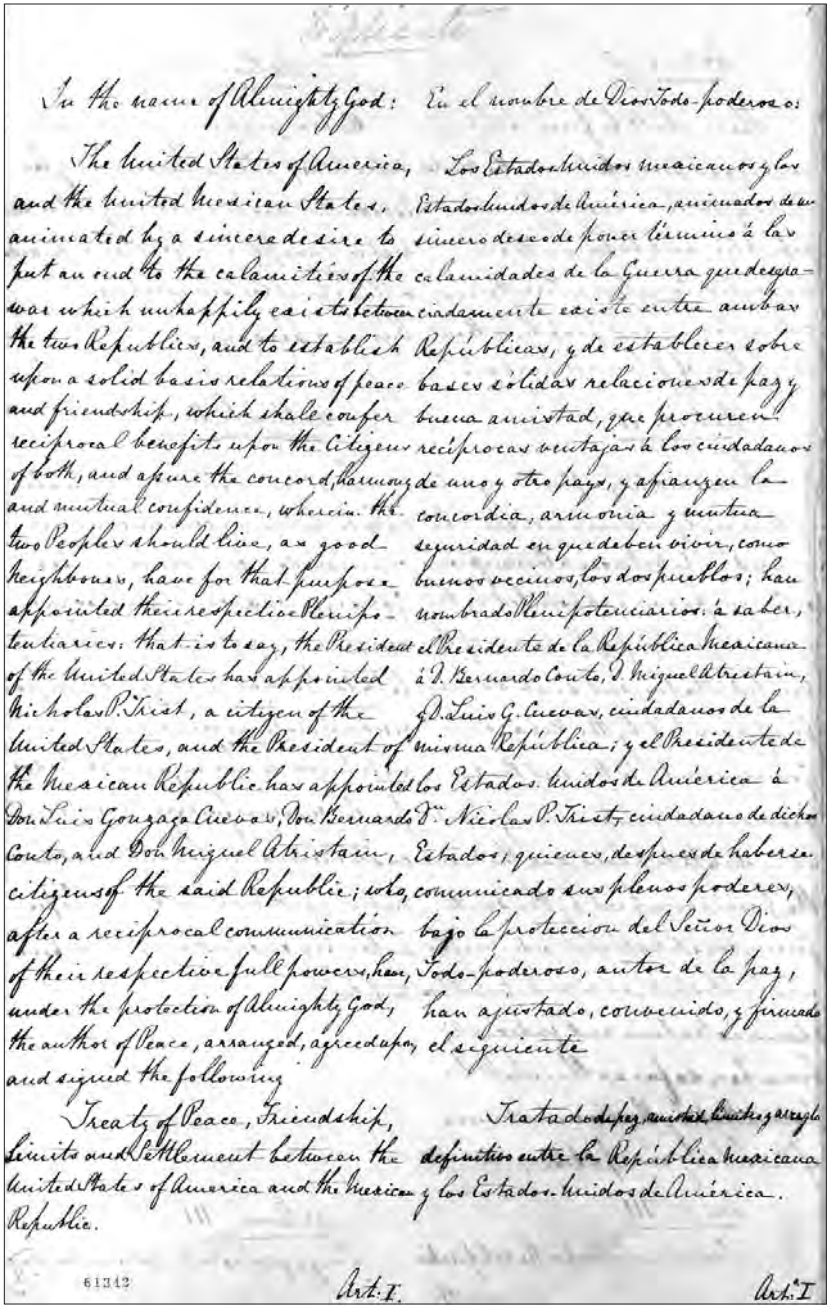
TRANSLATING CALIFORNIA:

Official Spanish Usage in California's Constitutional Conventions and State Legislature, 1848–1894

BY ROSINA A. LOZANO*

Pablo de la Guerra was not an ideal candidate for a conquered man. Educated, landed, and holding great prestige in his community, de la Guerra was a *Californio* who witnessed the transfer of his native land from Mexico to the United States during the Mexican American War. His previous advantages afforded him continued respect in post-1848 California. The Treaty of Guadalupe Hidalgo guaranteed United States citizenship for Mexican citizens living in the newly secured territories. While de la Guerra maintained some of his previous wealth and status, he shared conflicted views about his new "Yankee," English-speaking identity and the feeling that came from writing in English rather than in his native Spanish. De la

* Rosina A. Lozano recently completed her PhD in History at the University of Southern California. I would like to acknowledge several individuals who made this article possible. Thank you to William Deverell for recommending that I publish this article and to George Sánchez, Félix Gutiérrez, and Mary Dudziak for providing advice, encouragement, and notes on all my work. An early version of this article was presented at the Western History Dissertation Workshop held at Yale University in May 2009. I wish to thank Richard White, Steve Aron, Louis Warren, Adam Aranson, Ryan André Brasseaux, Jay Gitlin, and especially John Mack Faragher for their detailed comments and suggestions on my work.



In the name of Almighty God: — En el nombre de Dios Todo-poderoso:

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony and mutual confidence, wherein the two Peoples should live, as good neighbours, have for that purpose appointed their respective Plenipotentiaries: that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican Republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said Republic; who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of Peace, arranged, agreed upon and signed the following

Los Estados Unidos mexicanos y los Estados Unidos de América, animados de un sincero deseo de poner términos á las calamidades de la Guerra que desgraciadamente existe entre ambas Repúblicas, y de establecer sobre bases sólidas relaciones de paz y buena amistad, que proporcionen recíprocas ventajas á los ciudadanos de uno y otro pais, y afianzen la concordia, armonía y mutua seguridad en que deben vivir, como buenos vecinos, los dos pueblos; han nombrado Plenipotenciarios: á saber, el Presidente de la República mexicana á D. Bernardo Couto, D. Miguel Atristain, D. Luis G. Cuevas, ciudadanos de la misma República; y el Presidente de los Estados Unidos de América á Dn. Nicolas P. Trist, ciudadano de dichos Estados; quienes, despues de haberse comunicado sus plenos poderes, bajo la proteccion del Señor Dios Todo-poderoso, autor de la paz, han ajustado, convenido, y firmado el siguiente

Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic.

Tratado de paz, amistad, límites y arreglo definitivo entre la República mexicana y los Estados Unidos de América.

61342

Art. I.

Art. I

The Treaty of Guadalupe Hidalgo with parallel English and Spanish text, 1848.

The Library of Congress

Guerra's description of Anglos in a December 14, 1851, letter suggested just how strange he thought his new countrymen to be:

> The English (in which I have to write to you) the idiom of birds, I do not know it with such a perfection, as I have neither beak nor wings, things both I believe inherent to every Yankee, and notwithstanding that I am one of them, yet its deficiency in me I think is because I am an unwilling one.[1]

This letter not only points out how de la Guerra was forced to write in English to his lawyer, Archibald Peachy, but also suggests that he would never be comfortable in his new role as a Yankee due to his imperfect English. This language deficiency would forever label him as an "unwilling" or conquered American. De la Guerra's feelings of being an outsider in the new system would be underscored as the state moved away from supporting the mother tongue of the *Californios* and in the process began seeing them as foreigners in the land of their birth.

Despite his reluctance to be a Yankee, de la Guerra became a fixture in the American period's political system. He demonstrated a certain acceptance of the new government and was selected to represent his home region of Santa Barbara in the state senate. His English skills must have improved tremendously while in this role: Just two years into the statehood period, he had already begun writing in the language of the conquerors. This gain was impressive considering he needed a translator at the 1849 California Constitutional Convention.[2] Perhaps due to his own language struggles and the needs of his constituents, de la Guerra was the most adamant supporter in the state senate for proper and timely translations for Spanish speakers. As his brother, Antonio de la Guerra later reminded him, without translations entire regions could not follow the law,

> *Aquí hemos visto varias leyes de esa legislatura pero a nada hemos hecho caso por no venir de oficio y estar en Yngles . . . no hai quien*

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[1] Pablo de la Guerra to Archibald Cary Peachy, 14 December 1851, box 9 fol 413, Guerra Family Collection, The Huntington Library, San Marino, California (hereafter cited as GFC).

[2] California, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849* (Washington: Printed by J. T. Towers, 1850), 305.

> *traduzca tal cual . . . creo seremos los del sur los últimos en darles cumplimiento* / Here we have seen various laws of this legislative session, but we have paid them no attention since they are in English and not official . . . there is no one here to translate . . . I believe that we of the South will be the last ones to comply . . . .[3]

By providing representation for those who could not appeal to the Legislature in English, de la Guerra attempted to get the young state to support and respect native Spanish speakers. Without translations, this population would have to struggle to get their own translations or live in ignorance of the new laws that might benefit them and of those they were required to uphold as residents of the state. The translator was a position of major importance for *Californios* and de la Guerra was integral to the selection process. One of the most respected early translators was his brother-in-law.

William E.P. Hartnell, or Don Guillermo Arnel, married Pablo de la Guerra's sister, Maria Teresa de la Guerra, in 1825 after converting to Catholicism.[4] He was part of a larger group of Anglo immigrants who entered California prior to 1846 and who benefitted in the early statehood period from already understanding two languages and different legal, social, and political systems. This group of Anglos served to bridge the divide between the two cultures. Many of them such as Hartnell had married into *Californio* families and had strong ties with and the trust of native Spanish speakers. When the prospect of statehood came to California, Hartnell had the central role in facilitating communication between the new Anglo settlers and the *Californio* ranch leaders.

As *Californios* and Anglos worked together to get the new state to function, they tried to bridge a linguistic divide. This article traces the politics of the Spanish language in the early years of California statehood. It focuses on Spanish's official status in the state government. Another place where Spanish was at times required was in the courts. The use of language in court cases, however, was more on a case-by-case or county-by-county

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[3] Antonio de la Guerra to Pablo de la Guerra, 9 March 1850, box 8 fol 351, GFC (Spanish spelling and diacritics per the original).

[4] Louise Pubols, *The Father of All: The De La Guerra Family, Power, and Patriarchy in Mexican California*, Western Histories 1 (Berkeley: Published for the Huntington-USC Institute on California and the West by University of California Press and The Huntington Library, San Marino, Calif., 2009), 118–19.

basis. This article examines larger legislative trends instead of individual cases. The overall language policies in laws passed in the first fifty years of statehood shows that the use of Spanish in the government was largely a practical policy. If *Californios* were expected to follow the laws of the new state, they must be provided the opportunity to learn what legislation was passed and how it affected them. Studying state language law finds that the official sanction of the Spanish language dropped precipitously in the years after statehood. The loss of *Californio* representation in the state's government was largely tied to the shift in language policy. The changes in language outlook are apparent in the different approaches taken in the two state constitutional conventions completed in 1849 and 1879 that bookend the period of official Spanish usage.

LANGUAGE USAGE AT THE FIRST CALIFORNIA STATE CONSTITUTIONAL CONVENTION

The California State Constitutional Convention was held in the old Mexican capital of Monterey from September through October 1849. The delegates shifted during the debates, but forty-eight Californians signed the final Constitution. When the convention met, a demographic upheaval had already occurred in the territory; the vast majority of Northern California was populated by new arrivals. There remained however a significant Spanish-speaking minority. The early openness towards Spanish language usage can largely be explained by looking at the power *Californios* continued to have — particularly in Southern California — in the first years of statehood. There were eight native Spanish-speaking representatives at the first state constitutional convention.[5] With the exception of Mariano Guadalupe Vallejo, all of these delegates were from regions south of San Francisco and the mines. In addition to Vallejo, the other native Spanish-speaking delegates included: J.M. Covarrubias (San Luis Obispo), Pablo Noriega de la Guerra (Santa Barbara), Miguel de Pedrorena (San Diego), José Antonio Carrillo (Los Angeles), Jacinto Rodríguez (Monterey),

[5] Roger D. McGrath, "A Violent Birth: Disorder, Crime, and Law Enforcement, 1849–1880," in *Taming the Elephant: Politics, Government, and Law in Pioneer California*, ed. John F. Burns and Richard J. Orsi (Berkeley: University of California Press, 2003), 7.

Daguerreotype of (left to right): Pablo de la Guerra, Salvador Vallejo, and Andrés Pico

Courtesy The Bancroft Library, UC Berkeley

Antonio M. Pico (San José), and Manuel Domínguez (Los Angeles). With the exception of Pedrorena who was a native of Spain, the other seven were native-born Californians.[6] The southern residence of native Spanish-speaking delegates was contrary to the new demographics of the state. The center of the state's population had moved to Northern California during the Gold Rush, and San Francisco and Sacramento had eight signers each compared to five from Los Angeles and two from San Diego. The number of representatives from Southern California increased due to appeals made by individuals from Los Angeles like José Antonio Carrillo. With only 8,000 residents settled in Los Angeles, compared to the estimated 35,000 in San Francisco, the North had the ability to forcefully advocate for its interests throughout the convention.[7]

In 1849, the land cases had not yet stripped away the wealth, land, or prestige of most *Californio* families. The concerns and needs of native Spanish speakers were different from the Anglo miners and businessmen who entered the state. *Californios*' presence and outspokenness on certain topics at the convention helped to remind the other delegates of those distinctions. These included discussions related to voting rights for Indians, representation, and state boundaries. The native Spanish speakers had some Anglo allies. Twelve of the forty Anglo signers of the new state Constitution lived in California prior to the Mexican American War. This long residency suggests that they chose to remain in a Mexican state and probably understood Spanish as well as the social, economic, and political practices of the region. Seven of those twelve had lived in California for ten or more years and were highly respected businessmen and landowners in the *Californio* community. Abel Stearns, John Sutter, Hugo Reid, and Pierre Sainsevain each had pre-American period land grants. These individuals would be familiar with the main issues and discussions of Spanish speakers. They brought shared concerns over landholdings and representation into the debate over the new Constitution. Both Stearns and Reid as

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[6] It is not clear whether John Sutter, a native German speaker, used the Spanish interpreter as he confessed his poor ability to speak the English language during the proceedings. California, *Report of the Debates,* 478–79, 187.

[7] Ibid., 16, 407, 478–79, 14; Sidney Redner, "San Francisco Population History," Sidney Redner. 6 November 2003, Boston University Physics. 15 January 2009 <http://physics.bu.edu/~redner/projects/population/cities/sf.html>.

well as other Anglo San Luis Obispo and San Diego representatives voted against creating a state constitution and instead advocated for a territorial status where longstanding residents of California could continue to control local affairs.[8]

The eight native Spanish speakers at the convention had varying levels of English knowledge and ability. For that reason, the translator was a key position and one of the first selected. William E.P. Hartnell was officially appointed on September 4 and served as the intermediary between the Spanish and English speakers. After Hartnell's selection, Vallejo immediately requested that a clerk be assigned to assist the translator. He recognized the difficulties of the job and knew that one individual would be unable to ensure accurate and timely translations without aid. Vallejo's request was supported by the delegation, and H.W. Henrie was elected to the office of clerk to the interpreter and translator.[9] These two translators — neither of them native Spanish speakers — would have the unenviable task of trying to keep up with the English language debates occurring while translating the ideas, opinions, and arguments of the Spanish speakers. They would also be privy to what the Spanish language speakers were saying if they were discussing issues off the floor.

The report of the constitutional debates shows that there was no simultaneous translation during the convention, but rather a summing up of views by the translator at the end of the discussion and prior to the vote. In fact, Spanish-speaking views in the debates appeared few and far between. There was no record taken of the Spanish dialogue occurring during the constitutional convention. It is unknown whether the Spanish language speakers silently observed and waited for translations or if they debated the issues on their own and sent an emissary to discuss important concerns. Considering that Carrillo, de la Guerra, and Vallejo were the most likely to rise to speak on topics that concerned *Californios*, it is possible that these men were given a vote of confidence by other Spanish speakers to voice their opinions. These individuals spoke rarely (de la Guerra spoke the most, around fifteen times during the entire proceedings) and each talked about needing a translator, "Mr. Carillo [sic] felt a diffidence in

8 California, *Report of the Debates*, 22.

9 Ibid., 18–19.

addressing the assembly, from his ignorance of the English language. He claimed its indulgence, therefore, as he was compelled to speak through an interpreter."[10] Vallejo was the only one who discussed what could be described as his frustration with his inability to understand the discussion; "He regretted that his limited knowledge of the English language prevented him from replying to all the arguments adduced by those gentlemen who did not speak in his own tongue."[11] Vallejo let the convention know that he had an opinion that was going unspoken due to his language limitations.

Californios rarely took to the floor during the proceedings due to lack of comprehension. The *Report of the Debates* contains only two instances where José María Covarrubias spoke. Both instances occurred when he disagreed with something that another *Californio* had said. When Covarrubias heard the testimony of his fellow Spanish speakers in his native language, he immediately responded to the conversation at hand. In one instance, Vallejo was asked about some documents detailing the borders of California. After hearing his opinion, Covarrubias spoke up and corrected Vallejo's statement. Vallejo then responded and clarified his point.[12] In a second more heated exchange, Carrillo shared his ideas about a vote and again Covarrubias interjected his interpretation. Aside from a motion he presented, these were the only two cases when Covarrubias's name appeared outside of vote summaries.[13] His interjections were forceful and confident when he understood the issues at hand. If Covarrubias had grasped more of the proceedings, his involvement in discussions would have been much greater. Covarrubias's comments provide evidence that *Californios* were impeded from participating in the debates due to their English language deficiency.

While native Spanish speakers rarely participated in the discussion, there was a demonstration of respect toward the *Californio* delegates by the rest of the convention, especially in light of the discussions in favor of

[10] The recorder of the constitutional convention, J. Ross Browne, had difficulty staying consistent with the names he used. Carillo was used as well as Carrillo. Pablo de la Guerra was sometimes referred to as Noriego (his father was José de la Guerra y Noriega). Ibid., 14, 26, 63.

[11] Ibid., 303. For Pablo de la Guerra's use of an interpreter, see page 305.

[12] Ibid., 450–51.

[13] Ibid., 450–51, 456–57, 290–91, 153.

Anglo-Saxons throughout the proceedings. The "Spanish" gentlemen were viewed as white men deserving of the vote.[14] English speakers made requests throughout the convention to halt discussions prior to a vote in order to allow adequate translation time for Spanish speakers.[15] Sometimes the response to this request was that a translation had already been thought of and created prior to the meeting.[16] The delegates thought beyond their needs as well. All Californians could read the proceedings only if they had accurate translations, and the delegates therefore decided to publish the debates of the constitutional convention in both English and Spanish.[17] In addition, the Constitution itself would have a Spanish version that was engrossed and certified by the translator and placed in parallel columns of English and Spanish translations.[18] Recognizing that the Spanish-speaking delegates were representing significant populations within California, the English-speaking delegates at the convention made numerous attempts to get articles translated, debates understood, and generous wages for the interpreter.[19] The voting date for Californians to approve the Constitution was also extended by the length of time it would take to get accurate translations to meet the needs of Spanish-speaking residents.[20]

One Anglo repeatedly defended the rights of Spanish speakers during the convention. Kimball H. Dimmick appeared to be a very conscientious follower of procedure and fair representation and spoke up when he believed the convention was veering off course, especially on issues of fair *Californio* representation.[21] He made a point of recognizing *Californios* as American, "As to the line of distinction attempted to be drawn between native Californians and Americans, he knew no such distinction himself; his

14 Ibid., 71–72.

15 Ibid., 25, 31, 153, 219, 331.

16 Ibid., 31.

17 Ibid., 163–64.

18 Ibid., 398.

19 The interpreter had one of the largest salaries of any of the support staff at the convention. Hartnell was paid $28, equal only to the secretary. There was a request to raise his pay from $21 demonstrating his importance in the view of the convention and the commitment of the delegates to appear fair to Spanish-speaking delegates. Ibid., 95, 106–07.

20 Ibid., 390.

21 Ibid., 157–59, 274. Dimmick would later be a respected Los Angeles District Attorney and judge.

constituents knew none. They all claimed to be Americans."[22] This stance differed from the views of most delegates as the term "American" became synonymous with individuals born in what was called "the older states of the Union," despite the fact that the vast majority of Mexican citizens remaining in the United States opted to become citizens of the new ruling nation.[23] Dimmick forcefully argued *Californios* should not be placed in the minority and should be considered full members of the majority. He accepted and advocated for a new vision of an American that was broader than just those born in American states. Dimmick also showed his support for *Californios* as the convention was deciding on procedure. He rejected the idea to use the Constitution of Iowa as a model,

> It would have to be translated into Spanish, and a sufficient number of copies made for those who only spoke that language. If, on the other hand, the committee reported, article by article, a plan of a Constitution, it could be translated, copied, and laid upon the tables of the members at the opening of each day's session.[24]

Here Dimmick made his suggestion for how the convention should operate daily and he based his opinion on the needs of the entire convention to function properly, which included the Spanish speakers.

Native Spanish speakers were in the minority at the convention and in the state, but their language rights were supported as the decision to distribute government documents in Spanish met with little debate. On September 27, Pablo de la Guerra proposed a constitutional provision that all laws, decrees, publications, and provisions requiring public distribution in the new state be translated and printed in Spanish.[25] Myron Norton immediately responded that he believed a section was previously adopted to ensure that publications were in Spanish. His statement suggests this was an obvious provision in need of no further discussion. The sole dissenter to de la Guerra's proposal was Charles T. Botts who felt there was no need to require Spanish translations in the Constitution, as the new state government would take care of the task for as long as it was required. He

22 Ibid., 23.
23 Ibid., 23.
24 Ibid., 25.
25 Ibid., 273.

believed that the state would be burdened with "an immense and permanent expense upon the people — an expense for which there will be no necessity in a few years."[26] Botts viewed California as quickly becoming a monolingual English-speaking state.

De la Guerra responded to Botts by denouncing the early translation practices of the American occupational period where little effort was made to create or send translations to the southern regions of the state. He explained the reality of the language situation in Santa Barbara where he himself had to translate some government publications despite his lack of mastery of the language. He passionately argued that

> all laws ought to be published in a language which the people understand, so that every native Californian shall not be at the expense of procuring his own interpreter; and moreover, you will bear in mind that the laws which will hereafter be published, will be very different from those which they obeyed formerly. They cannot obey laws unless they understand them.[27]

De la Guerra was reminding the delegates that this American rule was new not only in language alone, but also in style of governing. He suggested the possibility that interpretations might not be necessary after twenty years, once native Spanish speakers got the opportunity to learn English, at which point the Constitution could be changed.[28] His statement suggested a resignation that English was the predominant language and that the state's future was not a bilingual one.

Some delegates sought to specify a time limit in the proposal after hearing de la Guerra's estimate for how long Spanish translations might be required. Henry A. Tefft shifted the conversation by supporting a possible bilingual future for the state. He explained that Louisiana continued publishing laws in French and Spanish over fifty years after statehood. The knowledge that another state published their governmental documents in languages other than English led to the delegates' unanimous passing of the resolution.[29] Article XI, section 21 of the constitution supported

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26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.

Spanish translations with no time limit. The provision implied an acceptance that California's linguistic future might remain a bilingual one.[30] This decision to conduct state business in both English and Spanish exemplified a support for language difference and a view that individuals who spoke Spanish could be seen as contributing members of the state and ultimately of the nation. By allowing political participation to continue without a language barrier, state officials decided that Spanish speakers would be viewed as full citizens — or at least the elite ones with no Indian blood would be afforded the status of citizen in good standing. Congress's acceptance of California as a state in 1850 with a Spanish language provision for publication of laws in its Constitution suggests language rights for Spanish speakers did not hinder Congress's decision to grant statehood as it later did for other territories like New Mexico.

The convention made a great effort to support Spanish and the Spanish-speaking delegates, but *Californios* were unable to participate as full members of the convention due to inadequate English skills. At one point, de la Guerra made a request that Spanish speakers abstain from a vote since the discussion dealt with semantics. The official summary reported: "The question appeared to be respecting certain English words, which they did not understand, and they desired to be excused from the voting."[31] Creating the clearest and most accurate statements in the Constitution required careful study of the semantics and intricacies of the English language. These discussions would be difficult if not impossible for even a great translator to explain. Acquiescing in their request, the convention released Spanish-speaking delegates from this vote. Spanish-speaking *Californios* received just two interpretations of the material presented at the convention with less than stellar results.

On September 15 — almost two weeks after the interpreter and clerk received their positions — José Antonio Carrillo addressed the convention in the absence of both the translator and his clerk. Stephen C. Foster, a delegate from Los Angeles who was bilingual, translated for him. Carrillo complained about the incompetence and disrespectful language on the part of the clerk toward the Spanish speakers. Upon hearing Carrillo's

30 Cal. Const. of 1849, art. XI, § 21 (superseded 1879).

31 California, *Report of the Debates*, 57–58.

concerns, the convention immediately rallied to the side of the *Californios*. Delegates remedied the offense toward one of its members by removing the clerk and replacing him with Judge White.[32] Anglos demonstrated their respect and good feelings toward their native Spanish-speaking members. They took time out of the convention to address and remedy Carrillo's concerns, and this highlighted the continued relevance that *Californios* had in state politics. A second conclusion can be drawn from this episode. The fact that the native Spanish-speaking delegates had to endure a clerk they disliked indicates how isolated they were at the convention.

Carrillo brought his concerns to the floor when both the interpreter and clerk were absent. This strategy could have been employed because he could not depend on the accurate translation of his sentiments from the interpreter and clerk. Or perhaps he hoped to avoid a public denouncing of the clerk and knew that he could enlist the services of a bilingual member of the delegation. Perhaps this was the first time the clerk had not attended and it was a coincidence that the well-respected translator, Hartnell, was not at the proceedings that day. Whatever the case, the absence of both interpreters from this particular session is troubling. Henrie and Hartnell were paid to attend sessions and inform native Spanish speakers about the debates and discussions on the floor. Would Stephen Foster and other bilingual members of the convention step in during their absence and translate? This would be a distracting alternative and perhaps a position that bilingual members would dislike, as they could not participate in the same manner if focused on translating. The convention members rallied behind their fellow member, but permitted a situation where a monolingual *Californio* addressed the group in a session with no official translator.

The absence of a translator halted discussions at the convention one other time when Spanish speakers asked to leave because of their inability to understand the proceedings. In this case, the person proposed to translate declined the position.[33] The monolingual *Californios* ended up remaining at the convention, and they allowed discussions and debates to proceed on sections where their constituents had few vested interests. They depended on their friends to keep them abreast of what those debates were

32 Ibid., 94–95.

33 Ibid., 399.

concerning, because when the subject of representation came up they immediately asked that the conversation be halted,

> They generally had very little objection to any of the provisions adopted by the Convention, but as this section was one in which they felt interested, and as they could not understand it without having it translated, and the arguments explained to them through an interpreter, they hoped at least that they would be allowed the privilege of a reconsideration, if it was deemed necessary.[34]

Californios had a great interest in the topic of the distribution of state senators and did not wish to allow this decision to be made without their input and approval.[35] Los Angeles delegates in particular were adamant about retaining their status by ensuring they received their share of state senators.[36] While the native Spanish speakers were able to persuade the other members of their opinions prior to voting, the absence of an interpreter demonstrated they could not participate as full members. The native Spanish speakers were not only separated by language, but also by location. They sat at another end of the room as the English debates occurred.[37]

Encouragement of *Californio* participation at the California Constitutional Convention of 1849 was fervid at first glance. Relying on a couple of translators and accepting a situation where native Spanish speakers rarely addressed the floor tells a different story. Monolingual Spanish speakers were largely isolated from the debates. Each native Spanish-speaking individual's sentiments and opinions could be expressed or obtained from a translator who was only summarizing debates. Bilingual individuals who spoke Spanish and English could have corrected portions of Hartnell's English translation if he went off course or failed to summarize a part of a debate if they had heard him. The Spanish summary came from an isolated discussion separate from the bilingual speakers. Key points could be lost or altered in translation. English language deficiency hindered native Spanish speakers' chance of fully representing their constituents, though

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34 Ibid., 400.

35 Ibid., 399–405.

36 Ibid., 400–14.

37 Botts acknowledged that "he was requested by one of the gentleman on the other side, (a member of the native California delegation)," which suggests a physical as well as linguistic division. Ibid., 400.

they did their part to get their voices heard on their most pressing issues. *Californios* would continue to find themselves at a linguistic disadvantage in the new state's government.

OFFICIAL SPANISH USAGE

After California became a state, the first state legislature was in position to decide how to fulfill the new constitutional mandates. The Committee on Printing proposed the creation of an office of the state translator and by the end of January 1850, the act passed.[38] Both the California State Assembly and Senate would choose the state translator in a joint vote, and the position would have a term of one year.[39] The state translator would receive copies of the laws from the secretary of state.[40] *Californio* representatives greatly aided the legislature's efforts to find a state translator.

Pablo de la Guerra was one of the Senate representatives in charge of finding a suitable individual for the position of state translator. He was also given the task of locating the funding to support the work.[41] While a candidate was being selected, the Joint Select Committee on the Examination of Applicants for the Office of State Translator submitted a report. De la Guerra represented the committee when he spoke before the Senate. He claimed that the committee had found no candidates who they believed were "fully competent to discharge the important duty that must necessarily devolve upon the officer, in translating, with minute accuracy, the laws of the State."[42] Due to the fact that the state printer needed the support of a translator daily, the committee selected William Lourie, "who has evinced over all other applicants superior qualifications as Translator," for the interim position.[43] De la Guerra subsequently recommended the creation of a joint committee to examine the accuracy of Lourie's translations.[44]

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38 California Legislature, *Journal of the Legislature of the State of California At Their First Session* (San José: J. Winchester, state printer, 1850), 85, 122.

