Law in the Western United States

Edited and with Introductions by Gordon Morris Bakken
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This book is published with the generous assistance of The Kerr Foundation, Inc.

Library of Congress Cataloging-in-Publication Data

Law in the western United States / edited by Gordon Morris Bakken.
p. cm.—(Legal history of North America; v. 6)
1. Law—West (U.S.)—History. I. Bakken, Gordon Morris. II. Series

KF352 .L393 2000
349.78—dc21
00-032610

Law in the Western United States is Volume 6 in the Legal History of North America series. The paper in this book meets the guidelines for permanence and durability of the Committee on Production Guidelines for Book Longevity of the Council on Library Resources, Inc.

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To the Memory of
Tempe Graves

Conservationist, Environmentalist, Friend.
Gone too soon to see this book, she became the swift uplifting
rush of quiet birds, a soft star by night, sunlight’s glint on
fallen snow, and the thousand winds that cross the West. She made
a difference in lives.
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*John Phillip Reid*  

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Preface

The authors of this volume prospect western legal history in the sense that they offer extensive, thorough, or expansive treatments of aspects of the field. This is not a comprehensive or exhaustive volume for the simple reason that the field of western legal history is yet young. As John Phillip Reid clearly demonstrates, the subject is ripe for intensive historical inquiry. Some of the essays that follow are evocative, and deliberately so. Others provide readers with a measured survey of cases or controversies. The sum of this volume is both information and provocation.

John Reid's "Layers of Western Legal History" was the keynote address of a symposium titled "Law for the Elephant, Law for the Beaver: A Transboundary Conference on the Legal History of the West and Northwest of North America," held at the University of Victoria, February 22-24, 1991. Reid suggested that there are numerous layers of western legal history, most only partially explored. They include 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, and transboundary law. As readers will quickly notice, this volume does not attempt to address all of these areas of inquiry, but does suggest some beyond those noted by Professor Reid.

American constitutional history was the dominant area of inquiry through the 1960s, and legal history emerged in the 1970s as a preferred means of teasing out the social, economic, racial, and gender implications of the legal process. Both types of historical inquiry are important for our understanding of how American society has constituted itself at times in different places. The essays in this volume provide a window into many of the issues of yesterday and today. Law operationalized the constitutive principles and values of communities, provided the means to social and economic goals, and focused the political interests of time and place upon legal institutions. Constitutional order relied upon law as a legitimate force. As James Willard Hurst observed, the characteristic functions of our legal order were contained in its scrutiny of the arrangements of power, its insistence upon the responsibility of legitimate power and its procedural regularity, and its use for the allocation of resources. In the West we see this legal order working in ways different from the East, yet very much a part of the national legal and constitutional order.
Clearly, the field of western legal history can yield refined metal, but the ore must be separated from the waste. Overland trail emigrants frequently told of seeing the elephant. To most, that meant facing an ordeal, gaining experience through hardship, or learning situational reality from facing the unbelievable. Many of these emigrants chased free farmland, or gold in California. All wanted to find a little color in the West. Farmers wanted to see the earth turn green with a crop, and miners wanted to see gold in the pan. We argonauts in western legal history hope to display some brilliant colors.

A few legal historians already have discovered law in the West. For example, Peter Karsten’s *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997) found five of the most innovative state supreme courts in the West. By Karsten’s lights, California, Texas, Oregon, Kansas, and Nebraska justices created an innovative jurisprudence. Something was going on in the West.

I asked the authors of this volume to write freely about what they found in the subject matter that I assigned them; with very few exceptions, the cases and topics are mine. These authors accepted their assignments with willingness, some out of a sense of adventure into uncharted mountains and valleys. Others were experts with many years of work in the West or in the law. All shared a sense of excitement in knowing that the product would be a first venture into a form of informative and evocative scholarship.

In style, this volume follows the path set out by John W. Johnson in his *Historic U.S. Court Cases, 1690–1990: An Encyclopedia* (New York: Garland Publishing, 1992). In selecting cases for scholars, I deliberately avoided duplicating those covered in that volume. I was not completely successful. The famous U.S. Supreme Court cases of *Yick Wo v. Hopkins* (1886), *Muller v. Oregon* (1908), and *Miranda v. Arizona* (1966) are covered in this volume also. The authors provide a different perspective on them. *Yick Wo* is portrayed in a broader context, *Muller* is given a feminist critique, and *Miranda* takes on a much more functionalist view. I would encourage readers to consult Johnson’s volume on these cases. Of particular interest there are cases with western facts and national implications.

