

## LAW, RACE, AND THE BORDER: THE EL PASO SALT WAR OF 1877

The "lawless Old West" is a familiar trope in American popular culture. Film, literature, and art have promoted this notion of the wild western frontier of the nineteenth century, where law enforcement was scarce and vigilante mobs roamed at will.<sup>1</sup> Recent historical scholarship has begun to revise this stereotype of lawlessness, however, by illustrating the presence of formal legal procedures and understandings even in remote parts of the nineteenth-century West.<sup>2</sup> This scholarship is notable not only for its revision of western history, but also for what it reveals about the legal consciousness of ordinary people.<sup>3</sup> As these authors show, even individuals not trained in the law were concerned with legal process and encouraged the development of legal culture.<sup>4</sup>

This Note adds a unique chapter to the story of legal consciousness in the West. It looks specifically at the El Paso Salt War of 1877, an extended altercation along the U.S.-Mexico border that began with misunderstandings about property ownership and ended with at least twelve dead, forty wounded, and more than \$500,000 worth of prop-

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<sup>1</sup> For discussions of the "imagined West" in American popular culture, see, for example, THE OXFORD HISTORY OF THE AMERICAN WEST 671-801 (Clyde A. Milner II et al. eds., 1994); and RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 613-32 (1991).

<sup>2</sup> See, e.g., DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821-1846 (1987); JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (paperback ed. 1997). Helpful articles discussing the relationship between western history and legal history include *Western Legal History: Where Are We and Where Do We Go from Here?*, 3 WESTERN LEGAL HIST. 115 (1990); and John R. Wunder, *What's Old About the New Western History? Part 3: Law*, 10 WESTERN LEGAL HIST. 85 (1997).

<sup>3</sup> The study of legal consciousness is a relatively new intellectual enterprise, introduced by critical legal theorists as a methodology for examining the effects of the law on everyday experiences and ordinary people. As legal scholar Mari Matsuda describes it, the study of legal consciousness is concerned with "the historical role of the belief systems underlying legal doctrine." Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16, 16 n.1 (1988). Matsuda draws on the work of Robert Gordon, who provides another definition in his seminal work, *Critical Legal Histories*:

Given what so often appears to be the indeterminacy of instrumental effects, a promising approach for such study may be to treat legal forms as ideologies and rituals whose "effects" — effects that include people's ways of sorting out social experience, giving it meaning, grading it as natural, just, and necessary or as contrived, unjust and subject to alteration — are in the realm of consciousness.

Robert J. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101 (1984).

<sup>4</sup> See generally REID, *supra* note 2 (arguing that the legal behavior of migrants on the Overland Trail in the nineteenth century reveals a shared legal culture, carried from the East to the West).

erty damaged and goods stolen.<sup>5</sup> Because it pitted the indigenous Mexican-American<sup>6</sup> population against the newer Anglo-American<sup>7</sup> population, the Salt War was called a "war of races."<sup>8</sup> The Mexican-Americans and Mexicans involved in it were, at the time, referred to as "hot-blooded"<sup>9</sup> and "deluded,"<sup>10</sup> their actions assumed to be triggered by their "ignorance" and disorganization.<sup>11</sup> As with many forms of extralegal action, however, the revolts of the Salt War had a political cause and purpose, both of which have been overlooked in most of the historical literature.<sup>12</sup> This Note retrieves this narrative, placing the so-called "vigilante" actions of the Mexican "mob" in their larger legal and political context.

Part I gives a brief overview of the development of law in the southwestern border region, from initial Spanish settlement, through the eras of Mexican and Texan control, up to the time of the Salt War. It argues that border residents created a hybrid legal system, composed

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<sup>5</sup> For estimates of casualties and monetary costs, see LETTER FROM THE SECRETARY OF WAR: EL PASO TROUBLES IN TEXAS, H.R. EX. DOC. NO. 45-93, at 57 (1878) [hereinafter EL PASO TROUBLES]. The Minority Report in this House document estimated the monetary damage at \$30,000; that amount in 2002 would equal approximately \$512,000. See John J. McCusker, *Comparing the Purchasing Power of Money in the United States (or Colonies) from 1665 to Any Other Year Including the Present*, Economic History Services, at <http://www.eh.net/hmit/ppowerus/> (last visited Dec. 6, 2003).