39 Cal. Code, ch. 7, §§ 1–2 (1850).

40 J.R. March 2, 1st Leg. (Cal. 1850).

41 California Legislature, *Journal of the Senate . . . First Legislature,* 776, 848.

42 California, *Report of the Debates*, 551.

43 Ibid.

44 California Legislature, *Journal of the Legislature . . . At Their First Session*, 150, 551.

The interim appointment failed to solve the problem of getting timely and accurate translations. José María Covarrubias submitted a resolution to the assembly a month after Lourie's appointment to examine the reason why the joint committee created to review his translations had not received any.[45] When Lourie submitted his explanation to the Assembly, it demonstrated the confusion of the young state government.[46] Lourie was never fully informed that he was selected for the position. He subsequently went to ask for items to translate, and was redirected to the secretary of state who had "no notice of what I applied for and had nothing for me to translate."[47] He finally began to receive work in March and claimed he was diligently translating those acts one at a time.[48] Lourie's letter suggested that he received documents from numerous individuals in the state. It was this confusion over who was to give the translator documents that likely led to the passage of a law requiring the secretary of state to transmit items to the state translator. The job of the translator was a large and difficult one with shifting expectations and responsibilities that were worked out in the first years of statehood.

The selective joint committee was unable to locate a suitable candidate even though prospective state translators applied and were nominated. Letters came in to de la Guerra requesting consideration for the post. Hopeful Toler inquired about the possibility for his appointment. His credentials demonstrated that he was a highly educated individual with business connections to Latin America, extensive legal training, and more than thirty years of claimed translator experience.[49] His impressive résumé and contacts suggest that the job of the state translator was taken very seriously and seen as an important position by those outside of the government. Vallejo recognized the significance of the post as well. He went out of his way to suggest a translator to de la Guerra.[50] None of the prospective

45 Ibid., 1023–24.

46 Lourie's name was spelled differently throughout the Legislative Journal (Lowry, Lowrie, and Lourie). The Lourie spelling was chosen because it was the way it was reported at the end of his letter to the Assembly.

47 California Legislature, *Journal of the Legislature . . . At Their First Session*, 1034.

48 Ibid., 1034, 1035.

49 Hopeful Toler to Pablo de la Guerra, 14 April 1854, box 22 fol 973, GFC.

50 Mariano Guadalupe Vallejo to Pablo de la Guerra, 13 February 1854, box 22 fol 997, GFC.

translators were native Spanish speakers.[51] This perhaps serves as a commentary on the newly conquered status of *Californios* that did not permit them to become educated in English with enough time to be competitive or qualified for the translator position, or that bilingual *Californios* had other priorities outside of government.

The Legislature voted numerous times on the best candidates without success. They ended the first day of voting with no state translator.[52] J.M. Covarrubias spoke before the Assembly on April 10 about his great disappointment that a state translator was not selected. He explained that the South was "almost entirely inhabited by people who do not know any other language than Spanish."[53] Covarrubias further conveyed Southern *Californio* sentiments, "they felt sorry for not knowing what was going on in the Legislature, as the information they received from their representatives was a very limited one, given by private letters."[54] He then pushed that a new date for election be decided upon and nominated Mr. Schleiden for the position.[55] Covarrubias was also involved in the joint committee's selection of competent candidates for state translator from the Assembly. A week after Covarrubias's prodding, Joseph H. Schull was selected for the position of state translator on April 17. He received the votes of Mariano Guadalupe Vallejo and Covarrubias. Lourie and Toler were the other possible translators nominated for the position.[56] De la Guerra was selected by the state senate to work on these tasks with E.K. Chamberlain (for examining candidates) and Robinson (for finding funds).[57] The Legislature authorized Schull to rent an office and to hire additional translators as necessary as long as the Committee of Examination approved them.[58]

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51 It is not clear how many of the prospective candidates may have been Anglo *Californios* who were conquered too. Many early settlers converted to Catholicism and became Mexican citizens, so they were also rightfully *Californios* although not native Spanish speakers.

52 The candidates included Schleiden, Jno. [Jonathan?] H. Schull, William Lowry [Lourie], Joseph Henriques, and Alfred Luckett.

53 California Legislature, *Journal of the Legislature . . . At the First Session*, 1172.

54 Ibid.

55 Ibid.

56 Ibid., 346.

57 Ibid., 776, 848.

58 J.R. March 11, 1st Leg. (Cal. 1850).

The journal of the first session of the California Legislature makes it evident that the state government needed translations in order to run. The legislative journal documents many discussions, reports, and acts that emerged during the proceedings dealing with translations and also with the delay of translations. As the joint resolution created to support the employment of additional translators explained, "there exists at present an urgent necessity for the translation of the laws into Spanish."[59] The state translator was listed as one of the nine major offices (e.g. governor, secretary of state, comptroller, treasurer, attorney general) of the state that would have expenses paid out of the general fund.[60] At eight thousand dollars, this salary was below only the governor ($10,000) and the state treasurer ($9,000).[61] The proceedings and laws passed during the first session of the California Legislature suggest that the state was committed to paying for and getting accurate translations. Native Spanish speakers continued in active roles in the state's governmental proceedings. The Legislature believed its efforts to fully establish a state translator position would provide a remedy for delayed translations. Unfortunately, the efforts of the first Legislature were wasted, and the position of state translator was short-lived and unsuccessful. The Legislature eliminated the State Translator position the next year.

By 1853, William Hartnell was authorized to translate items for the government. His position was not as prestigious as the first state translator; he received no salary and was not considered a state officer. Instead, he was paid piecemeal for the work he completed, at a price not to exceed two dollars per folio of one hundred words, and fifty cents per folio to be engrossed by the printer.[62] The lengthy time spent on a vote and examination of the translator candidates was greatly reduced after the first Legislature.

For the remainder of the years when Spanish translations were supported by the state, a committee of three was selected from the Assembly and another from the Senate to find a translator. In the early years, the committees were made up of *Californios* like Pablo de la Guerra, Ygnacio

59 J.R. March 9, 1st Leg. (Cal. 1850).
60 Cal. Code, Ch. 16, § 11 (1850).
61 Cal. Code, Ch. 25, § 1 (1850).
62 Cal. Code, Ch. XCV, § 1 (1853).

del Valle, Romualdo Pacheco, and Andrés Pico.[63] The committees were in charge of locating possible candidates and getting bids on the amount they would be paid. They presented their findings, and the Legislature would make a contract (with certain price limits as the one with Hartnell demonstrates) for the translations. The cost of translations greatly decreased over the years. When José F. Godoy requested payment for his services, he received it retroactively and the Senate voted for him to collect interest on his fees. The total in 1876 for Godoy amounted to a little over $2,500.[64] By 1878, instead of two dollars per folio, the bid that was won by Adelina B. Godoy was for sixteen cents per folio.[65] The selection of a woman and at such a low price may indicate how the position of translator changed over the first thirty years of statehood. It also could suggest that the availability of translators may have increased over this period, as more people knew they could get good-paying jobs by becoming bilingual. A bigger pool of competent individuals would increase competition, and could drastically reduce the compensation for services. These new contracts with the state translator no longer discussed the difficulty of the post. After the first year, there was no notation of the translator deserving an office or additional aid. Despite the reduction in status and pay, publication of Spanish copies of government documents, decrees, and speeches continued.

Printers published a significant number of Spanish translations of state material. As an example, Browne's *Report of the Debates of the Constitutional Convention* had 1,000 English copies made and 250 Spanish copies.[66] A joint resolution agreed upon by the Legislature in 1869 expands on the types of documents translated. Nine hundred sixty Spanish copies of the governor's biennial message and the reports of the controller, surveyor-general, and superintendent of public instruction were requested. The state treasurer's

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63 California Legislature, *Journal of the Third Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1852), 81, 94; California Legislature, *Journal of the Ninth Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1858), 252, 350.

64 California Senate, *The Journal of the Senate During the Twenty-First Session of the Legislature of the State of California* (Sacramento: State Printing Office, 1876), 13.

65 California Senate, *The Journal of the Senate During the Twenty-Second Session of the Legislature of the State of California* (Sacramento: State Printing Office, 1877), 144.

66 California, *Report of the Debates*, 163.

Romualdo Pacheco
Courtesy The Bancroft Library, UC Berkeley

report had 240 Spanish copies contracted. The governor's biennial message even included a request for 2,400 German copies. Despite these orders, many reports had only English language copies printed (e.g. adjutant general, attorney general, state librarian, state geologist, etc.).[67] The legislative discussions leading to the selection of some reports in Spanish over others,

67 J.R. Num. I, 18th Leg. (Cal. 1870).

were not present in the Legislature's journal. Spanish speakers would have to find other ways to translate those reports, if needed, at their own expense.

The number of Spanish copies varied over the years. In 1872, the Inaugural Address of California Governor Newton Booth and the Second Biennial Message of Governor H.H. Haight were each translated with 500 copies published in Spanish, while in 1876, the Legislature ordered 2,000 Spanish copies of the Inaugural Address of Governor William Irwin.[68] It is not clear from the Legislature's journal how the number of copies was determined and whether it was a political, administrative, or budgetary decision. The distribution of Spanish-language copies of laws appeared largely localized. In 1876, the counties of San Diego, San Bernardino, Los Angeles, Santa Barbara, San Luis Obispo, Monterey, Santa Clara, Contra Costa, Alameda, Marin, and Sonoma as well as the first, third, and seventh district judges were chosen to receive the 240 copies of Spanish language laws.[69] Perhaps requests from those counties dictated the number contracted. The state continued to order numerous Spanish copies of state documents up to 1879. The actual printing was sometimes stipulated as being contingent on the availability of funding.[70] By the 1870s, Spanish language translations were no longer deemed a logistical necessity. Native Spanish speakers were becoming a tiny minority in the state. The state continued to honor the Constitution and *Californios* by publishing laws in Spanish, although the state had larger immigrant language groups at that time (as evidenced by the occasional publication of German versions of state publications).

Notwithstanding efforts to get Spanish translations out to its constituents, California was never a bilingual state. A bilingual state would have enabled timely translations and interaction between individuals who spoke either language. California's translators never worked fast enough for this type of system to emerge. The commitment during the first year to create a well-paid position of state translator was an anomaly. The concerns of Covarrubias demonstrated that the southern portion of the state was awaiting translations about the actions of the government. *Californios* did not receive

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68 California Assembly, *The Journal of the Assembly During the Nineteenth Legislature of the State of California* (Sacramento: State Printing Office, 1875), 613; California Senate, *The Journal of the Senate During the Twenty-First Session,* 83, 90, 112.

69 Cal. Pol. Code, §§ 415, 528 (1876).

70 Cal. Code Ch. DIII, § 1 (1870).

immediate benefits from the Legislature's efforts as the translations took long and were rarely complete. They brought up the issue of missing translations to the Legislature on numerous occasions.[71] A list detailing precisely which of the laws were translated was once submitted after these requests. The list was long, but not exhaustive.[72] A committee during the ninth session attempted to remedy the situation by making an extensive list of laws still in effect. They hoped to create one comprehensive bound volume of laws in Spanish. Andrés Pico was chairman of the committee and presented the list for the "Schedule of Laws of 1856 and 1857, now in force" and he also suggested that the translations of laws still in the secretary of state's office be distributed.[73] Pico's actions indicated that Spanish speakers were not kept abreast of the laws on a regular schedule. Disseminating a complete book of laws would have cleared up any confusion that existed among native Spanish speakers about current state laws.[74] Spanish speakers were receiving a filtered and selective version of the state's official material.

Translating government material accurately and quickly was very difficult to accomplish because of the sheer volume of documents. *Californios* were frustrated and complained about slow and inadequate translations:

> *Todo va por ahora bien menos lo de la traduccion de las leyes pues el presidente como buen K.N. ha nombrado la comision. Sin poner en ella ninguno que hable español* / All goes well except with the translation of the laws, for the president who is a good K.N. [Know Nothing] has named the commission. Without putting a single person who speaks Spanish."[75]

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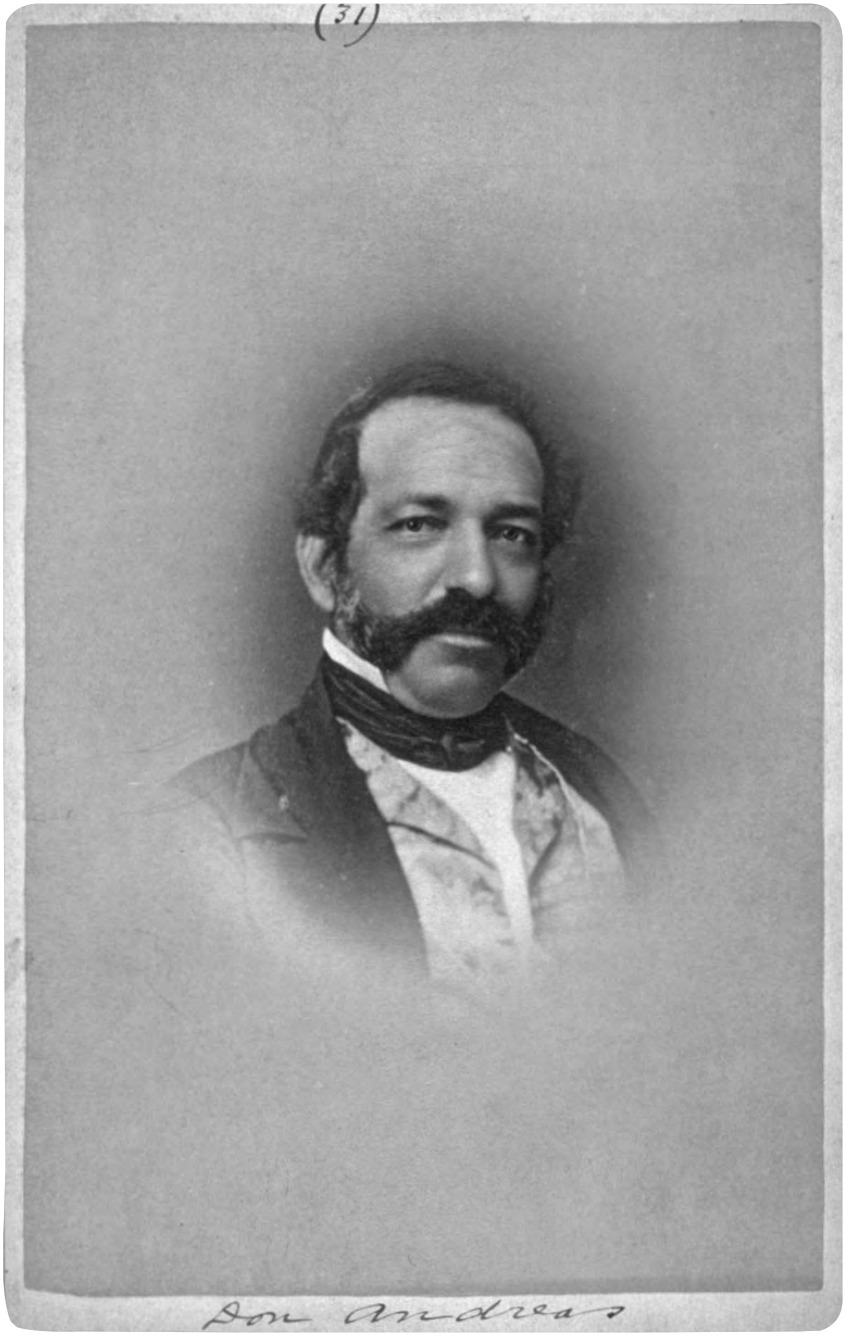
71 California Legislature, *Journals of the Legislature of the State of California at its Second Session* (San Francisco: Eugene Casserly, State Printer, 1851), 1413; California Legislature, *Journal of the Seventh Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1856), 152.

72 California Legislature, *Journals of the Legislature . . . at its Second Session*, 1449–52.

73 California Legislature, *Journal of the Ninth Session*, 550–55.

74 Sometimes the appeal for translations came from non-*Californios.* During the eighth session, Edward Harrison asked for the reason that the 1856 laws were still not translated. California Legislature, *Journal of the Eighth Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1857), 563.

75 Pablo de la Guerra to Antonio de la Guerra, 29 January 1850, box 9 fol 416, GFC (Spanish spelling and diacritics per the original).



Andrés Pico

Courtesy The Bancroft Library, UC Berkeley

De la Guerra criticized the Anglo majority for failing to place a native Spanish speaker on the committee that selected the candidates for translator. The report of the first Legislature gave the most respect to the translator position of any Legislature during this period, yet de la Guerra needed to assert himself in order to get on the committee. The translator was crucial to the daily operations of the government for *Californios*, but the importance of the position was lost on the president. Andrés Pico echoed de la Guerra's frustrations over translations by complaining about the many discrepancies between English and Spanish versions of state business. At times the translations were said to be so poor that they were almost "completely unintelligible."[76] While Spanish speakers expected and depended on the Legislature to commit to translations of official documents, it is clear that they took long to disseminate and were uneven in quality. *Californios* had to use their political presence in the Legislature to attempt to give their constituents the accurate and timely translations they deserved.

The slow process of translation undoubtedly affected *Californios* and, reportedly, the larger Spanish-speaking population in the hemisphere. Andrés Pico explained to the California Assembly that Spanish translations were essential to legal proceedings and would receive transnational exposure. He stressed accurate Spanish translations of the law were of day-to-day importance.[77] These versions were critical to southern county court decisions as many Spanish-speaking judges depended on them to determine that laws and convictions were being fairly administered. In addition, Latin Americans reviewed the translations and would criticize California if they were inaccurate or poorly done.[78] This transnational awareness reveals that *Californios* continued to have a positive view of their place in the larger Latin American world. They played a role in and identified with the southern part of the hemisphere. Spanish translations were not merely of ceremonial importance, but were required both for the state to function fully and to earn respect from Latin America.

Representatives from Southern California successfully proved this day-to-day Spanish language reality by gaining legislative support for Spanish

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76 Andrés Pico, "Address to California Assembly," *El Clamor Público*, April 10, 1858.

77 Since "a considerable number of justices of the peace come from the Spanish community." Ibid.

78 Ibid.

for *Californio* legal proceedings. Any witness in the state "who did not understand or speak the English language" was entitled to an interpreter.[79] In several counties, the state was required to provide defendants with their summons in Spanish so they could understand the charges. In Santa Barbara, San Luis Obispo, Los Angeles, San Diego, Monterey, Santa Clara, Santa Cruz, and Contra Costa counties, it was permitted "with the consent of both parties, to have the process, pleadings, and other proceedings" in Spanish.[80] By limiting Spanish proceedings to only certain counties with established Spanish-speaking populations, the state legislature was demonstrating a prejudice against mining regions or cities where South American immigrants were more likely to settle. The privileges of Spanish were meant for American citizens — for the *Californios*.

In order to give a fair trial to members of both language groups, counties that permitted Spanish proceedings needed to employ individuals able to do the work in both languages. G.A. Pendleton, a San Diego county clerk in 1866, distributed county legal documents and certified public posts completely in Spanish.[81] County clerks like Pendleton were not always fully compensated for their skills or recognized for the fact that much of their work in the county was conducted in Spanish.[82] Official county documents in Santa Barbara would alternate between officials' statements — judges, sheriffs, notaries public, and clerks — some of whom would write in Spanish and others who would write in English on the same page.[83] These examples could suggest a catering to native Spanish speakers by bilingual officials so they would understand the document, but that conclusion does not explain why there would be no translator hired for the English-speaking

79 Cal. Civ. Proc. Code, § 1184 (1876).

80 After 1862, only the first five counties listed were still permitted to have court proceedings in Spanish. By 1876, only the first four counties listed still permitted court proceedings in Spanish. Cal. Title XVII, 5575, § 646 (1865). Cal Civ. Proc. Code, § 185 (1876).

81 G.A. Pendleton, San Diego County Clerk, legal document, 3 July 1866, box 10 fol 624, Helen P. Long Collection, The Huntington Library, San Marino, California (hereafter cited as HPL); Julio Osima, San Diego County judge to James McCoy, San Diego County sheriff, 3 June 1867, box 11 fol 661, HPL.

82 David F. Newsom to Pablo de la Guerra, 22 February 1856, box 15 fol 710, GFC.

83 George D. Fisher, County Clerk and J. Carrillo, Juez del 2º Distrito (2nd District judge) Certification County Court of Santa Barbara, 21 April 1854, box 6 fol 292, GFC.

official's section. Officials writing and signing in different languages on the same document suggests more than a tolerance for bilingualism. Indeed it was routine for much of the region.

As a testament to the continued political power of *Californios*, Anglo office seekers also employed translators for their election campaigns. If a candidate hoped to carry the southern counties, he needed to reach out to the Spanish-speaking community. Democratic gubernatorial candidate "Juan" B. Weller sought to gain the support of the *Californio* elite by talking about the large land concessions made by *Californios* when the territory joined the United States. He made a statement that those affected should be compensated in some way by the government.[84] Democratic nominee S.B. Axtell had his speech translated into Spanish during his 1867 campaign as a representative of the 1st Congressional District, citing his main regret in addressing them as,

> *[m]i felicidad de encontrarme cara á cara con vosotros es solamente oscurecida por mi inabilidad de poderos hablar en vuestro idioma nativo . . . dulce y rica lengua castellana* / my happiness in meeting you face to face is only dimmed by my inability to be able to speak in your native language . . . the sweet and rich Castilian language.[85]

Axtell went beyond exhibiting a desire to comprehend the language and demonstrated an appreciation and respect for *Californios'* linguistic heritage.

Candidates sought *Californio* votes by making campaign promises and utilizing native Spanish-speaking advocates. Pablo de la Guerra was nominated as an elector for the Stephen Douglas ticket in 1860 and was asked to set up meetings in both Spanish and English in Los Angeles, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, and Santa Clara.[86] In 1868, de la Guerra was approached by the *Club Democrático* to give

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84 Coronel Juan [John] B. Weller, Campaign Speech, 25 July 1857, v. 2, 234, Documentos para la historia de California: Colección del Sr. Don Rafael Pinto, MSS C-B 91, The Bancroft Library, University of California, Berkeley.

85 S.B. Axtell, speech, 8 August 1867, box 28 fol 1103h, GFC (Spanish spelling and diacritics per the original).

86 Eugene Casserly to Pablo de la Guerra, 17 September 1860, box 4 fol 164, GFC.

a talk in Spanish about the current political situation.[87] Most elite, landowning, and educated *Californios* allied with the Democratic Party; *El Clamor Público*'s editor was one of the few *Californios* who chose to align himself with Republicans. Francisco P. Ramírez's editorials supported the party and he personally campaigned for candidates by giving speeches in Spanish. The Republican Party repaid his support at numerous times in his career.[88] Party politicians recognized the importance of having a well-known *Californio* statesman to communicate to the mass of monolingual Spanish speakers. Although a minority in the state, native Spanish speakers remained a significant — possibly election-deciding group — that could not be ignored.

Opportunities for translators in the new state were plentiful. Even during the 1870s' transition to English Only, bilingual individuals were necessary. As Sonoma County increasingly turned to English as its language of choice, it needed to translate its vast Spanish language archives. An 1870 law allowed for the translation of Spanish language documents (and those in any other foreign language) into English. The person employed was expected to be a "competent . . . , resident of the county," and was promised a just and reasonable salary decided by the recorder and the translator with Board of Supervisors' approval.[89] A check was put into place to ensure the accuracy of the translations.[90] Bilingual individuals served an important role in bridging the two monolingual segments of the state together and were rewarded for their skills as mediators for legal, municipal and state government documents.

The linguistic diversity of California's population increased in the years following 1849 with the influx of Europeans, South Americans, and Chinese immigrants, and Spanish became just one of many possible languages heard. This proliferation of different languages increasingly worried nativists who wanted the future of the state, the nation, and even the world to be an English-speaking one. Debates over language of instruction and English's supremacy surfaced repeatedly after 1870.

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87 Tadeo Sánchez to Pablo de la Guerra, 20 September 1868, box 19 fol 877, GFC.

88 Paul Bryan Gray, "Francisco P. Ramírez: A Short Biography," *California History* 84 (Winter 2006–2007); 26, 33.

89 Cal. Code, Ch. CCCCXXII, § 1 (1870).

90 Cal. Code, Ch. CCCCXXII, § 1–3 (1870).

CALIFORNIA MOVES TOWARDS ENGLISH ONLY

When the second California constitutional convention met in Sacramento in September 1878, few state laws existed that demanded English Only practices. State laws dictated that all students learn in the English language in the public schools (except the San Francisco Cosmopolitan Schools) and a pawnbroker or "pledgee" was required to keep records in English. Any individual who did not keep accurate pawn records was guilty of a misdemeanor.[91] When the convention met, Spanish was still afforded a special place in a state that had many immigrants and languages. Spanish was used in some counties for court proceedings and Spanish language publications of current laws continued. The new Constitution completely dismantled these language privileges. Nativist sentiments brought forth by many at the convention (the Workingmen's Party had a significant representation at the proceedings) made certain the loss of the bilingual aspects of the state's government.[92]

As the initial proposals stated at the convention, delegates made English language knowledge and usage the expectation and preference for the schools, electors, and all participants of government. Numerous amendments sought to revise the Constitution by disenfranchising non-English speakers and taking out any stipulation that permitted languages other than English to receive favorable government or educational support.[93] The move to require all voters to read and write in English did not make it into the Constitution. The delegates easily passed the amendment providing that "all laws of the State of California, and all official writing, and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and published in no other than the English language."[94] By the end

91 Cal. Penal Code, Ch. XI, § 339 (1876).

92 For more about the politics behind the constitutional convention, see Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–79* (New York: Da Capo Press, 1969).

93 California, *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, vol. 1 (Sacramento: State Office, J. D. Young, sup't, 1880), 89, 100, 110, 117, 143, 220.

94 Cal. Const., art. IV, § 24.

of the convention, native Spanish speakers lost all their language ties to the state government.

Unlike during the first constitutional convention, the proceedings had no native Spanish-speaking delegates. At one point, Joseph Brown attempted to seat Major José R. Pico "as a representative native Californian."[95] He made his case amidst the jeers of the Workingmen's supporters who applauded the announcement that, "Mr. Pico was repudiated by the delegation."[96] Aside from Major Pico's personal achievements, Brown asserted that at least one member of the convention should be from a *Californio* family,

> I believe he is the only man of that race, that once possessed this whole country, that is on hand here, and I believe none of the representative Californians are here in this House; and I would state that the Spanish and Mexican population amounts to twenty-three thousand.[97]

Despite Brown's intervention, Pico was not seated as a delegate, and only friendly individuals from the southern counties who knew what life was like in that part of the state supported *Californios* in the proceedings.

Horace Rolfe, Charles Beerstecher, James Ayers, and Brown all spoke in support of continuing Spanish language proceedings and translations in local venues during the convention. Rolfe, a representative of San Diego and San Bernardino Counties, spoke specifically about how monolingual judges continued to preside in some courts using the Spanish language. Prohibiting Spanish would hinder the ability of Spanish speakers to seek justice. Eli Blackmer of San Diego agreed and praised non-English-speaking judges he knew as "among the best Justices of the Peace we have."[98] Ayers further echoed Rolfe by saying,

> there are townships in Southern California which are entirely Spanish, or Spanish-American, and in those townships the Courts of Justice of the Peace are carried on sometimes exclusively in the

95 California, *Debates and Proceedings*, 1: 50.

96 Ibid.

97 Ibid.

98 California, *Debates and Proceedings of the Constitutional Convention of the State of California*, vol. 2 (Sacramento: State office, J. D. Young, sup't, 1880), 801.

> Spanish language, and it would be wrong, it seems to me, for this Convention to prevent these people from transacting their local business in their own language. It does no harm to Americans, and I think they should be permitted to do so.[99]

Ayers's support was sincere, but demonstrated the marginalized status of Spanish speakers. Even a supporter of Spanish language provisions did not see any real detriment for the larger group of "Americans" to have *Californios* conduct their "local business" in Spanish. The language was relegated to a small, isolated group that was not particularly American or equal to Euro-Americans, but deserved respect since they occupied the land first.

Ayers and Beerstecher discussed the promise in the Treaty of Guadalupe Hidalgo that *Californios* would receive the same rights and responsibilities as all citizens. They believed the amendment would renege on the assurances given to *Californios* when the territory became part of the United States. Beerstecher even went so far as to talk about eastern states that also published laws in other languages such as Michigan, Wisconsin, and Pennsylvania. He thought the policy of "Western States" to publish the laws only in English should be left to the Legislature, that "we ought not to put any Know-Nothing clause into the Constitution."[100] Despite their support, other delegates saw the requirement to translate and publish laws in Spanish as "entirely unnecessary."[101] When W.J. Tinnin of the 3rd Congressional District claimed that there was no reason to support "tons and tons of documents published in Spanish for the benefit of foreigners," Rolfe responded by asking if Tinnin called the native population foreign. Tinnin's reply was that they had ample time to learn the language.[102] In the end, delegates hardly debated the amendment to move the government and courts to English Only. On December 21, the constitutional convention rejected the state's commitment to Spanish and the bilingual court system that had prevailed for the previous thirty years.

Rolfe attempted to strike down the portion of the provision that required local proceedings in English. He perhaps recognized that he could not convince the delegates of any broader privilege than that. Rolfe hoped

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99 Ibid.

