

LAWYERS IN THE AMERICAN WEST, 1820-1920: A COMMENT

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INTRODUCTION

The articles by Professors Babcock, Bryant and Morris explore a variety of important questions for legal history.¹ The transmission of legal knowledge from one generation to another, the nature of judicial craftsmanship, and the gendered nature of law in the West are the narrower issues. The larger question within these issues is whether the West was different in some way from the East.² Was the western lawyer more creative, more decoupled from the textualism of the East, more apt to innovate, more likely to create new institutions of justice in the face of gendered and institutional forces that limited access to justice and the practice of law? This Comment considers these questions amid the backdrop of continuing historical inquiry regarding the West as a geographic, environmental, social, political, and legal topic, with practical attention paid to the role of women, society, and the law.

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¹ See Barbara Allen Babcock, *Western Women Defenders*, 1 NEV. L.J. 1 (2001); Andrew P. Morris, *Legal Argument in the Opinions of Montana Territorial Chief Justice Decius S. Wade*, 1 NEV. L.J. 88 (2001); A. Christopher Bryant, *Reading Law in the Office of Calvin Fletcher: The Apprenticeship System and the Practice of Law in Frontier Indiana*, 1 NEV. L.J. 19 (2001).

² The debate is current and this symposium is far richer for the debate and the publication of a goodly number of books touching on these issues. The observations about the field I am making in this paper are in whole or in part those published in the six-volume GORDON MORRIS BAKKEN & BRENDA FARRINGTON, *THE AMERICAN WEST* (2000). For elaboration of the legal history points raised in this essay, readers should see GORDON MORRIS BAKKEN, ED., *LAW IN THE WESTERN UNITED STATES* (2000). For a middle ground approach to locating the West within the frontier concept see ROBERT V. HINE & JOHN MACK FARAGHER, *THE AMERICAN WEST* (2000).

Defining the Elusive Concept of "The West"

For historians, it is easy to understand that Indiana is in the East and Montana and California are in the West. But Indiana at one time was what historians called "the frontier." It was the cutting edge of civilization, where white Northern Europeans confronted the savagery of wilderness and American Indians. In this new century that formulation of "frontier" has passed to some degree and historians are trying to determine where the West is today in the historical profession.

Turner's Frontier Thesis

When Frederick Jackson Turner announced his frontier thesis in 1893, most Americans had no doubt where the West was. It was simply across the Mississippi. It was simply the "Wild West" of Indians and cowboys riding horses and you could see those Indians and cowboys when the wild west show came to town. But that wild west was not part of San Francisco in 1893 or Denver. Those instant cities had acquired the degree of civilization based on wealth, commerce, and culture to make them part of a greater American urban landscape.

Turner's frontier thesis positing that the process of civilizing the West from the colonial period until 1890 produced American democracy and the American character started historians down the path of proof to find evidence supporting or debunking Turner's thesis. The process continues.³ Early supporters of Turner found settlers from the East finding greater democracy in the West. Detractors found evidence that eastern urban factory workers did not migrate to the West in any great numbers and the West was not a safety valve for labor unrest. So it went. Turner argued that the existence of free land, its continuous recession, and the process of settlement from east to west explained American history. Turner cast his net broadly and caught the American character as well as democracy in the seine.

Ongoing Debate Over the Concept of Frontier

Books and articles offered proof on both sides until the New Western Historians arrived with publication of Patricia Nelson Limerick's *The Legacy of Conquest: The Unbroken Past of the American West*.⁴ Limerick shifted the debate by noting Turner's Euro-centric focus on an east to west process whose

³ See Michael Steiner, *From Frontier to Region: Frederick Jackson Turner and the New Western History*, 64 PACIFIC HIST. REV. 479-501 (1995); Donald J. Pisani, *Is There Life After Turner? The Continuing Search for the Grand Synthesis and the Autonomous West: A Review Essay*, 67 N. MEX. HIST. REV. 285-95 (1992); Martin Ridge, *Frederick Jackson Turner, Ray Allen Billington, and American Frontier History*, 19 WESTERN HIST. QTLY., 5, 5-20 (1988).

⁴ See PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

vision was strictly that of the pioneers, not those experiencing the process and seeing the pioneers as conquerors from their perspective of looking to the east from the west.

Limerick's call for inclusion in western history was not the first, but clearly the most noticed. Herbert Eugene Bolton already had suggested the utility of borderland studies noting the richness of cultural interaction in New Spain's northern territories. Bolton appreciated the fact that Europeans and Indians had occupied lands together for generations in the American Southwest. Limerick's argument acknowledges the need for such studies, but rejects Bolton's emphasis on the opening and closing of Spanish and English empires in favor of the continuity of conquest. Further, Limerick tapped into the scholarly dissatisfaction of the 1960s with the political synthesis in American history and joined the legions of historians including women, persons of color, and marginalized classes in the general fabric of American history. Most importantly, Limerick called for studies of place. Here the West as a region needed recognition and definition.

Scholars more easily accepted the concept of the West as place or region than they were able to identify exactly what made any geographic area the "West." The most ambitious attempt to do so was William E. Riebsame's *Atlas of the New West: Portrait of a Changing Region*.⁵ This beautifully executed volume offers a variety of definitions of region noting that the West keeps moving around in time and space, if not the mind. Geographers, historians, artists, and writers have defined the West by certain marks. The West is marked by its extractive industries such as mining, logging, ranching, and irrigated farming. It is rooted in natural resources and their exploitation. The West is more urbanized than the East with far more black spots in the night than the East. From space at night, it is clear to any observer that the East shimmers and the West has spots of brilliance. The West contains more public land administered by the federal government resulting in jurisdictional boundaries drawn by the Bureau of Reclamation and United States Forest Service gridding the map-scape. Huge portions of this map-scape represent American Indian reservation lands. Indian country in the West is recognizable and substantial in space. These lands were developed with capital from the East, by corporations housed in the East, and managed by executives living in the East but visiting the West. The West remains Turner's, but it is Ted rather than Frederick Jackson that now defines the present reality.

Drawing Lines in the Map of the West

The atlas has its critics because much of what many consider the West is hacked off, even the Pacific coast and the Dakotas. But there is little to replace it excepting alternative concepts of how to define the West and where to fix its

⁵ See WILLIAM E. RIEBSAME, *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION* (1997).

boundaries.⁶

It is not difficult to start identifying regions and subregions. The Pacific slope belongs to Earl Pomeroy and was an identified region crying out for analysis. But can the Pacific Northwest stand scrutiny as a region? What ties the states of Oregon, Washington, and Idaho together? They all have extractive industries and logging clearly characterizing Washington and Oregon. Idaho had logging, but mining and potato farming seem clearer markers of identity. Perhaps the salmon would be a better regional icon. The whiteness of the present population of Oregon and Idaho set them apart from the multi-racial West of the borderlands. The Great Basin Kingdom belongs to Leonard Arrington, but his economic history of the Mormons in Utah gives religion a central part in identity. For Limerick, Mormon history was very much a part of the history of the West and today Mormon history has multiplied from many scholarly parents. But is the Great Basin a region? If we look to the people who live there, they thought so. If we look at it ecologically, it does have a hydraulic identity. What about the Rocky Mountains? Do the people of these majestic peaks see themselves linked to others? Would John Denver's calling upon the mountains for inspiration equally move people to see unity? Are they clearly not linked to the people of Omaha? Is the Great Plains different and if so how? These are the kinds of questions that flow from the issue of regional identity and their exploration will continue into the next century.⁷

Interestingly, the region once dubbed "The Great American Desert" now blooms and offers images of gardens of Eden within hydraulic societies. Even within these hydraulic societies, cultural differences must be accounted for and local history given its substantial due.

Not Exactly Marlboro Country: The Urban West

Beyond the question of "frontier" and the location of the West, these papers raise a closer question of whether urbanization was a central force in legal change. Urbanization in the West also is a question that historians have struggled to analyze in broader terms. The lawyers who discussed in the articles of this Symposium practiced in what might be called the Urban West of the time. Remember that Clara Foltz, Laura Gordon, and Lelia Robinson practiced law in cities large enough to produce clients and legal issues.⁸ Remember that Decius Wade lived in a Montana of instant cities.⁹ His *People ex. rel Boardman v. City of Butte* (1881)¹⁰ opinion concerned just such an instant city. Calvin Fletcher's law office was in Indianapolis, the capital city, where business was

⁶ See Virginia Scharff, *Honey, I Shrank the West*, 67 PACIFIC HIST. REV. 409-20 (1998).