<sup>6</sup> It is difficult to identify the citizenship of border residents of Mexican descent during the mid- to late-nineteenth century. The Treaty of Guadalupe Hidalgo in 1848 conferred American citizenship on all Mexicans in the newly acquired territories who did not specifically indicate their desire to remain Mexican citizens within one year after the ratification of the Treaty. RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* 62 (1990). Records of those who chose to remain Mexican citizens, however, are mostly incomplete or nonexistent. *Id.* at 63-66. Anglo-American residents of the borderlands in this period usually referred to all those of Mexican ancestry as "Mexican," favoring an ethnic designation over actual citizenship. Similarly, many of those of Mexican descent who had become American citizens continued to call themselves *mexicanos*. It is clear that Mexicans from both sides of the border participated in the Salt War. See, e.g., EL PASO TROUBLES, *supra* note 5, at 4 ("Of the mob of 500[,] . . . perhaps one hundred were men from the Mexican side, who had come over in defiance of the Mexican authorities."). For the purposes of this Note, "Mexican" refers to people of Mexican descent whose primary residence was on the Mexican side of the border, "Mexican-American" refers to those who lived primarily on the American side of the border, and "*mexicano*" refers to the general cross-border community of those of Mexican descent.

<sup>7</sup> For the purposes of this Note, the terms "Anglo" and "Anglo-American" refer to American citizens of European descent who would have been considered "white" in the context of the community.

<sup>8</sup> W.W. MILLS, *FORTY YEARS AT EL PASO: 1858-1898*, at 149 (Carl Hertzog ed., 1962) (1901).

<sup>9</sup> EL PASO TROUBLES, *supra* note 5, at 15.

<sup>10</sup> OWEN WHITE, *OUT OF THE DESERT: THE HISTORICAL ROMANCE OF EL PASO* 109 (1923).

<sup>11</sup> WALTER PRESCOTT WEBB, *THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE* 357 (1935).

<sup>12</sup> There are a few historical accounts that have looked more carefully at the Salt War. See *infra* note 74.



of remnants of a Spanish legal system and elements of the newly arrived Anglo-American system. As Anglo settlement increased in the 1860s and 1870s, the legal system became increasingly prejudiced against Mexican and Mexican-American residents. The Salt War was both a product of and a challenge to this hybrid legal system. Part II presents the standard narrative of the Salt War. Part III offers a reinterpretation of the event, elucidating the roles that law and concepts of justice played in the altercation. This Part further demonstrates the tenuous yet enduring give-and-take between extralegal and legal forms of dispute resolution in the late-nineteenth-century West.

### I. THE RISE AND FALL OF A FRONTIER LEGAL REGIME

Although Mexico lost approximately half of its territory to the United States in 1848 under the terms of the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, the lands that it lost were initially "Americanized" only in name. Large-scale settlement by Anglo-Americans did not begin in earnest in West Texas and New Mexico until the arrival of the railroads in the late 1880s and 1890s, and Mexican and Mexican-American residents continued to outnumber white settlers well into the twentieth century.<sup>13</sup> Indeed, much of the territory immediately north of the border was contested ground for at least the remainder of the nineteenth century.<sup>14</sup>

A legal system had been in place along the border well before the United States annexed the region. Under Spanish rule, which lasted until Mexico declared independence in 1821, the centerpiece of the legal regime was the *alcalde*, an officer somewhat similar to that of a justice of the peace under Anglo-American law.<sup>15</sup> Few of the *alcaldes* in the border region under Spain had official legal training, relying instead on the few law books that they could obtain as well as on apprenticeships under other *alcaldes*.<sup>16</sup> After Mexican independence, the government passed legal reforms aimed at formalizing justice along

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<sup>13</sup> Population estimates of West Texas gleaned from census data and travelers' memoirs indicate that in 1850 *Mexicanos* outnumbered Anglos seven to one, a striking contrast to the population of East Texas. See DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, at 31 (1987).

<sup>14</sup> See, e.g., ROBERT J. ROSENBAUM, *MEXICANO RESISTANCE IN THE SOUTHWEST* 37-52 (1998).