100 Ibid.

101 Ibid.

102 California, *Debates and Proceedings*, 2: 801.

this exception would permit business to be carried out as usual in regions where everything was still conducted in Spanish. While he conceded that most people in the southern parts of the state did speak some English, for many it was imperfect and would be "inconvenient" to conduct proceedings without full fluency. Rolfe argued that a judge "will make mistakes in language which will be injurious to litigants before his Court."[103] He ended his appeal by reminding the delegates that the Americans, "or English speaking people," were the newcomers to the state who took the land from those who were here "when the Spanish was universally the mother tongue of the people. They are a conquered people."[104] Rolfe believed that by taking their land and making them American citizens, the state had an obligation to take them as they were and "give them an equal show."[105] Although his argument was meticulously stated, it was not supported by any aside from Ayers and Blackmer in discussion. A.P. Overton believed that by catering to Spanish speakers the state enabled them to continue to neglect English language learning and that California had "honorably" lived up to the contract of the original treaty.[106] The delegation resoundingly rejected the amendment 27 to 55.[107]

Rolfe did not introduce another amendment dealing with language. Ayers, a representative of the 4th Congressional District that encompassed the San Joaquin Valley, Southern California, and the mid portion of the coast (Santa Clara, Santa Cruz, and Monterey), did twice attempt to get the convention to reconsider their decision.[108] Ayers argued,

> The object of this amendment is to permit Justices' Courts, in some of the townships of the southern portion of this State, where the population is almost entirely composed of native Californians, to preserve their proceedings in the Spanish language . . . . It can do no possible harm.[109]

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103 Ibid., 2: 802.

104 Ibid.

105 Ibid.

106 Ibid.

107 Ibid., 2: 803.

108 California, *Debates and Proceedings*, 2: 829; California, *Debates and Proceedings of the Constitutional Convention of the State of California,* vol. 3 (Sacramento: State Office, J. D. Young, sup't, 1880), 1269.

109 California, *Debates and Proceedings*, 3: 1269.

Both attempts failed and no other delegate tried to change the amendment.

Besides removing their language rights, delegates ridiculed Spanish speakers during the proceedings. In a particularly lively exchange, 4th Congressional District representative, Byron Waters of San Bernardino, presented a petition from eighty citizens. The secretary "read the petition down to the names, and then hesitated, as they were mostly Spanish names, difficult to pronounce."[110] The response from the delegates was animated, "Cries of 'Read!' 'Read!'" were reported.[111] Waters interrupted the proceedings by exclaiming that the petition was no laughing matter. Laughter ensued in response to his comment. He continued saying, "I know every man whose name is appended to that petition. They are electors of that county, and have been for the last twenty years or more."[112] He persisted by saying that they had lived there since 1842. The names needed to be read for the record and Waters offered to read the names. Ayers interjected, "They are just as good names as if they were all 'Smith.'"[113] In the end, the delegates made an exception and dispensed with reading the names and the convention continued.[114] The "difficult to pronounce" Spanish language names of petitioning citizens caused delegates to burst out in laughter. This nativist reaction was bigoted, but not necessarily racial since they had no sense of what these signers looked like. The petition itself was in English, and the Spanish-surnamed petitioners might have been afforded respect had they arrived and spoken in the English language at the proceedings. It was instead the simple fact of their names that was ridiculed and relegated them to an inferior position. Language in this case served as the primary discriminatory indicator, rather than an individual's physical characteristics.

California became the first English Only state during the period immediately following the constitutional convention. While the amendment to deny the teaching of other languages in the schools of California did not end up in the final Constitution, three separate and lengthy debates discussing

110 Ibid., 3: 1282.
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid.

the merits of language instruction occurred.[115] Some delegates believed that the schools overburdened young students with material and preferred assurances that all students receive an adequate English education by omitting additional language learning. Other delegates believed that hindering the upper limits of a student's curriculum was a huge step backward for the state and an ill-informed and anti-intellectual one. These delegates managed to garner enough support for their views, and the constitutional requirement for English knowledge failed. Despite this victory for language learning, the state that emerged after the constitutional convention of 1879 was not supportive of language differences. An 1888 state law required police officers to be able to speak, read, and write English among other requirements.[116] Another law required all election officers to be able to "read, write, and speak the English language understandably."[117] Written proceedings of the courts would be in English and therefore necessitated that all jurors "[p]ossessed sufficient knowledge of the English language."[118] The state legislature embraced the English Only preferences of the constitutional convention and went further in expanding the rights of citizens who spoke English while relegating non-English speakers to being second-class citizens with few civic responsibilities or privileges.

The English Only trend continued into the 1890s when those illiterate in the English language lost their right to vote. An 1891 provision allowed voters to determine whether they wanted to require that every voter "be able to write his name and read any section of the Constitution of the United States in the English language."[119] In 1894, an amendment passed that put the English language requirement for electors into the state constitution.[120] In the fifteen years following the constitutional convention, English Only sentiments solidified. Only those individuals literate

115 California, *Debates and Proceedings*, 2: 1101–06; California, *Debates and Proceedings*, 3: 1397–98, 1409–13.

116 The law regarding policeman qualifications was very detailed. It included requirements for height (five feet seven inches or taller) and age (under fifty-five years of age). Cal. City and County Code, 15,046 § 124 (1880).

117 Cal. City and County Code, 15,046 § 97 (1880).

118 Cal. Civ. Proc. Code, §§ 185, 198(2) (1880).

119 Cal. Code, Ch. CXIII, § 1 (1891).

120 Cal. Const. art. II, § 1 [adopted 1894, superseded 1970].

and conversant in English would receive full rights regardless of the non-English speaker's citizenship or nativity status.

CONCLUSION

California was never bilingual and was not committed to retaining Spanish. The official use of the language in government was largely out of necessity. Once the Spanish-speaking population got too small and had no real representation, the language concession made to the conquered people of California was completely rejected. This denial of language rights occurred even though there remained regions of the state that continued to operate completely in Spanish into the 1880s. The pressure to rid the state of Spanish language provisions came from political changes in the larger population, state elected officials, and delegates of the constitutional convention.

California no longer wanted to translate its politics or business, but not everyone supported a monolingual course of action. At the constitutional convention, John Wickes called to give some official recognition to Spanish because it "is a noble language, spoken by millions of people upon the American continent."[121] His suggestion went unheeded. Ayers made a remark that predicted the argument for Spanish used by many in the decades that followed,

> In the future it will be a popular question in this State to control the commerce of the vast populations which are to the south of us, and there is no manner in which we can more successfully obtain that control than by allowing our children to become more conversant with the language that prevails among the people.[122]

Ayers recognized the crucial role that Spanish played in hemispheric relations. Almost immediately following Ayers's encouragement of Spanish learning, Thomas Laine stated that there could be no education finer than the one in English, which was "of all the languages known now to this earth, the conquering language."[123] These were two different visions for America's future. These sentiments were precursors to stances held in the

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121 California, *Debates and Proceedings*, 2: 802.

122 California, *Debates and Proceedings,* 1: 1398.

123 Ibid., 1: 1398.

twentieth century supporting Americanization and Pan-Americanism. In California, the statewide support for the Spanish language would not return until the 1960s and 1970s. The second constitutional convention had set the state government's policy on language for the next eighty years.

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THE LADY IN PURPLE:

The Life and Legal Legacy of Gladys Towles Root

RICHARD F. McFARLANE*

Gladys Towles Root was a Los Angeles lawyer famous for flamboyant clothing, large hats and audacious trial tactics. Root used her legal skills to defend accused sex criminals, murderers, kidnappers, and other unsavory characters. She used the doctrine of legal insanity and aggressive cross-examination to get her clients acquittals or reduced sentences and successfully challenged California's miscegenation law as it applied to Filipinos. Root was as well known to the newspaper's society columnist as she was to the newspaper's crime reporters.

THE HISTORICAL PROBLEM

In their essay, "Women, Legal History, and the American West," John R. Wunder and Paula Petrick observe that

> little scholarship has been published concerning western women and criminal law, and, except for divorce, little has been accomplished by way of women and civil law. Likewise, western women's roles in the

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A COURTROOM APPEARANCE BY GLADYS TOWLES ROOT, *LOS ANGELES TIMES*, AUGUST 31, 1948, P. 15

Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.

> history of property and probate need more attention. No regional historical study of western law yet exists; similarly no history of women, the law, and the American West has been written.[1]

Although there have been some contributions to the literature since Wunder and Petrick wrote in 1994, women in the law remains an underresearched area. The present article is a biography, but one intended to be mindful of the maxim that "a biography to be really worthwhile must relate to something more than the life and activities of an individual."[2] Most lawyers' biographies ignore the contributions of attorneys to jurisprudence. For example, *The Invisible Bar* by Karen Berger Morello[3] is a valuable primer on women in the law, but largely ignores the contributions they made other than by just being there. It begins with Margaret Brent, who practiced law in Maryland in 1638, and concludes with the appointment of Sandra Day O'Connor to the U.S. Supreme Court in 1981. Virginia C. Drachman introduces her book, *Sisters in the Law*, stating, "The history of women lawyers is a powerful story of discrimination, integration, and women's search for equality and autonomy in American society."[4] *Sisters in the Law* begins in the 1860s and ends in 1930, the same year Root was admitted to the bar. It is well written, well researched and well documented, but it also ignores the contributions women made to American jurisprudence other than by simply being members of the bar. A notable exception is *America's First Woman Lawyer: The Biography of Myra Bradwell* by Jane M. Friedman.[5] This book begins with Bradwell's quest for membership in the Illinois bar, and goes on to discuss her friendship with Mary Todd Lincoln, her founding and editing the legal newspaper, *Chicago Legal News*, and her contributions to the woman suffrage movement. The book is well written and copiously endnoted to primary sources. Although Bradwell

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1 John R. Wunder and Paula Petrik, "Women, Legal History and the American West," *Western Legal History* 7 (Summer/Fall 1994): 197.

2 Owen C. Coy, "Introduction" in Caroline Walker, *Boyle Workman's The City That Grew* (Los Angeles: Southland Publishing Co., 1935), vii.

3 Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* (New York: Random House, 1986).

4 Virginia C. Drachman, *Sisters in the Law* (Cambridge: Harvard University Press, 1998), 1.

5 Jane M. Friedman, *America's First Woman Lawyer: The Biography of Myra Bradwell* (Buffalo, N.Y.: Prometheus Books, 1993).

may or may not be America's "first" woman lawyer, *America's First Woman Lawyer* is the sort of lawyer's biography — whether of a male or a female attorney — that is generally lacking in the literature because it actually demonstrates that Bradwell was doing something as a journalist and editor, and as a suffragette, if not as an attorney or jurist. Some lawyer biographies are anecdotal, for example, *A Song of Faith and Hope: The Life of Frankie Muse Freeman* by Frankie Muse Freeman with Candace O'Connor,[6] *Lawyer in Petticoats* by Tiera Farrow,[7] and *Call Me Counselor* by Sara Halbert with Florence Stevenson.[8] These books have the advantage of being primary sources in their own right, but have little value in discovering the thinking of the lawyers, and how they came to form their legal arguments.

There are two previous biographies of Root: *Defender of the Damned: Gladys Towles Root* by Cy Rice,[9] and *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer*, also by Cy Rice.[10] *Get Me Gladys* is essentially a second edition of *Defender of the Damned*. Much of *Get Me Gladys* is word-for-word the same as *Defender of the Damned*. However, *Get Me Gladys* deletes the account of Jay Geiger's final illness and death and adds a chapter on Root's defense of the accused kidnappers of Frank Sinatra, Jr. Both books have the advantage of having been written with Root's full cooperation and quote her frequently. Indeed, both books amount to the authorized biography of Root; they could be called second-hand primary sources — primary in the sense of not being based on the work of any previous author, second-hand in the sense of being written by someone other than the subject. Sadly, neither book is documented with footnotes or endnotes of any kind. Some of the facts related by Rice, such as Root's work in the *Roldan* case on Filipino-Caucasian miscegenation, or Root's defense of Allan Adron or Frank Sinatra, Jr.'s kidnappers, are verifiable from contemporary newspaper accounts. However, some of the

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6 Frankie Muse Freeman with Candace O'Connor, *A Song of Faith and Hope: The Life of Frankie Muse Freeman* (St. Louis: Missouri Historical Society Press, 2003).

7 Tiera Farrow, *Lawyer In Petticoats* (New York: Vantage Press, Inc., 1953).

8 Sara Halbert with Florence Stevenson, *Call Me Counselor* (Philadelphia: J.B. Lippincott Co., 1977).

9 Cy Rice, *Defender of the Damned: Gladys Towles Root*, (New York: The Citadel Press, 1964).

10 Cy Rice, *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer* (Los Angeles: Holloway House Publishing Co., 1966).

other anecdotes such as the name of Root's first client, the Case of the Austere Pasadena Judge, and Root's only appearance before the U.S. Supreme Court cannot be verified independently of Rice's books. Both books contain descriptions of Root's costumes and coiffure, and lack critical analysis of her legal career and influence. Rice's books are relied upon by every other biographer of Root.[11]

The present study differs from the previous two in that it will expand on and correct the facts of Root's biography, and provide an appraisal of her legal career through an analysis of certain types of cases she handled. It will make an original contribution to the literature by focusing on one lawyer's contributions to the evolution of specific, selected legal doctrines.

EARLY LIFE

Gladys Charlotte Towles was born in Los Angeles, California, on September 9, 1905. She was the second daughter of Charles Henry Towles and Clara Jane Deter Towles. Charles and Clara met in Topeka, Kansas, where Clara was secretary to the speaker of the Kansas House.[12] In 1892, they moved to Los Angeles, a city of about fifty thousand people.[13] During the 1880s and 1890s, Los Angeles was undergoing a boom in real estate and oil. Competition between the Southern Pacific Railroad and the Atchison, Topeka & Santa Fe Railroad had driven train fares from Kansas City to as little as one dollar.[14] Tens of thousands of mid-westerners came to southern California to seek their fortunes and enjoy the weather. Charles and Clara Towles were among them. Charles was the supervising agent for the Singer Sewing Machine Company. He was also a "gentleman farmer" and had invested well enough in real estate that he retired from business at the age

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[11] See, e.g., Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996), 157–67.

[12] Cy Rice, *Defender of the Damned: Gladys Towles Root* (New York: Citadel Press, 1964), 87; Cy Rice, *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer* (Los Angeles: Holloway House Pub. Co., 1966), 37.

[13] John D. Weaver, *Los Angeles: The Enormous Village, 1781–1981* (Santa Barbara, Calif.: Capra Press, 1980), 47.

[14] Remi Nadeau, *Los Angeles: From Mission to Modern City* (New York: Longmans, Green & Co., 1960), 73–75.

of fifty-five.[15] Charles and Clara are mentioned twice in the *Los Angeles Times*: once in 1903 in connection with the purchase of three lots in the Alvarado Heights area of Los Angeles, and later that year for the purchase of a lot and seven-room residence on Tenth Street between Grand View and Park View. The home cost $4,000.[16]

Gladys Towles attended Hoover Elementary School and Los Angeles High School.[17] She first appeared in the *Los Angeles Times* society pages at age ten doing a "butterfly dance" at the birthday party of a friend. Gladys entered the University of Southern California.[18] During her freshman year at college, Charles Towles said, "Gladys, you ought to be on the stage — not the theater, but life's real stage: the courtroom."[19] Charles Towles had wanted his daughter to become a lawyer.[20] He had wanted to become a lawyer himself, but "was forced to drop out of school for financial reasons."[21] Clara Towles wanted Gladys to become an actress.[22] In a sense, she became both.

Root took a Bachelor of Laws degree (LL.B.) from the University of Southern California.[23] What would become the law school at USC was organized on November 17, 1896, by "a group of law students meeting in the police court room of Justice Morrison in the old City Hall."[24] The group called itself "The Law Students' Association of Los Angeles."[25] Six months later, the group was reorganized as "The Los Angeles Law School."[26] In 1901, the Los Angeles Law School was reorganized as the "Los Angeles

15 Rice, *Defender of the Damned,* 87; Rice, *Get Me Gladys*, 37.

16 "Real Estate Transactions," *Los Angeles Times*, January 31, 1903, 19; "Among Real Estate Owners and Dealers," *Los Angeles Times*, August 31, 1903, B1.

17 Rice, *Defender of the Damned*, 87.

18 Ibid., 87.

19 Ibid., 92.

20 Ibid., 44.

21 Ibid., 87.

22 Ibid., 44.

23 Denise Noe, "The Life of Gladys Towles Root: A Feisty, Much Loved Child." http://www.trutv.com/library/crime/notorious_murders/classics/root/2.html. Accessed: July 15, 2011.

24 Allison Gaw, *A Sketch of the Development of Graduate Work at the University of Southern California, 1910–1935* (Los Angeles: University of Southern California Press, 1935), 5.

25 Ibid.

26 Ibid.

College of Law," and in 1904, it was reorganized a final time as the "Southern California College of Law" and incorporated directly into the University.[27] Under the direction of Dean Frank M. Porter, the law school offered a three-year curriculum leading to the double degree of A.B. and LL.B.[28] Root attended USC as an undergraduate and went to the law school without first obtaining a bachelor of arts degree.[29] Denise Noe writes, "In the 1920s and 1930s, in many colleges of law, people could transfer to the law school after three years of college work and that's what [Gladys] did."[30] In 1928, the law students at USC organized the Southern California Bar Association, including all of the law students";[31] presumably, Root was among them. During her years at USC, Root was an active member of the Phi Delta Delta law sorority.[32] Root sometimes performed "melody selections and character interpretations" at benefit concerts and social events supported by Phi Delta Delta.[33] She satisfied her love of drama and music by joining Phi Beta, national music and dramatic arts sorority.[34] She was a regular fixture of the society pages as the hostess of receptions, parties, benefit teas, and other social events, usually in connection with her membership in Phi Delta Delta, Phi Beta, or both.[35]

Rice suggests that Root joined the Junior Republican Study Club some time after she began practicing law as a way to meet potential clients.[36] However, the evidence shows that Root became active in Republican politics as early as 1928 when she, as a "representative of the Southern California Republican headquarters," announced the formation of a Hoover-for-President

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27 Ibid.

28 Ibid.

29 Noe, *op. cit*.

30 Ibid.

31 W. Ballentine Henley & Arthur E. Neeley, *Cardinal and Gold* (Los Angeles: The General Alumni Association of the University of Southern California, 1939), 112.

32 Juana Neal Levy, "Society," *Los Angeles Times*, March 14, 1926, C1.

33 Juana Neal Levy, "Society," *Los Angeles Times*, April 15, 1926, A6; Juana Neal Levy, "Society," *Los Angeles Times*, June 24, 1926.

34 Juana Neal Levy, "Society," *Los Angeles Times*, March 1, 1926, A6; Juana Neal Levy, "Society," *Los Angeles Times*, Nov. 28, 1926, C1.

35 See e.g. Myra Nye, "Society," *Los Angeles Times*, September 12, 1926, C1; Juana Neal Levy, "Society," *Los Angeles Times*, November 28, 1926, C1; Juana Neal Levy, "Society," *Los Angeles Times*, June 27, 1920, A6.

36 Rice, *Defender of the Damned*, 65–66; Rice, *Get Me Gladys*, 55.

club at USC.[37] Root was active in the Junior Republican Study Club and became its president.[38] Rice describes an incident in which Root, as president of the Junior Republican Club, had the idea to sponsor a reception for the President and Mrs. Hoover. According to Rice,

> [Root] was given carte blanche to manage the entire affair. The bottom of the treasury was scraped, and Mrs. Root was handed the money, which she took to a printer.
>
> The invitations read ". . . in honor of the President of the United States of America, Herbert Hoover."
>
> Proudly she showed one of them to her mother. The response was a stifled scream as the alarmed parent blurted, "Gladys! You're going to jail!"
>
> Jails held no terror for Mrs. Root. She asked, "Why, Mother."
>
> "Because you know he isn't coming," was the simple answer.
>
> Mrs. Root counteracted with a defiant, "Well, I didn't say definitely whether he was or not."
>
> Mrs. Towles collapsed into a chair. She was not a believer in smelling salts, but this was one time when she could have benefitted by a few sniffs.
>
> "You *knew* that he isn't coming," she stated categorically.
>
> "He *was* invited," Mrs. Root reminded her mother.[39]

Newspaper accounts verify some of the basic facts of this incident. The reception was scheduled for October 20, 1929, at the Hotel Knickerbocker in Hollywood.[40] Over one thousand tickets were sold to the event.[41] Lieutenant Governor H.L. Carnahan was scheduled to speak; honored guests included Mayor John C. Porter of Los Angeles and Mayor James Rolph of San Francisco.[42] However, President and Mrs. Hoover never committed to attend the reception in their honor. According to Rice, Root was expecting

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37 "Collegians Form Clubs for Hoover," *Los Angeles Times*, Sept. 29, 1928, A9.

38 Rice, *Defender of the Damned,* 66; Rice, *Get Me Gladys*, 56.

39 Rice, *Defender of the Damned*, 66–67; Root, *Get Me Gladys*, 56.

40 Rice, *Defender of the Damned*, 68; Rice, *Get Me Gladys*, 57; "Tribute to be Given by Club to President," *Los Angeles Times*, October 6, 1929, B10.

41 "Thousand to Attend Reception by Club," *Los Angeles Times*, October 16, 1929, A8; Rice, *Defender of the Damned*, 67; Rice, *Get Me Gladys*, 57.

42 "Club to Honor Hoovers," *Los Angeles Times*, October 20, 1929, 20.

to be embarrassed — if not go to jail — but at the last minute a telegram arrived from Washington, D.C., allegedly from Herbert Hoover thanking the Club for the honor and expressing regrets for not being able to attend.[43] The telegram was actually sent by a friend of her mother's.[44] The newspaper does not verify this last detail. Indeed, the *Los Angeles Times* does not report on the event at all. After this near fiasco, Root left politics to concentrate on her legal practice.

Gladys Towles married Frank A. Root in October 1929.[45] Frank Root was a deputy sheriff whose contacts at the county jail helped bring criminal defendants to Gladys's law practice.[46] A son, Robert "Bobby" Towles Root, was born in 1932.[47] Gladys and Frank divorced in 1943.[48] Frank Root died on March 15, 1970.[49]

Gladys Root married John C. "Jay" Geiger in 1943.[50] After her second marriage, Gladys kept the surname "Root" professionally because she had already established herself by that time.[51] However, she is sometimes referred to as "Mrs. Geiger" in the society pages[52] and, in at least one case, as "Gladys Towles Root Geiger."[53] Jay Geiger was the "West Coast representative of a national fashion magazine" and would later become his wife's

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43 Rice, *Defender of the Damned*, 69; Rice, *Get Me Gladys*, 58.

44 Rice, *Defender of the Damned*, 70; Rice, *Get Me Gladys*, 59.

45 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 7; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at 7; Cy Rice in *Defender of the Damned*, at page 94, gives the date of Gladys and Frank's marriage as 1930.

46 Eric Malnic & Karen Wada, "Gladys Towles Root Dies; Colorful Lawyer Was 77," *Los Angeles Times*, December 22, 1982, D4.

47 Rice, *Defender of the Damned*, 94.

48 *Root v. United States* 8 (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at; Cy Rice in *Defender of the Damned*, at page 94, gives the date of Gladys and Frank's divorce as 1941.

49 Ibid., 8.

50 Rice, *Defender of the Damned*, 94.

51 Ibid.

52 "Junior Associate Meeting Held," *Los Angeles Times*, January 19, 1946, A8; "Couple Entertain," *Los Angeles Times*, February 3, 1946, C2; Brandy Brent, "Carrousel," *Los Angeles Times*, February 9, 1950, B8; Walter Clarke, "Vacationers' Parties Include Plane Ones, Too," *Los Angeles Times*, October 22, 1950, C10.

53 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091.

business manager.[54] His sartorial taste matched his wife's.[55] He was known to wear pink satin tuxedos, coral-colored accordion-pleated dinner jackets with matching shirts, and sequin shirts.[56] He always wore a hat and carried an English walking stick.[57] He loved large pieces of jewelry.[58] Jay and Gladys entertained lavishly at their Hancock Park home and were often seen at Los Angeles's most trendy restaurants.[59] They were members of the Del Mar Club and the L.A. Athletic Club.[60] Their marriage was "supremely happy."[61] Jay and Gladys had one daughter, Christina Geiger, born in 1944.[62] Jay Geiger died October 12, 1958, after a long illness.[63]

THE LADY IN PURPLE

Gladys Towles was admitted to practice law in California on September 18, 1929, in a special proceeding of the California Supreme Court.[64] Of the 187 lawyers admitted to practice that day, twelve were women. She was issued bar number 11321.[65] She opened her first law office in 1930 at Suite 620, The Bartlett Building, 215 West Seventh Street, Los Angeles.[66] Charles Towles

54 "John C. Geiger, Husband of Attorney, Dies," *Los Angeles Times*, October 13, 1958, B9; Rice, *Defender of the Damned*, 94–95.

55 Rice, *Defender of the Damned*, 171.

56 Ibid., 95.

57 Ibid., 171.

58 Ibid., 172.

59 "Junior Associate Meeting Held," *Los Angeles Times*, January 19, 1946, A8; "Couple Entertain," *Los Angeles Times*, February 3, 1946, C2; "Jubilees," *Los Angeles Times*, February 16, 1947, C9; Lucille Leimert, "Confidentially," *Los Angeles Times*, February 24, 1946, C6; Brandy Brent, "Carrousel," *Los Angeles Times*, February 9, 1950, B8; Walter Clarke, "Vacationers' Parties Include Plane Ones, Too," *Los Angeles Times*, October 22, 1950, C10; Rice, *Defender of the Damned*, 95–96, 169, 172–76.

60 William Hord Richardson, ed., *Los Angeles Blue Book, 1954* (Beverly Hills, Calif.: Society Register of California, 1953), 89.

61 Rice, *Defender of the Damned*, 171.

62 Ibid., 94.

63 "John C. Geiger, Husband of Attorney, Dies," *Los Angeles Times*, October 13, 1958, B9; Rice, *Defender of the Damned*, 94, 178–94; Rice, *Get Me Gladys*, 89.

64 "Many New Attorneys Admitted," *Los Angeles Times*, September 19, 1929, A1.

65 State Bar of California. Attorney Search. http://www.calbar.org. Accessed: July 15, 2011.

66 Petition for Writ of Mandamus, *Roldan v. Los Angeles County*, No. 326484 (Superior Court, Los Angeles County, filed August 18, 1931), 2 (Root's office address in-

gave his daughter enough money to pay the office rent for six months.[67] There is no record of what Gladys did during the months between her admission to the bar and opening her own office. It may be that she tried to get a job but could not.

Karen Berger Morello, author of *The Invisible Bar*, has documented how difficult it was for women to be hired by large law firms. Morello wrote, "The Depression years were the most difficult of times [for women lawyers] to find employment."[68] The Second World War brought a few more women into the large law firms and corporate legal departments, but they had little impact on overall hiring practices.[69] The Los Angeles Bar Association denied membership to women lawyers "for many years" on the grounds that "even though they had diplomas and certificates, they could never be 'full-fledged lawyers.'"[70] A separate Women Lawyers' Club was founded in 1918 with Clara Shortridge Foltz among the charter members.[71] O'Melveny & Myers, one of Los Angeles's oldest and most prestigious law firms, did not hire its first women attorneys until 1943.[72] As late as 1952, Sandra Day O'Connor, third in her class at Stanford University Law School and future U.S. Supreme Court justice, was only offered one job by a large California firm, and that was as a stenographer.[73] Shut out of major law firms, almost one third of women lawyers opted for solo practice,[74] and most of these women had general practices or specialized in probate or family law

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cluded in the left margin of her pleading paper); Rice, *Defender of the Damned*, 45; Rice, *Get Me Gladys*, 35.

67 Rice, *Defender of the Damned*, 45; Rice, *Get Me Gladys*, 35.

68 Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present* (New York: Random House, 1986), 203.

69 Ibid.

70 W.W. Robinson, *Lawyers of Los Angeles: A History of the Los Angeles Bar Association and of the Bar of Los Angeles County* (Los Angeles: Los Angeles Bar Association, 1959), 168.

71 Ibid., 294.

72 William W. Clary, *History of the Law Firm of O'Melveny & Myers, 1885–1965* (Los Angeles: n.p., 1966), 1: 386, 2: 848–49.

73 Morello, *op. cit.*, 194; Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996), 208.

74 Virginia C. Drachman, *Sisters in the Law* (Cambridge, Mass.: Harvard University Press, 1998), 182, 184, 241, 259.

matters.[75] Only three percent of women lawyers practiced criminal law.[76] Root was among this three percent; however, that may have been the result of accident and circumstance rather than design.

Root's first client was Louis Osuna, "a small Filipino" who wanted to divorce his wife on the grounds of infidelity.[77] The statute operable in the 1930s was California Civil Code section 92 which stated, "Divorces may be granted for any of the following causes: One. Adultery. Two. Extreme cruelty. Three. Wilful desertion. Four. Wilful neglect. Five. Habitual intemperance. Six. Conviction of a felony. Seven. Incurable insanity."[78] Divorce could not be granted by the default of the defendant,[79] or by confession of adultery,[80] or if there was evidence of connivance,[81] collusion,[82] or condonation.[83] One panel of the Court of Appeal held that marriage was "not subject to dissolution upon the whim or caprice of one of the contracting parties or even upon their mutual consent [but] only for causes sanctioned by law."[84] Root began working on the divorce immediately; however, her client, Mr. Osuna, was an impatient man. Two days later, Root received a telegram, "Am in Los Angeles County Jail. Please come see me. [Signed] Louis Osuna."[85]

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75 Ibid., 182.