⁷ See David M. Wrobel, *The View from Philadelphia*, 67 PACIFIC HIST. REV. 382, 382-92 (1998); William Wyckoff, *Inside the New West: A View from Suburban Montana*, 67 PACIFIC HIST. REV. 401, 401-08 (1998).

⁸ See Babcock, *supra* note 1.

⁹ See Morriss, *supra* note 1.

¹⁰ See *People ex. rel Boardman v. City of Butte*, 4 Mont. 174, 1 P. 414, (1881).

adequate, connections plentiful, and banks just down the street.¹¹

Looking at the West in 2000, we find the most urbanized region of America. More than eighty percent of the people live in cities and, if we exclude Texas and the Plains states, the West contains almost half the American Indian and Hispanic population and more than one half of the Asian population. The West is urban and diverse. Some of these cities were instant cities, that is, they were created by a boom, grew from nothing to city size in months, and took on the trappings of urban America within a few years. San Francisco, Denver, and Butte fit into this category. Many of the small cities and villages revolved around booms of another sort.¹² The cattle trails out of Texas gave Kansas cities along the railroad instant business and instant economic distress when the herds no longer visited. Many of the cities reached out along routes of transportation for business and population. All sought to prosper and survive, some did not. The West also is a place for ghost towns like Bodie, California, now a tourist destination rather than a place of homes and families. The urban West was many things over time and continues to change with population shifts and telecommuting.¹³

Ethnicity and the West

San Francisco was a diverse community from its origins in the gold rush. The flood of humanity that docked there, left there, or stayed there produced a city with clear cultural and ethnic diversity. The Irish and the Chinese were the labor that built the Transcontinental Railroad and populated the city. The Irish moved into politics and the Chinese into Chinatown. Jews, Irish, and Italians moved into the imbedded mercantile elite. African-Americans formed a small but vibrant community. Chinese and blacks sought legal counsel when threatened within their communities and on the streets. Charlotte Brown's lawsuits would desegregate the San Francisco transit system in the 1860s. A lawsuit would desegregate the school system over a decade later. Anti-Chinese zoning ordinances would be challenged in court and overturned by the United States

¹¹ See Bryant, *supra* note 1.

¹² One area historians have given attention to is crime in the urbanizing West. See, e.g., Lyle Dale, *Rough Justice: Felony Crime and the Superior Court in San Luis Obispo County, 1880-1910*, 76 SO. CAL. QTRL'Y 195 (1994); John J. Stanley, *Bearers of the Burden: Justices of the Peace, Their Courts and the Law in Orange County, California, 1870-1907*, 5 WESTERN LEG. HIST. 37 (1992). Stuart H. Traub, *Rewards, Bounty Hunting, and Criminal Justice in the West: 1865-1900*, 19 WESTERN HIST. QTRL'Y 287 (1988); Robert H. Tillman, *The Prosecution of Homicide in Sacramento County, California, 1853-1900*, 68 SO. CAL. QTRL'Y 167 (1986); John R. Wunder, *Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi Frontier*, 17 WESTERN HISTORICAL QUARTERLY 25 (1986); John R. Wunder, *The Chinese and the Courts in the Pacific Northwest: Justice Denied?* 52 PACIFIC HIST. REV. 191 (1983); Ronald C. Woolsey, *Crime and Punishment: Los Angeles County, 1850-1856*, 61 SO. CAL. QTRL'Y 79 (1979).

¹³ See John M. Findlay, *Far Western Cityscapes and American Culture Since 1940*, 22 WESTERN HIST. QTRL'Y, 19, 19-43 (1991).

Supreme Court. Accommodations were not without rough spots, but diversity and accommodation became the mark of the city.¹⁴

Things were not so harmonious in Los Angeles or many other cities of the West. Remember that *Brown v. Board of Education*,¹⁵ the famous 1954 decision that dismantled school segregation, was a Kansas case. *Sweatt v. Painter* (1950)¹⁶ was a decision attacking segregation in a Texas state law school. *McLaurin v. Oklahoma State Regents* (1950)¹⁷ outlawed the admission of blacks to graduate school in that western state but segregated them within classrooms and other facilities. The racial liberalism of San Francisco was not followed throughout the West.

On our southern borders, America has a clear Mexican-American West that is both very urban and very sparsely settled. El Paso and San Diego are examples of our binational borderland of intensive interaction with a large cultural region of Hispanic settlement and enterprise. But border cities and borders have a long reach. Los Angeles in the twentieth century was the designation of many Mexican workers. Beyond the factories in the fields that characterized California's Imperial Valley, urban jobs constituted a substantial lure.

Business Linkage in the West

Cities in the West, in turn, have relationships with other western cities. Carl Abbott's *The Metropolitan Frontier: Cities in the Modern American West*¹⁸ describes a nested hierarchy of smaller cities and towns with strong regional, economic linkages. Most large economic regions are subdivided with one or more of these cities controlling significant economic interests. Denver's junior economic partner is Salt Lake City. Stockton and Fresno serve the interests of San Francisco. Phoenix and El Paso share economic territory not gobbled up by Dallas on the east or Los Angeles on the west. Much of this territoriality is historical. Dallas, for example, retains a long-term commitment to serving as a comprehensive trading and financial center while its sister city, Fort Worth, concentrated upon and continues to serve the West Texas cattle business. Beyond the reach of these trading and financial giants, smaller regional cities serve smaller markets. Lincoln, Nebraska, Bismark, North Dakota, and Billings, Montana are such centers of regional economic activity. As might be expected, lawyers had a significant role in all this. For example, it

¹⁴ See Frank W. Van Nuys, *A Progressive Confronts the Race Question: Chester Rowe, The California Alien Card Act of 1913, and the Contradiction of Early Twentieth Century Racial thought*, 73 CALIFORNIA HISTORY 2-13 (Spring 1994); Lucy Salyer, *Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891-1905*, 76 J. AM. HIST., 91-117 (1989).

¹⁵ See *Brown v. Board of Education*, 348 U.S. 886 (1954).

¹⁶ See *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹⁷ See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

¹⁸ See CARL ABBOTT, *THE METROPOLITAN FRONTIER: CITIES IN THE MODERN AMERICAN WEST* (1993).

was those railroads that Decius Wade wrote about from the bench that linked these economies.¹⁹ The cities of the West live by these economic relationships that transportation made possible and the computer today sustains with invisible speed.

Boom and Bust: Butte as Microcosm

Other western cities rose with industry and fell with industry. Butte, Montana is perhaps the most colorful example. Anyone visiting the World Mining Museum or the M & M Bar knows that you are not in Kansas anymore, much less "frontier" Indiana. Mary Murphy's *Mining Cultures: Men, Women, and Leisure in Butte, 1914-41*²⁰ is the most insightful book on the subject. Butte was another instant city growing from three thousand in 1880 to 90,000 in 1916 on the wealth of its copper deposit, the mining and milling operations, and the diversity of its people. Copper mining was the lifeblood of the city with three shifts of workers tramping from home to mine every eight hours and back again. Men went to the mines and women to clerical work by 1920. Unions protected the interests of both. The prosperity of Butte rode on copper wires and the demands of World War I. When the war ended, Butte's economic fortunes turned sour and one-third of its population left by 1921. Prohibition and the crusade to save the world for democracy went hand in hand, but in Butte, the former opened new doors for women. In addition to jobs, the clandestine entertainment industry opened its doors to women. Nightclubs encouraged women to attend. Roadhouses welcomed women and some women became owner/operators.

Butte was an ethnically diverse city. The Irish dominated the city and its union, but Finntown was the dominant ethnic neighborhood. The East Side of Butte also was home to Lebanese, Serbs, Croatians, Slovenes, Montenegrins, and Slavs. Further east in Meaderville and McQueen, Austro-Hungarians, Swedes, Norwegians, Germans, and French lived together. These diverse groups organized their social life around the complexities of class and ethnicity. A clear blue collar normative behavior characterized these neighborhoods with the challenges of mining and the harsh environment of Montana pasting diverse peoples into a western pastiche.

The Role of the Environment

Another avenue sometimes pursued in explaining change in the America West has been the environment. Clearly, the climate of Indiana was not the arid West of Montana or the desert vistas of Southern California or the Pacific raincoast of Northern California. For historians, this path of inquiry has led to

¹⁹ See Morriss, *supra* note 1.