<sup>15</sup> In the legal system of Spain at that time, the *alcalde* made up just one tier in a multi-level system of justice. In the more established jurisdictions in the New World, such as the urban centers of Mexico City and Guadalajara, cases were heard by official tribunals of formally educated jurists. The complicated, bureaucratic Spanish legal regime took on a more flexible and local character in the remote, sparsely populated northern frontier, where the *alcalde* took center stage in the resolution of various disputes. See CHARLES R. CUTTER, *THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700-1810*, at 69-102 (1995).

<sup>16</sup> *Id.* at 86-87.

the northern border. New laws required the formation of district courts closer to the frontier, the creation of an independent judiciary, and, in some states, the implementation of a jury system. Yet few of these reforms were actually implemented on the northern frontier.<sup>17</sup> The local *alcaldes* continued to exert significant influence, despite legislation seeking to disempower them.

When the Republic of Texas declared independence from Mexico in 1836, its leaders generally left the local *alcaldes* in place (although they were officially renamed justices of the peace),<sup>18</sup> no doubt recognizing their importance to maintaining order in the towns that would now straddle a new border but that would retain their Mexican populations. The Republic of Texas joined the United States in 1845, and the national government attempted to implement a federal legal structure in the newly obtained territories. The Spanish-speaking *alcaldes*, as they were still commonly called, continued to practice for several decades in Western Texas and New Mexico, despite the adoption of the common law by the Texas Legislature in 1840 and the gradual introduction of more typical Anglo-American, English-only court structures.<sup>19</sup>

Thus, from the 1830s to the 1850s, the legal system of the Western borderlands was a hybrid of Mexican and Anglo-American forms of dispute resolution, conducted in both Spanish and English.<sup>20</sup> This system began to change, however, with the migration spawned by the California gold rush of 1849, the establishment of an overland mail and passenger service through West Texas and New Mexico in 1851, and the introduction of railroads in the 1880s. The gold rush and the railroads brought greater numbers of white settlers seeking to make the border their permanent home. By the 1870s and 1880s, there were state district courts established, stone courthouses built, and Anglo bar associations formed in some border cities.<sup>21</sup> In 1874, the Texas Su-

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<sup>17</sup> DAVID J. WEBER, *THE MEXICAN FRONTIER, 1821-1846: THE AMERICAN SOUTHWEST UNDER MEXICO* 37-40 (1982).

<sup>18</sup> STEPHEN F. AUSTIN, *ESTABLISHING AUSTIN'S COLONY* 75-89 (David B. Gracy II ed., 1970) (reprinting regulations issued by Stephen Austin in 1829 for the governance of the Austin Colony).

<sup>19</sup> J. MORGAN BROADDUS, JR., *THE LEGAL HERITAGE OF EL PASO* 129 (1963).

<sup>20</sup> For example, juries in El Paso County in the 1850s, 1860s, and 1870s were made up almost entirely of Spanish-surnamed individuals and handed down their verdicts in Spanish. Minute Book, El Paso County District Court, 1867-1877 (Special Collections, University of Texas at El Paso, MS 132). Juries in other parts of the southwestern borderlands had similar compositions. See, e.g., Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 *LAW & SOC'Y REV.* 1129, 1130 (2000) (finding that "the native Mexican population participated substantially in the criminal justice system" in San Miguel County, New Mexico, during "the last quarter of the nineteenth century").

<sup>21</sup> In El Paso, a bar committee was formed by a local judge in 1868 and an official bar association was established in 1896. The first federal district court convened in 1885, and a new court-



preme Court declared, contrary to continuing practice in West Texas, that only English speakers could serve on juries,<sup>22</sup> with the exception of particular cases appearing before justices of the peace in towns west of the Guadalupe River.<sup>23</sup>

Anglo complaints about the hybridity of the legal system became more widespread in the 1860s and 1870s. Most of these complaints were directed at specific legal officials, typically of Mexican descent, who were perceived as incompetent, inefficient, or — even worse — of Mexican rather than American citizenship.<sup>24</sup> In El Paso and its surrounding towns, predominately Anglo grand juries investigated Spanish-speaking local officials on numerous occasions.<sup>25</sup> Complaints surfaced not only in official government investigations, but also in the popular media. A local newspaper article complained in 1882, for example, that the justice of the peace in the settlement of Ysleta was unable to speak English and that an interpreter therefore had to be provided for the witnesses, the accused, and the defendant, none of whom spoke Spanish.<sup>26</sup>