76 Ibid., 259.

77 Rice, *Defender of the Damned,* 48–53; Rice, *Get Me Gladys*, 39–43.

78 *California Civil Code Annotated* § 92 (Deerings 1941).

79 *California Civil Code Annotated* § 130 (Deerings 1941).

80 *California Code of Civil Procedure Annotated* § 2079 (Deerings 1941).

81 *California Civil Code Annotated* § 111(1) (Deerings 1941). "Connivance" was defined as "the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce." *California Civil Code Annotated* § 112 (Deerings 1941).

82 *California Civil Code Annotated* § 111(2) (Deerings 1941). "Collusion" was defined as "an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court to have committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." *California Civil Code Annotated* § 114 (Deerings 1941).

83 *California Civil Code Annotated* § 111(3) (Deerings 1941). "Condonation" was defined as "the conditional forgiveness of a matrimonial offense constituting a cause of divorce." *California Civil Code Annotated* § 115 (Deerings 1941).

84 *In Re* Lazar (1940), 37 Cal.App.2d 327.

85 Rice, *Defender of the Damned*, 49; Rice, *Get Me Gladys*, 40.

Gladys Towles Root in court, *Los Angeles Times*, July 20, 1955.

Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.

Root immediately went to visit her client. The only surviving account of the conversation is recorded by Rice. According to Rice, the conversation went like this:

> "Tell me what happened."
>
> "I come home. I see man getting in bed. He . . ."
>
> "Your bed?" she interrupted.
>
> "My own bed. With my own wife."
>
> "Go on," she urged.
>
> "They didn't hear me come in. So I sneak out again. I go buy gun and come back. He sees me, grabs his trousers, jumps out back window. I shoot at him." He paused for breath.
>
> Mrs. Root asked, "Did you hit him."
>
> "No, I miss."
>
> "And?"
>
> "Then I shoot her."
>
> Whistling softly under her breath, Mrs. Root asked, "What is the extent of her wounds?"
>
> "To big extent."
>
> "How big?"
>
> "To extent she now dead," Osuna related.
>
> From simple divorce the case had suddenly changed to murder.
>
> Osuna stated flatly, "I do it because divorce take you too long."
>
> "Too long?" Mrs. Root repeated, bewildered. "You only came to see me yesterday."
>
> "I know, I know," Osuna agreed. "But you say. 'The wheels of legal machinery turn slowly.' So I decided to speed them up."
>
> Mrs. Root said, "You went about it the hard way. It's murder now. Murder, you know, can cost you your life."
>
> "Not if you good lady lawyer," Osuna grinned. "You ever lose a case?"
>
> "No," she answered truthfully.
>
> "Good," Osuna said happily. "I tell all prisoners in jail about you."[86]

[86] Rice, *Defender of the Damned*, 51–52; Rice, *Get Me Gladys*, 41–42.

Osuna was good to his word. He told his fellow prisoners about his new lawyer and fifteen of them retained Root within the month.[87] Root was also good to her word. At trial, Louis Osuna was convicted of the lesser charge of manslaughter and sentenced to ten months' incarceration.[88] Rice is the only source for this account. I was unable to find any record of anyone named Louis Osuna being charged in Los Angeles for any crime during the 1930s. I believe the name "Louis Osuna" is a pseudonym used by Rice and possibly by Root to protect her client's confidentiality.

Jack the Bard of Main Street, a person described by Rice as a derelict who lived near Root's office building, once exulted:

> Root-de-toot, root-de-toot,
> Here's to Gladys Towles Root.
> Her dresses are purple, hats wide.
> She'll get you one instead of five.
>
> Root-de-toot, root-de-toot,
> Here's to Gladys Towles Root.
> I'm here to do repentance.
> She got me a suspended sentence.[89]

This poem appears in both of Rice's books as two separate quatrains. It accurately describes a criminal defense lawyer's standard for success: getting a client a reduced or suspended sentence is almost as good as an acquittal. Although many of Root's clients were convicted, they were convicted of lesser charges, or received reduced sentences, such as the accused kidnappers of Frank Sinatra, Jr. Rice claims that Root never lost a client to the gas chamber, and I have not been able to refute this contention, although it was a very close call in the case of *People v. Verodi*.[90]

Eventually, Root moved her office to 212 South Hill Street, Los Angeles, California.[91] Cy Rice describes the office thus:

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87 Rice, *Defender of the Damned*, 52–53; Rice, *Get Me Gladys*, 42–43.

88 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 53.

89 Rice, *Defender of the Damned,* 115, 232; Rice, *Get Me Gladys*, 107, 199.

90 *People v Verodi*, No. CR179108 (Superior Court, Los Angeles County, filed March 9, 1956); *People v. Verodi* (1957), 150 Cal.App.2d 137.

91 Rice, *Defender of the Damned*, 115.

> The façade is black stone trimmed in gold, but elsewhere on the outside and inside of the building her notorious passion for purple asserts itself. The door is purple glass. Her name on the window is purple script trimmed in gold. Inside the door one's feet sink into soft purple carpeting. Rugs, furnishings, and drapes are all the same eye-popping purple; the flower pots, containing artificial orchids, are of course purple. There are fourteen rooms, including a law library done in sea-green, a black marble bathroom containing a contour tub built to fit the bodily dimensions of Mrs. Root, a spacious dining room and kitchen.[92]

The building was damaged in a suspected arson fire on August 6, 1981.[93]

Root was best known for her fashion sense. Rice called Root "a Technicolor pinwheel in perpetual motion in Cinemascope."[94] Others called her "Circus Portia,"[95] the "Lady in Purple,"[96] and a "peacock from another planet."[97] One colleague remembers Root changing coats three times in one day during a particular jury trial.[98] Root called herself "a little nuts [and] a screwball."[99] She once explained:

> These are my working clothes. If I wore a sports dress or a tailored suit that the average person wears, I'd be miserable. I couldn't do my best. I have to have color and distinctive style. I like everything that is very feminine and luxurious looking. And different.[100]

Her taste for flamboyant clothing is well documented. For example, when defending one of the accused kidnappers of Frank Sinatra, Jr., she

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92 Ibid.; Rice, *Get Me Gladys*, 108.

93 Patt Morrison & Nieson Himmel, "Blaze Sweeps Vacant Office Building," *The Los Angeles Times*, D4.

94 Rice, *Defender of the Damned*, 7; Rice, *Get Me Gladys*, 12.

95 Beth Ann Krier, "Hats Off to the Hatted," *Los Angeles Times*, August 11, 1972, G11.

96 Cercilla Rasmussen, "'Lady in Purple' Took L.A. Legal World by Storm," *Los Angeles Times*, February 6, 1995, 3.

97 Roby Heard in Rice, *Defender of the Damned*, 74; in Rice, *Get Me Gladys*, 64.

98 Rice, *Defender of the Damned*, 74.

99 Ibid., 77.

100 Rice, *Get Me Gladys*, 85.

wore "a shocking pink dress and a huge hat trimmed with silver fox fur."[101] On another occasion, when she herself was the defendant, Root wore "a low-cut fuchsia-colored sheath, fuchsia shoes, and the usual large hat — fuchsia — with crushed net piled high atop the crown."[102] She once wore "a flowing champagne and beige coat of empire style and a high-crowned hat of turkey feathers."[103] Even her hair was color coordinated with her outfit.[104] Her choice of colors would often match her client's favorites.[105] Supreme Court Justice Stanley Mosk offered the following personal remembrance:

> Her flamboyant costumes and picturesque hats were admittedly deliberate attempts to be the focus of all attention whenever she appeared in court.
>
> But she ran into difficulty with one of my colleagues. The late Judge Charles Burnell had an unyielding policy, that since men must do so, women must also remove their hats in his courtroom. I suspect Gladys Root did not fully appreciate that form of sex equality.[106]

However, the legend is greater still. Rice offers the following anecdote dealing with Root's "sole appearance" before the U.S. Supreme Court:

> Mrs. Root has made only one appearance before the United States Supreme Court. It was a military case. An argument immediately erupted, not on a point of law but on decorum.
>
> She refused to don the conventional black robes. Argument failed to persuade her. She appeared in a tight-fitting bronze taffeta dress hemmed with brown velvet, bronze ankle-strap shoes, a topaz ring the size of a silver dollar, and a topaz pin of 190 carats at her bust. Over the dress was a monkey-fur cape, all white. Her

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101 "Sinatra Kidnap Trial Set to Open Feb. 10," *Los Angeles Times*, January 7, 1964, 8, col. 1.

102 Howard Hertel & Walter Ames, "Lawyers in Sinatra Trial Arraigned," *Los Angeles Times*, July 31, 1964, 18A.

103 Howard Hertrl, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16.

104 Rice, *Defender of the Damned*, 74–75, 76, 97; Berry, *op. cit.*, 162.

105 Rice, *Defender of the Damned*, 102,

106 Stanley Mosk, Letter to the Editor, *Los Angeles Times*, February 27, 1995, 4.

> huge hat was of the same material as the dress and her hair was dyed to match the topaz.[107]

This anecdote is repeated by many authors writing about Root, but it is not true. In this instance, Rice got his facts wrong.

As of 1964, when *Defender of the Damned* was published, Root had petitioned the U.S. Supreme Court once. In 1934, she petitioned the Court for a writ of certiorari, a motion for leave to proceed *in forma pauperis*, and for leave to file a writ of habeas corpus.[108] The motions were denied. There was no oral argument, no appearance before the Court, no occasion to wear bronze taffeta and white monkey fur. Root represented the defendant in one military case, an appeal to the U.S. Court of Military Appeals in 1953.[109] Army Corporal Tokuichi Tobita was convicted by a general court martial of rape and the conviction was affirmed.[110] There is no record of this case being appealed to the U.S. Supreme Court. Further, attorneys appearing before the U.S. Supreme Court do not wear black robes; such attire is worn by barristers in English courts. Traditionally, all attorneys practicing before the Supreme Court were required to wear formal "morning clothes," striped trousers, cut-way coats with tails. Today, only members of the Department of Justice and other advocates of the United States government adhere to the tradition of formal dress.[111]

According to Drachman, all women lawyers had a problem about what to wear.[112] She wrote:

> Before a woman lawyer left her home each day, she had to choose carefully an outfit that would convey at once seriousness and softness, objectivity and sentimentality, professionalism and femininity.[113]

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107 Rice, *Defender of the Damned*, 159.

108 *Groseclose v. Plummer* (1939), 308 U.S. 614, 60 S.Ct. 264, 84 L.Ed. 513. Root made two other appeals to the U.S. Supreme Court: *Till v. New Mexico* (1968), 390 U.S. 713, 88 S.Ct. 1426, 20 L.Ed.2d 254 and *Kowan v. California* (1969), 395 U.S. 335, 89 S.Ct. 1793, 23 L.Ed.2d 348. Both of these appeals were denied by the Supreme Court in two-sentence opinions "for want of jurisdiction," ibid.

109 *United States v. Tobita* (1953), 3 U.S.C.M.A. 267, 12 C.M.R. 23.

110 Ibid., 3 U.S.C.M.A. 272.

111 Kermit L. Hall, ed., *Oxford Companion to the United States Supreme Court*, 2nd ed. (Oxford: Oxford University Press, 2005), 1153.

112 Drachman, *op. cit.*, 93.

113 Ibid.

Belva Lockwood wore pink satin to meetings of the International Council of Women and a "plain black dress accentuated with lace or ruffles at the neck and wrist . . . [and] sometimes she wore flowers in her hair."[114] When arguing before the California Supreme Court, Clara Shortridge Foltz wore "a black silk business suit trimmed with velvet and lace, a gold broach at her neck, and golden butterflies attached to bands of black velvet at her wrists."[115] Nineteenth-century social etiquette required ladies to wear hats in public; however, the wearing of hats in courtrooms by women lawyers was controversial.[116] The controversy continued to Root's time.

Root's garish costumes were a personal statement, but were also a form of advertising. Until 1977, attorneys were not permitted to advertise their services in conventional ways,[117] so they had to find other methods to attract clients. Root's costumes were a billboard that identified her to all and sundry. Whenever she was mentioned in the press, her clothing was always part of the article. This also ran counter to Canon 27 of the ABA Canons of Professional Ethics which forbade "furnishing or inspiring newspaper comments . . . and other like self-laudation."[118] Nevertheless, Root stood out among other lawyers, and among other women lawyers especially. Although there were many other lawyers in Los Angeles during this time, and even other women lawyers, Root is the one mentioned, and she is mentioned for her clothing as much as for her skill as a litigator.

Root's costumes were also a deliberate trial tactic. They drew the jury's and witness's attention away from her client, and toward her. If the jury was looking at Root, at her dress, her feathered hat, and her hair dyed to match, they would not be looking at the defendant thinking about the crime of which he was accused.

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114 Ibid., 94.

115 Ibid.

116 Ibid., 95.

117 American Bar Association, Canons of Professional Ethics, Canon 27, reprinted in William M. Trumbull, *Materials on the Lawyer's Professional Responsibility* (Boston: Little, Brown & Co., 1957), 381. The U.S. Supreme Court declared state bans on attorney advertizing unconstitutional in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350, 97 S. Ct. 2691; 53 L. Ed. 2d 810. See also Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002) 464–66.

118 Ibid.

However, beneath the peacock feathers — literally and figuratively — was a hardworking lawyer. The secret of Root's success was an almost maniacal work ethic. She refused to "squander even a minute of precious working hours."[119] Root handled 1,600 cases per year, most of them sex crimes "plus a sprinkling of divorce, paternity, domestic, accident and civil matters."[120] She made on average seventy-five court appearances each month.[121] Sometimes, she was late for court. She was two and a half hours late for oral argument in the case of *Wood v. City Civil Service Commission of Los Angeles*. The irony is that the issue in the *Wood* case was the granting of a continuance because Root was engaged in another trial.[122] Root represented clients in 312 cases that resulted in officially reported decisions.[123] She was successful in getting her client's conviction reversed in about one fifth of those. She hired private investigators and, on at least one occasion, an astrologer, to assist her in defending her clients.[124] Rice reports that "at least thirty graduating law students received training in her office" as of 1964.[125] Root habitually worked well after midnight, went to bed at four in the morning, and then got up an hour later to go to work.[126] She had a "phenomenal memory, the ability to talk on the telephone, write a letter, and listen to three different conversations at the same time — plus a hard, cold, logical mind."[127] Rice reports that "one of her pet aversions was for any of her clients, overcome with joy, to embrace her."[128]

Root's law practice prospered financially. Rice reports that Root's "annual gross income runs into the high six figures" in 1964.[129] Assessed federal income taxes for the years 1959–1961 certainly bear this out.[130] Her wealthy

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119 Rice, *Defender of the Damned*, 54; Rice, *Get Me Gladys*, 43–44.

120 Ibid.

121 Rice, *Defender of the Damned*, 74; Berry, *op. cit.*, 158.

122 *Wood v. City Civil Service Commission of Los Angeles* (1975), 45 Cal.App.3d 105, 114n4.

123 See Appendix.

124 Rice, *Defender of the Damned*, 106; Rice, *Get Me Gladys*, 94.

125 Rice, *Defender of the Damned*, 94.

126 Rice, *Defender of the Damned*, 196–97; Rice, *Get Me Gladys*, 165–66.

127 Rice, *Defender of the Damned*, 92.

128 Ibid., 112.

129 Ibid., 76.

130 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 5.

GLADYS TOWLES ROOT AT A COURTROOM APPEARANCE, *LOS ANGELES TIMES*, JULY 22, 1955. "WAR BRIDE'S TRIAL DELAYED FOR MEDICAL EXAMINATION" WAS THE HEADLINE WHEN ROOT DEFENDED A WOMAN ACCUSED OF SHOPLIFTING.

Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.

clients paid "substantial" fees.[131] Root secured her fees with deeds of trust on clients' homes and other real property.[132] However, less well-heeled clients compensated Root with livestock, at least on occasion.[133] Once a client whom she successfully defended on a burglary charge paid her fees with part of the loot.[134] On another occasion, a client whom she successfully defended on a forgery charge paid her fees with a forged check.[135] Root, like her father, also invested in real estate.[136] She had interests in at least two real estate partnerships: Green Trees Enterprises, Inc., and Secure Defense Company.[137] She owned the building at 212 South Hill Street, Los Angeles, in which she maintained her offices.[138] She also inherited property from her father.[139]

In addition to being in court all day and visiting her clients in jail at night, she taught law at West Los Angeles School of Law.[140] She was invited to write a treatise on the defense of sex crimes by law book publisher Matthew Bender, but never completed the manuscript.[141] She helped found the Los Angeles Fellowship of Business Women, Ltd. and served as its legal advisor.[142] During her tenure as president of the Southern California Women Lawyers Association, Root led the group to raise one thousand dollars in cash and ten thousand dollars in law books for the Philippine Legal Aid System.[143] Her support for this cause may be related to her earlier representation of Filipino clients in various matters, including two miscegenation cases. She appeared on the *Tonight Show* with Johnny Carson "several times," and at least once on the *Merv Griffin Show*.[144]

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131 Rice, *Defender of the Damned*, 76.

132 See *People v. Jones* (1991), 53 Cal.3d 1115, 1132–33; *Brockway v. State Bar* (1991), 53 Cal.3d 51.

133 Rice, *Defender of the Damned*, 53.

134 Ibid., 78–79.

135 Ibid., 122–23.

136 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 5.

137 *Alpine Palm Springs Sales v. Superior Court (Green Tree Enterprises, Inc.)* (1969), 274 Cal.App.2d 523; *People v. Jones* (1991), 53 Cal.3d 1115.

138 *Lee v. Takao Building Development Co.* (1985), 175 Cal.App.3d 565.

139 Ibid.

140 Perry M. Polski, "Gladys Root," *Los Angeles Times*, January 3, 1983, C4.

141 Rice, *Get Me Gladys*, 166.

142 "Founders to Give Dinner," *Los Angeles Times*, January 4, 1931, B10.

143 Robinson, *op. cit.*, 296.

144 Larry Bodine, "In Flux," *National Law Journal*, October 1, 1979, 43.

ROOT FIGHTS FOR INTERRACIAL MARRIAGE

Whether or not Louis Osuna was Gladys Root's first client, another Filipino was the first client she represented before the California Court of Appeal. In fact, Root represented two Filipino-Caucasian couples challenging California's miscegenation law: Gavino C. Visco and Ruth M. Salas, and Salvador Roldan and Marjorie Rogers. According to Rice, Root considered her victory in *Roldan v. Los Angeles County*[145] to be the "most important conquest in her entire law career."[146] Yet its importance was short-lived because Root's argument — and the judicial decision based on it — was so narrow the Legislature could rewrite the law to prevent such marriages in the future.

Visco and Salas came to see Root in April 1931. Roldan and Rogers came to see Root "a few months after the Osuna trial — in [August] 1931."[147] Both couples wanted to get married, but the Los Angeles County Clerk refused to grant either couple a marriage license. Root promised to help them.[148] Visco and Salas, and Roldan and Rogers, may have come to Root because there was only one Filipino attorney in California at this time.[149]

MISCEGENATION LAW IN AMERICA AND CALIFORNIA THROUGH 1930

Although there was no ban on miscegenation at common law,[150] statutes banning interracial marriage and regulating interracial sexual relations in America are older than the republic. Initially, miscegenation laws were

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145 *Roldan v. Los Angeles County* (1933), 129 Cal.App. 267.

146 Cy Rice, *Defender of the Damned*, 63; Cy Rice, *Get Me Gladys,* 52.

147 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 52. See also Dara Orenstein, "Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California," *Pacific Historical Review* 74 (August 2005): 384.

148 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 52.

149 Benicio Catapusan, *The Filipino Occupational and Recreational Activities in Los Angeles* (1934, reprint San Francisco: R and E Research Associates, 1975), 18.

150 William Mack & Donald J. Kiser, eds., *Corpus Juris*, (New York: American Law Book Co., 1925) 38: 1290–91; Eugene Marias, "Comment: A Brief Survey of Some Problems in Miscegenation," *Southern California Law Review* 20 (1946): 82; James Wood, "Comment: Statutory Prohibitions Against Interracial Marriage," *California Law Review* 32 (1944): 269.

intended to protect African slavery and white supremacy; later, eugenic reasons were offered as a justification.[151] The first English colony to pass a miscegenation law was Maryland in 1664.[152] This law applied only to *marriages* between freeborn women and slaves, not to relationships outside of marriage, and not to relationships between freeborn men and slaves. Since most interracial births in colonial America were to slave women of children sired by slave owners, under the common law most mulattoes would be born free.[153] In a few generations, slavery would be bred out of existence. In 1691, the Virginia House of Burgesses passed a statute banning any "English or other white man or woman being free" from marrying "a Negro, mulatto, or Indian man or woman, bond or free" on pain of banishment from the colony.[154] Various amendments in the eighteenth,

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151 Lawrence M. Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, Mass.: Harvard University Press, 2004), 54–57.

152 Peter Wallenstein, *Tell The Court I Love My Wife: Race, Marriage and Law — An American History* (New York: Macmillan, 2002) 23; see also Leti Volpp, "American Mestizo: Filipinos and Antimiscegenation Laws in California," *UC Davis Law Review* 33 (2000): 798. Professor Volpp gives the date of Maryland's miscegenation law as 1661. Justice John W. Shenk of the California Supreme Court gives the date of Maryland's miscegenation law as 1663. *Perez v. Sharp* (1948), 32 Cal.2d 711, 747 sub. nom. *Peres v. Lippold*, 198 P.2d 17 (Shenk, J., dissenting).

153 Rachel F. Moran, *Interracial Marriage: The Regulation of Race and Romance* (Chicago: University of Chicago, 2001) 21. At English common law a person's station in life followed his or her father's. According to seventeenth century English jurist Edward Coke, "If a villein [bondsman] taketh a free woman to wife, and have issue between them, the issue shall be villeins. But if a nief [bondswoman] taketh a freeman to her husband, their issue shall be free." Edward Coke, *Institutes of the Laws of England* (1797; republished, Buffalo, N.Y.: William S. Hein Co., 1986), 2: 187. However, an older, thirteenth-century rule held, "He is born a bondsman who is procreated of an unmarried nief though of a free father, for he follows the condition of his mother." Henry Bracton, *On the Laws and Customs of England*, Samuel E. Thorne, trans. & ed., (Cambridge, Mass.: Harvard University Press, 1968), 2: 30. By the eighteenth century, William Blackstone wrote, "Pure and proper slavery does not, nay cannot, subsist in England." William Blackstone, *Commentaries on the Laws of England*, (1765; facsimile, Chicago: University of Chicago Press, 1979), 1: 325–27; see also *Somerset v. Stewart* (1772), 98 Eng. Rpt. 499, 510, 20 How. St. Tr. 1, 82; Alfred W. Blumrosen & Ruth G. Blumrosen, *Slave Nation: How Slavery United the Colonies & Sparked the American Revolution* (Naperville, Ill.: Sourcebooks, Inc., 2005), 1–14.

154 Ibid., 16 (internal footnote omitted). A tacit exception was made for the descendants of John Rolfe and Pocahontas, whom many of Virginia's most prominent families proudly claim as ancestors. Stuart E. Brown, Jr., Lorraine F. Myers & Eileen M.

nineteenth, and early twentieth centuries altered the details, but not the substance of Virginia's miscegenation law.[155] The Virginia law set a pattern that was followed by other colonies, and later states, for the next 250 years.

California passed its first miscegenation law on April 22, 1850. The act declared that "all marriages of white persons with Negroes or mulattoes are declared to be illegal and void."[156] In 1880, California amended section 69 of the Civil Code, to forbid county clerks from issuing marriage licenses "authorizing the marriage of a white person with a Negro, mulatto, or Mongolian."[157] In 1905, California's miscegenation law, now codified as California Civil Code section 60, was amended to read, "All marriages of white persons with Negroes, Mongolians, or mulattoes are illegal and void."[158] The amendment was passed to close a perceived loophole. Section 69 forbade county clerks from issuing marriage licenses if a white person wanted to marry a Mongolian, but, prior to the amendment, no law forbade whites and Mongolians from marrying. This is the statute that was in effect in 1931.

FILIPINO IMMIGRATION TO THE UNITED STATES

Filipinos first immigrated to the United States on Spanish ships during the period of the Manila Galleon Trade.[159] Filipinos may have settled in

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Cappel, *Pocahontas' Descendants* (Baltimore: Genealogical Publishing Co., Inc., 1994). The "Pocahontas exception" was codified in the Racial Integrity Act, *Virginia Acts of Assembly*, ch. 371 (1924); see also Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York: Pantheon Books, 2003) 483–84; Wallenstein, *op. cit*, 139. Notwithstanding the ban on European-Native American marriages, some very prominent Virginia statesmen, including Patrick Henry and Thomas Jefferson "championed the amalgamation of Indians and whites." Kennedy, *op. cit.*, 484.

155 Wallenstein, *op. cit*., 17–19.

156 Act of April 22, 1850, *Statutes of California*, ch. 35, § 3. The miscegenation law was passed before California was officially admitted to the Union. California was admitted to the United States by an act of Congress approved by President Millard Fillmore on September 9, 1850. Act of September 9, 1850, *Statutes at Large*, 9: 452.

157 Act of April 5, 1880, *Statutes of California*, ch. 74, § 1.

158 Act of March 21, 1905, *Statutes of California*, ch. 164 codified at *California Civil Code* § 60 (Deerings, 1906).

159 Volpp, *op. cit*., 803n34.

Louisiana in the 1830s and 1840s.[160] However, Filipinos began to immigrate to the United States in large numbers after the United States acquired the Philippine Islands at the end of the Spanish-American War.[161] Between 1924 and 1929, there were 24,000 Filipinos in California, only sixteen percent, or about 3,800, of whom were women.[162] By 1930, there were 40,904 Filipino men living in California, mostly agricultural workers,[163] and between sixteen and thirty years of age.[164] According to Volpp:

> The Filipinos lived in barracks, isolated from other groups, allowed only dance halls, gambling resorts, and pool rooms of Chinatown as social outlets. They led ostracized lives punctuated by the terror of racist violence. Many restaurants and stores hung signs stating "Filipinos and dogs not allowed."[165]

In Los Angeles, there were only 4,591 Filipinos, or 0.2 percent of the total population, in 1930.[166]

Despite the social isolation, or perhaps because of it, Filipino men met and formed romantic attachments to white women. W.E. Castle said,

> The individual prefers to mate only in his own group, and with his own kind, but circumstances may overcome racial antipathy . . . when mates of the same race are not available.[167]

Benicio Catapusan wrote, "No matter how rigid the man-made laws that tend to prohibit interracial marriages, they cannot ultimately prevent gradual intermixtures . . . despite the adverse sociological attitudes toward

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160 Ibid.

161 Arleen DeVera, "The Tapia-Saiki Incident," in Valerie J. Matsumoto & Blake Allmendinger, *Over the Edge: Remapping the American West* (Berkeley: University of California Press, 1999), 203.

162 Alison Varzally, "Romantic Crossings: Making Love, Family, and Non-Whiteness in California, 1925–1950," *Journal of Ethnic History* (Fall 2003): 18.

163 Moran, *op. cit.*, 37; DeVera, *op. cit.*, 203.

164 Volpp, *op. cit.*, 804.

165 Ibid., 805–13; see also DeVera, *op. cit.*, 201–14.

166 Constantine Panunzio, "Intermarriage in Los Angeles, 1924–33," *American Journal of Sociology* 47 (1942): 695.

167 W.E. Castle as quoted in Benicio T. Catapusan, Filipino Intermarriage Problems in the United States," *Sociological and Social Research* 22:3 (January/February 1938): 266.

such union."[168] Between 1924 and 1933, 701 out of 1,000 Filipino men married outside their community.[169] About half of these marriages were to white women.[170] "The legal status of Filipino intermarriages in California," wrote Nellie Foster, "has not yet been established, and the situation with regard to such marriages is one of confusion, of contradictory practices and policies, [and] of inconsistencies and insecurities."[171] The white partner, usually the wife, would be "diplomatically counted out" of her premarital social relationships, forced to resign from club memberships and abandoned by business connections and clientele.[172] The feelings were often mutual. Allison Varzally wrote:

> Anti-miscegenation laws and white supremacist notions limited interethnic crossings, but so did the social practices and views of minorities. Concerns about civil rights in the abstract gave nonwhites pause. Yet in general, they promoted co-ethnic dates and marriages in order to maintain familiar boundaries. Those who wandered beyond these boundaries were coaxed to return.[173]

For example, riots erupted between the Filipino and Japanese communities in Stockton, California, in 1930 when a Filipino man eloped with a Japanese woman.[174] Constantine Paninzio wrote in 1942 that

> the marriage of a white woman, even though of the servant class, to a Filipino is strongly disapproved by Americans in [Los Angeles]. . . . The Filipinos themselves disapprove of intermarriage with American girls. . . . since American-Filipino marriages are subjected to social punishment in the Phillippines even as they are in the United States."[175]

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168 Catapusan, "Filipino Intermarriage Problems," 266; Benicio Catapusan, *The Filipino Occupational and Recreational Activities in Los Angeles* (San Francisco: R and E Research Assoc., 1975), 52–54.