²⁰ See MARY MURPHY, *MINING CULTURES: MEN, WOMEN, AND LEISURE IN BUTTE, 1914-41* (1997).

a variety of tentative conclusions.²¹

Historians of the environment in the American West have adopted a variety of multi-disciplinary methods as well as a variety of topical approaches. What emerges from the literature is a lack of agreement about what should be done to unify this new field. Rather the literature lays out a varied landscape allowing scholars to adopt singular positions yet hold on to a central core of environmental focus.²²

The variety makes this field exciting. Some historians deal with ideas about the environment. What humans see in the landscape, how they create its image, and how they view its spiritual essence constitutes some of their concerns in research. Other scholars look at the institutional and political movements that brought environmental protection and preservation. Still others look at public policy formation and how it finds its way into law. Legal historians and policy scholars have barely scratched the surface of this field.²³

Law and the Environmental History of the American West

The common law approach to environmental protection was through the law of nuisance. Common-law nuisance was either private nuisance or public nuisance. Private nuisance cases were commonly between a single plaintiff or

²¹ Legal historians are not of one mind in this field. See, e.g., Malcolm Ebright, *Frontier Land Litigation in Colonial New Mexico: A Determinant of Spanish Custom and Law*, 8 WESTERN LEG. HIST. 199 (1995); Carl Abbott & Deborah Howe, *The Politics of Land-Use Law in Oregon: Senate Bill 100, Twenty Years After*, 94 OREGON HIST. QRTL'Y 3 (1993); Allen Broussard, *Law, Order, and Water Policy on the Arizona Frontier: The Career of Joseph H. Kibbey*, 34 J. ARIZ. HIST. 155 (1993); Donald J. Pisani, *The Origins of Western Water Law: Case Studies from Two California Mining Districts*, 70 CAL. HIST. 242-58 (1991); M. Catherine Miller, *Water Rights and the Bankruptcy of Judicial Action: The Case of *Herminghaus v. Southern California Edison**, 58 PACIFIC HIST. REV. 83 (1989); Gordon Morris Bakken, *American Mining Law and the Environment: The Western Experience*, 1 WEST. LEG. HIST. 211 (1988); Donald J. Pisani, *Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century*, 18 WEST. HIST. QRTL'Y, 15 (1987); John E. Lamborn & Charles S. Peterson, *The Substance of the Land: Agriculture v. Industry in the Smelter Cases of 1904 and 1906*, 53 UTAH HIST. QRTL'Y, 308 (1985); Douglas R. Littlefield, *Water Rights During the California Gold Rush: Conflicts over Economic Points of View*, 14 WEST. HIST. QRTL'Y, 415 (1983); Malcom Ebright, *The San Joaquin Grant: Who Owned the Common Lands? A Historical-Legal Puzzle*, 57 N.M. HIST. REV. 4 (1982).

²² Norris Hundley, Jr., *Water and the West in Historical Imagination*, 27 WESTERN HIST. QRTL'Y 5 (Spring 1996), pp. 5-31; Mark Harvey, *Echo Park, Glen Canyon and the Postwar Wilderness*, 60 PACIFIC HIST. REV. 43 (February 1991); Thomas G. Alexander, *From Rule of Thumb to Scientific Range Management: The Case of the Intermountain Region of the Forest Service*, 18 WESTERN HIST. QRTL'Y 409 (October 1987); Randall Rohe, *Man and the Land: Mining Impact in the Far West*, 28 ARIZONA AND THE WEST 299-(Winter 1986).

²³ See Jared Orsi, *Restoring the Common to the Goose: Citizen Activism and the Protection of the California Coastline, 1964-1982*, 78 SO. CAL. QRTL'Y, 257 (1996); Christopher J. Huggard, *Mining and the Environment: The Clean Air Issues in New Mexico, 1960-1980*, 69 N. M. HIST. REV. 369 (1994); Gordon Morris Bakken, *Was There Arsenic in the Air?*, 41 MONTANA 30 (Summer 1991); Thomas Dunlap, *American Wildlife Policy and Environmental Ideology: Poisoning Coyote, 1939-1972*, 55 PACIFIC HIST. REV. 345 (1986).

a small number of plaintiffs and a polluter. These cases usually revolved around land use questions or the interference with another's unimpaired use of private property. Public nuisance related to interference with public access to rivers, ways of necessity, or a breath of air. Polluters had no right to diminish the value of downstream property owners whether that interest in land had to do with water or air. In the eighteenth century *Blackstone's Commentaries* used the example of a smelter too near the land of others killing crops and damaging cattle as subject to nuisance law. The problem for some plaintiffs was that courts under the common law did have the option of granting damages without putting a halt to the pollution. Landowners had the option, in turn, of accepting contracts in the form of easements for pollution without lawsuit that would compensate them for the continuing pollution. Further, courts could look at the market value created by the polluter and weigh it against the social and economic costs to the community. Courts often determined that the balance was in favor of industry because of employment and deny recovery for the plaintiffs. Common-law remedies did not look beyond market factors and contract issues unless a compelling case regarding public health could be raised.²⁴ This was the law that clerks poured over in Calvin Fletcher's office²⁵ and the stuff of litigation in nineteenth century Montana.²⁶

Common-law liability rules further frustrated the victims of pollution. The theory of negligence is that there is a reasonable standard of conduct for every human situation. Conduct is negligent when there is proof of unreasonable risk of harm to others. Further, plaintiffs must prove that the defendant knew or should have known that the conduct was harmful. As a result, in bringing a lawsuit the plaintiff had four elements to allege and prove: (1) a legal duty of care was owed the plaintiff; (2) breach of that duty; (3) causal relationship between the breach of duty and injury; (4) plaintiff was damaged. Beyond negligence, most jurisdictions provide for strict liability in tort for injury caused by abnormally dangerous activities.²⁷ In the West, a smelter dumping arsenic into the air and water was sending a known poison on to the property of others.²⁸ However, a coal mine in Montana that washed its coal in river water and cleaned its machinery with the same water was putting coal slack downstream to the detriment of water used for irrigation and fish in the stream, as well as the end users of these resources. The substances were different, yet dead fish told the tale in both instances. As our research goes beyond the descriptive to the analytical we will see that western lawyers were fashioning arguments to

²⁴ Bakken, 41 MONTANA 30-41.

²⁵ See Bryant, *supra* note 1.

²⁶ See Morriss, *supra* note 1.

²⁷ See generally JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS, ch. XIV, 669-686 (9th ed. 1994).

²⁸ See Gordon Morris Bakken, *An Inversion Layer in Western Legal History: Air Pollution in Butte, Montana*, in HENDRIK HARTOG AND WILLIAM E. NELSON, EDS., LAW AS CULTURE AND CULTURE AS LAW 264-91 (2000).

keep gold fish alive and return trout to their pristine habitat.

For plaintiffs, strict liability claims did not require proof of negligence, but there were other proof problems. The polluter could defend its poisoning of the air and water by claiming that its value to the community outweighed the dangerous attributes of its operations. Private nuisance law contained these general tort law elements. Plaintiffs had to prove that the polluter's conduct caused the invasion of his/her interest in land, that it was intentional and unreasonable, or negligent or reckless, or abnormally dangerous. The polluter could raise the balancing test asking the court to weigh the gravity of the harm and the utility of the defendant's conduct.²⁹

In public nuisance cases, the plaintiff must show that there was an unreasonable interference with the interests of the community or the rights of the general public. For a citizen rather than a public entity to raise this claim, the citizen must show the injury to be different in kind, rather than different in degree. The final common-law cause of action used in environmental cases was trespass. Trespass usually involved the interference with the right of exclusive possession of land. In modern practice, trespass was the basis for *Martin v. Reynolds Metals Co.*,³⁰ a 1959 Oregon case. We need to remember that this was good law in the East as well as the West. The common-law remedies were continuous, yet limited.