For newly arrived Anglos, the persistent use of Spanish was frequently an annoyance. For the *mexicanos* already established in the area, however, the advent of an Anglo-American justice system — along with its abuse by some Western Anglos — too often proved a serious threat to their persons and property.<sup>27</sup> The terms of the Treaty of Guadalupe Hidalgo conferred American citizenship upon all Mexican citizens of the newly annexed territories unless they voluntarily chose to remain Mexican citizens.<sup>28</sup> The treaty also guaranteed that “property of every kind, now belonging to Mexicans[,] . . . shall be inviolably respected.”<sup>29</sup> In practice, however, Anglo settlers found numerous

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house — built in grand European style — was dedicated in 1886. BROADDUS, *supra* note 19, at 147–68.

<sup>22</sup> See *Lyles v. State*, 41 Tex. 172, 176–77 (1874). The court opined that “[i]t is scarcely necessary to remark that the proceedings in the courts of Texas are in the English language. No other is allowed.” *Id.* at 176.

<sup>23</sup> *Id.*

<sup>24</sup> For example, a grand jury investigating the justice system in El Paso County in 1877 stated that it had “reason to believe” that Guadalupe Carbajal, a local justice of the peace who later stood in judgment over Charles Howard at his arraignment for the murder of Louis Cardis, “is not a citizen of the United States.” Report of the Grand Jury to Judge Allen Blacker (Sept. 5, 1877), reprinted in EL PASO TROUBLES, *supra* note 5, at 119, 119.

<sup>25</sup> See, e.g., *id.*

<sup>26</sup> BROADDUS, *supra* note 19, at 137 (citing THE LONE STAR, Feb. 1, 1882).

<sup>27</sup> Reports of legal injustices submitted to the Mexican Ministry of Foreign Affairs in 1884 from consulates in border towns are discussed in Mario T. García, *Porfirian Diplomacy and the Administration of Justice in Texas, 1877–1900*, 16 AZTLAN: INT’L J. CHICANO STUD. RES. 1, 10–12 (1985).

<sup>28</sup> Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922.

<sup>29</sup> *Id.*

ways to deprive Mexicans of their rightful property.<sup>30</sup> In the worst cases, newcomers drove Mexicans off their lands using sheer force, as in Matagorda County, Texas, where Anglos united in 1853 to "expel the Mexican population."<sup>31</sup> Other Anglos used legal tactics, both licit and illicit, to deprive the new citizens of their land. Especially frustrating for landowning Mexican families was a series of laws passed by Congress in the 1850s stipulating that Mexicans in the new territories had to prove title to their lands before an appointed land grant commission within two years or lose their lands to the state.<sup>32</sup> As the Mexican consul in Tucson, Arizona, complained in 1878, "[t]he commission was always ready to dispute Mexican titles, no matter how perfect and respectable they were; the law would force them to undergo such high costs that were equivalent to depriving Mexican owners of their properties."<sup>33</sup>

Former Mexican citizens also lost land because of conflicts between notions of property ownership in Anglo-American and Mexican law. When the southwestern frontier was under Spain's control, property was governed primarily by the *Siete Partidas*, a code of law drafted in the thirteenth century and still in use in Spain and its colonies in the nineteenth century, and the *Recopilación de Indias*, a specific set of laws governing Spain's colonies in the New World.<sup>34</sup> As part of the Spanish method of settlement and colonization, lands were granted to European settlers and to indigenous communities for both personal and communal use.<sup>35</sup> After Mexico declared independence from Spain, the new government respected these communal land rights.<sup>36</sup>

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<sup>30</sup> For an extensive discussion of the various forms of manipulation of Mexican land grants, see Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife"*, 4 MICH. J. RACE & L. 39, 78-133 (1998).

<sup>31</sup> Letter from the Mexican Consul in Brownsville, Texas, to the Mexican Secretary of Foreign Relations in Washington, D.C. (Dec. 28, 1853), reprinted in TESTIMONIO: A DOCUMENTARY HISTORY OF THE MEXICAN AMERICAN STRUGGLE FOR CIVIL RIGHTS 22 (F. Arturo Rosales ed., 2000) [hereinafter TESTIMONIO].