169 Varzally, *op. cit.*, 19; Panunzio, *op. cit.*, 696.

170 Panunzio, *op. cit.*, 695.

171 Nellie Foster, "Legal Status of Filipino Intermarriages," *Sociology and Social Research*, 16:5 (May/June 1932): 441.

172 Catapusan, "Filipino Intermarriage Problems," *op. cit.*, 269.

173 Varzally, *op. cit.*, 10.

174 DeVera, *op. cit.*, 201–10.

175 Panunzio, *op, cit.*, 695.

Despite the social pressure against Filipino-Caucasian unions, their legal status was ambiguous. The issue was whether or not Filipinos were included within the statutory term, "Mongolian." County clerks, who were obliged and authorized to issue marriage licenses, had differing opinions on this issue. The Sacramento county clerk denied a marriage license to Marino Pill, a Filipino, and Emma Lettie Brown, "a white woman born in Wisconsin."[176] Orange County also denied a Filipina-white couple a marriage license.[177] The Riverside county clerk decided not to issue marriage licenses to Filipino-white couples in 1930.[178] On the other hand, Tulare County apparently issued a marriage license to a Filipino-white couple.[179] On May 13, 1921, Assistant County Counsel Edward T. Bishop, writing for the Los Angeles County Counsel's Office, wrote to L.E. Lampton, Los Angeles county clerk:

> While there are scientists who would classify the Malayans as an offshoot of the Mongolian race, nevertheless, ordinarily when speaking of "Mongolians" reference is had to the yellow and not to the brown people and we believe that the Legislature in Section 69 did not intend to prohibit the marriage of people of the Malay race with white persons . . . We do not believe that the Legislature intended in its unscientific language in Section 69 to cover all the races of mankind.[180]

This legal opinion governed the issuance of marriage licenses in Los Angeles County until 1930.[181] However, five years later, on June 8, 1926,

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176 "Wedding Prevented: Marriage License to Filipino and White Woman Denied," *Los Angeles Times*, July 1, 1926, 1.

177 "Girl Fails to Prove Race," *Los Angeles Times*, January 31, 1930, 12.

178 "License to Wed Denied to Filipino," *Los Angeles Times,* November 7, 1930, A7.

179 "Girl's Mother Halts Plan to Wed Filipino," *Los Angeles Times*, December 6, 1929, 13. The marriage was halted because the bride was underage.

180 Edward T. Bishop to L.E. Lampton, May 13, 1921, as quoted in Foster, *op. cit.*, 447–48. Bishop had offered a similar opinion in December 1920 in regard to Leonardo Antony, "a Filipino and disabled veteran of the World War, who sought a marriage license to wed Luciana Brovencio, 19 years old, a Spanish girl residing in New Mexico." "Finds Filipino is Real Malay; May Wed White," *Los Angeles Times*, December 16, 1920, H10.

181 Volpp, *op. cit.*, 814.

California Attorney General U.S. Webb, writing to the San Diego County Clerk, issued a contrary opinion:

> While we find some difference, as will be noted, as to the number of classifications into which the human race should be divided, there seems to be no difference of opinion that the Malays belong to the Mongoloid Race and therefore, come under the classification of Mongolians. The Filipino, with the exception of the inhabitants belonging to the black race and to the whites constituting a negligible proportion of the population being Malays, are therefore, properly classed as Mongolians and marriages between them and white persons are prohibited by the provisions of Section 60 of the Civil Code.[182]

The opinions of lawyers, no matter how learned, and no matter how important the lawyer's political office, are not binding unless and until accepted by a court of competent jurisdiction and made a part of the court's ruling.

The first judicial decision on the issue of miscegenation was *People v. Yatko*, from Los Angeles County Superior Court.[183] Timothy Yatko, a Filipino, married Lola Butler, a white woman. At Yatko's trial for the murder of Butler's lover, the prosecution collaterally attacked the validity of Yatko's marriage to Butler so she would be permitted to testify against him. The prosecution argued that since Yatko was a Filipino, he was also a Mongolian, and his marriage to Butler was therefore void.[184] The judge agreed with the prosecution:

> I am quite satisfied in my own mind that the Filipino is a Malay and that the Malay is a Mongolian, just as much as the white American is of the Teutonic race, the Teutonic family, or of the Nordic family, carrying it back to the Aryan family. Hence, it is my

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182 U.S. Webb, *Opinion of the Attorney General No. 5641*, June 8, 1926, 483–84; see also, Foster, *op. cit*., 447.

183 Volpp, *op. cit*., 814–15; "Old Law Invoked on Yatko: Judge Declares Marriage Void to Allow Wife to Testify in Asserted Murder of Kidder," *Los Angeles Times,* May 6, 1925, A5; "Pleads Unwritten Law: Filipino Triangle Slaying Defendant Tells of Death Grapple In Victim's Apartment," *Los Angeles Times*, May 7, 1927, A2.

184 Volpp, *op. cit.*, 814–15.

> view that under the code of California as it now exists, intermarrying between a Filipino and a Caucasian would be void.[185]

Yatko was later convicted and sentenced to life imprisonment.[186]

Following the *Yatko* case, five other Los Angeles Superior Court judges ruled directly on the issue of whether Filipino-Caucasian marriages were void under California Civil Code section 60. Volpp wrote that these are the only cases directly on the issue. In *Robinson v. Lampton*, Stella F. Robinson sought an injunction preventing Los Angeles County Clerk Lampton from issuing a marriage license to her daughter, Ruby Robinson, a white woman, and Tony V. Moreno, a Filipino.[187] At trial, the arguments of counsel centered on whether humanity ought to be divided into five races or three.[188] Superior Court Judge Frank M. Smith agreed that there were only three races and ruled that Filipinos were part of the Mongolian race and therefore barred from marrying whites.[189]

In *Laddaran v. Laddaran* and in *Murillo v. Murillo*, the superior courts refused to annul marriages between Filipinos and Caucasians on grounds of race.[190] In the *Laddaran* case, Judge Myron Westover "refused to annul the marriage of Estanislao P. Laddaran, a Filipino, and Emma P. Laddaran, Caucasian."[191] Judge Westover made his ruling because "no proof was offered that a Filipino is of the Mongolian race and due to the fact that

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185 *People v. Yatko*, No. 24795 (Superior Court, Los Angeles County, 1925); Volpp, *op. cit.*, 816 (internal footnote omitted).

186 Volpp, *op. cit.*, 816; "Life Sentence to be Imposed on Yatko Today," *Los Angeles Times*, May 11, 1925, A17.

187 "Filipino Marriage Balked," *Los Angeles Times*, February 20, 1930, A5.

188 "Racial Tangle Halters Cupid," *Los Angeles Times*, February 25, 1930, A2.

189 *Robinson v. Lampton*, No. [unknown], (Superior Court, Los Angeles County, 1931); "Filipino-White Unions Barred," *Los Angeles Times*, February 26, 1930, A1; Volpp, *op. cit.*, 818–19, which says, "Unfortunately, the case number [No. 2496504] Foster gives, cited by other scholars, is incorrect, and I was unable to locate the decision. Happily, the decision was excerpted in contemporary newspaper reports." Moran, *op. cit.*, 38; Foster, *op. cit.*, 448, 945. My own research to locate the correct number was also unsuccessful. Ruby F. Robinson and her intended, Tony V. Moreno, were married in Tijuana, Mexico, before the court made its ruling, which was therefore moot. "Racial Tangle Halters Cupid," *Los Angeles Times*, February 25, 1930, A2.

190 *Laddaran v. Laddaran*, No. D95459 (Superior Court, Los Angeles County, decided September 5, 1931); *Murillo v. Murillo*, No. D97715 (Superior Court, Los Angeles County, decided October 10, 1931); Volpp, *op. cit.*, 820–21; Foster, *op. cit.*, 453.

191 "Filipino Vows Ruled Binding," *Los Angeles Times*, September 6, 1931, C12.

the question has not been determined by the higher courts."[192] In *Murillo*, Judge Thomas C. Gould "rejected [the] modern day scientific definition of Mongolian in favor of what the state legislature had in mind when it enacted the law."[193] Gould ruled that only "Chinese, Japanese and Koreans (who are popularly regarded as Mongolians)," are prohibited from marrying whites.[194]

In *Visco v. Los Angeles County*, Root represented Visco in a writ of mandamus proceeding to obtain a marriage license for his marriage to Salas.[195] County Clerk Lampton answered that "Gavino C. Visco is a Mongolian," and "Ruth M. Salas is a white person."[196] Root submitted affidavits on behalf of her clients stating that Visco was born in "Pasquin, Island of Imson, Philippine Islands, Provence of Ilocon Norte" and that his grandparents were born in Madrid, Spain,[197] and that Salas, her parents and grandparents were born in Mexico.[198] Superior Court Judge Walter Guerin, sitting without a jury, ruled that the couple could marry and ordered Lampton to issue the marriage license.[199] Unfortunately, findings of fact and conclusions of law were waived by the parties, so the court file has no record of why Guerin made his decision. However, the *Los Angeles Times* reports that Guerin ruled that the couple could marry because the bride, who was born in Mexico, was of American Indian descent and therefore the miscegenation law didn't apply.[200] According to newspaper reports, Lampton

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192 Ibid.

193 Volpp, *op. cit.*, 820–21; "Racial Divorce Plea Rejected," *Los Angeles Times*, Oct. 11, 1931, A5.

194 Ibid.

195 Petition for Writ of Mandamus, *Visco v. Los Angeles County*, No. 319408 (Superior Court, Los Angeles Co., filed April 8, 1931). Other authors sometimes refer to this case as *Visco v. Lampton*; however, original documents in the court's file show that Los Angeles County was the first named defendant, not County Clerk L.E. Lampton. Therefore, the proper name of the case is *Visco v. Los Angeles County.* Other named defendants were the State of California and "John Doe, Official."

196 Answer, *Visco v. Los Angeles Co.*, No. 319408. There are no other answers in the file. Although not explicitly stated, Lampton apparently answered on behalf of all defendants.

197 Affidavit of Visco, *Visco v. Los Angeles Co.*, No. 319408.

198 Affidavit of Salas, *Visco v. Los Angeles Co.*, No. 319408.

199 Judgment, *Visco v. Los Angeles Co.*, No. 319408.

200 Volpp, *op. cit.*, 819; "Filipino and Mexican May Wed, Says Court," *Los Angeles Times*, June 4, 1931, A8.

intended to appeal Guerin's ruling in *Visco*; however, there is no notice of appeal in the superior court file.[201] The *Visco* case is unsatisfactory because the ruling is based on the factual determination that the bride was not white, and therefore, that the miscegenation law did not apply.

The fifth case is *Roldan v. Los Angeles County*. It is the only one of the five cases to be appealed and receive a published decision that became, briefly, a binding precedent. Foster, writing at the time *Roldan* was pending in the courts, wrote:

> [T]here seems to be a tendency in the recent decision of the Superior Court of Los Angeles County to sustain the legality of Filipinos' intermarriages. . . .
>
> If such marriages are not sustained, on the ground that Filipinos are Mongolians, the social consequences will be very serious and far-reaching.[202]

GLADYS ROOT'S CONTRIBUTIONS TO THE DEVELOPMENT OF THE LAW ON INTERRACIAL MARRIAGE

Roldan and Rogers came to see Root in about August 1931. It may be that they had heard of Root's successful representation of Visco and Salas through coverage in the *Los Angeles Times* or through the local Filipino press. Although the *Roldan* case was not the first time Root had represented a Filipino in a miscegenation case, the facts here were quite different than the facts in *Visco*. Whereas Salas was born in Mexico and was, or claimed to be, of Native American descent, Rogers was "born in England of English parents, her progenitors on both sides of the family for generations having been English."[203] Therefore, Root could not simply avoid the law; she had to challenge it. The superior court file contains no briefs or documentary evidence. In his findings of fact and conclusions of law, superior court Judge Walter S. Gates found that "neither Salvador Roldan nor

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201 "Right Denied Irish-Indian to Wed Spanish-Filipino," *Los Angeles Times*, June 6, 1931, A6.

202 Foster, *op. cit.*, 453.

203 Findings of Fact and Conclusions of Law, *Roldan v. Los Angeles County* No. 326484 (Superior Court, Los Angeles Co. filed August 18, 1931), 2.

Marjorie Rogers are Mongolians" and ordered Lampton to issue the marriage license.[204] The County of Los Angeles and County Clerk Lampton appealed, probably because the facts were so much clearer than in *Visco*.[205]

In the appeal, California Attorney General Webb, as *amicus curiae*, and County Counsel Everett W. Mattoon, for Los Angeles County, argued that the term *Mongolian*, as understood in 1880, included Filipinos.[206] In addition to arguing that the term *Mongolian* did not include Filipinos, Root argued that "attempts to induce public officials and courts to construe law to bring Filipinos under the general classification of Mongolians is influenced by labor, social and immigration agitation."[207]

The Court of Appeal ruled three-to-three to affirm the superior court. Writing for the court, Judge Harry R. Archibald relied on definitions of *Mongolian* found in various dictionaries and encyclopedias[208] and on the legislative history of the 1878–1879 California Constitutional Convention[209] to find

> that the *common* classification of the races was Blumenbach's, which made the "Malay" one of the five grand subdivisions, i. e., the "brown race," and that such classification persisted until after section 60 of the Civil Code was amended in 1905 to make it consistent with section 69 of the same code. As counsel for appellants [that is, Root and her co-counsel, George B. Bush] have well pointed out, this is not a social question before us, as that was decided by the legislature at the time the code was amended; and if the common thought of to-day is different from what it was at such time, the matter is one that addresses itself to the legislature and not to the courts.[210]

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204 Ibid., 3; "Filipino Opens Battle on Intermarriage Ban," *Los Angeles Times*, April 12, 1932, 10.

205 "Filipino Race Question Given to Higher Court," *Los Angeles Times*, April 20, 1932, A3.

206 Appellants' Opening Brief, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed June 17, 1932); Brief Filed By . . . Amicus Curiae, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed July 8, 1932).

207 Respondent's Brief, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed August 1, 1932), 9.

208 *Roldan*, 129 Cal.App. 268–70.

209 *Roldan*, 129 Cal.App. 270–73.

210 *Roldan*, 129 Cal.App. 273 (italics in the original). The reference to "Blumenbach" is to Johann Friedrich Blumenbach (1752–1840), a German physiologist and anthropologist. Based on the analysis of human skulls, Blumenbach divided humanity

The appellants petitioned the California Supreme Court for rehearing, but the petition was denied on March 27, 1933.[211]

The holding in the case is based entirely on the statutory interpretation of the word *Mongolian*. By not addressing the issue as a "social question," Root probably won the case for her client, because of longstanding precedent upholding miscegenation laws.[212] In 1933, public feeling was not ready for the end of miscegenation laws, and courts follow public opinion, though to a lesser degree than legislatures and members of the executive branch. Nevertheless, by avoiding the larger social question, the court's holding in *Roldan* could easily be deprived of lasting effect through legislative action. It was.

AFTER *ROLDAN v. LOS ANGELES COUNTY*

Salvador Roldan and Marjorie Rogers were married on April 4, 1933.[213] Although of great significance to Mr. and Mrs. Roldan, Root's victory in *Roldan v. Los Angeles County* was of negligible support to other Filipino-Caucasian couples. Nine days before the Court of Appeal issued its opinion, State Senator H.C. Jones introduced two bills which added the word "Malay" to California's miscegenation statutes.[214] Senator Jones was a political ally of Attorney General Webb, who was himself a member of the influential Commonwealth Club of California.[215] In addition to the Commonwealth Club, the California Joint Immigration Committee, which was

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into five races: Caucasian, Mongolian, Malayan, Ethiopian, and American. *The New Encyclopedia Britannica: Micropedia* (15th ed., Chicago: Encyclopedia Britannica, 1991), 2: 303.

211 *Roldan*, 129 Cal.App. 267.

212 See for example, Brief on Behalf of Appellee, *Loving v. Virginia*, 31–38, reprinted in Phillip B. Kurland & Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Bethesda, Md.: University Publications of America, 1974) 64: 824–31.

213 "Intention to Marry," *Los Angeles Times*, April 4, 1933, 14.

214 Orenstein, *op. cit.*, 385; "Racing Bill Approved . . . Filipino-White Marriages Opposed by Senate," *Los Angeles Times*, March 16, 1933, 8, col. 6.

215 Orenstein, *op. cit.*, 379, 381, 385; According to Professor Foster, in 1929, the Immigration Section of the Commonwealth Club recommended that Civil Code section 60 be amended to specifically ban marriages between Filipinos and whites. Foster, *op. cit.*, 443.

sponsored by the American Legion, the Sons and Daughters of the Golden West, and the California Federation of Labor, asked its members to urge passage of the bills.[216] The new section 60 of the Civil Code read, "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."[217] The companion statute amended section 69 of the Civil Code and directed the county clerk to note on all marriage licenses whether a bride or groom is "white, Mongolian, Negro, Malayan, or mulatto," and forbidding the issuance of a marriage license "authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."[218] Both statutes were approved by Governor James Rolph, Jr., himself a member of the Native Sons, on April 30, 1933, and took effect on August 31, 1933.[219] According to Volpp, this action "*retroactively* [voided and made] illegitimate all previous Filipino/white marriages."[220]

After the phrase "member of the Malay race" was added to California's miscegenation law, Caucasian-Filipino couples left California to marry in other states. Couples went to Oregon, New Mexico, Utah, and Idaho, with New Mexico favored because "that State does not even have a law proscribing Mongolian-white marriages, and because it is easily accessible to persons residing in Los Angeles."[221] Miscegenation laws were "doomed by the civil rights movement and, more broadly, by society's commitment to equality and multiculturalism."[222]

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216 Volpp, *op. cit.*, 822.

217 Act of April 20, 1933, *Statutes of California*, ch. 104 codified at *California Civil Code Annotated* § 60 (Deerings 1934).

218 Act of April 20, 1933, *Statutes of California*, ch. 105, codified at *California Civil Code Annotated* § 69 (Deerings 1934).

219 Ibid.; see also Volpp, *op. cit.*, 822.

220 Volpp, *op. cit.*, 822 (Italics in the original). Professor Volpp does not offer any examples of Filipino/white couples actually having their marriages declared void and illegitimate. Under the rule in *People v. Godines* (1936), 17 Cal.App.2d 721, this result is unlikely.

221 Panunzio, *op. cit.*, 697. In 1937, Utah Attorney General Joseph Chaz ruled that Filipinos were Malayans — not Mongolians. "Filipino-and-White Marriages Ruled Legal In Utah," *Los Angeles Times*, June 11, 1937, 5.

222 Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), 56.

Although the Court of Appeal's decision in *Roldan* was effectively overturned by the Legislature, the California Supreme Court would be the first to find a miscegenation law unconstitutional. Pascoe wrote, "Beginning in the late 1870s, judges declared that the laws [against miscegenation] were constitutional because they covered all racial groups 'equally.'"[223] This changed with the case *Perez v. Sharp*.[224]

Andrea Perez, who identified herself as a white person, wanted to marry Sylvester Davis, who identified himself as African American.[225] W.G. Sharp, Los Angeles county clerk, denied Perez and Davis a marriage license pursuant to California Civil Code section 69.[226] The California Supreme Court declared that

> marriage and procreation are fundamental to the very existence and survival of the race. Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws. . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.[227]

The Court also found the statutes to be "invalid because they are too vague and uncertain."[228] This decision was a major advance in civil rights. By invalidating miscegenation laws on constitutional grounds, the Court put the matter beyond mere legislation. *Perez* built on the precedent established by

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223 Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History*, 83 (1996): 50 (and cases cited there).

224 *Perez v. Sharp* (1948), 32 Cal.2d 711, sub. nom. *Perez v. Lippold*, 198 P.2d 17. W.G. Sharp replaced Earl O. Lippold as Los Angeles County Clerk while the case was pending, and therefore was substituted as the named defendant.

225 Ibid., 32 Cal.2d 712.

226 Ibid.

227 Ibid., 32 Cal.2d 715.

228 Ibid., 32 Cal.2d 728.

Skinner v. Oklahoma[229] and served as a precedent in *Loving v. Virginia*.[230] The *Perez* decision is best understood as a step in the evolution of civil rights. Between the *Roldan* decision in 1933 and the *Perez* decision in 1948, California had experienced a tremendous growth in population brought about by mobilization for World War II. This growth in population included Americans of every race, and their interaction was inevitable. America had also just completed a war against Nazi racism and was shamed by its actions against Japanese Americans. World War II and the Cold War opened America's eyes to the hypocrisy of racism in California and in America. Simply put, political and social institutions in California had evolved slightly faster than elsewhere in America.

The first marriage license issued in Los Angeles County after the *Perez* ruling went to a Filipino-white couple: Guillermo O. Esquerra and Miriam Elizabeth Russell.[231] They were married immediately after obtaining the license.[232] Although the California Supreme Court found the miscegenation law to be unconstitutional, the ruling in *Perez* did not reach the race reporting requirement found in Civil Code section 69.[233] The California Legislature repealed Civil Code section 60 and amended Civil Code section 69 to remove the race reporting requirement in 1959.[234]

Federally, it would be almost twenty years before miscegenation laws were declared unconstitutional. It is certainly ironic, and perhaps appropriate, that the decision which held miscegenation to be unconstitutional came from Virginia, the state with the longest tradition of miscegenation laws.[235]

Root made a small contribution toward the removal of miscegenation laws in the United States. In *Visco*, she avoided the law by having her client

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229 *Skinner v. Oklahoma* (1942), 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 declaring that there was an inherent right to reproduce.

230 *Loving v. Virginia* (1967), 388 U.S. 1, 875 S.Ct. 1817, 18 L.Ed.2d 1010 declaring that all miscegenation laws are unconstitutional.

231 "Mixed Marriage License Granted," *Los Angeles Times*, November 19, 1948, A1, col. 3.

232 Ibid.

233 *Stokes v. County Clerk of Los Angeles County* (1953), 122 Cal.App.2d 229.

234 Volpp, *op. cit.*, 824; Act of April 20, 1959, *Statutes of California*, ch. 146.

235 Maryland repealed its miscegenation laws prior to the decision in *Loving v. Virginia* (1967), 388 U.S. 1, 6 fn5, 875 S.Ct. 1817, 18 L.Ed.2d 1010. March 24, 1967, *Laws of Maryland*, ch. 6.

declare her lineage to be Native American. Her argument in *Roldan* was based on statutory interpretation of the word *Mongolian*, rather than on constitutional grounds as in *Perez* and in *Loving*. Thus, the victory was short-lived. The California Legislature promptly passed legislation specifically banning marriages between Filipinos and whites, thereby preventing wider application of the decision. It would be fifteen years until the political and social climate changed enough to permit the California Supreme Court to rule as it did in *Perez*. It would be another twenty years before the political and social climate changed enough to permit the U.S. Supreme Court to rule as it did in *Loving*.

THE KIDNAPPING OF FRANK SINATRA, JR.

Root's last high-profile case was the defense of John William Irwin, one of the accused kidnappers of Frank Sinatra, Jr., son of the famous singer.[236] Not only did the case itself make headlines, but Root herself and her co-counsel, George A. Forde, became defendants in a related case that made a trip to the U.S. Supreme Court and consumed four years of her life. This case illustrates Root's use of the blame-the-victim defense strategy. It also demonstrates the lengths to which she went to do so.

Sinatra, Jr., had his professional singing debut on September 12, 1963.[237] According to Sinatra biographer Kitty Kelly, Sinatra, Jr., "was a pale imitation" of his father.[238] Sinatra biographer Randy Taraborrelli describes Sinatra, Jr., as "a prototypical lounge lizard."[239] Two months later, on Sunday, December 8, 1963, Frank Sinatra, Jr., was taken blindfolded from his hotel room in Lake Tahoe, Nevada, by "two husky gunmen [who] carried young Sinatra, his mouth sealed with a strip of adhesive tape out of the lodge and into a car that sped off into the night during a snowstorm."[240] The kidnappers and

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236 *United States v. Amsler et al.* No. 33087-CD (U.S. District Court, Southern District, Central Division, filed Januray 2, 1964).

237 J. Randy Taraborrelli, *Sinatra: Behind the Legend* (Secaucus, N.J.: Carol Publishing Group, 1997), 296.

238 Kitty Kelly, *His Way: The Unauthorized Biography of Frank Sinatra* (New York: Bantam Books, 1986), 329.

239 Taraborrelli, *op. cit.*, 294.

240 "Kidnap Sinatra Jr. In Tahoe Storm," *Los Angeles Times* December 9, 1963, 1; Taraborrelli, *op. cit.*, 298–99.

their hostage passed several police roadblocks and crossed the California-Nevada state line to a hideout in the San Fernando Valley area of Los Angeles.[241] On December 11, Sinatra, Sr., and FBI agent Jerome Crowe delivered the ransom of $239,985 (fifteen dollars was used to buy a valise to carry the balance) to a drop-off point between two parked school buses on "Wilshire Boulevard, near the Sawtelle [Avenue] Veterans Facility."[242] Frank Sinatra, Jr., was released unharmed after his father paid a ransom of $240,000.[243] On December 14, 1963, Barry Worthington Keenan, Joseph Amsler, and John William Irwin were arrested for the crime, and the ransom was recovered.[244]

Since the kidnapping of Charles A. Lindbergh, Jr., in 1932, kidnapping has been a federal crime.[245] The statute was amended in 1938 to make kidnapping a capital offense, unless the victim was released unharmed prior to imposition of sentence, in which case it was punishable by up to life imprisonment.[246]

Keenan, Amsler, and Irwin were indicted and tried beginning in February 1964 in the U.S. District Court in Los Angeles.[247] Keenan and Amsler were indicted on one count of transporting the victim across state lines.[248] Irwin was indicted for aiding and abetting.[249] Because Sinatra, Jr., was released unharmed, the maximum penalty possible on conviction was life imprisonment, rather than death; however, the indictment did not specify that the victim was released unharmed and the death penalty remained a legal possibility.[250] This technicality would be significant on

241 Ibid., 303.

242 Ibid.

243 "Sinatra Safe," *Los Angeles Times*, December 11, 1963, 1; "Valley Net! Predawn Search of Kidnapers," *Los Angeles Times*, December 12, 1963, 25; "Guard Relates How He Took Frankie Home," *Los Angeles Times*, December 12, 1963, 3; see also Taraborrelli, *op. cit.*, 308–09; Kelly, *op. cit.*, 330.

244 "FBI Seizes 3; Recovers Ransom," *Los Angeles Times*, December 14, 1963, 1; Taraborrelli, *op. cit.*, 309.

245 "Lindbergh Kidnaping Act," June 22, 1932, *Statutes At Large*, 47: 326, codified as amended *United States Code Annotated,* title 18, § 1201 (West 2005).

246 Act of May 18, 1934, *Statutes At Large*, 48: 781–82.

247 *United States v. Keenan, et al.* No. 33087-CD (SD Cal., filed January 2, 1964).

248 "3 Named by Grand Jury in Sinatra Jr. Kidnaping," *Los Angeles Times*, January 3, 1964, E7.

249 Ibid.

250 Ibid.

appeal. Root represented Irwin.[251] According to Rice, "She was hired by an industrialist, a former employer of Irwin."[252] Attorney Charles L. Crouch represented Keenan. Forde and Morris Lavine represented Amsler.

Root began "blaming the victim" by casting doubt on the truth of the kidnapping almost as soon as she was retained. In court on Monday, December 24, 1963, Root, "wearing a large white feathered hat and a black suit trimmed with white fox fur and a fox head," asked that her client's bail be reduced and referred to the allegations as, "This kidnaping — if there was a kidnaping,"[253] After the indictment, Root suggested that "other persons" besides the defendants were involved.[254] The *Los Angeles Times* continued, "Mrs. Root, known for her wearing of enormous hats and elaborate earrings, would not explain this hint that possibly not all of the 'persons' in the case had been arrested."[255] The defense attorneys suggested in the press that a mysterious "Wes" or "West" would be called as a witness to exonerate the accused.[256] No such witness was ever called to testify.

At trial, Root accused Sinatra, Jr., of being in on the entire plot, which was a publicity stunt. In *Sinatra: Behind the Legend*, Keenan is quoted as saying, "One of the attorneys — not my own — came in one night and said to me, 'Look, if this was a publicity stunt and you are able to tell us that it was a publicity stunt, then that would be a very strong defense.' "[257] Neither Keenan's statement nor Taraborrelli's other research clearly identify Root as the source of the hoax defense; however, given Root's statements in the press, and after considering the record in *Root v. United States*, it appears likely that Root was the source of the hoax defense.

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251 Gene Blake, "Woman Attorney Hired to Defend John Irwin," *Los Angeles Times*, December 21, 1963, 16.

252 Rice, *Get Me Gladys*, 212.

253 "Doubts Raised on Kidnaping in Sinatra Case," *Los Angeles Times*, December 23, 1963.

254 "Sinatra: Secrecy Still Clouds Kidnaping Case," *Los Angeles Times*, January 4, 1964, N3.

255 Ibid.

256 "'Hoax' Defense Pressed in Sinatra Case," *Los Angeles Times,* February 18, 1964, 27; Walter Ames and Arthur Berman, "Still Hopes for Exoneration by 'West,' Amsler Testifies," *Los Angeles Times*, March 4, 1964, 2; Howard Hertel and Arthur Berman, "No 'Mystery' Witness Called; Sinatra Kidnap Defense Rests," *Los Angeles Times*, March 6, 1964, 1.