Beyond the common law, western legislatures were busy dealing with some of the same problems. In 1852 the California legislature passed an "Act to prevent certain public nuisances." This statute declared it a public nuisance and a misdemeanor to pollute any creek, stream, pond, road, alley or highway. The same session passed a law to protect salmon runs. In 1862 trout fishing became regulated. The next year the legislature moved to protect seals and sea lions. In 1872, it banned the killing of Mocking Birds. Six years later fishing was banned on Lake Bigler. In 1877 the Montana Territorial Legislature outlawed the dumping of coal slack in the waters.³¹ As early as *Nelson v. O'Neal*,³² an 1871 case, the Montana Territorial Supreme Court would declare in a trespass case that there was "no right to fill the channel of a creek with tailings and debris." In 1884, California's high Court would make a similar decision in *California v. Gold Run Ditch and Mining Company*.³³ As Robert Bunting points out in his *The Pacific Raincoast: Environment and Culture in an*

²⁹ *Id.*

³⁰ See *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790 (1959).

³¹ See Michael Black, *Tragic Remedies: A Century of Failed Fishery Policy on California's Sacramento River*, 64 PACIFIC HIST. REV. 37 (1995); Thomas G. Smith, *John F. Kennedy, Stewart Udall, and New Frontier Conservation*, 64 PACIFIC HIST. REV. 329 (1995); Clark C. Spence, *The Golden Age of Dredging: The Development of an Industry and Its Environmental Impact*, 11 WESTERN HIST. QTRLY 401 (1980); Donald J. Pisani, *Conflict Over Conservation: The Reclamation Service and the Tahoe Contract*, 10 WEST. HIST. QTRLY 167 (1979).

³² See *Nelson v. O'Neal*, 1 Mont. 284 (1871).

³³ See *People v. Gold Run Ditch and Mining Company*, 66 Cal. 138; 4 P. 1152 (1884).

American Eden, 1778-1900,³⁴ Washington and Oregon passed laws to forbid the dumping of sawdust in streams to protect fish. State lawmakers were busy providing piecemeal for environmental protection. Some of this legislation had environmental protection in mind to increase the profits of farmers.

The federal government got into the pollution control business late in the century. In 1899 the Congress passed the Rivers and Harbors Appropriation Act that came to be known as the Refuse Act of 1899.³⁵ This act facilitated the Corps of Engineers mission of keeping navigation channels free of obstructions. Section 407 forbade the dumping of refuse in any navigable stream or on the banks so as to be washed into the waters without a permit. Section 411 contained criminal penalties and a reward for informants who reported violations. The enforcement of this act federalized pollution control on our nation's waterways and made industry change its ways in part. The Clean Water Act of 1972 created tougher standards and a bureaucracy to put permitting into practice. The Clean Air Act of 1970 created modern federal regulatory control law, a bureaucracy to administer it, and continuing administrative law and congressional tinkering with emissions standards. The federal bureaucracies in the environmental field must follow the procedures set out in the Administrative Procedures Act of 1946. This statute sets out procedures for agency rulemaking and adjudication. Implicit in these procedures is public notice and citizen participation in many of the stages of rulemaking.

The biodiversity of the West was furthered by another federal statute, the Endangered Species Act of 1973. This legislation was in line with the Convention on International Trade in Endangered Species. The federal Fish and Wildlife Service and the Commerce Department's National Marine Fisheries Service administer the program. Under the statute, the Services place endangered and threatened species on the federal endangered species list. They also prepare recovery programs. Most importantly, the law forbids all federal agencies to act in a manner that would jeopardize the existence of a listed species or destroy critical habitat of a listed species. In 1978 the Congress created a cabinet-level "God Committee" with the power to issue exemptions after findings of necessity and lack of alternatives. An amendment in 1982 further weakened the statute by allowing petitioners to obtain "incidental take" permits from the Secretaries. These petitioners must go through an extensive labyrinth of procedures including Habitat Conservation Plans that can include strict controls of private projects. The statute does include civil penalties and criminal sanctions for violation. The success of the program can be seen by all Americans in

³⁴ See ROBERT BUNTING, *THE PACIFIC RAINCOAST: ENVIRONMENT AND CULTURE IN AN AMERICAN EDEN, 1778-1900* (1997). See also MARK FIEGE, *IRRIGATED EDEN: THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST* (1999) (surveying water law as well as Idaho seed purity law and finding that the reach of law was not always as intended).

³⁵ See Michael Welsh, *Western Historians, The U.S. Army Corps of Engineers, and the Rivers of Empire*, 59 NO. DAK. HIST. 38 (1992); Albert W. Cowdrey, *Pioneering Environmental Law: The Army Corps of Engineers and the Refuse Act*, 44 PACIFIC HIST. REV. 331 (1975).

the return of the Bald Eagle in our skies.

In the federal courts, the United States Supreme Court in a 1907 Georgia case involving interstate air pollution recognized that the states have a legally enforceable interest in stopping pollution. Copper heaps and smelting such as Montana witnessed in Butte was producing acid rain wiping out forests and crops. This doctrine was dormant until *Texas v. Pankey*,³⁶ a 1971 case. These cases recognized that states have a right to protect ecological interests from impairment by polluters. Because such pollution is interstate in nature and the federal government has exclusive jurisdiction over commerce under the commerce clause of the constitution, this judicial recognition of state authority to sue to abate pollution when other governmental entities have not was significant. Questions of federal preemption of state action were raised in *California Tahoe Regional Planning Agency v. Jennings*,³⁷ a 1979 decision. The court found that the Clean Air Act and the Federal Water Pollution Control Act did not preempt state action to protect the environment under the federal nuisance law doctrine.

Unfortunately, a comprehensive history of these legal developments has not seen print. The sheer breadth of such a study and its technical nature may mean that another decade of articles will be needed to form a secondary source foundation for interpretation.

Although federal and state environmental law draws scholars to the public policy and politics aspects of history, other historians have found biodiversity and its science to be equally illuminating. Mark Fiege's *Irrigated Eden*, Peter Boag's *Environment and Experience: Settlement Culture in Nineteenth-Century Oregon*,³⁸ and Robert Bunting's *Pacific Rainforest* demonstrate the limits of man's control of the environment through careful discussion of biodiversity and man's impact. Different kinds of grass, insects, rodents, and rabbits inhabit their pages and give readers basic ecology to nuance the narrative. Introduced species conflict with native plants and animals often to their detriment. Science produces insecticide, fungicide, and rodenticide to further alter nature's course. Again, the science that is applied to nature may have unintended consequences further diminishing nature's economy. The stories vary in time and place but the consequences frequently converge in human error.³⁹

Finally, historians have started the process of understanding that there is no more a singular West than there was an American Indian. Region and section

³⁶ *Texas v. Pankey*, 441 F.2d 236 (5th Cir. 1971).

³⁷ *California Tahoe Regional Planning Agency v. Jennings*, 594 F. 2d 181 (9th Cir. 1979).

³⁸ See PETER BOAG, *ENVIRONMENT AND EXPERIENCE: SETTLEMENT CULTURE IN NINETEENTH-CENTURY OREGON* (1992).

³⁹ See also R. Douglas Hurt, *Gaining Control of the Environment: The Morton County Land Utilization Project in the Kansas Dust Bowl*, 19 KAN. HIST. 140 (1996); Jack L. August, Jr., *Carl Hayden's Indian Card: Environmental Politics and the San Carlos Reclamation Project*, 33 J. ARIZ. HIST. 397 (1992); Stephen R. Van Wormer, *A History of Flood Control on the Los Angeles County Drainage Area*, 73 SO. CAL. QTRL'Y 55 (1991).

in the Turnerian world of yesterday and the regional location of the West in the eyes of "New Western Historians" has been further refined by environmental historians who recognize micro-climates, watersheds, and arroyos. Again this is an interdisciplinary enterprise as Robert I. Rotberg and Theodore K. Rabb's *Climate and History: Studies in Interdisciplinary History*⁴⁰ demonstrated. Beyond history, these scholars must include biology, chemistry, geography, and geology in their quiver of inquiry.

Gender and the West

Unfortunately, environmental history has a very arid void in that it seldom concerns itself with gender. Simply put, Clara Foltz, Laura Gordon, and a myriad of other women made a substantive difference in the West. Further, the history of women in the American West affords legal historians a growing base upon which to build new questions about the gendered nature of law and politics. Barbara Allen Babcock's paper and her prior work does exactly that, breaking new ground for our understanding of how women gained access to the bar, clients, and power.⁴¹ Lelia Robinson was forced by a patriarchal eastern bar to move to the West to find trial experience and clients. Clara Foltz pioneered for women in gaining access to the bar in the West, just as women gained suffrage in the West giving reformers in the East rhetorical ammunition for their campaigns.

