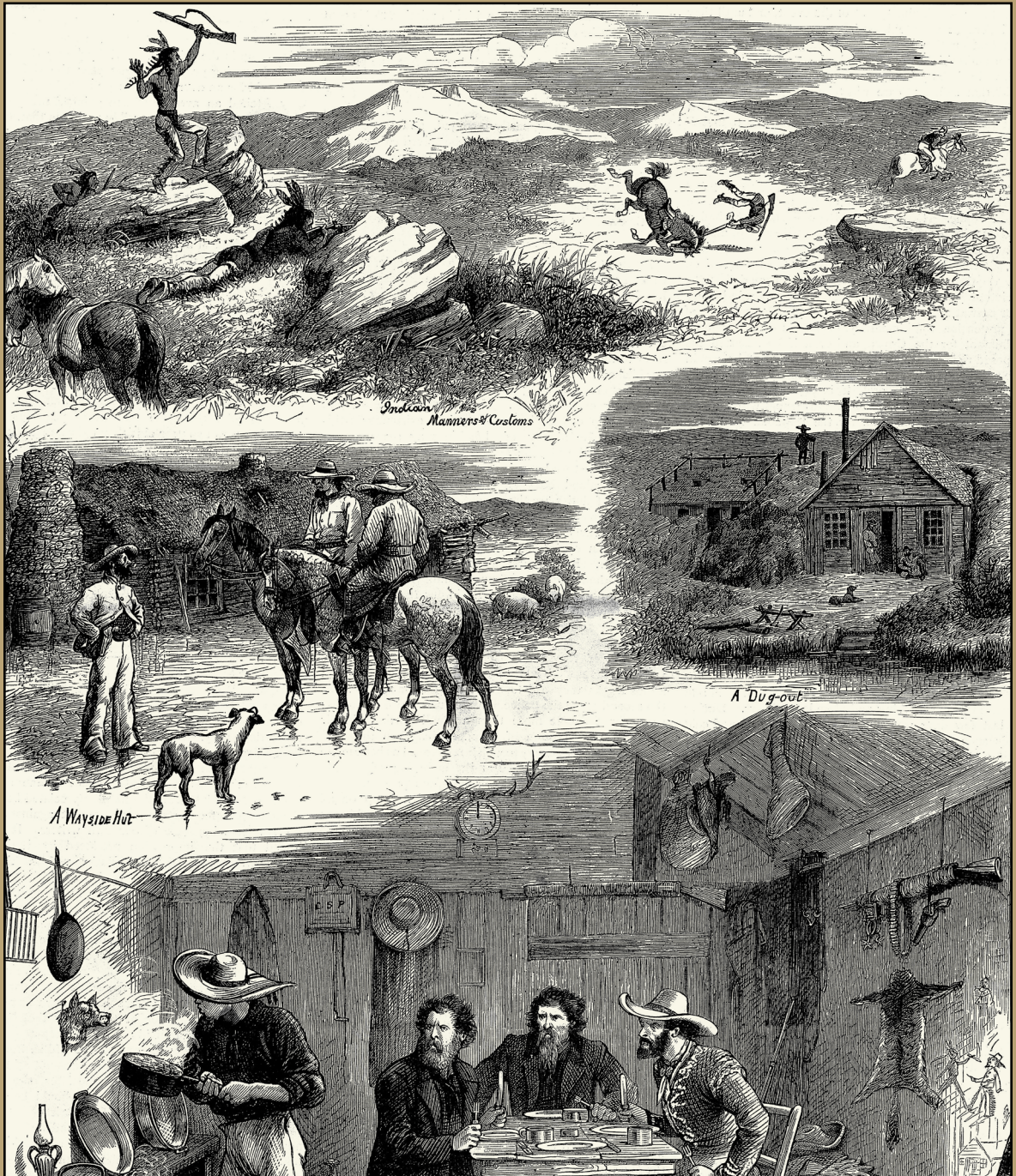




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Serranus Clinton Hastings: A Counterpoint on Culpability

Serranus Clinton Hastings: A Counterpoint on Culpability

BY KRISTIAN WHITTEN

EDITOR'S NOTE: *The Spring/Summer issue of the Review included an article by San Francisco lawyer and historian John Briscoe, generally supporting the recent renaming of Hastings College of the Law to UC College of the Law, San Francisco. Our original intention was to feature a second article in that same issue questioning the name change and further interrogating Serranus Hastings' role in the Indian massacres of the mid- and late-1850s. None of the scholars we contacted last spring agreed to take up the opposing position. But after that issue was published, Kristian Whitten, a retired deputy attorney general and Hastings alumnus, came forward and has written this rejoinder to John Briscoe's article.*

JOHN BRISCOE'S "Reflections on the Great Denaming Debate" in the *Review's* Spring/Summer 2023 issue quotes Thucydides as remarking: "Most people . . . will not take the trouble in finding out the truth, but are much more inclined to accept the first story they hear."¹ He also posits, "History should make you uncomfortable," quoting Sydney Sheehan.² Both of those concepts are at play in the renaming of Hastings College of the Law.

The law school's renaming was driven by a scholarly characterization of its founder as "profit[ing] from the theft of California Indian land,"³ and being the "wealthy mastermind" of Indian hunting expeditions.⁴

According to this narrative, when the settlers' "pastoral activities began to threaten the Yuki hunter/gatherer economy, . . . [the Yuki] retreated into mountain areas where they faced the twin challenges of fewer food sources and violent encounters with hostile tribes. Without access to productive land and fearful of the dangers associated with hunting and gathering on neighboring tribal lands, Yuki began killing settlers' stock to survive."⁵

However, at the time of the events at issue, the death penalty was imposed for many crimes, including "horse stealing and cattle rustling."⁶

1. John Briscoe, "Reflections on the Great Denaming Debate" (Spring/Summer 2023) *CSCHS Review* 8.

2. *Id.* 9.

3. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873*, New Haven: Yale Univ. Press, 2016, 348.

4. Benjamin Madley, "California's Yuki Indians: Defining Genocide in Native American History" (2008) 39 *Western Hist. Qtrly.*, 303, 319.

5. Benjamin Madley, "Patterns of frontier genocide 1803–1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia" (2004) 6 *J. of Genocide Res.* 167, 177.

6. William Gangi, "A Scholar's Journey in the Dark Side" (2007) 11 *Chap. L. Rev.*, 1, 18, fn. 79, citing Raoul Berger, *Death Penalties: The Supreme Court's Obstacle Course*, Harvard Univ.

At the same time, the California Legislature passed the 1850 "militia acts," which created "ranger militias" that were commissioned and supervised by the governor to serve as local police forces. It is reported that more than 3,000 militiamen enrolled in 24 of these ranger militias, which are said to have indirectly encouraged Indian killings by "a far greater number of vigilantes, with devastating effect."⁷

These were the volatile times in which Serranus Clinton Hastings purchased 1,200 acres in the Eden Valley of Mendocino County to provide for his livestock.