These cases include a wide variety of legal and constitutional questions. Roger D. Hardaway’s entry, “Free Speech and Legal Ethics: The Issue of Lawyer Advertising,” discusses the Arizona case that gave rise to attorney advocacy in the print media and on television. The case held that attorney advertising was protected free speech under the First Amendment, but subject to regulation. Charles E. Quirk’s “From Court Side to Courtroom” tells of the successful legal battle of Jerry “Tark the Shark” Tarkanian with the National Collegiate Athletic Association (NCAA). Civil liberties is the subject of Carol E. Jenson’s studies of *Whitney v. California* 274 U.S. 357 (1927) and *Stromberg v. California*, 283 U.S. 359 (1931). Paul Finkelman’s analysis of “Flag-burning and the Constitution” involves a Texas statute making it a crime to desecrate a “venerated object.” Thomas D. Morris looks at another case from the Lone Star State, *Texas v. White*, 7 Wallace 700 (1869), in which the United States Supreme Court upheld the Republican reconstruction of the defeated Confederacy. A perusal of these essays makes clear that western subject matter was very much a part of constitutional as well as legal material before the United States Supreme Court.
One important distinction between this volume and Johnson's will become immediately obvious to readers. Johnson's focuses upon appellate cases; this volume's sweep is broader. Here you will find essays on western legal history topics. Some, like John Phillip Reid's, are historiographical and expansive, looking at all of the American West and comparing our scholarly view of it with Canada and its history. Others, like John Joseph Stanley's, cover very specific topics such as vigilantes, jails, and arson in California. These essays suggest fields of research while constituting exhaustive discourses on the topics. Here you will find a few on statutory development acknowledging that law is not exclusively the province of appellate courts. Here you will find some on trial court records. Here you will find entries on the intersections of law and culture. This is a different kind of volume for a different America, the West.

The organization of the chapters is intended to give the general reader a taste of the West in broad brush as well as in depth within a topic. The law of the West best known to students of history involves treaties, both with Mexico and with American Indian tribes, vigilante or popular justice, water rights, hardrock mining, and Mormons. Less well known, but nonetheless western, are legal developments touching on certain aspects of business, the range cattle industry, protective labor legislation, taxation, municipal corporation authority, race and gender, and environmental regulation.

These essays go into scholarly depth sufficient to inform the general reader, but many include the intricate legal analysis necessary to bring explanation and interpretation to a sophisticated level of understanding. For example, lawmakers in the West frequently chose a path uncharted in the East in areas such as mining law, labor law, business regulation, and civil procedure. None of these areas is particularly a part of normal historical discourse, and all are frequently misunderstood in legal circles. Many of the chapters target historical misunderstandings of the legal record and others, like Peter Reich's, address the misuse of history by the bench and bar. Chapters on law in Indian country and law for American Indians are informative narratives of key cases; a few interpretative essays are designed to flesh out the incredible complexity of the legal development and current judicial interpretations. In sum, the entries will inform and evoke further inquiry.

When you finish reading these essays, you may feel further unease because there is much more that is not included in this volume. There are a variety of reasons for these omissions. First, subjects such as the products liability law are quite familiar to lawyers, and its origin in the California Supreme Court of Roger Traynor is well known. But I determined that those cases were best left for other scholars in a different format. One volume can only cover so much. Second, some obvious subjects are subsumed in the text of the essays. For example, an entry on the bench and bar of the West would be useful, albeit based on limited work to date. I felt that, because many of the authors confronted the role of judges and lawyers, their work would stand as additional scholarship for a future historian of the western bench and bar. Finally, a single-volume work must impose limits in order to give authors sufficient latitude to explore their material. Here I simply eliminated categories with abundant literature, such as female suffrage in the American West. Most students of this subject know of Wyoming's statute, but few of its pioneering work on employer's liability law. I chose to include subjects that were not well known and that should
not remain obscure in our literature. I did not clutter the volume with a case or statute from every western state.

If you still pause at the table of contents, perhaps you need to start with an overview by the dean of American legal history, John Phillip Reid. “Layers of Western Legal History” suggests so much still to be done. Scholars are only now scratching the hardscrabble of western law to view its richness. Our hope is that when you close the cover, you will have seen a little color as well as the elephant.

GORDON MORRIS BAKKEN

Fullerton, California
Law in the Western United States
In the vast unresearched reaches of North American legal history, there may be no area more neglected than what some have started to call western legal history. So little has been written of the legal history of the American and Canadian West that we may be only guessing when we say there is a western legal history to be researched and written. We may, in fact, not appreciate how little we know and how much we have to guess. Legal historians of the generation working after Willard Hurst occasionally boast of the “explosion” that has recently occurred in legal historical scholarship.1

We seldom notice, however, how much of that activity has been on the substance of legal history and how much on debates about style. True, there has been a remarkable increase in the quantity of scholarship, but a significant proportion of it has been devoted to defining how we should write legal history—to applauding a shift from what Barry Wright has called the “traditional emphasis on doctrine and institutional description,” reflecting the perceived autonomous legal system as little influenced by politics, economics, or social change,2 to what William Nelson has termed the writing of legal history “from a genuine historical perspective.”3 Perhaps discussions about methodology have distracted us from the narrative component of legal history. When we realize that there is not available one instance of the legal history of a state, a province, or an Indian nation,4 it must be evident that we lack some of the basic scholarship needed for making judgments about the state of western legal history.

Despite the doubts of some about its legitimacy, western legal history has swiftly gained not only acceptance but identity. Just a few years ago, the mention of “western legal history” would have raised thoughts of praetorian justice and of the worldwide legacy of the Roman legal system. The very idea that there could be a scholarly discipline concerned with the history of the North American West has had an even more serious image problem to overcome. We may suspect that mainstream legal historians like the general historians of North America have thought western legal history “intellectually barren and cluttered with trivia,”5 dealing with outlaws, cowboys, and beaver trappers. Although it is still a somewhat lonely entity, like another shadow called “southern legal history”6—we do not hear of New England legal history or Maritime legal history—the legal history of the American West