From first contact, American Indians knew that Europeans did not understand the gendered nature of America. Confusion regarding the role of women within tribes and bands continued from first contact well into the late nineteenth century. European willingness to conflate the 500 tribes and bands into a singular American Indian further confused a growing populace that moved west seeking opportunity on lands long inhabited by native peoples.⁴² In the process of moving to a region that we now call the West, gender played a major role in changing the society that confronted a changing environment and splendidly varied landscape.

The mistaken role of women in American Indian societies opens Sara Evans' *Born for Liberty: A History of Women in America*,⁴³ making clear the nar-

⁴⁰ See ROBERT I. ROTBERG & THEODORE K. RABB, *CLIMATE AND HISTORY: STUDIES IN INTERDISCIPLINARY HISTORY* (1981).

⁴¹ See Babcock, *supra* note 1 .

⁴² See James A. Sandos, *Between Crucifix and Lance: Indian-White Relations in California, 1769-1848*, 76 CAL. HIST. 196 (1997); Brad Asher, *Their Own Domestic Difficulties: Intra-Indian Crime and White Law in Western Washington Territory, 1873-1889*, 27 WESTERN HIST. QTRLY 189 (1996); George Kios, *Our People Could Not Distinguish One Tribe from Another: The 1859 Expulsion of the Reserve Indians of Texas*, 97 SW. HIST. QTRLY 599 (1994); Glenda Riley, *Some European (Mis)perceptions of American Indian Women*, 59 NEW MEX. HIST. REV. 237 (1984); Glenda Riley, *Frontierwomen's Changing Views of Indians in the Trans-Mississippi West*, 34 MONTANA 20 (Winter 1984); John C. Ewers, *When Red and White Men Met*, 2 WEST. HIST. QTRLY 133 (1971).

⁴³ See SARA EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* (1989).

row vision of Euro-Americans from the seventeenth century to the recent past. Many early Euro-American overlooked the complex and nuanced cultural complexity of American Indian societies and the dimensions of women's economic, social and religious roles. Rather they saw a corrupted, uncivilized people who allowed women to perform men's tasks such as chopping wood, building dwellings, planting fields, harvesting crops, and leading war parties. Missionaries wanted their neophytes to become white Indians in the image of a white Christ. White eyes could not see women at the center of creation myths. God was white and male in white eyes. They could not see American Indian women as Mother Earth, the Keepers of the Game, or the Double Woman Dreamer. God, a white male, created the earth, put men in charge of animal husbandry, and ordained that men alone were in touch with the Holy Spirit. The divisions between American Indian reality and white eyes were manifest despite the facts that were clearly at hand.⁴⁴

In the recent past, historians have started the process of recovering the gendered past of the American West and recognizing the complexity of western women's history. The stereotypes of western women as civilizers in sunbonnets have yielded to the complexity of western women's history.⁴⁵ First, historians have recognized that the West was the most multi-cultural region of the country. Ethnic and racial backgrounds played a significant part in the roles of women on the West's varied stages. Migration experiences were formative for many, but varied widely in time, place, and manner of migration. Women formed bonds with other women of like and dramatically different cultural heritages. The contributions of women to the success of families varied with time, place, and class as well as race. American Indian women were, for example, in charge of economic transactions and the means of production such as Navaho sheep. Women struggled for rights, but in the West we can see variation found in few other regions. While white women marched for the vote in California, they already had the vote in Wyoming Territory in 1869. American Indian women found it hard to contemplate the vote without citizenship and they would wait until 1924 to become citizens. Asian women would wait until World War II to gain rights to citizenship. Black women in Kansas would suffer the indignities of racial discrimination in public accommodations while women of color in the San Francisco Bay Area would be riding local street cars in the 1860s and attending desegregated schools thirty years later. The similarities as well as the differences in female experience because of race further complicate the West.⁴⁶

⁴⁴ This cultural blindness has been noted by legal historians. See, e.g., Richmond L. Clow, *The Anatomy of a Lakota Shooting: Crow Dog and Spotted Tail, 1879-1881*, 28 SO. DAK. HIST. 209 (1998); Orlan J. Svingen, *The Case of Spotted Hawk and Little Whirlwind: An American Dreyfus Affair*, 15 WEST. HIST. QTRL'Y 281 (1984).

⁴⁵ See Susan Armitage, *Women and Men in Western History: A Stereotypical Vision*, 16 WEST. HIST. QTRL'Y 381 (1985); Glenda Riley, *Images of the Frontierswoman: Iowa as a Case Study*, 8 WEST. HIST. QTRL'Y 189 (1977).

⁴⁶ See Antonio I. Castaneda, *Women of Color and the Rewriting of Western History: The*

Race and Gender in the West

Race also impacted women's outlook on the future and the range of choice in the past. In many ways, these choices had to do with relationships with men. Men obviously wanted women in the West particularly when gender balances were out of center in the 1850s and 1860s. Henry Halleck stood on the floor of the 1849 California Constitutional convention advocating women's legal rights as a lure to bring them west. Wyoming's female franchise found advocates because of another form of lure. When they arrived, women varied by marital status, sexual preference, religion, race, class, and culture. Some came from rural America, others the factories of the East. Some came west to escape religious persecution in the east and find Zion in Utah or Idaho. All of these factors molded a woman's perception of the West. While the men of the West looking for women frequently did not recognize these distinctions, historians have done so recognizing the diversity of the women of the West. Rather than marginalizing women because of a distinction, historians have found it necessary to account for difference in critically analyzing the experiences of western women.⁴⁷

Racial and ethnic heritage played a role in female experience whether Hispanic, Japanese or Irish.⁴⁸ Women's work was part western history, but women did not confine themselves to plow handles or brothels. Women were very much a part of most occupations or in the process of breaking down barriers of access. They worked in the fields for wages as well as for family welfare and prosperity. Women demanded access to the professions whether teaching or

Discourse, Politics, and Decolonization of History, 61 PACIFIC HIST. REV. 501 (1992); Gail H. Landsman, *The >Other= as Political Symbol: Images of Indians in the Woman Suffrage Movement*, 39 ETHNOHISTORY 247 (1992); Elizabeth Jameson, *Toward a Multicultural History of Women in the Western United States*, 13 SIGNS 761 (1988); Lawrence B. de Graaf, *Race, Sex, and Region: Black Women in the American West, 1850-1920*, 49 PACIFIC HIST. REV. 285 (1980).

⁴⁷ Legal historians have started down this path and found rich prospects. See, e.g., Gloria Ricci Lathrop, *Rancheras on the Land: Women and Property Rights in Hispanic California*, 76 SO. CAL. QTRL'Y 59 (1994); Donna C. Schuele, *Community Property Law and Politics of Married Women's Rights in Nineteenth-Century California*, 7 WEST. LEGAL HIST. 245 (1994); Paula Petrik, *"Send the Bird and Cage": The Development of Divorce Law in Wyoming, 1868-1900*, 6 WEST. LEG. HIST. 153 (1993); Gordon Morris Bakken, *Constitutional Convention Debates in the West: Racism, Religion, and Gender*, 3 WEST. LEG. HIST. 213 (1990); Paula Petrik, *If She be Content: The Development of Montana Divorce Law, 1865-1907*, 18 WEST. HIST. QTRL'Y 261 (1987); Kenneth L. Cannon, II, *Mountain Common Law: The Extralegal Punishment of Seducers in Early Utah*, 51 UTAH HIST. QTRL'Y 308 (1983); Joseph W. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SW. HIST. QTRL'Y 369 (1983).