In his 1978 history of Hastings College of the Law, the late UC Berkeley historian Thomas Garden Barnes describes California's first chief justice as having become "very rich, and very newly-rich," by the time he and the state founded the college.⁸

In 1851, two years after arriving in California, Hastings moved his family into a modest home in the state's third capital, Benicia. The bulk of his later-acquired real property holdings were in San Francisco, Sacramento, Solano, Napa, Lake and Mendocino counties.⁹

Much, if not all, of that land was considered by the state's indigenous people to be theirs, but before Congress conveyed it to the State of California, it had been ceded to the United States under the terms of the Treaty of Guadalupe Hidalgo after the Mexican War. Mexico had acquired it after its successful war of independence from Spain.¹⁰

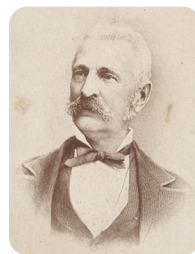
Press, 1982, 148. As Prof. Berger points out: "The common law, it will be recalled, knew no doctrine of disproportionate or excessive punishment," and that "such was the disproportion that prevailed at the adoption of the Constitution." *Ibid.* See *People v. Love* (1961) 56 Cal.2d 720, 734 (McComb, J. dissenting) ("In the early history of the United States of America, including California, the death penalty was imposed by early settlers to stop the rustling of cattle").

7. Madley, *An American Genocide* 173–75.

8. Thomas Garden Barnes, *Hastings College of the Law: The First Century*, Univ. of Calif. Hastings College of the Law Press: 1978, 25.

9. *Id.* 28.

10. The United States acquired ownership to the 100 million acres of land known as California in 1848, when the U.S. Senate ratified the Treaty of Guadalupe Hidalgo. In 1853, Congress conveyed 500,000 acres of that land to the new State of California. The state then made that land available for purchase by private parties, and in 1858 Serranus Hastings purchased from the state 1,200 acres of that land. Eventually, he acquired many tens of thousands of acres by, among other



Chief Justice
Serranus Hastings.
Photo: Public domain.

Regarding the claims of Hastings' alleged "theft" of his land from those indigenous people, in the twenty-first century the "uncomfortable" truth is that at that time, the law in the United States of America and of the new State of California was, and is still today, that:

It is well settled that . . . the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission of the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.¹¹

In his 2016 book, *An American Genocide*, UCLA history professor Benjamin Madley writes that Hastings built his fortune on California real estate, and thus "profited from the theft of Indian land."¹²

Following Madley's lead, Briscoe creates his own narrative that the Mendocino Indian Wars constituted "genocide," and that Serranus Hastings "had directed the mass murders of Indians in Round Valley and elsewhere, and taken their lands."¹³

However, Madley and Briscoe are wrong in their foundational assumption that Hastings' title to the Eden Valley was inferior to Indian tribes' aboriginal rights.¹⁴

And there is nothing in their narrative that, by extension, would prevent their theory about Hastings' title from applying to that of all current non-native holders of title to land in California.

means, purchasing "school-land warrants." An image of one of his such warrants is reproduced in this *Review* issue above.

11. *Tee-Hit-Ton Indians v. United States* (1955) 348 U.S. 272, 279. In Briscoe's 2003 law review article, cited at page 9 of his *Reflections* (John Briscoe, "The Aboriginal Land Rights of the Native People of Guam" (2003) 26 *Hawaii L. Rev.* 1, 3–4), he confirms that Congress has the right to extinguish "aboriginal title" "without any legally enforceable obligation to compensate the Indians." Thus, Congress' cession of the formerly Mexican land to California extinguished any "aboriginal title," and Hastings took good title to some of that land from the State of California.

12. Madley, *An American Genocide* 350.

13. Briscoe, "Reflections," (Spring/Summer 2023) *CSCHS Review* 2.

14. See also Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846–1873*, Lincoln: Univ. of Nebraska Press, 2012, 2 ("It is the openly arrived at and executed genocide of Native peoples in order to secure property with which I am concerned in this study").



School land warrant granting 160 acres of land to S. Clinton Hastings in 1852, one of many he held. Photo: Public domain.

Regarding the claim, by proponents of denaming, that Hastings "masterminded" Indian hunting expeditions, there is no assertion and no evidence that he killed, or knew in advance of any plan to kill, Indians. In fact, he testified under oath in the legislature's 1860 investigation into the Mendocino Indian Wars¹⁵ that he had no knowledge of any Indian killings before they occurred.

15. The legislature's investigation is published in Select Committee on Indian Affairs, "Majority and Minority Reports of the Special Joint Committee on the Mendocino War" (1860) *Appendix to the Journal of the Senate of California*, 11th Session (1860 report). The majority report, signed by Senators Farrell and Dickinson and Assembly members Maxon and Phelps, found that "grievous wrong has been committed upon a defenseless race" and strongly criticized the settlers' "slaughter of [Indian] beings, who at least possess the human form." *Id.* 6. The majority report concluded that no "war" had actually occurred in Mendocino County, because the abject "slaughter" of native Indians, who themselves made "no attacks," did not rise to the "dignity" of being called "war, and that the amount appropriated by the federal government for the thousands of Indians in California" was "a pittance scarcely sufficient to pay the salaries of the officers employed for its disbursement" *Ibid.* The minority report, signed by Assemblyman Lamar, found the settlers' conduct to have been necessary, and blamed the federal and state governments for failing to control the Indian population. He noted that many Indians worked for settlers, receiving "liberal compensation for their labor," and asserted that a government policy should be adopted to facilitate such "domestication." *Id.* 9–11. Printed versions of the depositions of Serranus Hastings and selected others, appended to the legislature's report, also are set out, transcribed from the original handwritten documents, in the "White Paper" prepared by Professor Brendan Lindsay for the Hastings Legacy Review Committee, "Serranus Clinton Hastings in Eden and Round Valleys" (Dec. 14, 2021) 58, uclawsf.edu/wp-content/uploads/2022/01/Hastings-Legacy-Review_FINAL-1.pdf [as of Aug. 30, 2023]; Record F3753:484 Deposition of S. C. Hastings 1860 at Sacramento, CA. Except as noted, *infra*, citations to the depositions in this article are to this latter and more readily available source. In addition to the depositions chosen for inclusion in Professor Lindsay's White Paper are

WAS THERE A STATE POLICY OF “EXTERMINATION”?

As observed in footnote 16 on page 4, California’s first chief executive, Gov. Peter Burnett, foresaw “a war of extermination” that would be waged against “the Indian race” until it “becomes extinct.” In the course of researching images to accompany this article we found a number of original sources, including newspaper articles, related to this theme as part of news accounts describing the killing of Indians in Northern California circa 1860. Three publications stood out, and are described here.

INDISCRIMINATE MASSACRE OF INDIANS. WOMEN and CHILDREN BUTCHERED.

A report was brought from Eureka on Sunday morning, that during the night nearly all the Indians camping on Indian Island, including women and children, were killed by parties unknown. A few loaded canoes bringing the dead bodies to Union on their way to Mad river, where some of the victims belonged, confirmed the report. But when the facts were generally known,

The first, attributed (in Lindsay, “White Paper,” *supra* fn. 15, 326) to the noted writer Bret Harte, appeared in the February 29, 1860, edition of the *Northern Californian Union* under the headline “Indiscriminate Massacre of Indians, Women and Children Butchered.” It reported that groups of settlers had attacked and slaughtered approximately 70 Indians in Humboldt, the vast majority — 50 or 60 — “women and children.” The “[o]ld women, wrinkled and decrepit lay weltering in blood, their brains dashed out and dabbled with their long gray hair.” And there were numerous “[i]nfants scarce a span long, with their faces cloven with hatchets and their bodies ghastly with wounds.” The same article further related: “It is also said that the same has been done at several ranches on the Eel river,” undertaken by “men who have suffered from depredations so long on Eel river and vicinity.”