257 Taraborrelli, *op. cit.*, 311.

The hoax defense was not successful. Keenan and Amsler were convicted of kidnapping and immediately sentenced to life imprisonment, plus seventy-five years each.[258] Irwin was also convicted, and was later sentenced to sixteen years, six months imprisonment.[259] Keenan's and Amsler's sentences were later reduced to twenty-five years and five months.[260]

All three defendants appealed their convictions to the United States Court of Appeals for the Ninth Circuit.[261] Amsler's and Irwin's convictions were overturned and remanded to the district court for retrial on the grounds that the trial court did not follow the correct procedures for trying a capital offense.[262] Keenan withdrew his appeal before the appellate court rendered its decision.[263] Keenan would ultimately serve four and a half years in prison.[264] On remand, Amsler and Irwin pleaded guilty to superseding indictments, and were sentenced to five years of probation.[265] Ultimately, it was a very good result for Amsler and Irwin.

The defense allegation that the kidnapping was a hoax angered Frank Sinatra, Sr. According to Taraborrelli, Sinatra resolved to take the defense lawyers, including Root, to court.[266] Indeed, on July 29, 1964, a federal grand jury indicted Root and Forde on three counts of subornation of perjury and obstruction of justice.[267] They entered pleas of "Not Guilty" and moved to dismiss the indictment on the grounds that the indictment

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258 Howard Hertal and Arthur Berman, Jury Finds Three Guilty in Sinatra Kidnaping," *Los Angeles Times*, March 8, 1964, G1.

259 Ibid. See also "Sinatra Case: Judge Reduces Two Sentences," *Los Angeles Times*, July 19, 1964, 35.

260 "Sinatra Case: Judge Reduces Two Sentences," *Los Angeles Times*, July 19, 1964, 35.

261 *Amsler v. United States*, No. 19509 (9th Cir., decided May 3, 1967).

262 *Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967). The Court of Appeals held, "It is the possibility of an imposition of a death penalty under the indictment, not the evidence produced at the trial, which determines if the accused is entitled to the procedural benefits available in capital cases." Ibid., 45.

263 Ibid., 42.

264 Taraborrelli, *op. cit.*, 313.

265 Howard Hertel and Henry Sutherland, "Keenan Admits He Instigated Kidnaping of Sinatra's Son," *Los Angeles Times*, January 9, 1968, 3.

266 Taraborrelli, *op. cit.*, 314.

267 Indictment, *United States v. Root*, No. 33933-CD (SD Cal., filed July 29, 1964); Walter Ames, "2 Sinatra Trial Lawyers Indicted," *Los Angeles Times*, July 30, 1964, 1.

was vague.[268] The motion was granted.[269] On December 9, 1964, the federal grand jury again indicted Root and Forde for conspiracy, subornation of perjury, and obstruction of justice.[270] This second indictment was 148 pages long.[271] Again Root and Forde moved to dismiss the indictment, this time on the grounds that it was confusing. In a memorandum decision, Judge Peirson M. Hall "carefully and repeatedly examined the indictment and the authorities cited by the parties, . . . and [could not] conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them."[272] Judge Hall did not "indulge in a prolonged dissertation of [his] views."[273] However, on appeal, the United States argued that while "the appellees persuaded the Court below that [the first indictment] should be dismissed for lack of specificity"; the "present indictment is attacked for having pleaded too much."[274] Root and Forde lost the appeal on all points, and the case was remanded. Root took her appeal to the U.S. Supreme Court which denied certiorari.[275]

Back in the district court, Root was urged to "'keep up the fight'" by sympathetic colleagues.[276] "'You can see I'm still fighting . . . . It's just the embarrassment,'" said Root.[277] Charges against Forde were dropped on March 6, 1967.[278] Root's attorney Morris Lavine, formerly counsel for Amsler, argued for dismissal on legal grounds and "humanitarian grounds,"

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268 "2 Indicted Sinatra Case Lawyers to Enter Pleas," *Los Angeles Times*, August 31, 1964, 22A.

269 Appellant's Opening Brief, *United States v. Root*, No. 20360 (9th Cir., filed November 29, 1965) 6n6 (citations to reporter's and clerk's transcripts omitted).

270 Indictment, *United States v. Root*, No. 34352-CR (SD Cal., filed December 9, 1964).

271 Ibid.

272 Ibid.

273 Ibid.

274 Appellant's Opening Brief, *United States v. Root*, No. 20360, (9th Cir., filed November 29, 1965), 13.

275 *Root v. United States* (1967), 386 U.S. 912, 87 S. Ct. 861, 17 L.Ed. 2d. 784.

276 Howard Hertel, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16.

277 Ibid.

278 Howard Hertel, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16. Forde died August 28, 1970 of an apparent heart attack while vacationing in Hawaii. "George A. Forde Dies: Sinatra Case Attorney," *Los Angeles Times*, September 9, 1970, 27.

because of Root's failing health.[279] On April 8, 1968, the indictment was finally dismissed by Judge Hall, with a concurrence of the U.S. attorney.[280]

"I'm just very happy. I knew I was innocent and that ultimately I would be exonerated," said Root.[281]

FINAL YEARS

By the 1970s, Root was suffering financial and professional hardships.[282] In 1970, Root was assessed $125,000 in unpaid income taxes for the years 1959, 1960 and 1961.[283] As a result, the government seized real property and sold it.[284] She sold her Hancock Park mansion and moved to "less resplendent quarters."[285] She also moved her office to a "seedy — but still gold and purple — office in a crumbling building on Hill Street."[286] Apparently, Root also was "the subject of substantial litigation by her daughter."[287] It is possible that she would have faced State Bar discipline had she lived.[288]

In addition to financial and professional problems, her health began to fail in the late 1960s and 1970s. She broke her right hip in an automobile accident in June 1966, suffered a cerebral hemorrhage and stroke in

279 Ibid.

280 "Gladys Root Cleared in Kidnap Case Count," *Los Angeles Times*, April 8, 1968, OC-A12.

281 Ibid.

282 Eric Malnic & Karen Wada, "Gladys Towles Root Dies; Colorful Lawyer Was 77," *Los Angeles Times*, December 22, 1982, D4.

283 *Geiger v. Commissioner* (1969), 28 T.C.M. (CCH) 795, TCM (RIA) 69159 *affirmed sub nom. Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at 5.

284 Ibid.

285 Malnic & Wada, *op. cit.*

286 Ibid.

287 See *People v. Jones* (1991), 53 Cal.3d 1115, 1132–33.

288 Root's partner, attorney David Brockway was disciplined by the State Bar in 1991 in connection with the case *People v. Jones* (1991), 53 Cal.3d 1115. Brockway was suspended from the practice of law for three months and placed on probation five years for conflicts of interest resulting from securing his fee by taking a mortgage on the client's home. Root was initially involved in the transaction. *Brockway v. State Bar* (1991), 53 Cal.3d 51, 59–65.

January 1967, and broke her left hip in August 1967 in a fall.[289] During her last years, she endured dialysis treatment three times a week.[290]

On Tuesday, December 21, 1982, Root — wearing all gold — appeared before Judge Peter Smith in the Los Angeles County Superior Court in Pomona where she was defending two brothers accused of sodomy-rape.[291]

She said, "Give me a few moments . . . I'm having trouble breathing." Then she collapsed on a courtroom bench.[292]

Root was rushed to Pomona Valley Hospital where she was officially pronounced dead of a heart attack.[293] She was buried at Forest Lawn Memorial Park, Glendale, California, on December 24, 1982.[294]

CONCLUSIONS

Dawn Bradley Berry justifiably lists Root among *The Fifty Most Influential Women in American Law*.[295] Root is a legend, and her legend is the flamboyant lady lawyer from the society pages who devoted herself to helping the destitute and despised. The Circus Portia was the self-appointed, self-styled champion of human rights, taking cases other attorneys routinely turned down, working tirelessly for her clients.

Root was first a performer. Rather than the stage or the cinema, she chose to perform in the courtroom. Her court appearances, especially her trials, were carefully stage managed to garner attention for herself and to deflect it from her clients. Her eye-catching costumes were just that, costumes. At a time when women were very much a minority in the legal profession, she chose to stand out, rather than blend in. Of course, her clothing choice was a matter of personal taste, and she liked the attention she received. However, her clothing was also a form of advertising at a time when attorney advertising was forbidden, or at least discouraged. People

289 Hertal, "Gladys Root Weeps After Court Hearing," *op. cit.*

290 Perry M. Polski, "Gladys Root," *The Los Angeles Times*, January 3, 1983, C4.

291 Malnic & Wada, *op. cit.*

292 Ibid.

293 Ibid.

294 "Rites for Gladys Towles Root Stated," *Los Angeles Times*, December 22, 1982, OC-A7.

295 Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996) 157–67.

in Los Angeles recognized "The Lady in Purple" even when they did not know her personally or have reason to retain her services. Thus, whenever someone was arrested, he knew to call out, "Get me Gladys!"

Root did her job as a lawyer exceedingly well and it meant a great deal to her. She carried out her lawyer's oath to zealously represent her clients, even at great risk to herself. Many of the practices she began, such as employing investigators, are now common practice among the criminal defense bar. She used her femininity as a shield and a weapon in defending her clients. Her cross-examination of victims and witnesses discredited unfavorable testimony. She also used props, such as the fabled grandfather clock in the *Adron* case, in which she had the clock wheeled into the courtroom to demonstrate the hypnotic effect on the defendant of its ticking, "Shoot, Shoot, Shoot," to win an acquittal. And she used innuendo, such as the mysterious "Wes" in the *Irwin* case.

Because she was a woman, Root was shut out of the large, established law firms that existed in Los Angeles. Therefore, she turned to solo practice. Root became an expert defending accused sex criminals, at first by happenstance, and then because it was a niche that proved successful. Since very few other attorneys wanted to defend them, Root faced less competition for clients.

Root sought to benefit society at large with her legal work as did Clarence Darrow, Charles Houston, Jr., and Thurgood Marshall. Her brief in *Roldan v. Los Angeles County* hinted at larger societal issues, but the court's ruling in *Roldan* was based on a narrow, statutory interpretation. Thus, the Legislature was able to pass amendatory legislation to specifically ban Malay-white marriages within a month of the appellate court's decision being issued.

Root was a "career girl" at a time when few women were in the work force, and very few were in the legal profession. In 1955, when Root was at the height of her career, there were 387,385 lawyers in the United States, of whom only 5,036, or 1.3 percent, were women.[296] She used her position to assist and encourage other women entering the legal profession.

Root's large hats sat above a brilliant legal mind. California's jurisprudence and legal history are much richer and more colorful because of her.

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296 Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), 457.

ANTI-CORRUPTION CRUSADE OR "BUSINESSMAN'S REVOLUTION"? —

An Inquiry into the 1856 Vigilance Committee

BY DON WARNER*

INTRODUCTION

In a work published during the year 2000, the noted California historian Doyce B. Nunis stated that "a judicious history" of the 1856 San Francisco Vigilance Committee "has yet to be written."[1] He had written the same in 1971.[2] It would appear that no one has publicly disagreed with Professor Nunis's opinion in the ensuing forty years.

This article is, by necessity, not a complete history of the Vigilance Committee. It will, however, examine in a judicious manner the facts pertaining to one central question concerning the Committee's existence and operations. That question is whether the Committee's actions conformed to the ostensible reason for which it was formed: to protect the citizens of

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1 Doyce B. Nunis, Jr., ed., Another View of the San Francisco 1856 Vigilance Committee: Robert George Byxbee's Letter to His Sister, June 1856 (Los Angeles: Zamorano Club ["Keepsake"], (2000), 5.

2 Doyce B. Nunis, Jr., ed., The San Francisco Vigilance Committee: Three Views [by] William T. Coleman, William T. Sherman [and] James O'Meara, 1856 (Los Angeles: Los Angeles Westerners, 1971), 9 [hereinafter "Three Views"].

San Francisco from a situation in which crime was rampant, and murderers were systematically going unpunished.

The methodology for this examination will be to use existing primary source material, produced by the Committee itself, to describe the Committee's actions as they pertain to the question of whether they served its ostensible purpose.

This is an important task because the Second, or Great, San Francisco Vigilance Committee, which controlled the city during the months of May through August 1856, was a major event in the early history of California. It can claim several superlatives. Although not the most deadly of the state's insurrections, it was the best organized, the longest-lived, and the most successful in its resistance to the established governments of the day. It was, and remains, the most controversial.[3]

The controversy is not about whether what the Committee did was an insurrection. All would agree — the Committee itself and those who opposed it, called the "Law-and-Order Party," and its defenders and detractors in the years since — that it was an insurrection, an open rebellion against an established government.[4] They differ, however, on whether the Committee's actions were justified under the circumstances.

It is necessary to disambiguate the term "justified" because there are several possible meanings. Actions may be justified legally, politically, or morally. The Committee's actions in deliberately hanging four men cannot be *legally* justified, under the criminal statutes in effect in California at that time.[5] Those actions may be justified politically, however, as acts

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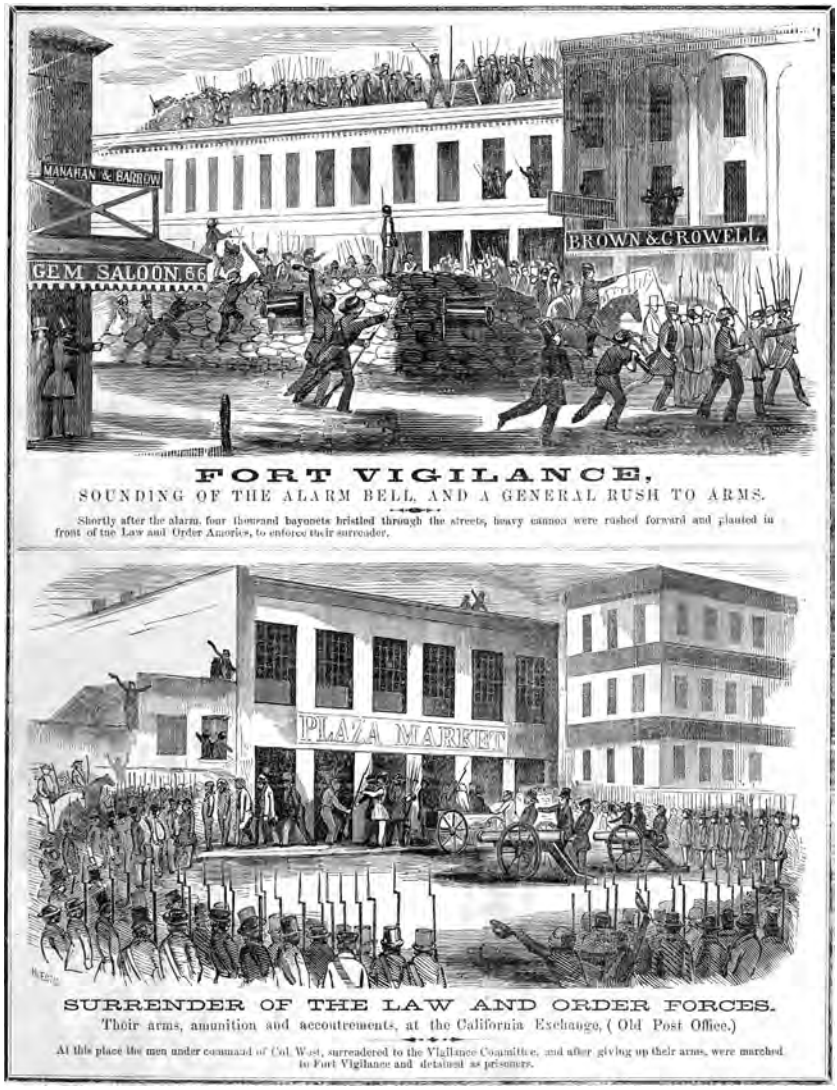
[3] It has also been the subject of a mountain of historical writing. In that vein, please note that this article is not a historiography of the Committee. That was done, well, in Professor Nunis's 1971 introduction to *Three Views*, and updated through 1985 in Robert Senkewicz, Vigilantes in Gold Rush San Francisco (Stanford: Stanford University Press, 1985), 203–31. No additional history of the Committee has appeared since then.

[4] Webster's Encyclopedic Unabridged Dictionary (1989), 738.

[5] Stats. 1850, Ch. 99. Sec. 13: "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." Sec. 14: "Malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." Sec. 29: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."



(TOP) "**FORT VIGILANCE,**
SOUNDING OF THE ALARM BELL, AND A GENERAL RUSH TO ARMS. SHORTLY AFTER THE ALARM, FOUR THOUSAND BAYONETS BRISTLED THROUGH THE STREETS, HEAVY CANONS WERE RUSHED FORWARD AND PLANTED IN FRONT OF THE LAW AND ORDER ARMORIES, TO ENFORCE THEIR SURRENDER."

(BOTTOM) "**SURRENDER OF THE LAW AND ORDER FORCES.**
THEIR ARMS, AMMUNITION, AND ACCOUTREMENTS, AT THE CALIFORNIA EXCHANGE, (OLD POST OFFICE.) AT THIS PLACE THE MEN UNDER COMMAND OF COL. WEST, SURRENDERED TO THE VIGILANCE COMMITTEE, AND WERE MARCHED TO FORT VIGILANCE AND DETAINED AS PRISONERS."

California Letter Sheets 1850–1871. *Huntington Library, folder #112, UID: 48771.*

in rebellion or revolution, a rising of the people to overthrow a government that has acted against the people's interests. A right of rebellion was claimed at least as far back as the barons at Runnymede and, most notably, by the American patriots during the Revolution. Section 2 of article I of the original 1849 Constitution of California reflects that right, as it existed at the time of the Vigilance Committee.[6] The question remains, however, and it is not resolved by the language of the 1849 Constitution, whether the right may be exercised through extra-legal means. If it cannot, then the question of justification under the right of rebellion merges into the question of moral justification: whether the Committee's acts conformed to its claimed intent.

If the Vigilance Committee was organized and acted in order to reform the criminal justice system in San Francisco, because, due to corruption, it was allowing murderers to walk free, then the Committee's actions would seem to have been warranted, since judicial reform is the rationale that was offered on behalf of the Committee.

If, on the other hand, the true purpose of the Vigilance Committee was to carry out an extra-legal change of city government under the cover of an attempt at reform, justification would be lacking.

However, a strict dichotomy such as that just stated is inevitably, and quite properly, subject to several caveats. Two seem especially important.

First, what is meant by the term, "the Vigilance Committee?" The organization had within its membership several thousand men, and it remained in existence, and in control of San Francisco, for just one week shy of three months. Was it so monolithic, so centrally controlled, that one may with confidence impute a single, discreet motive for its actions? Or was it loosely enough organized that the various parts or factions within it may have been acting in accordance with differing purposes?

The second question is related to the first. Given the relative longevity of the Committee's existence, and the tumultuous nature of the events that unfolded during that time, can a single motive be imputed when circumstances may have changed so much that ascribing the same motive to later action may not be relevant?

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6 "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."

This question is of fundamental importance to the inquiry set forth herein. As will be described in detail below, one of the Committee's most influential detractors, then Militia general and later General of the U.S. Army William T. Sherman, seemed to concede that the actions taken by the Committee during the first week of its existence, principally the execution by hanging of two men, James Casey and Charles Cora, may have been necessary in order to forestall mob violence sparked by Casey's shooting of a popular newspaper editor. In essence, the Vigilance Committee "got out ahead of the mob" and removed the reason for the intense public feeling that, otherwise, might have gotten out of hand.

But what, Sherman writes, about the ensuing ten weeks? Should not the Committee have disbanded, since its work was done with regard to the incident that ignited the populace? Moreover, what do the actions taken over the latter ten weeks say about the Vigilance Committee's real purpose? This question seems to be at the heart of the controversy over the Committee's motive that has continued through 155 years.

Keeping those two questions in mind, this article will investigate the controversy over the justification of the Vigilance Committee's actions, trying to replace opinion with facts, obtained from primary source materials.

The methodology of the investigation will be revealed in the organization of this article.

Following this Introduction, Section I will set forth a brief description of the events that led to the Vigilante Committee's formation, its actions while it was in power, and its disbanding. This is intended to orient the reader who has not actively studied the Committee and set the context for the issue to be discussed herein. It is not intended, as stated above, to be either a complete history of the Committee nor a historiography of writings about it.

Section II will begin the actual investigation by looking at the writings of two men who were major actors in the events described — William T. Coleman, the president of the Vigilance Committee, and Sherman, one of his principal antagonists—as well as James O'Meara, a journalist who was present in the city during the Vigilantes' reign. These three accounts were included in the Los Angeles Westerners' *Three Views*, which

was scrupulously edited by Nunis.[7] Thus, they have reliability. They also serve to establish the context for the actual Vigilante documents described and discussed in the following section.

Section III delves into the most primary of all primary sources, manuscripts in the marvelous collection of Vigilante Committee documents held by the Huntington Library in San Marino, California. Portions of those manuscripts provide evidence of the day-to-day activities of the Committee and its agents. Some of this evidence is salient to the question of the Vigilance Committee's motivation. The descriptions of these materials herein are detailed and extensive, because the story that they tell gains power from the details.

A final evidentiary section, number IV, deals with the issue of trial records from the period. This record is regrettably sparse, because all of the official records of the San Francisco courts were destroyed in the great earthquake and fire of April 1906. There are, however, records of a sort, of the five capital trials held by the Vigilance Committee itself. More importantly, there is a narrative of the court trial of Charles Cora, apparently prepared during, or concurrently with, the trial itself. This narrative provides the only available insight into what actually happened in the criminal courtrooms in the years just before the organization of the Committee.

Section V will be a summary of the evidence as discussed, and a statement as to the author's conclusion concerning the controversy about justification: Was it a valid effort at judicial reform, or was it, in essence, a political coup?

I. OVERVIEW OF THE VIGILANCE COMMITTEE

The immediate antecedent of the 1856 Vigilance Committee was the Committee of 1851. It arose in response to the depredations of a number of gangs, many of whose members were former convicts who had immigrated from Australia.[8] The gangs developed the technique of setting fires in

[7] Coleman's and O'Meara's pieces are presented unedited in *Three Views*; Sherman's had been edited previously — the edited portions are returned to the text in an additional section.

[8] Mary Floyd Williams, History of the San Francisco Vigilance Committee of 1851: A study of social control on the California frontier in the days of the gold rush (Berkeley: University of California Press, 1921), 61–72, 121–24, 179.

order to loot the burned buildings. On several occasions large parts of the gold rush city had burned as a result.[9] The 1851 Committee eventually executed four alleged villains and exiled many others from San Francisco.[10] One of its presidents was the merchant and shipping magnate William T. Coleman.[11]

A few years later, in the mid-1850s, tensions in San Francisco were again high. A series of market panics and bank failures had contributed to the unrest.[12] A veteran of one of those failures, a man who styled himself James King of William (because there were too many "James Kings" in his hometown) left banking to found a newspaper, the *San Francisco Bulletin*.[13] In the paper, he began a strident crusade against corruption in city government. Much of his vitriol seemed to be aimed at the wing of the ruling Democratic Party led by U.S. Senator David Broderick.[14] In addition, some of King's editorials criticized members of the Irish immigrant population, and the Catholic Church.[15]

King's crusade was supported by a feeling among the general public that murderers were not being published under the existing legal system.[16]

One member of the government, and of Irish extraction, was James Casey, a San Francisco county supervisor who had migrated to the city from New York.[17] Casey published his own newspaper, a weekly with smaller circulation, and less importance, than King's *Bulletin*.

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9 *Id.* at 164, 179, 181, and 239.

10 *Id.* at 208–17, 270–71, 293–302.

11 *Id.* at 191.

12 Hubert Howe Bancroft, Popular Tribunals, vol. II, (San Francisco: The History Co., 1887), 22–23 [hereinafter Popular Tribunals].

13 *Id.*

14 *Id.* at 26–27.

15 R.A. Burchell, The San Francisco Irish, 1848–1880 (Berkeley: University of California Press, 1980), 128–29.

16 "Although a thousand homicides were committed in San Francisco between 1849 and 1856, only one legal execution took place." James Scherer, "The Lion of the Vigilantes" William T. Coleman and the life of old San Francisco (Indianapolis, New York: The Bobbs-Merrill Co., 1939), 152. This received wisdom is repeated in many works about the period, although 1/1000 is the most extreme fraction used. Nonetheless, the numerator is always very small, and the denominator very large.

17 Three Views, *supra* note 2, at 92–93.

In November 1855 an incident occurred which brought the public temper in the city close to the boiling point. William Richardson, a federal marshal, was shot to death by a small-time gambler, Charles Cora.[18] When Cora was tried for murder in January of 1856, the jury hung, unable to reach a verdict.[19] Cora remained in the San Francisco jail, awaiting a retrial. James King demanded the formation of a new Vigilance Committee to redress the murder of Richardson by Cora.[20]

By this time there had been several threats on James King's life. He seemed to court them. At one point, in an editorial, he wrote: "Mr. Selover, it is said, carries a knife. We carry a pistol. . . . We pass every afternoon, at about half-past four to five o'clock, along Market Street from Fourth to Fifth Street. The road is wide and not much frequented as those streets farther in town. If we are to be shot or cut to pieces, for heaven's sake let it be done there."[21]

In the spring months of 1856 King's crusade thundered on in the pages of his paper.[22] Within it developed a feud between him and Supervisor Casey, carried out mainly through editorials in their newspapers. In May, King stated that Casey had once resided in Sing Sing Prison back in New York. Though true, the revelation enraged Casey, who demanded but was denied a retraction.[23]

In the late afternoon of May 14, 1856, Casey accosted King at the corner of Washington and Montgomery Streets. He said something to King; witnesses (of whom there were many) differed on what was said. Then Casey raised a revolver and fired a single ball into the left side of King's chest.[24]

King was taken into a nearby building and quickly received medical attention.[25] By nightfall Casey was incarcerated in the San Francisco City Jail, an institution overseen by Sheriff David Scanell, a member of Casey's political faction and another object of King's wrath. Also resident in the jail was Charles Cora, still awaiting retrial.[26]

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18 *Id.* at 79–84.

19 *Id.* at 84.

20 In a coy manner. *See* William H. Ellison, A Self-Governing Dominion: California, 1849–1860 (Berkeley: University of California Press, 1950), 236–39.

21 San Francisco Bulletin, December 6, 1855.

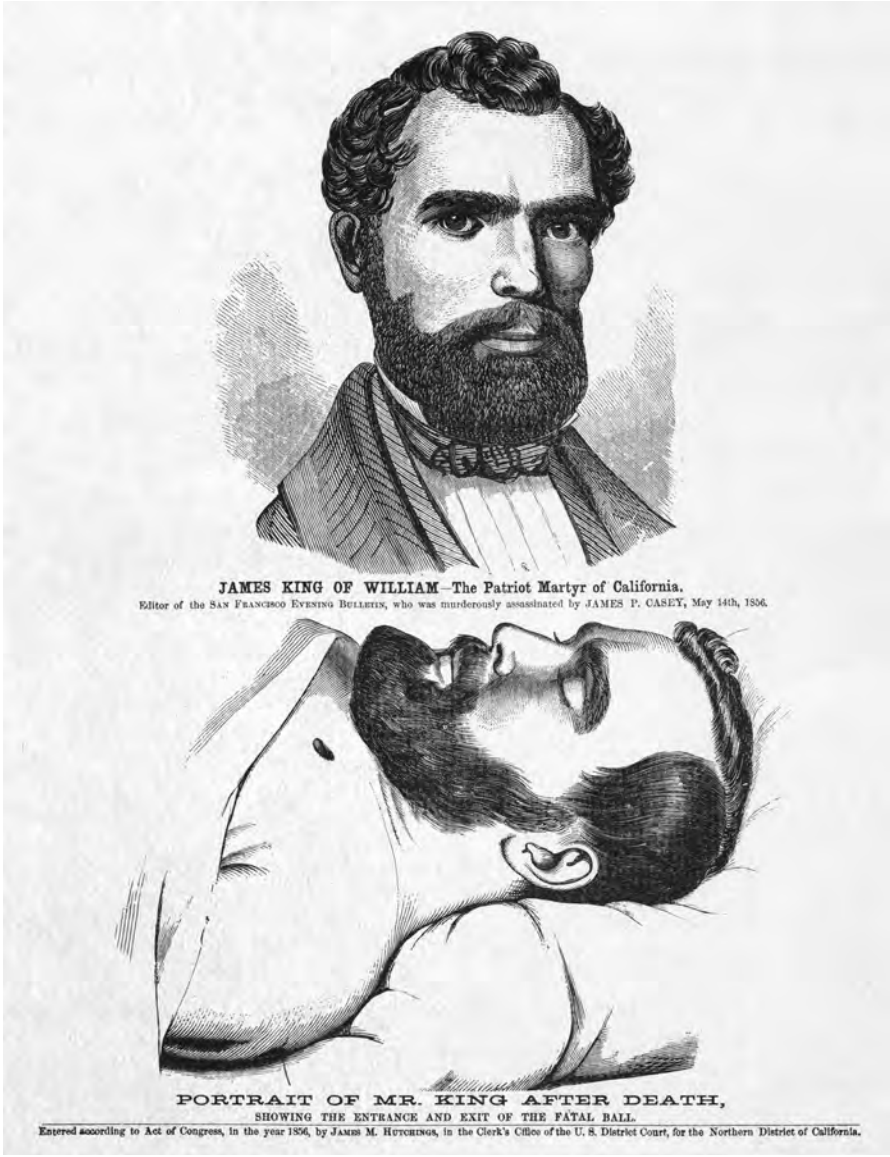
22 Ellison, *supra* note 20, at 237–38.