⁴⁸ Richard Griswold del Castillo, *Neither Activists nor Victims: Mexican Women's Historical Discourse: The Case of San Diego, 1820-1850*, CAL. HIST., vol. 74 (Fall, 1995), pp. 230-43; Laurie K. Mercier, *We are Women Irish: Gender, Class, Religious, and Ethnic Identity in Anaconda, Montana*, MONTANA: THE MAGAZINE OF WESTERN HISTORY, vol. 44 (Winter 1994), pp. 282-301; Yuji Ichioka, *Amerika Nadeshiko: Japanese Immigrant Women in the United States, 1900-1924*, PACIFIC HIST. REV., vol. 49 (MAY 1980), pp. 339-57.

law, accounting or medicine. The process of eliminating barriers varied in time and space, but the struggle was constant. Yet the story of women in polygamous Utah or Idaho was different and an integral part of the fabric of western history. Because of their beliefs and practices these women suffered at the hands of the federal government and persevered.⁴⁹

One method of illuminating women's lives in a multicultural West is looking from their point of view and analyzing their experiences in their own context before placing their story in the larger West. Rosalina Mendez Gonzalez, Deena J. Gonzalez, and Antonia Castenada have been very successful with this method. In particular, Deena J. Gonzalez's *Refusing the Favor: The Spanish-Mexican Women of Santa Fe, 1820-1880*⁵⁰ situates women and gender issues within the debate on conquest and colonization as New Mexico politically transforms itself from Mexico to America. More generally, historians Joan Jensen and Darlis Miller have turned to women's documents to look at context through the eyes of nineteenth-century women.⁵¹ Sarah Deutsch traced Hispanic women within families and communities across the West.⁵² These women seasonally migrated north following the ripening of various crops. They worked fields, maintained families, and created communities. Other Hispanic women remained in traditional villages seasonally re-gendered and took on expanded responsibilities for institutions and social relations. Antonia I. Castenada found similar struggles without the migrating males in Alta California from 1769 to 1848.⁵³ Amerindian and mestiza women carved out space for themselves and their families, were active agents in their spheres, and resisted Spanish military and clerical power. Laurie K. Mercier looked at women's documents and preserved women's voices with oral history in reconstructing the lives of Irish women in Anaconda, Montana. A town created by the Anaconda Copper Mining Company smelting facility, Anaconda was twenty-five percent Irish. These women constructed a community with economic, social and political security that persisted until the 1950s.⁵⁴ For comparative purposes, readers should consult Mary Murphy's *Mining Cultures: Men, Women, and Leisure in Butte, 1914-41* (Urbana: University of Illinois Press, 1997). Murphy, like Mercier, looks at community through the experiences of women in a very multi-cultural gendered community in the American West.

Perhaps the best book on the multi-cultural West in women's eyes is

⁴⁹ Carol Cornwall Madsen, *At Their Peril: Utah Law and the Case of Plural Wives, 1850-1900*, WEST. HIST. QTRL'Y, vol. 21 (Nov. 1990), pp. 425-43.

⁵⁰ See DEENA J. GONZALEZ, *REFUSING THE FAVOR: THE SPANISH-MEXICAN WOMEN OF SANTA FE, 1820-1880* (1999).

⁵¹ See Joan M. Jensen & Darlis A. Miller, *The Gentle Tames Revisited: New Approaches to the History of Women in the American West*, 49 PACIFIC HIST. REV. 173 (1980).

⁵² See Sarah Deutsch, *Women and Intercultural Relations: The Case of Hispanic New Mexico and Colorado*, 12 SIGNS 719 (1987).

⁵³ See Antonia I. Castenada, *Engendering the History of Alta California, 1769-1848*, 76 CAL. HIST. 230 (1997).

⁵⁴ Mercier, *MONTANA* (1994), pp. 50-61.

Glenda Riley's *A Place to Grow: Women in the American West*,⁵⁵ putting synthesis and documents in the hands of students of western women. Riley's work, foundational in this field of western history,⁵⁶ opened the issue of women pioneers and their attitudes concerning the West and American Indians in time and place. Riley's *The Female Frontier: A Comparative View of Women and the Prairie and the Plains*⁵⁷ analyzed the lives of women during the nineteenth century living lives in dramatically different places. Importantly, their voices play a large role in the analysis. *Building and Breaking Families in the American West*⁵⁸ took her study of divorce on a national level to the West and included the process of courting, committing, marrying, intermarrying, separating, and deserting. Open space and opportunity in the American West as well as divorce law allowed the creation of a fluid society. Riley's *Prairie Voices: Iowa's Pioneering Women*⁵⁹ brought nineteenth century voices to life for twentieth century ears and eyes. The gendered West owes a great debt to this intrepid historian.⁶⁰

Clearly, the history of gender in the West has a literature basis awaiting new questions and insights. With law as the glue that held western society together and with western lawyers at the center of that political and institutional world, it is incumbent that we understand that gender mattered then as it does now in law and politics.

Critical Western History and the Study of Law in the West

Western legal history has come of age with the work of John Phillip Reid and others guiding a research agenda finding the familiar in American law in the West and identifying the unique flowing from water and mining law development. In addition, Professor Reid and others have identified a research agenda including multicultural legal analysis that should prove to illuminate the vitality of western legal history. Reid suggested that there were numerous layers of western legal history, most only partially explored. They included the development of law during the westward expansion, the law of Indian Territory, the law of cattle drives and the open range, the law of the Mormons, mining law, water law, the law of American Indian nations, violence and the law,

⁵⁵ See GLENDA RILEY, *A PLACE TO GROW: WOMEN IN THE AMERICAN WEST* (1992).

⁵⁶ See GLENDA RILEY, *WOMEN AND INDIANS ON THE FRONTIER, 1825-1915* (1984).

⁵⁷ See GLENDA RILEY, *THE FEMALE FRONTIER: A COMPARATIVE VIEW OF WOMEN AND THE PRAIRIE AND THE PLAINS* (1988).

⁵⁸ See GLENDA RILEY, *BUILDING AND BREAKING FAMILIES IN THE AMERICAN WEST* (1996).

⁵⁹ See GLENDA RILEY, *PRAIRIE VOICES: IOWA'S PIONEERING WOMEN* (1996).

⁶⁰ In *BY GRIT & GRACE: ELEVEN WOMEN WHO SHAPED THE AMERICAN WEST* (1997), Professor Riley teamed with Professor Richard W. Etulain to provide readers with biographies of significant women. Riley summarized her *THE LIFE AND LEGEND OF ANNIE OAKLEY* (1994) in tandem with the other authors' biographies. Riley's attention turned to the conservation movement in *WOMEN AND NATURE: SAVING THE "WILD" WEST* (1999) and recovers botanists, ornithologists, naturalists, authors, photographers, and outdoor enthusiasts who supported the environmental movement.

and transboundary law.⁶¹

In addition to Reid's research agenda, the "New Western Historians" have offered some insights on law in the American West. Howard Lamar made the following observation in 1992:

"Bureaucracy thrives on rules. Rules suggest laws, and laws lead to litigation. In the past fifty years both citizens and the state and federal governments have hired armies of lawyers to fight their battles in legislative halls or in courts. The current debate over water needs, pollution, the environment, and development has been cast in legal terms. In addition to studying the history of these endless litigations, we should ask why the debate has taken this form. Are we a legal-minded people, or, as one suspects, have Americans become so accustomed to using the law as a selfish manipulative tool--from the time of the first Indian treaty on through two centuries of abuse of public lands--that it is a fundamental part of our culture? The new bureaucracy itself now seems to be using the law, sometimes callously, to achieve its own ends. The point is not to condemn but to ask how we came to this litigiousness and why we continue it."⁶²

Lamar's formulation of the research question is confrontational. Are the American people, particularly those that people the West, law-minded as John Phillip Reid found on the overland trail, or is the law a tool of capitalistic oppression, as the critical legal studies school would have us believe.

Patricia Nelson Limerick writing in the same volume finds the West a place of opportunity for legal history research.

Western history is full of ...examples of words consulted and puzzled over as if they were Scripture. When mining law awarded ownership of all the "angles, dips, spurs, and variations" of a vein to the person who claimed the "apex" of that vein, lawyers took on the trying task of translating a verbal construction into a geological reality.

Limerick also found lawyers representing "forests and rivers, antelope and coyotes." She offered that "when inarticulate nature found voice in legal proceedings, the world of words had reached its peak of inclusiveness." Further, "legal words provide abundant opportunities for cross-cultural comparisons." Finally, "written or oral, legal tradition is transmitted in words, by which power and influence flow toward the appointed custodians and interpreters of those words. The study of law and verbal behavior also provides important informa-

⁶¹ Reid's observations in *The Layers of Western Legal History* contained in JOHN MCLAREN, HARMAR FOSTER, AND CHET ORLOFF, EDs., *LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAY IN THE LEGAL HISTORY OF NORTH AMERICA* (1992) clearly delineate a topical and conceptual agenda for research. The work in western legal history is extensive, but as Reid suggests a great deal of scholarly opportunity awaits researchers.