<sup>32</sup> See GRISWOLD DEL CASTILLO, *supra* note 6, at 73, 78; Luna, *supra* note 30, at 79-83. As a condition of joining the union, Texas public lands were exempted from Congressional control. Therefore, Texas created its own similar commission to hear land disputes. See ARMANDO C. ALONZO, *TEJANO LEGACY: RANCHEROS AND SETTLERS IN SOUTH TEXAS, 1734-1900*, at 152-54 (1998).

<sup>33</sup> Letter from M. Escalante, Mexican Consul in Tucson, Arizona, to the Mexican Secretary of the Foreign Ministry (Aug. 6, 1878), reprinted in TESTIMONIO, *supra* note 31, at 23, 25.

<sup>34</sup> CUTTER, *supra* note 15, at 32.

<sup>35</sup> The literature on early colonial Mexican settlement patterns is extensive; for a succinct explanation, see John Tutino, *Agrarian Social Change and Peasant Rebellion in Nineteenth-Century Mexico: The Example of Chalco*, in RIOT, REBELLION, AND REVOLUTION: RURAL SOCIAL CONFLICT IN MEXICO 95, 98-99 (Friedrich Katz ed., 1988). For a more specific discussion of land-tenure patterns in the U.S.-Mexico border region, see ALONZO, *supra* note 32, at 36-37.

<sup>36</sup> However, a law passed in Mexico in 1856, known as the *Ley Lerdo*, prohibited corporate land ownership, whether by the Catholic Church or by rural village residents. This law, part of a series of mid-century liberal reforms, effectively dispossessed village farmers of their communal



Under the Treaty of Guadalupe Hidalgo, the United States was also supposed to honor all previous land claims; however, it did not do so with regard to communal landholdings. These lands, in short, fell victim to the failure of one legal regime to accommodate another — Anglo-American law did not have a corresponding category to recognize communal land rights.

Mexicans along the new border responded to these developments in a variety of ways. Some attempted to use the new legal system to fight for their rights and their lands.<sup>37</sup> Others had no choice but to leave for Mexico, driven away by direct or indirect forms of violence. Still others, like Juan Cortina, engaged in armed rebellion. The Cortina War, a resistance movement that took place in 1869 in and around the border town of Brownsville, Texas, was a reaction to Anglo land grabbing and other perceived legal injustices.<sup>38</sup> In a published proclamation, Cortina condemned the “flocks of vampires” who had come to settle along the border and empathized with his fellow *mexicanos* who had been “robbed of [their] property, incarcerated, chased, murdered, and hunted like wild beasts.”<sup>39</sup> Another group of Mexican-American social bandits, known as *Las Gorras Blancas* (“The White Caps”), undermined Anglo capitalist enterprises by cutting fences and derailing railroads. In its political platform, the group observed that “[t]here is a wide difference between New Mexico’s ‘law’ and ‘justice’” and insisted that “[o]ur judiciary hereafter must understand that we will sustain it only when ‘Justice’ is its watchword.”<sup>40</sup>

## II. THE EL PASO SALT WAR: THE STANDARD NARRATIVE

Like the Cortina War that came eight years before it, the El Paso Salt War was a direct outgrowth of the shift from a hybrid legal system to a more established Anglo-American one. It stemmed from misunderstandings about American and Spanish law, the legitimate and illegitimate use of American courts, and the increasingly racialized practice of law enforcement. The story of the Salt War is complicated and convoluted, steeped in local politics and tradition, and offers many

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lands. See MARK WASSERMAN, *EVERYDAY LIFE AND POLITICS IN NINETEENTH CENTURY MEXICO: MEN, WOMEN, AND WAR* 103–04, 137–39 (2000). For a further discussion of communal land rights under Mexican law, see Luna, *supra* note 30, at 114 n.376.

<sup>37</sup> Consider, for example, the legal challenge brought by the Cavazos family of Brownsville, Texas, against Charles Stillman, discussed in ALONZO, *supra* note 32, at 147–48.

<sup>38</sup> See ROSENBAUM, *supra* note 14, at 42–45.