23 *Id.*

24 *Id. See also* Three Views, *supra* note 2, at 85.

25 *Id.*

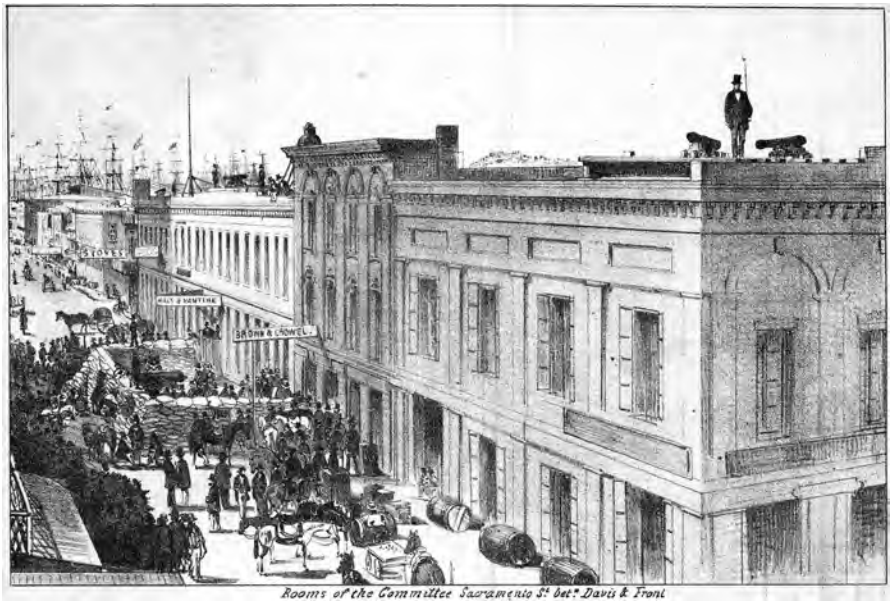
26 Three Views, *supra* note 2, at 85; Ellison, *supra* note 20, at 238–39.



(top) "James King Of William —
The Patriot Martyr Of California.
EDITOR OF THE SAN FRANCISCO EVENING BULLETIN, WHO WAS MURDEROUSLY ASSASSINATED BY JAMES P. CASEY, MAY 14TH, 1856."

(bottom) "Portrait Of Mr. King After Death,
SHOWING THE ENTRANCE AND EXIT OF THE FATAL BALL."

Joseph Armstrong Baird, California's Pictorial Letter Sheets, 1849–1869 *(San Francisco: David Magee, 1967), Catalogue 120.*



"Rooms of the Committee — Sacramento St. betn. Davis & Front"

California Letter Sheets 1850–1871. *Huntington Library, folder #7a, UID: 48671.*

Word of the shooting spread quickly. The city was in an uproar. A few men who had been prominent in the 1851 Committee met, and under the leadership of Coleman, issued a call for a new Vigilance Committee.[27]

The tension between the two possible motivations for the Committee's work emerged immediately upon its formation. The Vigilance Committee's Constitution, adopted during the second day of its existence, stated that the organization's purpose was to ensure that "no thief, burglar, incendiary, assassin, ballot-box stuffer, or other disturber of the peace, shall escape punishment, either by the quibbles of the law, the insecurity of prisons, the carelessness or corruption of the police, or a laxity of those who pretend to administer justice. . . ."[28]

However, in the same document, the Committee recognized the potential for the other argument, that a coup might be its aim, by stating this

[27] Ellison, *supra* note 20, at 239–40; *see also* Three Views, *supra* note 2, at 32, where Coleman himself writes, "I finally consented to take charge and organize the committee, provided I should have absolute control — authority supreme."

[28] *See* Popular Tribunals, *supra* note 12, at 112.

disclaimer in Article Seventh, "That the action of this body shall be entirely and vigorously free from all consideration of, or participation in the merits or demerits, or opinion or acts, of any and all sects, political parties, or sectional divisions in the community. . . ."[29]

Within two days after the shooting of James King a large number of men had enlisted as members of the Committee, military units were being formed, and officers chosen.[30] (No exact count of the eventual total membership exists, but the figure most commonly cited for the size of the Committee's "military companies" is about five thousand men.[31])

J. Neely Johnson, the governor of California, who had been elected on the Know Nothing ticket the year before, came to the city from Sacramento and entered into discussions with Coleman and the Vigilantes' Executive Committee.[32] Johnson had recently appointed William Tecumseh Sherman, a San Francisco banker who was a West Point graduate, to be the commanding general of the local division of the California Militia.[33] Sherman sat in on Neely's discussions. To his dismay the governor acceded to the Vigilantes' demand that they be allowed to place their own guards in the jail, alongside the city's guards.[34]

Sherman began to try to call men into the Militia and to arm them. His recruiting had some success, but the Vigilance Committee's efforts were bringing in more men, and faster.[35] A loosely organized anti-Vigilance faction emerged, called the "Law and Order Party."[36] Many of the more prominent members of this group were lawyers and judges.[37]

The next major event occurred a few days after Johnson and Coleman had made their joint guarding agreement, and after the Committee had reached a sufficient level of organization, including the securing of a base of operations on Sacramento Street, called "Fort Vigilance" (popularly

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29 *Id.*

30 Ellison, *supra* note 20, at 240.

31 Popular Tribunals, *supra* note 12, at 93; Three Views, *supra* note 2, at 85, 93.

32 Three Views, *supra* note 2, at 51.

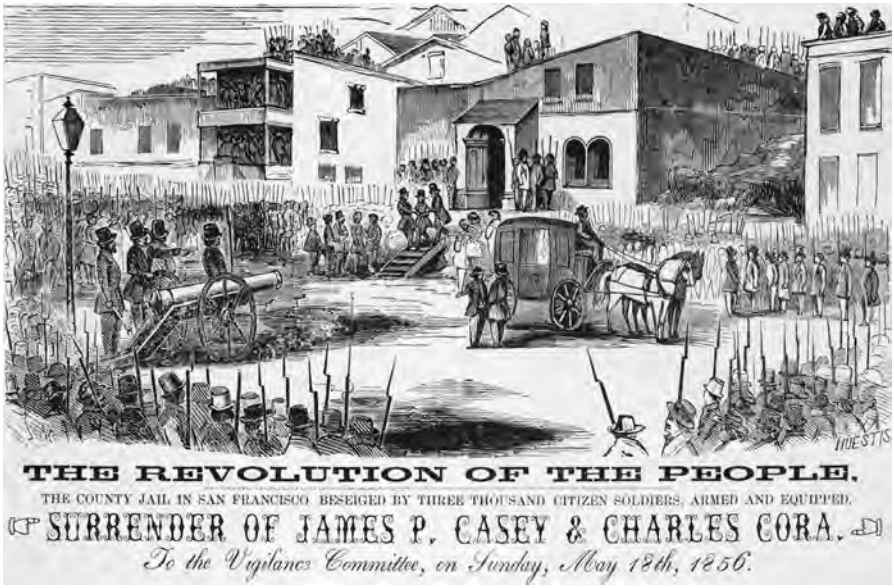
33 *Id.* at 50.

34 *Id.* at 52.

35 *Id.* at 50.

36 *Id.* at 86.

37 *Id.* at 33.



"The Revolution Of The People.
THE COUNTY JAIL IN SAN FRANCISCO BESIEGED BY THREE THOUSAND CITIZEN SOLDIERS, ARMED AND EQUIPPED. SURRENDER OF JAMES P. CASEY & CHARLES CORA. TO THE VIGILANCE COMMITTEE, ON SUNDAY, MAY 18TH, 1856."

Joseph Armstrong Baird, California's Pictorial Letter Sheets 1849–1869 *(San Francisco: David Magee, 1967), Catalogue 214.*

known as "Fort Gunnybags").[38] The Vigilantes' military force, numbering by most accounts about twenty-five hundred troops, marched to and surrounded the city jail.[39] The release of Casey *and* Cora into the Committee's custody was demanded, and the two men were taken to Fort Gunnybags.[40]

Neely Johnson issued a proclamation declaring the Vigilance uprising to be an insurrection and calling for it to disband. The Executive Committee ignored the proclamation and many Vigilance members derided it.[41]

[38] An empty warehouse was occupied and fortified against attack by placing around it sand-filled bags to a height of about four feet. The Committee also secured some cannon, which were placed in gaps in the gunnybag fortification.

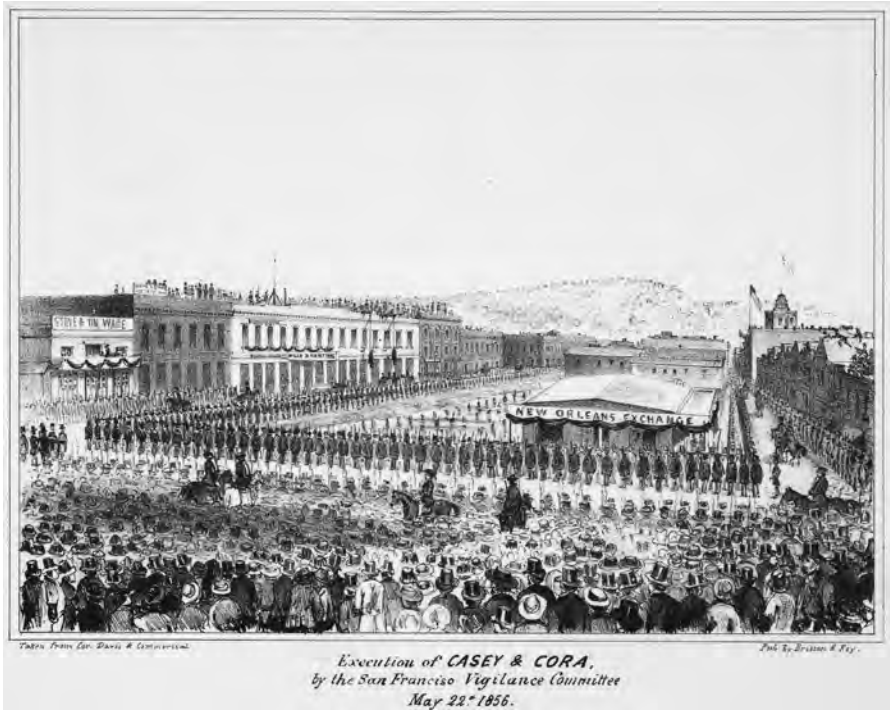
[39] Ellison, *supra* note 20, at 245; Three Views, *supra* note 2, at 89.

[40] *Id.* at 245.

[41] Popular Tribunals, *supra* note 12, at 296–98.

In the meantime King, under doctors' care, seemed to rally. Then his condition quickly deteriorated and he died.[42]

Soon after they were immured in Fort Gunnybags, Casey and Cora were tried before a jury consisting of the Vigilante Executive Committee, and quickly found guilty of murder. The two were sentenced to hang.[43] On May 22, they were hanged from scaffolds built out from the upper



"Execution of Casey & Cora,
by the San Francisco Vigilance Committee May 22d. 1856.
[taken from cor. Davis & Commercial — pub. by Britton & Rey.]"

Henry H. Clifford, California's Pictorial Letter Sheets 1849–1869 *(San Francisco: Castle Press, 1980).*

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42 One of the attending physicians, Beverly Cole, later testified that the immediate cause of King's death was not the gunshot wound, but poor medical treatment. Cole was himself a member of the Vigilante Executive Committee. *See* George D. Lyman, *The Sponge. Its Effect on the Martyrdom of James King of William*, in Annals of Medical History (1928), 460–79; *see also* Popular Tribunals, *supra* note 12, at 113.

43 Popular Tribunals, *supra* note 12, at 233.

windows of Fort Gunnybags, as King's funeral cortege wended its way to Lone Mountain Cemetery.[44]

There followed a period of less dramatic activity on the part of the Vigilance Committee. It primarily occupied itself in compiling blacklists of candidates for exile from the city and in deporting those it selected.[45] At the same time the Committee's opponents increased their efforts to mount a countervailing force. Sherman had thought that he had received a guarantee of arms for his troops from U.S. Army General John Wool, the commandant at Benecia, the nearest Army facility. Then he was told by Wool that only President Pierce could authorize the transfer of arms from the federal to the state authorities. In other words, the answer was no. Sherman resigned his command.[46]

A new and powerful personality entered the scene on behalf of Law and Order. David Smith Terry, a justice of the California Supreme Court and a prominent politician from the Stockton area, tried to assist in obtaining arms for General Volney Howard, General Sherman's successor. The entry into the city on June 21 of a small shipload of arms led to a melee in the streets. In the course of this, Justice Terry stabbed Vigilance Committee Sergeant Sterling Hopkins in the neck.[47] Hopkins, like King before him, went under medical care, and Terry was captured by the Vigilance Committee and detained in Fort Gunnybags.[48] In the immediate aftermath, the Committee's military wing descended on all the Militia armories in and around the city, capturing them and seizing whatever arms they may have held.[49]

Contemporary sources reported that the Executive Committee was not happy to have caught Judge Terry. As Coleman wrote in later years, the Terry incident was "the most unexpected and severest task of the year."[50]

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44 Ellison, *supra* note 20, at 246–48.

45 As the discussion in Section II will set forth in detail, this is a period that is critical to the inquiry herein. At this point the Vigilance Committee had acted to satisfy "the mob" through its speedy capture, trial, and execution of Casey and Cora. *See* Ellison, *supra* note 20, at 248.

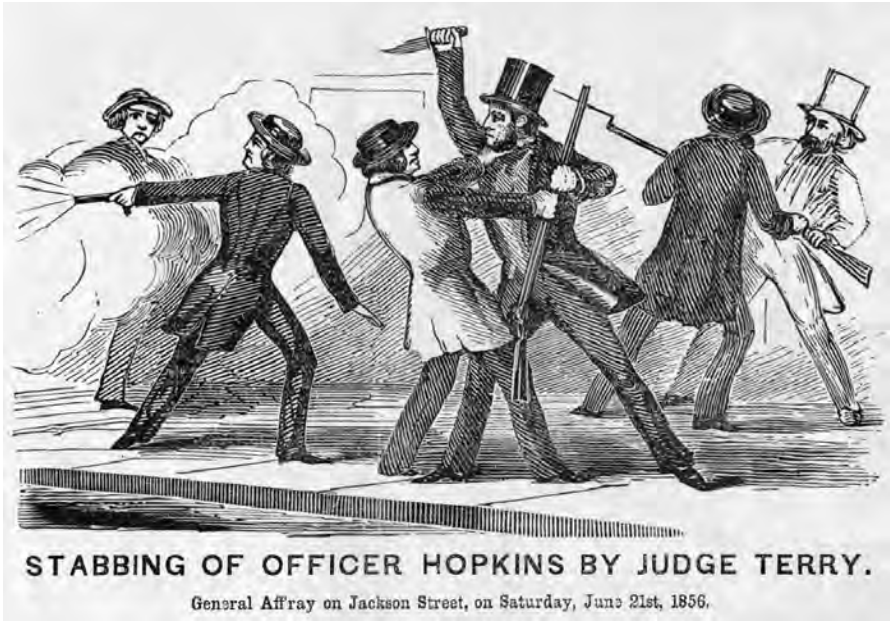
46 Three Views, *supra* note 2, at 58–59; Ellison, *supra* note 20, at 251–53.

47 Ellison, *supra* note 20, at 256–57.

48 *Id.* at 258.

49 Three Views, *supra* note 2, at 60.

50 *Id.* at 37.



"Stabbing Of Officer Hopkins By Judge Terry.
GENERAL AFFRAY ON JACKSON STREET, ON SATURDAY, JUNE 21ST, 1856."
California Letter Sheets 1850–1871. *Huntington Library, folder #112, UID: 48771.*

Terry was a high state official with a great deal of political support outside of the city. But the citizenry, encouraged by King's *Bulletin*, were adamant that, as Sherman put it in a letter, "if Hopkins died, Judge Terry would be hung."[51]

The Executive Committee began to try Terry, very slowly. Happily for all, during the course of the trial, Hopkins recovered.[52] The choice before the Committee then became not whether to hang Terry, but whether to send him into exile. In the end, on July 24, the Committee convicted Terry on the charges before them, and then released him.[53]

During the period of Terry's captivity and trial the Committee also tried, convicted, and hanged two more accused murderers, Joseph Hetherington and Philander Brace.[54]

51 Letter, W.T. Sherman to H.S. Turner, July 2, 1856.
52 Three Views, *supra* note 2, at 37.
53 *Id.* at 37; Ellison, *supra* note 20, at 260–62.
54 *Id.*

On August 18, a few weeks after Terry's release, the Committee declared the civic emergency at its end and their work completed. A grand parade was held, and the Committee formally disbanded.[55]

Four months after the disbandment, at the next round of elections, a new political party, called the "Peoples' Party," appeared to contest for positions in the city/county government. It was composed entirely of former Vigilance Committee officers, members, and adherents. The Peoples' Party was enormously successful in that election, and in succeeding elections over the next decade.[56]

II. ACCOUNTS BY THE TWO PRINCIPAL ANTAGONISTS AND ANOTHER CONTEMPORARY

Of great value to the historian of the Vigilance Committee, and important in setting the scene for the information contained in the Huntington manuscripts, are accounts written by two men who were present in San Francisco during the reign of the Committee.

The two men are William Tell Coleman, the only president of the 1856 Committee, and William Tecumseh Sherman, who was in charge of the local division of the California Militia. By his position, Sherman was the principal antagonist of the Committee, and of Coleman, during the critical early days of the Committee's organization and activity.

The most important parts of these witness accounts are reproduced in Nunis's edition of *Three Views*.[57]

Sherman's contribution is a series of letters written contemporaneously with the events reported to correspondents "back in the States." All of these letters were originally published in 1891 in *Century Magazine* soon after Sherman's death.[58] Coleman's piece is a discussion of all three of the Vigilance Committees of which he was a leader, those of 1851, 1856, and

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55 *Id.*

56 Ellison, *supra* note 14, at 264–67.

57 The third "view" is a piece written by James O'Meara, who styled himself "A Pioneer California Journalist," which he was.

58 Three Views, *supra* note 2, at 18.

1877. It was published the month before Sherman's letters, in the same magazine.[59]

William T. Sherman

Sherman's attitude was, of course, staunchly anti-Vigilante, and Coleman's the opposite. In 1856 Sherman had been the outsider, running a branch of a St. Louis bank, maligned because of his support for "law and order."[60] In the next decade, he took Atlanta, marched to the sea, accepted the surrender of the last significant Confederate army, and fought the Plains Indians, becoming only the second general in the history of the U.S. Army (after Ulysses S. Grant) to achieve the rank of General of the Army.[61]

Here is Sherman, writing to his father-in-law, the Hon. Thomas Ewing, on June 16, 1856, shortly after he had resigned as general of the militia:

> You already know of the hanging of Casey and Cora by the Vigilance Committee. When that was done we all supposed the Vigilance Committee would have adjourned and things be allowed to resume their usual course, but instead, they hired rooms in the very heart of the city, fortified them, and each day the papers announced some act that looked like a perpetuation of their power. . . .[62]

On July 2, reporting on the Terry capture, Sherman wrote to his friend and business partner, Henry S. Turner:

> At the same time all the armories of the State Volunteers were surrendered [to the Vigilance Committee], giving up their arms and accoutrements — a regular *coup d'etat a la Louis Napoleon*. Thus from that day the State of California ceased to have any power to protect men here in defense of her sovereignty. . . .[63]

Finally, a letter to his brother, U.S. Representative (later Senator) John Sherman, sent on August 3, after Hopkins had recovered, but before the release of Terry. Sherman reviewed all of the events of the summer:

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59 *Id.*

60 *Id.* at 59.

61 William Tecumseh Sherman, Memoirs of General W.T. Sherman, v. II (New York: D.A. Appleton and Co.: 2nd ed., 1886).

62 Three Views, *supra* note 2, at 55.

63 *Id.* at 60.

> For three months we have been governed by a self-constituted committee who have hung four men, banished some twenty others, arrested, imprisoned, and ironed many men, and who now hold a judge of the Supreme Court in their power, the authorities being utterly unable to do anything. . . .

Later in the same letter: "If there is not an entire revolution and withdrawal from the Union, then all these acts of violence must come up before our courts on action for civil damage. . . ."[64]

Thus Sherman's views, at the time, of the Vigilance Committee. His *Memoirs*, published years later in 1875, gives very little space to the Vigilance episode, and claims that he was drawn into his involvement by his "reluctant consent."[65] Summarizing his thoughts, he wrote of the Committee:

> As they controlled the press, they wrote their own history, and the world generally gives them the credit for having purged San Francisco of rowdies and roughs; but their success has given great stimulus to a dangerous principle, that would at any time justify the mob in seizing all power of government; and who is to say that the Vigilance Committee may not be composed of the worst, instead of the best elements of society?[66]

William T. Coleman

Coleman's contribution to *Century Magazine*, as reprinted in *Three Views*, is surprisingly brief, considering the importance of the 1856 Vigilance Committee as a part of his résumé, and considering the vehemence of his prior disagreement with Sherman, or at least the Sherman of the 1875 *Memoirs*. That disagreement is expressed in another reprint in *Three Views*, a photocopy of a piece that appeared in the San Francisco *Morning Call* of April 20, 1884. This article is titled, "The Vigilantes of '56 — William T. Coleman's Record of the Early Days," but it is written in the form of an

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64 *Id.* at 50.

65 William Tecumseh Sherman, Memoirs of General William T. Sherman by Himself, v. II. (New York: D.A. Appleton and Co., 1875), 131.

66 Three Views, *supra* note 2, at 61.

interview with, and quotations from, Coleman, and in a style that is highly similar to that of Hubert H. Bancroft.[67]

The *Morning Call* piece, published nine years after Sherman's *Memoirs*, cites a "manuscript" by Coleman as follows: "In his manuscript, Mr. Coleman speaks in the pleasantest manner of General Sherman as a gentleman of unquestioned honor, but declares that his published account of [the Coleman/Sherman/Neely Johnson meeting regarding placing Vigilante guards in the jail], and of vigilante matters in general, is the incorrect result of a defective memory."[68]

But seven years later, when he was asked to contribute to *Century Magazine* an account of the Vigilance Committees of 1851 and 1856, and a third, in 1877, called the "safety committee," Coleman made no mention of Sherman. Whenever an event is described in which Sherman took part, he is included only in the collective descriptive "several gentlemen."[69]

Coleman's recollections were printed in the magazine the month before Sherman's letters appeared. Given the strong anti-Vigilante nature of Sherman's descriptions and opinions, it is surprising that Coleman did not take the opportunity to write again and rebut them. Perhaps the magazine did not provide him with that opportunity.

In any case, these are some of the things that Coleman *did* say in his description of the 1856 Committee and its works.

He was, also, a reluctant participant. Coleman recounts what happened when he went to Portsmouth Plaza, San Francisco's town square, on the evening after Casey's shooting of King: "Members of the old committee [of 1851] sought me in numbers and urged me to organize a new committee. I declined these importunities; several meetings were held in different places, and urgent appeals were made not to allow a repetition of the failure of organization as was done a few months previously when Cora killed Richardson. The result of all was that I finally consented to take charge and organize the committee, provided I should have absolute control — authority supreme."[70]

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67 *Id.*

68 *Id.* Note 2, Appendix I.

69 *Id.* note 2, at 31–39.

70 *Id.* at 31–32.

Nothing in the rest of his account indicates that he ever relinquished that supreme authority.

Coleman described the constituent members of the Vigilance Committee in its early days, and its principal antagonists. He ascribes their enmity to the earlier criticisms made by James King of William in his newspaper, the *Bulletin*:

> He had severely, though in the main justly, castigated that portion of the press that upheld or apologized for excesses or irregularities in political affairs. He had aroused a Roman Catholic influence hostile to himself by ill-advised strictures on one of their clergy. He had invited the bitter animosity of a large portion of the Southern element. . . . All of these elements, separately and combined, were inimical to King, who had . . . made himself many bitter personal enemies. Thus, the committee was assailed as his champion by all these parties, when in fact it was not such, but was merely the champion of justice and the right. . . .[71]

But Coleman goes on to add another layer to his description of the Vigilance Committee's adversaries. "With the opposition were some of the best people of the country. Their party and friends had all the city and State offices; they had with them the law and most of the lawyers, and all of the law-breakers."[72]

A description of all the meetings and maneuvers that led to the capture of Casey and Cora and their imprisonment in Fort Gunnybags leads to "[t]he trial of Casey and Cora [which] was soon begun and carried on with all the attention to legal forms that marked the trials of the first committee. No outside counsel were permitted,[73] but all witnesses desired by the prisoners were summoned and gave their testimony in full. Both were convicted of murder in the first degree and sentenced to be hanged."[74]

What of the period directly after the hangings? Sherman decries the Committee's failure to disband at that point, its principal task having been

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71 *Id.* at 32.

72 *Id.* at 33.

73 N.B.: this means that no counsel were permitted who were not, themselves, members of the Vigilance Committee.

74 Three Views, *supra* note 2, at 35–36.

completed. Coleman does not indicate that such a move was even contemplated. He describes the delegation of three members of the Committee sent to meet with Governor Neely Johnson and San Francisco's mayor, with a "hands off" message: "that we did not encroach on the regular execution of law or the maintenance of order, provided the laws were enforced or carried out; . . ."[75]

"The next important work," Coleman writes, "was the action to be taken with regard to notorious ballot-box stuffers and other desperate characters. They were a curse to the country."[76] He describes the debate as to what to do with the desperate characters once they were identified and prosecuted. It is decided that execution is too harsh — they must be banished from the city "with a warning never again to return under pain of death."[77]

How to identify the proper subjects of this treatment? "[A] black-list was made of all these notorious characters."[78] After the blacklist was made, "evidence was collected, and orders were soon given for the arrest of these men. . . ."[79]

And that is all. Coleman describes no investigation with regard to whether the courts had actually released serious criminals unpunished, or who, indeed, such malfeasants might be. The blacklist process occupied the Committee for another few weeks. Finally on June 18, a month after its formation, the Committee was ready to consider disbanding, when the

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75 *Id.* at 36. This message brings up the question of what the Committee actually did to see how well the laws were being carried out. As discussed below, the manuscript records of the Vigilance Committee maintained by the Huntington Library provide assistance in answering that question.

76 *Id.* at 37. At just this point, on June 9, 1856, the Committee published an "address" to the people of California. This document, several thousand words in length, offers the Committee's justifications for their actions to that date, and those that they were about to undertake. Its most salient sentence, for the purpose of this study, was the following: "The Committee of Vigilance believe that the people have intrusted [sic] to them the duty of gathering evidence, and, after trial, expelling from the community those ruffians and assassins who have so long outraged the peace and good order of society, violated the ballot-box, overridden law, and thwarted justice." POPULAR TRIBUNALS, *supra* note 12, at 322. The entire text of the "address" supports the inference that the Committee based its belief in what the people wished on the Committee's own popularity in the city.

77 *Id.*

78 *Id.*

79 *Id.*

incident involving Justice David Terry occurred, and the long coda of the Terry imprisonment, trial, and release went forward. In the interim, as Coleman briefly mentions, the Committee's last two murderers, Hetherington and Brace, who had been scooped up in the course of the blacklist exercise, were hanged.[80]

Coleman describes the eventual disbanding, on August 8, 1856, and adds this final comment:

> The conclusion of the Vigilance Committee of 1856 brought a complete revolution, politically and financially. At the general election occurring soon after, the old political regime with its retainers was retired. . . . A new era followed; the "people's" party swept everything before them and gave the city the delightful novelty of an honest, nonpartizan [sic], and economical administration, which continued for about nine years.[81]

The two entries in *Three Views* are the only writings of Coleman that relate directly to the question examined here. Much was written *about* him, including a full-scale biography, "*The Lion of the Vigilantes*" *William T. Coleman*, by James A.B. Scherer (1939). This book devotes 74 of its 315 pages to the 1856 Committee and Coleman's role in the direction thereof, but the quotations of Coleman's words found in those pages are all from secondary sources.[82]

James O'Meara

James O'Meara, billing himself as "a Pioneer California Journalist," published in 1887[83] a pamphlet of 57 pages titled, "The Vigilance Committee

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[80] *Id.* at 37–39.

[81] *Id.* at 39.

[82] There are, of course, many biographies of Sherman, but, not surprising in view of his immense *curriculum vitae*, little attention is paid to the San Francisco era. The shining exception is *William Tecumseh Sherman: Gold Rush Banker* by Dwight L. Clarke (San Francisco: San Francisco Historical Society, 1969), but its quotations of Sherman are from the same letter sources described above, as well as from the *Memoirs*.

[83] James O'Meara, The Vigilance Committee of 1856 by a Pioneer California Journalist (San Francisco: James A. Barry, 1987), published within a year of both Bancroft's and Royce's works, and four years before Coleman published his piece in *Century Magazine*.

of 1856."[84] Though it was not published in a newspaper, the work is in a journalistic style, of the highly opinionated sort typical of the nineteenth century in America. O'Meara did not take an active part either for or against the Vigilance Committee, but from the text of his work, clearly he disapproved of it.[85]

With regard to the central question addressed in this article, O'Meara is direct and forceful in his opinion, and he adduces facts to back it up.