⁶² See Howard Lamar, *Westering in the Twenty-first Century: Speculations on the Future of the Western Past* in WILLIAM CRONON, GEORGE MILES AND JAY GITLIN, EDs. *UNDER AN OPEN SKY: RETHINKING AMERICA'S WESTERN PAST* 263-64 (1992).

tion on intergroup relations in the West."⁶³

Looking at Richard White's *It's Your Misfortune and None of My own": A History of the American West*,⁶⁴ it is clear that there is plenty of law in the New West, but a good deal of analysis and explanation regarding that law remains for close study. My conservative count of law references in this text yielded 107 citations. Many of these references should not be surprising to students of legal history or the American West. Numerous federal statutes pertained to the West or had substantial impact in the West such as the Trade and Intercourse Act of 1834, the Oregon Donation Act of 1850, the Dawes Act of 1887, American land law generally, the Northwest Ordinance of 1787, the Edmunds Acts of 1882 & 1887, the Chinese Exclusion Act of 1882, the California Land Act of 1851, the Sherman Anti-Trust Act, the Alien Land Law of 1887, the Boulder Canyon Act of 1928, the General Mining Law of 1872, the Coal Lands Act of 1873, the Mineral Leasing Act of 1920, the Carey Act of 1894, the Newland's National Reclamation Act of 1901, the Forest Management Act of 1897, the Yosemite Act of 1864, the Lacey Act of 1906, the Tydings-McDuffie Act of 1934, the 1917 Immigration Act, the 1917 Literacy Test Act, the 1921 and 1924 Immigration Quota Laws, the Emergency Relief and Construction Act of 1934, the Agricultural Marketing Act of 1924, the Silver Purchase Act of 1934, the Lanham Act, the Agricultural Act of 1956, Public Law 283 of 1952, the Sustained Yield Act of 1944, the Multiple Use-Sustained Yield Act of 1960. The U. S. Housing Act of 1949, the Collier-Burns Act of 1948, the Federal Interstate Highway Act of 1956, the Payments in Lieu of Taxes Act of 1976, the Federal Land Policy and Management Act of 1976, the Religious Freedom Act of 1978, the Indian Civil Rights Act of 1968, the Immigration and Naturalization Act of 1952, the Immigration Act of 1965, and the Simpson-Mazzoli Act of 1986. This is quite an impressive list.

The federal courts also are part of the New West legal landscape.⁶⁵ State and territorial law are included in the portrait. Women used Spanish law in New Mexico to manage their affairs and gain a great deal of independence, but the law of debt peonage forced Indians to work one year for a creditor. Americans in pre-Revolutionary Texas complained about the Mexican legal system. With the Mexican War, New Mexico had Kearny's Code as a base. In Utah, the Mormons used their probate courts against Gentile aggression.⁶⁶ California

⁶³ See Limerick, *supra* note 4, at 181-2. The research opportunities according to Limerick and Reid are abundant. See PATRICIA NELSON LIMERICK, *SOMETHING IN THE SOIL: LEGACIES AND RECKONINGS IN THE NEW WEST* (2000).

⁶⁴ See RICHARD WHITE, *IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST* (1991).

⁶⁵ White notes *U. S. v. Wheeler*, 435 U.S. 313 (1978), *Hernandez v. Texas*, 347 U.S. 475 (1954), *Muller v. Oregon*, 208 U.S. 412 (1908), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *North Bloomfield Gravel Mining Co. V. Woodruff*, 122 U.S. 629 (1884), *Reynolds v. U.S.*, 98 U.S. 145 (1879) and other cases. Arizona also went to the federal courts to determine its water rights under the Colorado River Compact.

⁶⁶ See Sara Barringer Gordon, *The Liberty of Self-Degradation: Polygamy, Woman Suffrage*

passed a Foreign Miners Tax Act in 1850 to run the Californios off the diggings. California courts refused to uphold the communal land rights of Hispanics. Mexican and American law was in conflict in California regarding the law of heirship. Western railroad boosters wanted lawmakers to give railroads "breaks." Western miners and smelter workers got the 8-hour day by statute. A California statute of 1850 enabled the peonage of Indians. Western state law and federal statute, in sum, disfranchised western minorities by denying citizenship, imposing poll taxes, and creating white-only primaries. Western states passed prohibition statutes. California enacted a Railroad Commission law, but the Southern Pacific used legal procedures to frustrate or delay the law's impact. Oregon's Compulsory School Act of 1922 was unconstitutional. Texas statutes and court decisions prevented a Standard Oil monopoly in Texas. Western water law was the product of legislatures and courts. Tax law changes in Texas caused a civil war in South Texas, 1915-17. California's alien land laws, 1913, to bar Japanese land use was avoided and later declared unconstitutional. Texas and Oklahoma used executive orders, statutes and court actions to regulate the oil industry. State law after World War II made municipal annexation easier stimulating expansion of city boundaries. Since the 1960s, state law has attacked environmental pollution, taxed extractive industries, regulated land use, and expanded the tax base. The states of the New West were busy using law and it was not always clear who benefited from these various uses of law.

Law at the local level does not escape Professor White's extensive research net. Both elite and peasant women in New Mexico go to court to maintain their rights within marriage. The expansion of the bureaucratic state in the 19th century West brought with it the growth of administrative law before it was ever noticed in the nation. When it was discovered that trapping beaver violated Mexican law, the Hudson's Bay Company ordered it stopped. Restrictive covenants in deeds proved an effective way of segregating minority communities, particularly Asians. Stockmen often worked out law among themselves without resort to courts. Law at the operational level also is an important part of understanding the New West.

This last issue, like that of the "dispossession of the Californios" under the California Land Act of 1851, is a volatile one with a great deal of political baggage. From the legal historian's perspective, the analysis usually ends with the issue of due process, that fundamental principle of American constitutional right and liberty. While the Indians may both won and lost cases in court, we must remember that the Chinese often used those same courts to win and lose. Perhaps when western historians ask legal history questions we will learn more

and Consent in Nineteenth Century America, 83 J. AMER. HIST. 815 (1996); Carol Conway Madson, *Decade of Detente: The Mormon Gentle Female Relationship in Nineteenth Century Utah*, 63 UTAH HIST. QTRL'Y 298 (1995); Carol Cornwall Madsen, *At Their Peril: Utah Law and the Case of Plural Wives, 1850-1900*, 21 WESTERN HIST. QTRL'Y, 425 (1990).

about how to play the game, than who won and lost.⁶⁷ Perhaps the best players were the winners with the best lawyers sitting at the Mad Hatter's Tea Party trying to make sense of western history.

The best analytic work using law in the New West questions is Debra L. Donahue's *The Western Range Revisited: Removing Livestock from Public Lands to Conserve Native Biodiversity*.⁶⁸ Professor Donahue brings extensive training and experience in rangeland science together with a law professor's analytic quiver of tools to suggest the "unthinkable": the removal of livestock from many western rangelands on the grounds that it make economic sense, is ecologically wise, and clearly is legally justifiable. In the process of arriving at this politically explosive suggestion, Professor Donahue analyzes why the cattle industry has been able to retain such political and bureaucratic clout despite clear evidence that their grazing practices are destroying the region's grasslands. It was most fitting that the press released this book in the last month of the millennium because it brings the New Western History into an analytic framework that both informs and convicts public policy.

Women, the West, and Work: Regional, National, and Historical

More broadly, the struggles of females lawyers in the West to access clients is part of a larger inquiry into the nature of women's work in America. Thomas Dublin's *Women at Work: The Transformation of Work and Community in Lowell, Massachusetts*, a 1979 publication, demonstrates that mill workers shift from daughters of freemen (yeoman farmers) to immigrants (Irish). Labor unrest emerges in late 1850s led by immigrant women. The era of unrest creates a new era of fragmentation, especially fragmentation of culture and religion. His 1994 work, *Transforming Women's Work: New England Lives in the Industrial Revolution*, suggests that women were integrated into industrial capitalism in two-step process: (1) the penetration of market practices into farming households with the emergence of rural outwork; and (2) massive rural-urban migration and foreign immigration created a female urban industrial workforce in period 1830-1900. Dublin includes a study of New Hampshire teachers who had lengthier careers, fewer and later marriages, and fewer children at greater intervals. They were clearly distinct having greater independence than the mill worker.