A corresponding news report published in San Francisco’s *Daily Alta California* described the same Humboldt events under the headline “Horrible Massacre of Indians at Humboldt Bay” (Feb. 29, 1860). Finally, that edition of the newspaper editorialized about the Humboldt episode as well as other related events under the headline, “Our Indian Massacre Policy” (Feb. 29, 1860), labeling the killers “exterminators” and repeatedly characterizing the state as promoting extermination. The editorial apparently viewed Gov. Burnett’s anticipated “war of extermination” as reflecting state policy. It asserted:

Daily Alta California.

SAN FRANCISCO, WEDNESDAY, FEB. 29.

Our Indian Massacre Policy.

If anything could jeopardize the passage of a plunder bill providing for the payment of the Indian war claims, more than the inherent wickedness of the principle upon which the bill is founded, it ought to be the report of the re-

Horrible Massacre of Indians at Humboldt Bay.

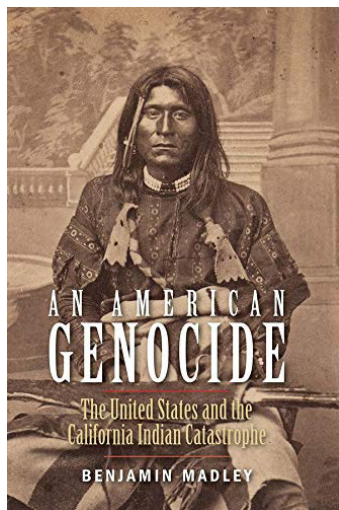
The *Telegram* of last evening has the following particulars relative to a massacre of Indians in and near the vicinity of Humboldt Bay:

It appears that a party of farmers and graziers residing around the bay, annoyed at the frequent instances of running off stock by the Indians, formed a secret society for their extermination.

On Sunday morning, Feb. 26th, between 3 and 4 A. M., a party of about thirty men from Eel River crossed over to Indian Island, and massacred some forty Indians, men, women and children—butchering them with axes and knives. Indian Island is situated in the bay opposite Eureka, and is about a quarter of a mile from the latter place. Eight or ten Indians escaped the massacre, and made their way to Eureka, where they placed themselves under the protection of the citizens. A party of the latter immediately proceeded to the island, where they found thirty-six butchered in cold blood—among them several infants only a few weeks old. No trace of the murderers could be found, except the remains of their victims.

“This policy of exterminating the Indians is, in a great degree, the work of a few . . . land grabbers who first cover as many of the valleys among the mountains and on the river margins as possible, with school-land warrants and other titles, and then employ the Killers to go on and massacre the Indians in the whole region, for the purpose of leaving the country free for their herds. Some of these men have been commissioned after the nefarious object of their organization was known, and have slaughtered their hundreds of Indians, not because the latter were guilty, but because these white-faces, with black hearts and red hands, were paid for their work of death and extermination.”

— THE EDITORS



Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873*.

An 1852 government report said that many Californians believed “destiny has awarded California to the Americans to develop,” and that if the Indians “interfered with progress they should be pushed aside.”¹⁹ But after more than a century of the “civilization” imposed by the State of California and the United States, some tribes have learned to profit handsomely from their unique status.²⁰

On its present-day website, the Round Valley Indian Tribes in Covelo, Mendocino County, California, recount that the Yuki were warriors who were

“aggressive and attacked other nearby native peoples on numerous occasions trying to protect their homeland and resources.”²¹ In addition, as Madley noted, at the time we’re studying there were ongoing violent encounters between the Yuki and other tribes.²²

Serranus Hastings’ Actions in the Late 1850s Did Not Constitute Genocide

Madley’s 2008 Yale Ph.D. thesis focused on redefining the term “genocide” to include the Yuki’s “cataclysmic population decline” between 1854 and 1864.²³

His ultimate conclusion that the Yuki case is one of genocide rests on his determination that the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such” (as required by the 1948 UN convention’s definition) can be inferred by actions of

diverse groups of individuals who are not working in direct concert.²⁴

In that thesis, Madley began by recounting a grim and dramatic event on May 15, 1854, about “six Missourian explorers” swooping down on 3,000 Yuki Indians in the Round Valley “‘who just lay over the horses’ necks and shot They just rode them down It was not difficult to get an Indian with every shot’” The massacre was a prelude to an American genocide.²⁵ This account had nothing to do with Serranus Hastings or existing settlers, but it set a sensational tone for Madley to single out Serranus Hastings as the “wealthy mastermind” of the Eel River Rangers militia’s actions.²⁶

In his book, Madley admits that, by referring to the Yuki’s experience as genocide, he is applying a twentieth century international treaty, which by its own terms does not allow for retroactive application, to nineteenth century events,²⁷ but he asserts that the UN genocide convention “remains the only authoritative international legal definition.”²⁸

Nevertheless, he then divides “killings” into four categories: battles, massacres, homicides, and even legal executions following a court trial. In each case, Madley believes that the killings can be genocidal when they “consciously contribute to a larger killing pattern” aimed at a “national, ethnic, racial, or religious group.”²⁹

However, the UN’s Office on Genocide Prevention and the Responsibility Project states:

Intent is the most difficult element to determine. To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Cultural destruction does not suffice, nor does an intention to simply disperse a group. . . . Importantly, the victims of genocide are deliberately targeted — not randomly — because of their real or perceived membership of one of the four groups protected under the Convention (which excludes political groups, for example). This means that the target of destruction must

19. <https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/> [as of Aug. 16, 2023].

20. See Donald Craig Mitchell, *Wampum: How Indian Tribes, the Mafia and an Inattentive Congress Invented Indian Gaming and Created a \$28 Billion Gambling Empire*, New York: The Overlook Press, 2016. In 2020, tribes that operate casinos in California received gaming revenue that totaled \$8 billion, and in 2008, at least one tribe that operates a casino was paying its members \$100,000 a month. Donald Craig Mitchell, “Tuition-waiver policy for Native Americans isn’t the right way to atone for historical wrongs,” *Cal Matters*, June 29, 2022, <https://calmatters.org/commentary/2022/06/tuition-waiver-policy-for-native-americans-isnt-the-right-way-to-atone-for-historical-wrongs/#> [as of July 28, 2023].

21. “About Us,” *Round Valley Indian Tribes*, <https://www.rvut.org/about/about-us> [as of Aug. 16, 2023].

22. See text accompanying fn. 5.

23. Madley, “California’s Yuki Indians,” 39 *Western Hist. Qtrly.*, 303, 304.

24. *Id.* 329–30 (“There are, however, complicating factors relating to proof of intent, the federal government’s role, and the non-state actors as agents of genocide”).

25. *Id.* 303–04.

26. *Id.* 319.

27. Madley, *An American Genocide*, 5.

28. *Ibid.* See Edna Friedberg, *Why Holocaust Analogies Are Dangerous*, United States Holocaust Memorial Museum, Dec. 12, 2018, <https://www.ushmm.org/information/press/press-releases/why-holocaust-analogies-are-dangerous#> [as of Aug. 16, 2023] (“It is all too easy to forget that there are many people still alive for whom the Holocaust is not ‘history,’ but their life story and that of their families”).