<sup>39</sup> Proclamation of Juan A. “Nepomuceno” Cortina, reprinted in TESTIMONIO, *supra* note 31, at 28, 28.

<sup>40</sup> Juan José Herrera, Platform of Las Gorras Blancas (1890), reprinted in TESTIMONIO, *supra* note 31, at 29, 29.

insights into life and law on the border during this period.<sup>41</sup> The city of El Paso, Texas, has a long history, dating back to the arrival of Spanish conquistador Juan de Oñate in 1598. Located on the western edge of Texas, directly bordering both Mexico and New Mexico, El Paso was originally part of the larger town of El Paso del Norte, the Mexican city that is now known as Ciudad Juárez. After the Mexican-American War, El Paso and El Paso del Norte were officially divided, although communication, trade, and travel continued mostly unabated across the Rio Grande. Citizens of El Paso had family, friends, and business partners in both cities, in the surrounding mission towns of Ysleta, Socorro, and San Elizario, Texas, and in smaller pueblos across the river in Mexico.<sup>42</sup> In the 1870s, the area that is now known as El Paso County boasted a population of approximately 3700 people, only 80 of whom were not of Mexican descent;<sup>43</sup> El Paso del Norte, across the Mexican border, had approximately 10,000 residents.<sup>44</sup> Despite their small numbers, by 1870 Anglo settlers held a variety of important posts, including county judge, sheriff, and customs inspector.

Most historical accounts agree that the conflict precipitating the Salt War began when a newcomer to El Paso, Charles H. Howard — a lawyer and judge from Missouri — attempted to lay claim to precious salt beds located 110 miles northeast of the town.<sup>45</sup> Salt was still a valuable commodity in the nineteenth century, and these particular beds, at the base of the Guadalupe Mountains, were well known for the high quality of the salt that they supplied. It is unclear how long area residents had been using these salt beds, but contemporary accounts trace their use back to the period of Spanish rule, based on the presence of cattle trails to the beds. Locals would gather salt for their own use and also to sell at market, especially when crops failed and

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<sup>41</sup> The El Paso Salt War is considered one of the key events in the local history of the borderlands. For early twentieth-century historical accounts of the Salt War, see, for example, MILLS, *supra* note 8, at 149–58; WEBB, *supra* note 11, at 345–67; and WHITE, *supra* note 10, at 93–118. The most detailed recent historical account is C.L. SONNICHSEN, *THE EL PASO SALT WAR [1877]* (1961). Other recent histories that touch on the event include LEON C. METZ, *BORDER: THE U.S.-MEXICO LINE 170–72* (1989); and W.H. TIMMONS, *EL PASO: A BORDERLANDS HISTORY 165–66* (1990). The event is also chronicled in a lengthy government report, entitled “El Paso Troubles in Texas,” which was commissioned by President Rutherford B. Hayes shortly after the end of the conflict. See ROBERT M. UTLEY, *LONE STAR JUSTICE: THE FIRST CENTURY OF THE TEXAS RANGERS* 203 (2003). The report includes the testimonies of more than eighty local residents — Anglo-American, Mexican-American, and Mexican. See generally *EL PASO TROUBLES*, *supra* note 5.

<sup>42</sup> *EL PASO TROUBLES*, *supra* note 5, at 50.

<sup>43</sup> For population statistics for El Paso County, see OSCAR J. MARTÍNEZ, *BORDER BOOM TOWN: CIUDAD JUÁREZ SINCE 1848*, app. at 159 tbl.2 (1978). This estimate of the Anglo population in this era appears in numerous sources, including *EL PASO TROUBLES*, *supra* note 5, at 53; and WHITE, *supra* note 10, at 96.

<sup>44</sup> MARTÍNEZ, *supra* note 43, app. at 158 tbl.1.