Miriam Cohen's *Workshop to Office: Two Generations of Italian Women*

⁶⁷ See John R. Wunder, *What's Old About the New Western History?* 10 WESTERN LEG. HIST. 85 (1997); Eiichiro Stanley, *Japanese Immigrant Farmers and California Alien Land Laws: A Study of the Walnut Grove Japanese Community*, 73 CAL. HIST. 99 (1994); Malcolm Ebright, *Frontier Land Litigation in Colonial New Mexico: A Determinant of Spanish Custom and Law*, 8 WESTERN LEG. HIST. 199 (1995); John R. Wunder, *Territory of New Mexico v. Yee Shun: A Turning Point in Chinese Legal Relations in the Trans-Mississippi West*, 65 N.M. HIST. REV. 305 (1990).

⁶⁸ See DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999).

in *New York City, 1900-1950*⁶⁹ tells us that women went to work in great numbers out of economic necessity whether single or married. She uses comparisons with Jewish women in garment industry to demonstrate that Italian women not as politically active due to higher number of hours at work, but move into labor activism later for same reason. Italian children worked and attended school less in period 1900-30; increased schooling with decreased family size in the 1940s. Italian women focused on family across period due to traditions, cultural expectations, and belief that the third generation would benefit from the labors of the first and second generations in America. Boys were the beneficiaries of the system. It would be another generation before large numbers of Italian women would be educated as teachers, social workers, or doctors and lawyers. Italian women's continuing focus on the familial had political implications for the women's movement as it evolved in the 1960s. Twentieth-century feminism has expressed a commitment to the individual aspirations of women as well as a sense of solidarity among women. To the extent that feminism appealed to women in positions to consider the possibilities of some autonomy from the family, feminism had a much more immediate appeal for more prosperous women in postwar society—for American Jews, for example—than it did for women in communities like the Italian American in New York City.

Eileen Boris's *Home to Work: Motherhood and the Politics of Industrial Homework in the United States*, published in 1994, is a study of homework [from cigar making to weaving, keyboarding, and data processing] 1870s-1990s. This is a good law, politics, labor, and gender study that explores the uses of the "women want to stay at home" rhetoric to justify the existence of homework or sweat labor without the sweat shop...efforts to prohibit, to regulate, to tax, to license...complex treatment of a complex issue, then and now!

Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn*, a 1999 book, is a study of Dr. Mary Dixon Jones and her strategies for penetrating a male domain, achieving notice and respect among her colleagues, cutting her own professional path, and surviving the challenge of a criminal trial for the death of two patients. It also is the study of a libel trial against the newspaper the continually defamed her and the context of the professional lives of male and female doctors in Brooklyn and New York City.

What is particularly striking about these studies is the agency of women in achieving access to employment opportunities. These strategies went beyond those of Laura deForce Gordon working in the California Constitutional Convention of 1878-79 to obtain constitutional access to employment. They were many and varied and worth of our consideration in exploring the western experience. Gayle Gullett has done this in part.⁷⁰ She places Clara Foltz and

⁶⁹ See MIRIAM COHEN, *WORKSHOP TO OFFICE: TWO GENERATIONS OF ITALIAN WOMEN IN NEW YORK CITY, 1900-1950* (1992).

⁷⁰ See GAYLE GULLETT, *BECOMING CITIZENS: THE EMERGENCE AND DEVELOPMENT OF THE*

Laura Gordon in a much larger picture of female activism. In 1896 few women were in the workplace and suffrage lost at the polls. In 1911 women were in the work force, better organized, and writing copy for newspapers. Women were in the legislature working for a juvenile court system tied to the municipal playground movement. Success in getting their program institutionalized meant jobs for women. Gullett's historical quilt is the work of many hands in and out of the legislature, but all hands were sewing new opportunities for women.

Sally Zanjani focuses upon women in the mining business dividing the periods of 1850-1918 & 1919-1950.⁷¹ Her book is primarily biographies of women in the prospecting business; mostly Nevada women. One chapter centers on a Mexican woman in the mines, but the work also ranges from the "famous" like Josephine "Josie" Marcus Earp (the longtime companion and eventually the wife of the legendary Wyatt Earp) to the unknown, now recovered for history.

Her conclusions are important: few women married; few had children because there was a certain incompatibility of prospecting and raising children; none sought self-worth through what Carl Degler has described as the sense of identification with other women to be attained by confining their activities to the domestic sphere; and they relished equaling or exceeding male achievements.

Regarding prospecting wives, they reverted to a traditional role in mine sales and promotion phase of prospecting. Forty-seven percent of women in this study began prospecting during period 1898-1910. They came from a variety of backgrounds and often pursued a variety of occupations and businesses. Jennie Enright, for example, was a cattle rancher, craftswoman, cashier, bakery and boarding house operator, and real estate agent.

Woman prospectors were not domestics and not factory workers. Fewer than 10 percent of the women in the study left prospecting once they started. "Mrs. Helen C. Quigley, a prospector from Utah who ventured into Death Valley alone with a horse and a pack mule in 1907,...was found in a cave "in the Funeral Mountains... "barely alive." "Her narrow escape deterred Quigley not at all. As soon as her rescuers had nursed her back to health, through weeks of delirium, she set off into the desert to return to the ledge she had discovered."⁷²

Some successful prospectors took trophy husbands. Twenty-nine per cent of the women who married took men 5 to 30 years younger. Mary Grantz "paraded her hew husband before her Wisconsin relatives."⁷³ Yet social ambition is conspicuously absent: no woman prospector built a pretentious seaside man-

CALIFORNIA WOMEN'S MOVEMENT, 1880-1911 (2000).

⁷¹ See SALLY ZANJANI, *A MINE OF HER OWN: WOMAN PROSPECTORS IN THE AMERICAN WEST, 1850-1950* (1997).

⁷² See *Id.* at 309-10.

⁷³ See *Id.* at pp. 222-3.

sion with gold doorknobs. Pleasure lay in achievement.⁷⁴

Western Lawyers and Making a Difference

Achievement – rather than ostentation – also appears to have been the primary motivating force for the better lawyers in the western bar.

Those better lawyers achieving positions of influence started with reading law in a local lawyer's office, whether in Calvin Fletcher's in Indiana⁷⁵ or in the gold rush tents of the mother lode country. Christopher Bryant's paper clearly delineates the vitality as well as the drudgery of working for Calvin Fletcher in frontier Indiana. For the women of the bar later in the century access was the first issue and Clara Foltz's use of the legislature was significant, yet not uniformly applied.⁷⁶ Decius Wade also read law in his uncle's office and used political connections to elevate himself.⁷⁷

When in power, these frontier and western attorneys left important marks. Wade's work on the Montana Supreme Court and as a code commissioner left a substantial heritage. He created a framework for the development of the state's common law jurisprudence, a jurisprudence so strong that it survived codification. The women defenders of the West, particularly Clara Foltz, created the modern public defenders office. This supported the justice system and gave women access to important positions and trial practice. Perhaps there was something in frontier soil that allowed lawyers of both genders to grow and make the legal landscape to match the mountains.

⁷⁴ On women and work in the West, see also Kimberly Jensen, *The Open Way of Opportunity: Colorado Women Physicians and World War I*, 27 WESTERN HIST. QTRL'Y, 327 (1996); Gilbert G. Gonzalez, *Women, Work and Community in the Mexican Colonias of the Southern California Citrus Belt*, 74 CAL. HIST. 58 (1995); Margo McBane, *The Role of Gender in Citrus Employment: A Case Study of Recruitment, Labor, and Hiring Patterns at the Limonena Company, 1893-1940*, 74 CAL. HIST. 69 (1995); Karen Anderson, *Work, Gender, and Power in the American West*, 61 PACIFIC HIST. REV. 481 (Nov. 1992); Sherry L. Smith, *Single Women Homesteaders: The Perplexing Case of Elinor Pruitt Stewart*, 22 WESTERN HIST. QTRL'Y 163 (May 1991); Charles E. Rankin, *Teaching: Opportunity and Limitation for Wyoming Women*, 21 WESTERN HIST. QTRL'Y 147 (1990); Laurie K. Mercier, *Women's Economic Role in Montana Agriculture: "You Had to Make Every Minute Count,"* 38 MONTANA 50 (Autumn 1988); Joan M. Jensen, *"I've Worked, I'm Not Afraid of Work": Farm Women in New Mexico, 1920-1940*, 61 N.M. HIST. REV. 27 (1986); Mary Lee Spence, *They Also Serve Who Wait*, 14 WESTERN HIST. QTRL'Y 5 (1983).

⁷⁵ See Bryant, *supra* note 1.

⁷⁶ See Babcock, *supra* note 1.

⁷⁷ See Morriss, *supra* note 1.