29. Madley, *An American Genocide*, 11–13.

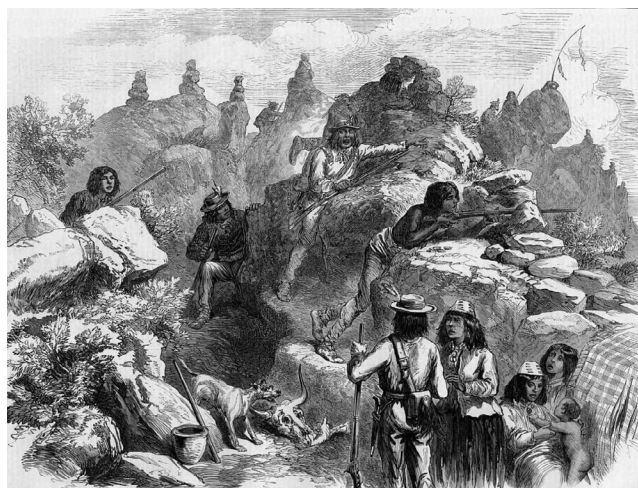
be the group, as such, and not its members as individuals.³⁰

Madley's thesis thus admits that generalizing about California Indians is difficult,³¹ and his book acknowledges an "ongoing American genocide debate."³²

Although the wanton killings committed by the Eel River Rangers were deplorable, the group also took prisoners and returned Indians to the Mendocino Reservation. And the separate killing by Hastings' employee, H.L. Hall, of 14 Indians because they stole and butchered livestock, a capital offense at the time (which was not specifically noted by Madley — but is addressed in Hastings' testimony), occurred in the absence of state law enforcement and the result of the "vigilante justice" of the time. Hall also took prisoners and returned them to the reservation.³³

Serranus Clinton Hastings

Hastings was a man trained in the law who, after he left state service, in 1878 established the first law school west



"The Modoc Indians in the Lava Beds." Illustration, 1873. Public domain.

30. Madley, "California's Yuki Indians," 39 *Western Hist. Qtrly.*, 303, 331, quoting William D. Rubenstein, *Genocide: A History*, London: Routledge, 2004, 53 ("American policy toward the Indians . . . never actually encompassed genocide"), *ibid.* quoting Guenter Lewy, "Were American Indians the Victims of Genocide?" *History News Network*, Sept. 2004, <https://hnn.us/articles/7302.html> ("Genocide was never American policy. . . . [T]he sad fate of America's Indians represents not a crime but a tragedy") [as of Aug. 16, 2023].

31. Madley, "California's Yuki Indians," 39 *Western Hist. Qtrly.*, 303, 332.

32. Madley, *An American Genocide*, 14. Indeed, as shown in the editors' sidebar on page 5, that debate traces back to at least 1860, when some contemporaneous observers characterized the state as having and enforcing a "policy of extermination."

33. Lindsay "White Paper," *supra* fn. 15, 59–62: Record F3753:449, Deposition of H.L. Hall, 1860 at Round Valley, Mendocino County, CA [capitalization in original] [as of Aug. 16, 2023]. See Dan McLaughlin, "California's First Experiment Without Police," *National Review*, Aug. 20, 2020, <https://www.nationalreview.com/2020/08/san-francisco-1850s-california-first-experiment-without-police/> ("Californians learned the hard way that vigilante justice and the demands of the mob are no substitute for police and courts of law") [as of Aug. 23, 2023]. California Governor Gavin Newsom also publicly referred to the state's treatment of its native population as genocide (Fuller, "He Unleashed a California Massacre," A-12), but apparently decided not to use the word "genocide," in his published executive order establishing his Truth and Healing Council. See <https://www.gov.ca.gov/wp-content/uploads/2019/06/6.18.19-Executive-Order.pdf> (June 18, 2019) [as of Sept. 7, 2023]. Similarly, President Joe Biden's accusations of genocide in Ukraine were denied by his National Security Advisor, Jake Sullivan, to which Biden responded: "We'll let the lawyers decide, internationally, whether or not it qualifies [as genocide], but it sure seems that way to me." "Biden says Russia is committing 'genocide' in Ukraine," *ABC News*, Apr. 12, 2022, <https://www.nbcnews.com/politics/white-house/biden-calls-putin-actions-ukraine-genocide-rcna24131> [as of Aug. 16, 2023].

of the Mississippi. One of his most vocal detractors at the time claimed he was doing so to atone for his past sins.³⁴

From the outset, he was at odds with his hand-picked board of directors. As the college's first dean, and contrary to the directors' rule barring women students, he supported Clara Shortridge Foltz's admission,³⁵ and he later sparred with the directors in court over the University of California's role in the administration of the law school,³⁶ leading UC Berkeley's professor Barnes to describe the law school's relationship with the university as a "common law marriage."³⁷

In 1834, Hastings left New York, where he was born in 1814, and in 1837 "moved to the far frontier, the Black Hawk Purchase, now Iowa, then part of the Wisconsin Territory."³⁸ There he was appointed a justice of the peace, served in the territorial legislature, and as a member of the new state's first contingent of United States congressmen, where he served with colleagues like John Quincy Adams and Abraham Lincoln. In 1848, he became Iowa's chief justice, and in 1849, came to California with the Gold Rush³⁹ in the company of 3,000 Iowans. During that crossing they reportedly were attacked by Indians, who were dispersed with military help secured by Hastings.⁴⁰ In late 1849 he was appointed California's first chief justice

34. Barnes, *Hastings College of the Law*, 22.

35. *Foltz v. Hoge* (1879) 54 Cal. 28. See John Caragozian, "Clara Foltz: pioneer lawyer for women, criminal defendants and all Californians," *S.F. Daily Journal*, Nov. 8, 2022, 5.

36. *People ex. rel. Hastings v. Kewen* (1886) 69 Cal. 215.

37. Barnes, *Hastings College of the Law*, 85.

38. *Id.* at pp. 25–26.

39. *Ibid.*

40. See Beverly Ann Doran, "S. Clinton Hastings," thesis submitted in satisfaction of the requirements for the degree of Master of Arts, Univ. of Calif., Berkeley, deposited in the University Library Mar. 26, 1952, 17.

SACRAMENTO DAILY UNION.

THE "MENDOCINO WAR" EXPOSURES.

I saw a man driving squaws from a clover field inside the Reservation; they were picking clover or digging roots; he said he would be d—d if he would allow them to dig roots or pick clover, as he wanted it for hay.

Lawrence Battaile, who is employed on the same farm, estimates the number of Indians killed in that vicinity since last July to be from three to four hundred:

The manner of attacking an Indian camp is to attack the camp first, and after the Indians have been killed or run away, then to enter the camp and see if any evidence can be found against them; I know this, because persons who have gone out after them have told me of the pains it was necessary to take to surround a camp without the Indians knowing it.

Battaile supplies further information on the subject of the Indian boy murder, gathered through an interpreter. He says:

Three men, the morning before, overtook the boy in the field and took him to Charles Bowen's, and from Bowen's to a thicket about three-quarters of a mile below the corner of the field, and there killed him.

The "Mendocino War" Exposures, *Sacramento Daily Union*, April 16, 1860. Public domain.

and in 1851, after his Supreme Court term ended, he ran for and was elected its third attorney general.⁴¹

An example of Hastings' judicial approach to the rights of native people is found in *Sunol v. Hepburn*,⁴² where land had been granted to a native person named Roberto by the Mexican government, and conveyed by him to Sunol in payment of a debt. The majority opinion determined that Sunol had not received good title from Roberto because Mexican laws prevented native people from selling land. In doing so it described the purpose of Mexican laws that prevented native people from transferring their lands:

All of them manifest the great anxiety which the rulers of Mexico have felt, to collect the natives together in communities and subject them to municipal regulations, to secure to them the ability to pay tribute imposed upon them for the supply of the national treasury, to induce them to forget their ancient religious rites and embrace the Catholic faith, to reform their idle and roving propensities and make them industrious and useful subjects.⁴³

41. See Doran, "S. Clinton Hastings," 83–84.

42. (1850) 1 Cal. 254.