> First, as to the cause or pretence for the organization of the Vigilance Committee: It is declared by its ex-members and supporters, or apologists, that it was necessary for the reason that the law was not duly administered; that the Courts, the fountains of justice, were either corrupted or neglectful of their duties; that juries were packed with unworthy men in important criminal cases, that there were gross frauds in elections, by which the will of the people was defied and defeated. . . .[86]

As splendidly as O'Meara sets up these pro-Vigilante arguments, he then proceeds to knock them down with facts that he asserts he knows first-hand:

> It is not true that the Courts were corrupt, neglectful, or remiss. Judge Hager presided in the Fourth District Court, and his integrity and judicial qualifications, or judgments, have never been questioned or impeached. Judge Freelon presided as County Judge; the same can be remarked of him. There was no material fault alleged against the Police Court.[87]
>
> What of the composition of the juries?
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> It is true, however, that in important criminal cases, and sometimes in civil suits, the juries were often packed. But why? I will state: Merchants and business men generally had great aversion to serve on juries, particularly in important criminal cases, which

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84 Three Views, *supra* note 2, at 69.

85 *Id.* at 67.

86 *Id.* at 76.

87 *Id.*

> are usually protracted . . . because their time was too valuable and their business interests required their constant attention. . . .
>
> Had the merchants and solid citizens then drawn as jurors, fulfilled their duty to the cause of justice, to the conservation and maintenance of law and order, they would have had no cause or pretence for the organization which they formed.[88]

O'Meara continues to the third part of the Vigilantes' self-justification:

> Concerning the frauds in election: Yes, there were frauds, outrageous frauds, at every election: repeaters, bullies, ballot-box stuffing. . . . More than one member of the Vigilance Executive Committee had thorough knowledge of all of this, for the very conclusive reason that more than one of them had engaged in these frauds. . . .
>
> Out of the . . . Executive Committee, the detectives of that body might have unearthed these honorable and virtuous purifiers and reformers;[89] with them, perhaps others whose frauds were no less wicked and criminal; but in business transactions, and not in political affairs.[90]

O'Meara then lists particular examples of frauds carried out by members of the Executive Committee.

After describing the shooting of Richardson, the hung-jury trial of Cora, and the shooting of King, O'Meara goes on to the removal of Casey and Cora from the county jail and into Fort Gunnybags. He brings up the case of a man named "Rod. Backus," who had been sitting in jail after his murder jury had failed, like Cora's, to reach a verdict. Why, O'Meara asks, was Cora taken by the Vigilantes and not Backus? "[Backus] had been a boon companion of many of the young men of the Committee before he committed the murder in Stout's alley."[91]

O'Meara did not focus, as had Sherman, on the moment after the hanging of Casey and Cora, when, at least arguably, the hunger of the "mob" for retribution had been assuaged and the Committee could have disbanded without the Terry incident and the further hangings of Hetherington and

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88 *Id.* at 77.

89 The author reads this as sarcasm.

90 Three Views, *supra* note 2, at 78–79.

91 *Id.* at 91–92.

Brace. As to the final purpose of the Committee, however, he has much to say. First, he describes the exhibition at the Vigilance Committee's final military parade of Committee memorabilia: a stuffed ballot box; the nooses that hanged Casey and Cora; and "shackles and gyves, . . . all the other instruments and paraphernalia of the gallows and the cells. . . ."[92]

> The city and county election was soon to follow. The Committee men did not neglect the opportunity which their powerful organization had given them. The Executive Committee became practically a self-constituted nominating convention. . . . For every . . . office Vigilance men were named the candidates. None others had chance or hope. Their ticket was elected.[93]

III. THE VIGILANTE MANUSCRIPTS[94]

A substantial number of Vigilante Committee manuscripts found in the trove[95] held by the Huntington Library in San Marino, California,[96] bear on the issues that are examined here.

The Huntington manuscripts are kept in ten document boxes, of which four contain documents that bear on the day-to-day activities of the

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92 *Id.* at 124.

93 *Id.* at 125.

94 This part of the article describes, in considerable detail, the relevant material that was found in the manuscript holdings of the Huntington Library. These descriptions are detailed because there appears to be no other set or collection of Vigilante manuscripts in existence that reflect the actual work of the Committee. An exact picture of these manuscripts, as they are, is the best way to understand and envision who the men of the Vigilance Committee were and what they did.

95 The word "trove" is used for two reasons. First, because this is clearly the largest, and perhaps the only, such collection in existence; second, because it seems remarkable that somehow, through some agency, handwritten documents produced by such a large number of individuals in a confused and perilous time, could have been first assembled, and then preserved, until they came to the Huntington in two purchases in 1916 and 1931.

96 The California State Library, the Bancroft Library at UC Berkeley, and the San Francisco Public Library were also visited, but none contained any contemporary manuscripts or other documents with information bearing on relevant aspects of the Vigilance Committee's activities. A review of all available bibliographical writing produces the conclusion that there is no other substantial holding of 1856 Vigilance Committee working documents in existence.

Committee.[97] They are the best source extant for detailed information about the activities of the Committee, having been created by members of the Committee during the course of those activities. Insofar as they reflect the effort to detect and remedy corruption in the courts, they would support the conclusion that the Vigilance Committee was, indeed, carrying out the course of action mandated in its Constitution, to promote "security of life and property . . . and perform every just and lawful act for the maintenance of law and order, and to sustain the law when properly administered."[98] On the other hand, insofar as they do not reflect such an effort, but instead describe primarily an effort to hunt out and punish members of the "Irish faction of the Democratic Party," then the adjuration against political actions found in Article Seventh of the Constitution will have been ignored.[99] These records, therefore, are the touchstone that will help to answer, as far as it may be done, the central question of this article.

Box 1 is the Miscellaneous part of the collection, containing manuscripts of all types, filed in folders, some numbered, some labeled, many not.

In Box 1 are the only manuscripts that relate to any Committee activities other than the "Black List" procedures reflected in the documents in Boxes 2 and 3, below.[100]

The first document in this box is a "rap sheet" for one John Cooney, showing 36 arrests, almost all for assault, between 1853 and 1856, with the eventual outcome of each case. Cooney was deported from California by the Vigilantes.[101]

At first glance the second document seems to reflect an effort to get at the truth about the magnitude of unpunished crime in 1856 San Francisco. It is a newspaper clipping, with neither the name of the paper nor the publication date shown. It is titled "Jottings from the Record of the Court of

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97 The other boxes contain documents related to the military operations of the Committee, such as unit rosters and pay records, and Committee members, including thousands of applications for membership.

98 Popular Tribunals, *supra* note 12, at 112.

99 *Id.*

100 The descriptions of the contents of documents made in this part of the article are, except when separately footnoted, based on actual physical examination of each document by the author.

101 Popular Tribunals, *supra* note 12, at 592–95.

Sessions." At that time the court of sessions was the higher-level criminal court in the City and County of San Francisco. It received appeals from the police court, and its original jurisdiction included felony cases and grand jury indictments.

The clipping begins with this statement:

> We to-day continue the transcripts from the docket of the Court of Sessions, for the purpose of showing how, by means of packed juries and the connivance of corrupt officials, the hounds have managed to escape punishment. We think, as we before said, that before we get through, those who were so eager to defend Judge Freelon and Attorney Byrne because we went back to a period before their being in office, will be glad to take a stand in the back ranks.

Then there is a list of docket entries for 14 cases, seven of them litigated entirely in 1851. None of them involves a charge of murder. Most of them ended with the discharge of the prisoner.

Why is this here? Why did the Vigilance Committee (we presume) clip it and keep it? It is safe to assume that the court of sessions handled more than 14 cases over the course of more than five years. Thus, this clipping appears not to be a systematic investigation of Judge Freelon or the court of sessions.

The third document shows more promise. It is a three-page manuscript listing arrests by the San Francisco police over a period of about eight months, ending on July 30, 1856, near the end of the Vigilantes' reign. The arrests are arranged by date; thus, this initially appears not to be simply evidence supporting an effort to gather material for a blacklist.

There are 78 individuals listed, followed by the crime of which the individual is accused, names of witnesses, and, in a few cases, the outcome of the case. Since this is a list of recent arrests, the only outcomes listed are either assignment to a court (usually the court of sessions), or "discharged." Nine alleged murderers are listed, including "Chas Cora." James Casey is not listed.

Most interesting is this subscript: "The above embraces the most important arrests by the Police since Nov. 1st 1855 to July 30th 1856 — there are many cases where I know the parties to be either in state prison or out

of the country that I have not noted also Chinese and some Mexicans." It is signed "Hesse."

Who was "Hesse?" The only Hesse listed in Bancroft's extensive index at the end of *Popular Tribunals*, v. II, is "Hesse, Mrs., murderess."[102] The name does not appear among the many applications for membership that are part of the Huntington's manuscript collection. From context it would seem that Hesse was a lawyer, and a member of the Vigilance Committee.[103] But his research does not offer proof as to the need for a Committee, because it covers only cases so recent that no court resolutions were available. Based on the subscript, which describes other arrests that he left out, there seems to have been no effort to achieve a complete picture of criminal activity in the city. Since it continues through July 30th, 1856, the research was done quite late in the period of Vigilante control of the city. Making a reasonable inference, this would seem most likely to be just another, late-term, attempt to add names to the "black list." This conclusion is, arguably, reinforced by "Hesse's" statement that he has omitted the names of individuals who were out of the country or in prison — and thus not subject to deportation by the Vigilance Committee.

Also found in Box 1 were thick folders containing documentary evidence, apparently collected for trials before the Executive Committee, on Charles Cora, James Casey, Philander Brace, and Justice David Terry. Also included, and fascinating to a litigator but not relevant to this examination, are witness lists and other notes apparently created by a prosecutor for use at Terry's trial.

A document that bears, at least indirectly, on the question of the Committee's motivations is a report by Hampton North, who is self-described as the "County Marshall" and was also in overall charge of the city jail. The report is on the "State of the Police in San Francisco." From the report, the state of the police was miserable. The 75 officers were paid, when they were paid, one dollar a day in scrip, which then had to be hypothecated

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102 Popular Tribunals, *supra* note 12, at 758. None of the earlier-published works reviewed herein contains an index.

103 Despite the lack of an application for membership in the Huntington's collection. It is reasonable to conclude that members of the Vigilance Committee's inner circle, and others close to them, did not have to go through the application for membership procedure.

(cashed in) at a discount for cash. Also, from July 1, 1855, until some time in June, 1856, the officers were not paid at all. Then they were each paid with scrip in the face amount of $525, which was "hypothecated" for $105. The financial state of the jail was so poor, North reports, that the prisoners were "starving."

Finally, a 16-page document, labeled on the back, "Report of the Grand Jury for the Term Ending June 1st, 1856," and labeled on the front , "Investigation of County Affairs." It is written in an elegant, clear hand with only one phrase crossed out and rewritten in the 16 pages, leading to the inference that this is a formal copy of the official document. It is not dated, but the matters covered seem all to have occurred in calendar years 1854 and 1855.

There are several marginal notes written in other hands, some in ink and some in pencil. It is impossible to determine whether these notes were written by someone on behalf of the Vigilance Committee. None of the marginal comments provides any insight into the Vigilance's view of this apparently official document. In essence, it is an audit report that discloses many instances either of negligence or actual malfeasance on the part of county officers, resulting in the loss, or the overspending, of county funds. Much of the material is the record of sworn testimony by county officers, including school and hospital commissioners, and several county supervisors, not including James P. Casey.

Casey does appear in the testimony, however, several times. None of the audit deficiencies is directly attributed to Casey, but the general tenor of the document is to depict Casey, among others, as a man to be watched. The following is an excerpt from the sworn testimony of one J.W. Brittain:

> Mr. [Mayor] Van Ness was at first bitterly opposed to the admission of Casey as Supervisor but afterward he displaced Slocum & put Casey in (sic) Chairman of the Auditing Committee. Mr. Green also opposed him — but afterwards made friends with him.

Box 2 is labeled "Denounced Members and Other Suspicious Characters." The 26 file folders in this box are denoted by the first letter of the last name of the "suspicious character." Each folder contains one or more documents. They reflect the Committee's efforts to investigate and obtain evidence concerning the misdeeds of individuals put on the blacklists

referred to by Coleman.[104] Several of the folders disclose that some of the men denounced to the "black list investigating committee" as "suspicious characters" were also found to be members of the Committee.

In all, there are 201 documents in Box 2 that reflect denouncements and actions taken, either by the Investigating Committee, or the Executive Committee, in response thereto. Almost all of the documents, 191 in total, reflect only allegations concerning ordinary (not corruption-related) misbehavior.

Ten documents contain allegations that describe official corruption, using the broadest sense of the term. These may be placed in several categories, as follows.

Corruption by the Police[105]

1. An anonymous statement that one M. DeHaan "bribed some officers." This was referred to the Investigation Committee, but the file shows no further action.[106]
2. Someone whose last name was Gray "committed a murder at San Mateo, he was given into the custody of Officer Fish Dennison." Dennison is a "companion" of Gray, so he let him go. No indication of referral or follow-up.
3. An accusation against officer Jack McKenzie: A "Frenchman" was convicted of a robbery; paid a fine of $500, which McKenzie kept. No investigation, referral, or follow-up.

Other Official Corruption

1. No. 4761 accuses one Pete McGlothlin of selling his "commission" (perhaps his seat as a delegate) to the Democratic Party Convention for $20 to a man named Brannigan who "made $100 out of the deal." No referral, no follow up.
2. An accusation against Kent, the coroner and city sexton, that he padded his accounts by burying animal bones in city graves, and by

104 Three Views, *supra* note 2, at 37.

105 Each of these cases was checked against the excellent (for the times) index in *Popular Tribunals*, and nothing was found.

106 Actions by the Vigilantes are generally reflected in handwritten notes written, usually in pencil, on the document but placed at 90 degrees from the original handwriting.

splitting corpses to fill more than one grave. He was asked to resign by the Vigilance Committee.[107]

Judicial Corruption

1. A man named Levi Parsons accuses Supreme Court Justice Hugh Murray of offering to sell his vote in *Wood v. City of San Francisco* for $20,000. There is nothing further in the file, but Bancroft reports that Murray left Sacramento at about this time and did not return to the bench until after the Vigilance Committee had disbanded.[108]

Perjury

1. An accusation by William Quimby that John Colby perjured himself several times. This was at the trial of Colby's divorce. No referral, no follow-up.

Accusations Involving the Vigilance Committee

1. Accusation that a man named Henry Toy tried to bribe his way out of the Vigilance Committee's jail in Fort Gunnybags. The Committee notes that it can find no mention of a Toy in its records.
2. Two men named Willis and Jordan shook down a "darkey" by telling him they were members of the Vigilance Committee police. No referral, no follow-up.

Accusation Involving the Grand Jury

1. Accusation by No. 132 against one John O'Meara (not the O'Meara of Three Views) that he was placed on the "present grand jury by Sheriff Scannell for some reason other than the public good." "He associates with the *worst men*." Investigating Committee note: "See if he is a brother of the O'Meara who edits Casey's paper." Executive Committee note: "O'Meara allowed to resign from the Vigilance Committee." No other follow-up.

Boxes labeled 3A and 3B hold 73 and 36 folders,[109] respectively, containing "Documents Related to Ballot Box Stuffing and Fraudulent Elections." The process disclosed by these documents is the same as that used for other alleged crimes recorded in box 2, except that the activity investigated is,

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107 Popular Tribunals, *supra* note 12, at 446.

108 *Id*. at 333.

109 The reason there are two "Box 3's" is that the 109 folders were together too thick for one box.

generally, election fraud. Much of the activity reflected in these documents involved investigations of Supervisor James Casey and his associates in the "Irish wing" of the local Democratic Party.

The two boxes, 3A and 3B, also contain numerous sworn statements by witnesses to alleged ballot box fraud, and a few reports by the Investigating Committee. All reflect the same procedure as found in box 2: denouncement, investigation of some of the denouncements, and a few notations of action taken — either removal from the Committee's rolls, or deportation from California. At least a plurality of the documents relates to allegations against a few men: Casey, Sheriff Scannell, city jailer Billy Mulligan, and their allies.

In the 109 folders there are four documents of particular interest.

1. James Kearney, a policeman, relates that he arrested one Dan Aldrich, who had assaulted him. "He was released about an hour afterwards by a written order from Mayor Van Ness." Later, Aldrich was fined $250 by Judge Freelon, but he never paid it. No indication of a referral or follow-up.
2. Robert Nixon states that Paddy Martin told him that if Dave Mahoney had given him (Martin) $2,000 he would be Sheriff instead of Scanell. No referral or follow-up.
3. Anonymous: "W.F. McLean elected supervisor sold out to Casey for $50." Committee note: "Rumor."
4. Pat Cooney, a printer, informed an anonymous writer that Charles Gallagher demanded and received $250 for procuring the appointment of men on the police." Committee note: "Call Lockwood, McKibben." Nothing further.

The folders in Box 3 disclose a huge amount of election fraud and intimidation. One popular method of persuading a man not to vote, or to vote according to orders, was to pull out a pistol and to threaten to blow his head off. This shows up in many folders.

No link is shown, however, between the election fraud and the original incitement and the ongoing rationale for the Vigilance Committee: corruption in the functioning of the courts so as to allow dangerous criminals to go free.

Accusations Not Found

Even more important than what was found in the piece-by-piece examination of the Vigilance Committee's records is what was *not* found. In the boxes there was:

1. No material re packing of juries.
2. No material re bribery or other attempts to influence jurors.
3. No material re bribery or other attempts to influence trial judges.
4. No material re subornation of perjury.
5. No material re spoliation of evidence.

In sum, the Huntington manuscripts provide a torrent of evidence as to the energy and determination with which the Vigilance Committee went about creating blacklists and investigating those who were listed. This was true as to crimes in general, and especially as to allegations of election fraud. There is no evidence of any investigation to link voting fraud to corruption in the courts. The only two documents that disclose any effort to look into the courts' failure to punish crimes are the newspaper clipping and the report by "Hesse." Both appear to present "cherry picked" information. There is no record of any follow-up effort as to either.

An apologist for the Vigilance Committee, on reading this conclusion, certainly could argue that the absence of documentation of such activity does not prove that it did not take place. But these documents are all that remain to us of the Committee's working papers, and they *do* reflect a tremendous amount of energy devoted to blacklisting, the task that Coleman describes and Sherman bemoans. If the Vigilance Committee had actually done anything to clean up the courts, wouldn't there remain at least a few manuscripts reflecting that activity?

IV. TRIAL RECORDS

The original research plan for this article included a review of official court of sessions and police court records from the period 1854–56 in order to determine the factual basis for the "one thousand murders — one hanging" received wisdom. One possibility was that it would be discovered that constitutional and common law guarantees of rights of criminal defendants might have played a significant role in acquittals, or convictions on

reduced offences, thus creating whatever the actual statistic might have been as to the ratio of murders to hangings. The impoverished state of the police department might also have been a factor, as revealed in the court records.

However, all records of criminal trials in San Francisco prior to 1906 were destroyed in the fire that followed the great earthquake in April of that year.[110] There is a record of only one San Francisco criminal trial from that period — the trial of Charles Cora for the murder of U.S. Marshal William H. Richardson. This record exists because it was prepared some time before the fire for inclusion in the *American State Trials* series.[111]

Obviously, given a sample number of one, the record of the Cora trial can disclose nothing about the general nature of criminal trials in San Francisco in the years just before Casey shot King. It does, however, tell us much about the atmosphere in San Francisco in the months between the end of the trial and the shooting of James King on Montgomery Street.

The format of the *American State trials* is first, a Narrative, setting up the circumstances that led to the trial; then the names of the trial's participants with short biographies of each; the report of the coroner's jury; description of the initial procedural motions and decisions; verbatim reports of opening statements; digests of witness testimony for the prosecution, then the defense; closing statements, again verbatim; and then the final result. There is no indication as to who wrote the Narrative. Throughout the Narrative there is commentary. In the Cora report this is uniformly hostile to the defendant. For example: "The character of the victim as opposed to that of the slayer made the homicide peculiarly odious in the popular

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110 Northern California Historical Records Work Projects Administration, Inventory of the County Archives of California : no. 39, the City and County of San Francisco, vol. II (San Francisco: Northern California Historical Records Survey Project, 1940), 410, pars. 243, 248, 251, 254, 357. N.B.: An earnest but, in the author's opinion unsuccessful attempt to fill this gap was reported in Kevin J. Mullen, Dangerous Strangers: Minority Newcomers and Criminal Violence in the Urban West, 1850–2000 (New York: Palgrave MacMillan, 2005). Acknowledging the pre-1906 gap in official records for San Francisco, the author of *Dangerous Strangers* attempted to fill the gap by examining crime reports in local newspapers. This method seems inherently flawed, likely to produce skewed data that would be misleading and worse than no data at all.

111 "The Trial of CHARLES CORA for the Murder of William H. Richardson, San Francisco, California, 1856," in American State Trials, v. 15, 16–54.

mind[.]"[112] Footnote to the first naming of Cora: "He was an Italian."[113] "Let there be an impartial jury, and give the assassin a fair trial." "If he be guilty he must be *hung!*"[114]

The brief biographies make clear that this was far from the usual murder trial of the era. One of Cora's lawyers was Edward D. Baker. Baker was a well-known lawyer at the time He was also Abraham Lincoln's long-time friend, soon to be the first U.S. senator from Oregon, and finally a colonel in the Union Army who was killed at Ball's Bluff, his first battle.[115] His co-counsel, James McDougall, had been California's attorney general and would later serve in Congress and in the U.S. Senate. The judge, John S. Hagar, would also later represent California in the Senate.[116]

Much was made in the Narrative and at the trial of the fact that Cora's "paramour," Belle Ryan or Belle Cora, was a wealthy madam who supplied the funds for his defense, including a $5,000 fee to Baker.[117]

Throughout the trial, it is clear that the prosecution was worried about the possibility of a verdict of manslaughter, a lesser offense included in the indictment.[118]

There is no indication in the record as to whether any evidence was excluded by the judge. The prosecution presented five eyewitnesses who described Cora holding Richardson by the shirt, helpless, and then gunning him down with a single shot to the chest.[119] The defense then presented the same number of eyewitnesses who described what, in the language of the day, was called an "affray." The two men, having stepped outside a bar, drew weapons; Cora, having managed to avoid a downward thrust of Richardson's knife, shot him in self-defense.[120] Both sides presented witnesses who

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112 *Id*. at 16.

113 *Id*.

114 *Id*. at 17 [emphasis in original].

115 *Id*. at 21. *See also, generally,* Elijah R. Kennedy, The Contest for California in 1861; How Colonel E.D. Baker Saved the Pacific states to the Union (Boston, New York: Houghton Mifflin Co., 1912).

116 *Id*. at 19, 22–23.

117 *Id*. at 17–18, 46–48.

118 "[The prosecutor] said that the verdict must be one of conviction or honorable acquittal." *Id*. at 33.

119 *Id*. at 27–29.

120 *Id*. at 30–33.

described several meetings between the two men, some hostile in character, some not, over the two days before the fatal encounter.[121] In closing statements, counsel wrangled over the reliability of the panels of witnesses and the character of the two men and their reputations for violence.[122]

The case went to the jury. After 41 hours of deliberations the foreman reported the jury to have found it impossible to reach a verdict. The *American State Trials* report describes four ballots, and then a period of 24 hours' deliberation after the last ballot when no juror would change his vote. The final tally was eight for manslaughter and four for murder.[123] In his 1914 *Autobiography*, Baker's law partner points out that three of the Vigilance Executive members who sat as a jury in Cora's trial before that body had also been on the jury in Judge Hagar's court, and of the three, two had voted for manslaughter, and one, on one ballot, for acquittal.[124]

It is not excessive to say that Cora was tried principally on issues of ethnicity and social class. Cora was Italian; he lived with his mistress who was a madam; no matter that, without dispute, he had no reputation for violence. Richardson was a U.S. marshal; he was high in the social pecking order of San Francisco; no matter that several of the prosecution witnesses admitted that he was drunk the afternoon of his death, and had a reputation for violence.[125]

American State Trials also reports the trials for Casey and Cora,[126] Hetherington and Brace,[127] and Justice David Terry[128] before the Vigilance Executive Committee. Review of those reports discloses that the Committee tried to provide some safeguards for the defendants, except that Casey and Cora, accused of two separate crimes, were tried together,

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121 *Id.*

122 *Id.* at 33–35.

123 *Id.* at 53–54.

124 Isaac J. Wistar, Autobiography of Isaac Jones Wistar, 1827–1905; half a century in war and peace (Philadelphia: The Wistar Institute of Anatomy and Biology, 1937), 314.

125 "Trial of Cora," *supra* note 111, at 27–29. Indeed, part of the prosecution's summary of the case, aside from attacking the probity of the defense witnesses, was to argue that Richardson was too drunk to attack Cora. "Trial of Cora" at 50.

126 American State Trials, v. 15, 97–116.

127 *Id.* at 117–24.

128 *Id.* at 125–65.

as were Hetherington and Brace, similarly accused. The most profound difference between the Vigilance trials and the official trial of Cora is that the counsel and the juries were composed only of members of the Vigilance Executive Committee.[129]

VI. ANALYSIS AND CONCLUSIONS

So, based on a thorough review and analysis of the various sources presented above, what is the answer? Was the Great Vigilance Committee a true reform effort, or a coup?

The Witnesses

Only one of the witnesses, William T. Sherman, was writing in the heat of the events as they were occurring.[130] His "law and order" stance is, of course, consistent with his role in that far greater insurrection that took place five years after San Francisco's Vigilance summer. It is also more in tune with political and ethical thought of today. His views, especially as to the Committee's failure to disband after the first two hangings, have great weight.

Coleman's writing seems most singular with regard to what he did not address. He portrays the Committee as less overwhelmingly popular and powerful than do several of the other writers. He does not appear to have considered disbanding the Committee until just prior to the Terry incident, after which, as he saw it, they had to continue, in essence to protect their jurisdiction. Perhaps most importantly, he takes all authority, and thus all responsibility for the committee's actions, on himself, effectively answering one of the caveats presented at the beginning of this article: Was the Committee so loosely organized and controlled that no clear motive for its actions can be stated? The answer to that is "no." Mr. Coleman ran the show.

O'Meara, a professional journalist, most clearly and completely states the case against the Committee's justification for its activities. He explodes

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129 *Id*. at 55–124.

130 This is not true with regard to his *Memoirs*, but the great majority of the points that come from him come from his letters to friends, relatives, and business associates in "the States."

the "corruption of the courts" argument, item by item. His comment about the reluctance of businessmen to serve on juries has a modern flavor that also rings true.

In sum, the detailed and apparently probative eyewitness accounts, including Coleman's, support the "coup" side of the question.

The Vigilante Documents

These manuscripts, the best evidence of all, because they are the most reliable source of facts about what happened that year, support the following conclusions:

One, the Committee made no effort to ascertain whether or not the assumption that the courts were corrupt and murderers were escaping justice thereby, was true.

Two, the Committee, through its efforts, did establish as a fact that there was a great deal of election fraud, including ballot-box stuffing and bullying, associated with recent elections in San Francisco.

Three, the Committee did obtain some evidence, gathered primarily by the official grand jury, that there was substantial corruption on the part of city and county officials.

Four, the Committee did nothing to connect either the election fraud or the other official malfeasance to its purported *raison d'être*, court corruption. And,

Five, the Committee devoted a great deal of effort to seeking out evidence to support its deportations of alleged wrongdoers.

Overall, the Vigilance documents go as far as it is ever possible to "prove the negative" that the Committee was not really trying to do what it had said it would — ensure that the people would be protected from crime and violence through reform of the criminal law system.

The Trial Record

We have only the record of Cora's trial. He seems to have been *the* singularly unlucky person in the whole affair. This is derived both from the facts as set forth in the trial report, including the evidence of social prejudice against his background and lifestyle, and from the disastrous circumstance that he was in the city jail when the Vigilance Committee army came to get Casey.

Summary and Conclusion

W.T. Sherman may have been right, although he was grudging in the way that he stated it: Perhaps there was no other way to avoid a far greater civil cataclysm than for Coleman et al. to form a Committee, capture Casey, and, when King died, to hang Casey. The inclusion of Cora in the hanging seems to have been motivated more by the desire to support the claim that Casey would not have been subjected to justice in the court of sessions than it was by the need to deal out justice itself.

After that point in time, Sherman's basic argument wins the day, especially in light of the record produced by what is in, and what is not in, the Huntington Library's Vigilante documents. The Vigilance Committee, from that point, was occupied solely with a political housecleaning, aimed primarily at the "Irish" wing of the Democratic Party. They did such a good job that the "Peoples' Party" held sway in San Francisco for about a decade thereafter.

Finally, to return to Professor Nunis's statement published in 1971 and republished in 2000, that "A judicious history" of the San Francisco Vigilance Committee of 1856 "has yet to be written." I hope that this article will inform the debate over the justification for the Vigilance Committee's actions, in a judicious manner. A corollary hope is that it will spark enough interest so that, if there are any more original Vigilante manuscripts still in existence that are not at the Huntington Library, they will be brought to light.

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