43. *Id.* 278.

Chief Justice Hastings dissented, interpreting Mexican law narrowly in favor of Roberto, so that it would not prevent his title from passing to Sunol, by pointing out that the laws preventing native people from transferring their lands were based on the fact that title to land was actually held by the government. Thus, because they were "the mere occupants of the lands from which they had never been ejected," he reasoned that a transfer of such title was only "voidable" by the native people and their heirs, and the government. Because the government did not challenge Roberto's title, Hastings would have granted a new trial to determine other issues that had not been reached.⁴⁴

Juxtapose that with a case that Briscoe cites as manifesting Hastings' anti-Indian attitude,⁴⁵ where white settlers were arrested for allegedly massacring Indians, and sought to be released on bail pending trial. The local magistrate denied that request, but in the first case to come before it, the California Supreme Court ordered them released on bond. Briscoe says that they "jumped bail" and were never tried, which he assumes "the court no doubt knew would happen."⁴⁶

What Briscoe fails to report is that Madley's book, upon which he relies heavily, reveals that the defendants were represented by a "legal defense team," and that the court's opinion provided two reasons for releasing them on bond: (1) the lower state courts were still not fully organized, and (2) there was no jail or prison where the accused could be securely held.⁴⁷

Madley's book also says that they "jumped bail," but that "several remained prominent citizens"; and that California superintendent of Indian Affairs Thomas J. Henley later explained, "[t]he excitement ran high during the confinement of the parties, and the responsibility of

44. See also Doran, "S. Clinton Hastings," 40–41. See generally, Barnes, *Hastings College of the Law*, 34–37. But see *United States v. Candelaria* (1926) 271 U.S. 432, 442, citing *Sunol v. Hepburn*; *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247 ("The [United States Supreme Court] explained that since the arrival of the colonists on American soil, the [Native American] tribes were treated as dependent sovereign nations, with distinct political communities under the protection and dominion of the United States," citing *Worcester v. Georgia* (1832) 31 U.S. 515, 549–61 (Marshall, C.J.)).

45. *People v. Smith* (1850) 1 Cal. 9.

46. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 5.

47. Madley, *American Genocide* 124–25. See *People v. Smith*, *supra* 1 Cal. at 14–15 ("If the District Courts were fully organized, and their terms prescribed and known, we should, perhaps, not deem it within the proper exercise of a sound discretion to bail them; but considering the want of definite and well understood laws regulating proceedings in the existing Courts of First Instance, and the uncertainty as to the time when the District Courts will be ready to proceed with business, superadded to the fact that there is no jail or prison in which prisoners can be kept with security, we feel disposed to order their release on bail").

conducting the prosecution was very great, and even dangerous to personal safety,” but “we do know that the arrests halted the killing campaign”⁴⁸

Thus, rather than being an indication of anti-Indian bias, these early legal proceedings show that the rule of law was beginning to develop and have a positive effect in those chaotic early days of statehood, and that by December of 1850, when *Sunol v. Hepburn* was decided, the California courts were starting to operate as such.⁴⁹

The Renaming of UC Hastings

On September 23, 2022, California Governor Gavin Newsom signed AB 1936, which changed the name of Hastings College of the Law to College of the Law, San Francisco, effective January 1, 2023.⁵⁰

Among the findings made in AB 1936 are that:

S.C. Hastings perpetrated genocidal acts against Native California Indigenous People, most especially the Yuki Tribe

S.C. Hastings enriched himself through the seizure of large parts of [the Eden and Round Valleys] and financed the college of law bearing his namesake with a \$100,000 donation . . . ; and

S.C. Hastings’ name must be removed from the College to end this injustice and begin the healing process for the crimes of the past.⁵¹

Briscoe compares this legislative action to the renaming of Calhoun College at Yale University because John C. Calhoun owned slaves and supported the institution of slavery, and of Phelan Hall at the University of San Francisco because John Phelan “was a rank racist.”⁵² He notes that “as far as we know” neither man killed a slave or a Chinese person, and asks, “If slaveholding and racism are grounds for renaming, what of genocide?”

And in his July 20, 2017, op-ed in the *San Francisco Chronicle*, Briscoe concluded that Serranus Hastings made a fortune in real estate, which was facilitated by his acquiring title to land “by the massacre of the rightful claimants, a near-extinction [he] promoted and funded. As UCLA professor Benjamin Madley wrote in his sobering *An American Genocide*, published in 2016 by

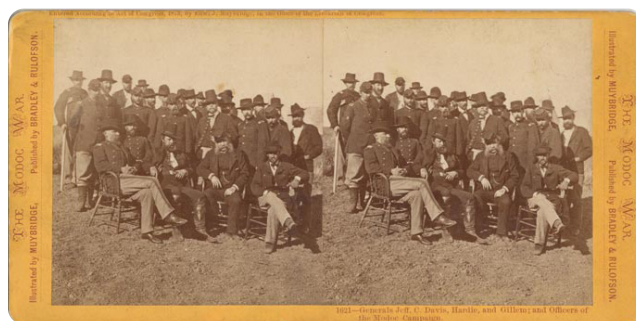
48. *Ibid.*

49. See Doran, “S. Clinton Hastings,” 34 (“The beginnings of the court were set in a period of transition. In the transfer of governmental control from Mexicans to Americans there was bound to be some degree of confusion until the new government was firmly established and efficiently working.”); *id.* 36 (“Despite the fact that the state government had been organized and was in operation, there still prevailed a great deal of political and legal confusion”).

50. Cal. Ed. Code § 92200.

51. Cal. Stats. 2022, ch. 487 (reg. sess.).

52. Briscoe, “Reflections” (Spring/Summer 2023) *CSCHS Review* 9.



“The Modoc War.” Generals Jeff. C. Davis, Hardie, and Gillem; and officers of the Modoc Campaign. Stereograph by Eadweard Muybridge, 1872. Photo courtesy of the California History Room, California State Library, Sacramento, California.

none other than Yale University Press, . . . Hastings had ‘helped to facilitate genocide.’”⁵³

In discussing UC Hastings’ process, Briscoe notes that its chancellor and dean, David Faigman, stated in a September 14, 2020, memo, “I reached the conclusion that, when taken together, the factors relevant to considering this question overwhelmingly point toward retaining the name, UC Hastings College of the Law.”⁵⁴

And after reaching that conclusion, Dean Faigman and James Russ, president of the Round Valley Indian Tribes, co-authored a July 3, 2021, op-ed piece in the *Sacramento Bee* concluding: “Changing the name of the school would be of little benefit to the living descendants of Serranus Hastings’ crimes. These atrocities should not be erased — instead it should be a societal goal to never forget this sordid chapter of American history and the challenges that Native Americans continue to face.”⁵⁵ While disagreeing that Hastings committed what were

53. John Briscoe, “The Moral Case for Renaming Hastings College of the Law,” *S.F. Chronicle*, July 20, 2017, <https://www.sfchronicle.com/opinion/openforum/article/The-moral-case-for-renaming-Hastings-College-of-11275565.php> [as Aug. 16, 2023].

54. Briscoe, “Reflections” (Spring/Summer 2023) *CSCHS Review* 12. See also *id.* 8 (Yale University remains named after “an English slave trader who profited handsomely from the institution of slavery”); Myron Moskowitz, “Cancel ‘Berkeley’?,” *S.F. Daily J.*, June 5, 2023, 6 (the name of “an individual whose views warrant no honor or commemoration” can take on a secondary meaning that, over time, “come[s] to embody and represent very different values and perspectives”).

55. David L. Faigman and James Russ, “UC Hastings Name-sake Killed, Displaced California Tribes. But Changing Name Isn’t Enough,” *Sacramento Bee*, July 3, 2021, <https://www.sacbee.com/opinion/op-ed/article251138474.html> [Sept. 2, 2023]. Several years later, in the *New York Times* front-page article that caused the sudden decision to change the name, James Russ, president of the Round Valley Indian Tribes is quoted as “emphasiz[ing] that the leadership is happy to accept the college’s offer of legal assistance for the tribe’s activities. ‘We have a window of opportunity and we don’t want to screw it up,’ Mr. Russ said.” Thomas Fuller, “He Unleashed a California Massacre. Should This School be Named for Him?” *N.Y. Times*, Oct. 27, 2021, 1.

crimes at the time, I believe that the societal goal is nevertheless a good one.

However, in October of that year, Thucydides' prediction about people not wanting to take the time to find out about the truth was about to become manifest.

As Briscoe notes, Dean Faigman suddenly changed his mind and supported changing the law school's name, when all that had happened of significance in the interim between September 2020 and October 2021 was the publication of a front-page article in the *New York Times* repeating the claims made by Madley in his book.⁵⁶ Within a week of that article, the name-change legislation was already in process.

But Briscoe's account omits an important detail; almost immediately after the *New York Times* article was published, several powerful and wealthy law school alumni, including former California Assembly Speaker and San Francisco Mayor Willie Brown and Joseph Cotchett, announced their insistence that the name be changed. Cotchett, who had given roughly \$10 million to the law school to establish the Cotchett Law Center, said, "I will do everything in my power as a 55-year alumnus of Hastings to change the name."⁵⁷

Briscoe also notes that under Yale's renaming criteria: "[t]here is a strong presumption against renaming a building on the basis of the values associated with its name-sake."⁵⁸ When addressing the renaming of the building at Berkeley Law named after John Boalt, he fails to note that the Berkeley campus' Building Name Review Committee determined that John Boalt had no connection to the university,⁵⁹ or the law school dean's conclusion that even where "notable individuals" owned slaves or supported racist policies, "in those instances there are good reasons to honor these individuals notwithstanding their racist statements and actions." One of those "notable individuals" who supported racist policies was Earl Warren, former California governor and chief justice of the United States.⁶⁰

56. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 12.

57. Nanette Asimov, "UC Hastings Leaders Move to Change Name Linked to Native American Massacres," *S.F. Chronicle*, Nov. 2, 2021, <https://www.sfchronicle.com/bayarea/article/UC-Hastings-leaders-move-to-change-name-linked-to-16586688.php> [as of Aug. 16, 2023].

58. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 12.

59. "Memorandum from the Building Name Review Committee to Chancellor Carol Christ, Re: Berkeley Law's Proposal to Remove the Name from Boalt Hall," 5 (undated) https://chancellor.berkeley.edu/sites/default/files/building_name_review_committee_recommendation_-_boalt_hall.pdf [as of Aug. 16, 2023].

60. Memo from Dean Erwin Chemerinsky to UC Berkeley Building Name Review Committee, Nov. 30, 2018, 3, https://chancellor.berkeley.edu/sites/default/files/boalt_hall_building_name_review_committee_proposal.pdf [as of Aug. 16, 2023]. See Sumi Cho, "Symposium: Redeeming Whiteness in

Thus, it would appear that UC Hastings' leadership's decision to seek the required legislative cooperation in changing the law school's name had more to do with money and political clout than weighing against his alleged shortcomings objective factors that compared a notable individual's contributions to society and the school.⁶¹

The Evidence

In reviewing Serranus Hastings' alleged shortcomings, it appears that the school's leadership and California's legislature and governor simply accepted as gospel what the *New York Times* said about him on October 21, 2021,⁶² notwithstanding all the evidence and process that had preceded the Hastings Legacy Review Committee's conclusion to retain the Hastings name.

However, there is no mention in the *Times* article of the fact that in the 1860 legislative investigation into the Mendocino Indian Wars, Serranus Hastings testified under oath that he had no contemporaneous knowledge of the Indian killings with which he is now being charged.⁶³ At the conclusion of that investigation, the

the Shadow of Internment: Earl Warren, Brown and a Theory of Racial Redemption" (1989) 19 *B.C. Third World L. J.* 73.

61. See Doran, "S. Clinton Hastings," 143 ("Hastings, pioneer, jurist, and businessman, added to the color of early California history. Questions may be raised as to the methods employed by the judge, but that he made contributions of merit to California cannot be denied.").

62. Fuller, "He Unleashed a California Massacre." At the April 26, 2022, hearing before the California Assembly's Higher Education Committee, the chair of the committee said that he was convinced that what the *New York Times* wrote about Serranus Hastings was true, because the *Times* prints only "news that's fit to print." "I do not doubt the facts," he said. See [https://www.assembly.ca.gov/committees/MediaArchive/04/26/2022 Assembly Higher Education Committee](https://www.assembly.ca.gov/committees/MediaArchive/04/26/2022%20Assembly%20Higher%20Education%20Committee) [as of Aug. 16, 2023]. Before the state Senate Education Committee, commenting on opposition to eliminating the Hastings name, Sen. Mike McGuire . . . asked, "if this is fake news or not?" He then said: "I am embarrassed to hear folks come in and defend the name of this institution." [https://www.senate.ca.gov/committees/MediaArchive/04/06/22 Senate Education Committee](https://www.senate.ca.gov/committees/MediaArchive/04/06/22%20Senate%20Education%20Committee) [as of Aug. 16, 2023]. See Malcolm Maclachlan, "Bill advances to change name of Hastings Law School," *S.F. Daily Journal*, April 7, 2022 ("That's true, an investigation was done in 1860," [state Sen. Thomas] Umberg said. "It is a further embarrassment to us that the Legislature should absolve him where the historic record is I think complete and replete with Hastings' part in these atrocities.").

63. See Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 9–10; Lindsay "White Paper," *supra* fn. 15, 58; Record F3753:484 Deposition of S.C. Hastings, 1860 at Sacramento, CA: "I arrived at Eden Valley with a herd of about 300 cows and calves & put them also in charge of Mr. Hall on my arrival then I learned that the Indians had dispersed from the Ranch in the Valley and had killed seven breeding mares this I learned from Mr. Hall and two or three other persons I found when I arrived there. I had no doubt then nor have I at this time that the reports were true — on my way home about a day's ride from Eden Valley my son a young man of 16 years of age informed me that Mr. Hall had been out the

California Legislature did not implicate Hastings in any killings or other wrongdoing.

The failure to fully consider the 1860 files is a miscarriage of justice; doing so would have resulted in a more complete examination of the times, and the then current, sorry state of affairs between the Indian tribes and the state and federal governments. Those who rushed through the name change prefer to avoid exposing these “uncomfortable” truths by scapegoating Hastings, who is no longer able to speak for himself.

What Hastings actually did in order to protect his and other settlers’ lives and property was first ask the federal authorities to contain the Indian tribes so that they would stop rustling and slaughtering livestock; and when that request was refused, he followed state law in drafting and circulating a petition asking the governor to authorize local law enforcement (then called militias) to protect their property and lives.

As he and his predecessors had done in many other instances, the governor complied with the settlers’ request and commissioned the militia, which he ultimately disbanded in early 1860, conveying his “sincere thanks for the manner in which [the force’s work] was conducted.”⁶⁴

Regarding killings attributed to his employee, H.L. Hall, Hastings testified that he eventually terminated Hall’s employment because he believed him inadequate to care for his cattle, not because of the killings. Thus it appears that, between the lack of today’s speedy communication,⁶⁵ and the perception by lawmakers and settlers in the 1850s and early 1860s that ongoing conflict between Indians and settlers was inevitable in the absence of state-sponsored law enforcement, vigilante killings were not viewed as unusual.⁶⁶

The UC Hastings Board of Directors Committee Report

The characterization of those killings as “genocide” was more recently rejected by a committee of the law school’s Board of Directors, after a group of the school’s alumni provided that board with evidence from the 1860 investigation indicating that Madley’s and Sacramento State

morning previous to my arrival there and killed 14 male Indians, in whose camp we found the remains of horses, this fact was concealed from me by Mr. Hall.” *Id.* 59: “Until since the investigation of this committee I was entirely ignorant of any outrages commit[ted] except the one related by my son led by Mr. Hall and the Indians. I dismissed him not because I then knew that he had committed any outrages but because that I was satisfied that my stock would be much better taken care of in other persons hands.” (*Ibid.*)

64. Lindsay “White Paper,” *supra* fn. 15, 106–07, Record F3753:409 Gov. Weller to Jarboe, Jan. 3, 1860.

65. See *post* fn. 78.

66. See *supra* fn. 16. And yet, as shown in the editors’ sidebar on page 5, some vociferously objected to what they characterized as the state’s “policy of extermination.”

DEPOSITION OF S. C. HASTINGS.

S. C. Hastings, being sworn, says :

I reside in Solano County ; my age is forty-five years, and my occupation is that of a dealer in horses, cattle, and real estate. About the month of August, one thousand eight hundred and fifty-eight, I owned between three and four hundred breeding mares and colts. Desiring to find a place to graze them and raise horses and stock, I inquired of the Superintendent of Indian Affairs, Col. Henley, who recommended to me Eden Valley and the country between the Middle and South Forks of Eel River, then uninhabited, except by the Ukia Indians, who had been, and were then, hostile to the white people, and had been committing depredations upon the stock in the vicinity of Round Valley ; and, upon consultation with Col. Henley, I believed that I could, by feeding one or two tribes, subdue them and make them useful, and have no difficulty with them,

Deposition of Serranus C. Hastings, Special Joint Committee on the Mendocino War, Calif. Leg., 1860, p. 29 (see n. 15). *San Francisco Pub. Lib. Photo: Jake Dear.*

University history professor Brendan Lindsay’s conclusions about Hastings do not reflect the facts about him or the culture of the times.⁶⁷

The committee focused on the facts that the Board of Directors had included in its resolution to pursue renaming the law school: “Serranus Hastings promoted and funded genocide,” and after reviewing the material submitted by alumni, the directors had determined “that the Board does not have adequate information to say that Judge Hastings engaged in genocide.”⁶⁸

These facts and evidence also led the Board of Directors’ committee to admit “that there is no incontrovertible proof that Judge Hastings knew more than he acknowledged.”⁶⁹

But the committee’s report rejected the broader request by some alumni to reconsider the name-change resolution, and the Board of Directors’ decision shows that it was clouded by what is referred to as “hindsight bias” — that is, “the tendency for people with knowledge of an outcome to exaggerate the extent to which they perceive that outcome could have been predicted. . . . More colloquially it is known as ‘Monday morning quarterbacking.’ ”⁷⁰

What is now widely referred to as hindsight bias can be traced back to the work of psychologist Baruch Fischhoff, who found that:

67. In spite of that finding by the committee, the entire UC Hastings Board rejected that finding. It also accepted Madley’s analysis of what constitutes genocide as true.

68. Chip Robertson & Albert Zecher, “Re-Examination of Board of Directors Decision to Pursue Renaming of College” (May 28, 2022), Hastings Legacy Review Committee, Board of Directors Report, 9 uclawsf.edu/wp-content/uploads/2023/04/Report-of-Committee-to-Re-Examine-Bd-Decision-5-28-22-1.pdf [as of Aug. 30, 2023].

69. *Id.* 2. It did not recommend abandoning the name change, stating that the UC Hastings Board’s decision was a “moral” and not a “legal” one. *Id.* fn. 3.

70. See generally, Hal R. Arkes and Cindy A. Schipani, “Medical Malpractice v. Business Judgment Rule: Differences in Hindsight Bias” (1994) 73 *Or. L. Rev.* 587, 588.

The march of civilization deprives the Indian of his hunting grounds and other means of subsistence that nature has so bountifully provided for him. He naturally looks at this as an encroachment on his rights, and, either from motives of revenge, or what is more likely in California, from the imperious and pressing demands of hunger, kills the stock of the settler as a means of subsistence, and in consequence thereof, a war is waged against the Indian, with its incidents of cruelty, inhuman revenge, rapine, and murder, which we are sorry, from the evidence before us, to be compelled to acknowledge, have in some instances, been perpetrated by some few of our citizens.

History teaches us that the inevitable destiny of the red man is total extermination or isolation from the deadly and corrupting influences of civilization. There is no longer a wilderness west of us that can be assigned them, and our interest, as well as our duty and the promptings of humanity, dictate to us the necessity of making some disposition of the Indian tribes within our borders that will ameliorate their sad condition, and also secure the frontier citizen from their depredations.

Excerpt from the Majority Report, Special Joint Committee on the Mendocino War, Calif. Leg., 1860, p. 1. *San Francisco Pub. Lib. Photo: Jake Dear.*

In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared “relatively inevitable” before it happened. People believe that others should have been able to anticipate events much better than was actually the case.⁷¹

Hindsight bias is found in a variety of applied settings including law, politics, historical judgment, psychotherapy case histories, medical diagnoses, and employee evaluations, and the United States Supreme Court has warned factfinders to avoid the distortion it can cause.⁷²

One of the most empirical explanations of hindsight bias posits that “learning an outcome alters what people believe about the world in ways that make the known outcome seem inevitable.” A related account explains this inevitability might be an adaptive feature related to self-esteem such that it enables people to “appear intelligent, knowledgeable, or perspicacious.” . . . Perhaps the point of greatest agreement among researchers is that the hindsight bias is automatic and non-conscious.

71. Jeffrey J. Rachlinski, “A Positive Psychological Theory of Judging in Hindsight” (1998) 65 *U. Chi. L.J.* 571, 572, quoting Baruch Fishhoff, “For Those Condemned to Study the Past: Heuristics and Biases in Hindsight,” in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under uncertainty: Heuristics and biases*, Cambridge: Cambridge Univ. Press, 1982, 335, 341.

72. Adam Powell, “KSR Fallout: Questions of Law Based on Findings of Fact and the Continuing Problem of Hindsight Bias” (2009) 1 *Hastings Sci. & Tech. L.J.* 241, 260. See *KSR Int’l Co. v. Teleflex Inc.* (2007) 550 U.S. 398, 421 (“A factfinder should be aware, or course, of the distortion caused by hindsight bias and must be cautious of arguments reliant on ex post reasoning”). See also Deborah L. Rhode, “Leadership in Law” (2017) 69 *Stan. L. Rev.* 1603, 1639 (with hindsight bias “[w]e revise the history of our beliefs in light of what actually happened; in hindsight, we exaggerate what could have been anticipated in foresight”).

That is, it operates even without the awareness of the person influenced by it.⁷³

The committee’s report claims that Hastings’ failure to report Indian killings by an employee to law enforcement, and his assistance in the formation of a local militia that went on to wantonly kill many Indians, shows his complicity in those killings.⁷⁴

Thus, the committee assumed that prior to Hastings’ role in the creation of the Eel River Rangers, and his acts of facilitating that group, there was state “law enforcement” extant in the Eden Valley of Mendocino County. However, that state militia, which Hastings and the other settlers sought and obtained from the governor after their request for help from the U.S. Army was rejected, *became* the state’s law enforcement.⁷⁵

What the committee really found troubling is what state and federal law provided for at that time, which led to the subjugation of Indians and the 1860 investigation’s findings. But in doing so the committee incorrectly characterized and exaggerated Hastings’ role, concluding: “Either Hastings did not concern himself with what the militia was actually doing, even merely to confirm that it was not engaging in mass violence — which his ongoing support for the militia clearly obligated him to do — or he knew and did not object. In either case he is implicated in the militia’s wrongdoing.”⁷⁶

That statement underscores that the committee’s knowledge of the militia’s ultimate “mass violence” caused it to presume that Hastings should assume that the militia would engage in “mass violence,” thus imposing a duty on him to continually check on the militia. It also assumes that once the militia was operational, Hastings had the power to stop it. In fact, the governor ordered the militia leader to restrain its behavior, but his order was not implemented. At that time, such orders were not quickly or easily delivered.⁷⁷

Further, the report takes no account of the times, and the fact that communication even remotely like what we have today was not available. Nor was travel quick or easy. It took Hastings five to seven days to travel between Eden Valley and his home in Benicia. Print media was

73. Justin D. Levinson, “Superbias: The Collision of Behavioral Economics and Implicit Social Cognition” (2011–2012) 45 *Akron L. Rev.* 591, 600–601.

74. UC Hastings College of the Law, Report to the Board of Directors, *supra* fn. 68, 3–4.

75. See Madley, *An American Genocide* 173–78 (California’s 1850 militia acts created 24 “ranger” militias, which “set an example that a far greater number of vigilantes followed, with devastating effect.”

76. *Id.* 6.

77. Lindsay “White Paper,” *supra* fn. 15, 100, Record F3753:382 Gov. Weller to Jarboe Sept. 8, 1859; *id.* 103, Record F3753:399 Gov. Weller to Jarboe, Oct. 23, 1859. See also text accompanying footnotes 78 and 79.

local, and Mendocino County was not reached by telegraph until 1870.⁷⁸

In a letter to the governor, Hastings described the fastest way for someone to get from Sacramento to the Eden Valley without the roads and bridges of today: “night boat to San Francisco I will meet him on board at Benicia to come down with him. He will have then to go to Petaluma & can take the Stage to Cloverdale Where he can procure a horse.”⁷⁹

Given his many business interests in other parts of the state, Hastings was not able to supervise day-to-day operations in the Eden Valley, and judging him by current standards is illegitimate.⁸⁰

Madley’s Genocide Narrative

In order to bolster his genocide narrative, Madley conflates the despicable action of some settlers acting under state authority with Hastings’ use of state law to help settlers petition the governor to form a local police force for their protection. The resulting suggestion that Hastings “masterminded” Indian killings is more than an exaggeration; it is not supported by direct evidence that takes account of the record of the 1860 investigation and the times.⁸¹

The literary method used in Madley’s book was described by Stanford University history professor Richard White as “call[ing] nineteenth century elected officials ‘the primary architects of annihilation’ against Native Americans in the state. Reading it is like watching bodies being piled on a pyre.”⁸² That hyperbolic presentation distracts the reader’s attention from the reality that essential facts necessary to connect Serranus Hastings to the narrative are missing.⁸³

78. Alice L. Bates, “History of the Telegraph in California” (1914) 9 *Annual Pub. of the Hist. Soc. of So. Calif.* 185.

79. Lindsay, “White Paper,” *supra* fn. 15, 96 Record F3753:365, S.C. Hastings to Gov. Weller, April 30, 1859.

80. See Sumi Cho, “Symposium: Redeeming Whiteness,” 19 *B.C. Third World L.J.* 79–80 (“In the field of history, a guiding canon is to judge one’s subject in the context of his time, by ‘recreating the world as it looked to those who lived it,’ and evaluating historical figures within their era’s social, moral and political norms. To do otherwise is presentist — illegitimately assessing historical figures based upon contemporary values and goals.”).

81. Regarding H.L. Hall, Madley’s thesis refers to him as a “vigilante leader” but does not reference his killing Indians who were alleged to have rustled Hastings’ livestock. Madley, “California’s Yuki Indians” 39 *Western Hist. Qtrly.*, 317.

82. Richard White, “Naming America’s Own Genocide,” *The Nation*, Aug. 17, 2016, <https://www.thenation.com/article/archive/naming-americas-own-genocide/> [as of Aug. 16, 2023].

83. In the *New York Times* article (*supra* fn. 55), Madley is quoted as follows: “It’s not an exaggeration to say that California state legislators established a state-sponsored killing machine,” and then goes on to conflate Serranus Hastings with the state.

But Madley cannot dispute that Hastings bought his considerable lands from the state, and the weakness of his argument that Hastings had effective control over the Eel River Rangers and hence was an accomplice to the atrocities they committed is suggested by the college’s Board of Directors committee’s report rejecting the genocide label for Hastings, and its own hindsight bias. Although the name-change legislation finds that Hastings committed “genocidal acts,”⁸⁴ judging Hastings’ conduct and his connection to the atrocities committed by the Eel River Rangers by today’s standards is not the historically appropriate way to evaluate whether he was good or bad; moral or immoral.⁸⁵

To Sum Up

Today’s times are very different from those in California’s early statehood. Addressing the ruthlessness of the conquest of Native California is and should remain a top priority for those of us who daily benefit from the state’s current prosperity. But singling out and scapegoating Serranus Hastings is antithetical to creating the successful and lasting partnership that Dean Faigman and James Russ agreed in their July 2021 *Sacramento Bee* op-ed was the best way to achieve “a societal goal to never forget this sordid chapter of American history and the challenges that Native Americans continue to face.”⁸⁶

Also, this is a law school we’re discussing, and the process by which the school’s name was summarily changed is unworthy of its 145-year legacy of teaching the value of due process of law, transparency, and inclusion in such decision-making.

Although the title and much of the text of the *Sacramento Bee* op-ed adopt Madley’s and Briscoe’s narrative and do not reflect the truth about Serranus Hastings’ actions or intentions, the partnership agreed upon by Dean Faigman and James Russ and the restorative justice that it speaks to are something that he would likely support. In the long run, remembering, not erasing, would best facilitate meaningful and ongoing amends. ★

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84. See text accompanying fn. 51.

85. See *supra* fn. 80.

86. See *supra* fn. 55. The editors’ sidebar on page ** recites newspaper accounts and an editorial of the time about atrocities committed against Indians in Humboldt County and other locations, including on or near the Eel River. None is alleged to have been undertaken with Hastings’ knowledge or participation.