<sup>45</sup> See *EL PASO TROUBLES*, *supra* note 5, at 15; WHITE, *supra* note 10, at 98–100.



they had no other means of sustenance. In 1863, residents of El Paso — who were almost all, if not all, of Mexican descent — funded the construction of a wagon road to the beds to make them more easily accessible. The wagon road enabled people to remove larger amounts of the salt, certainly a benefit when taking salt to sell at market. As described by Elizario Montes, the nephew of a participant in the Salt War, much of the salt was hauled on a long, difficult trip of more than 225 miles to the city of Chihuahua, Mexico, where it was “traded for merchandise such as clothing, blankets, hardware, pottery, chocolate, and many other articles of merchandise needed by the stores for the stock in El Paso County, or it was sold for cash.”<sup>46</sup>

Departing from local custom, which allowed all comers to take the salt freely, but comporting with new state laws, Howard sought to claim all of the salt beds as private property and charge a fee for all salt removed from them.<sup>47</sup> The conflict over the ownership of the salt beds became personal as Howard made enemies of some local politicians, including, most importantly, Louis Cardis.<sup>48</sup> Cardis, an Italian immigrant to Texas, was considered a leader among the Mexican and Mexican-American peoples. He was elected by a predominantly Mexican-American voting population to the state senate and “enjoyed,” according to one account, “a popularity and influence among [the *mexicano* community] greater than their spiritual advisors.”<sup>49</sup>

In the fall of 1877, Howard greatly offended the Mexican and Mexican-American population of the area by having two area residents, Macedonio Gándara and José María Juárez, arrested simply for stating that they were going to go to the salt beds and take salt without paying.<sup>50</sup> Their detention enraged the local Mexican and Mexican-American population, who gathered together to seek a just solution.

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<sup>46</sup> Elizario M. Montes, *The Salt War 1* (n.d.) (unpublished manuscript, included in the Blanca Gomez Hill Papers, Special Collections, University of Texas at El Paso, MS 185, Folder 4).

<sup>47</sup> Howard was not the first person to lay claim to the beds; in 1865, Samuel A. Maverick claimed a small portion of the beds, but left most to continued communal use. Other El Paso politicians had sought ways to lay claim to the rest of the salt beds, but Howard was the first to succeed. See SONNICHSEN, *supra* note 41, at 8–9. Howard sought to claim both the Maverick grant and the other portions of the salt beds. *Id.* at 18.

<sup>48</sup> The relationship between Howard and Cardis began amicably. They partnered politically, joining together to help shift El Paso from a Republican to a Democratic county. Cardis's support helped Howard get elected as District Attorney in 1872 and appointed as District Judge in 1874. Similarly, with Howard's support, Cardis was elected to the state legislature in 1874. *Id.* at 16–17. But their relationship eventually soured to the point of hatred, for reasons that are still unknown. The animosity between them was public knowledge, thanks in part to editorials that both men published in local papers. In one, for example, Howard accused Cardis of being “a liar, a coward, a mischief-maker, a meddler; such a thing as could only spring from the decaying carcass of an effete people.” *Id.* at 18 (quoting *THE MESILLA INDEPENDENT*, Oct. 6, 1877).

<sup>49</sup> *EL PASO TROUBLES*, *supra* note 5, at 65.

<sup>50</sup> SONNICHSEN, *supra* note 41, at 25.

When the justice of the peace, Porfirio García, refused to grant the residents a warrant for Howard's arrest, they detained him, along with the judge who had ruled in Gándara and Juárez's case, Gregorio N. García, who happened to be Porfirio's brother.<sup>51</sup> They held Howard hostage as well, until he agreed to their terms: to leave the county and never to come back; to post a bond of \$12,000 that could be collected if he did return; and to admit that his treatment of Gándara and Juárez had been "unjust, improper, and without cause."<sup>52</sup> Howard also had to agree to allow the courts to decide on the ownership of the salt beds and to refrain from prosecuting those taking salt until ownership was determined.<sup>53</sup> The García brothers were released unharmed once they agreed to resign from their judicial posts.<sup>54</sup>

Howard left town on October 3, after being released in accordance with his agreement, but returned on October 7.<sup>55</sup> Howard apparently blamed Cardis for turning the *mexicano* population against him, even though Cardis had assisted with the peaceful resolution of the uprising after Gándara's and Juárez's arrests. After telling his African-American servant, Wesley Owens, that he "must have [his] revenge,"<sup>56</sup> Howard walked into the local dry goods store and shot Cardis at point blank range, killing him, just as Cardis had finished dictating a letter to the local governments of nearby towns asking them to verify that all was now at peace in the area.<sup>57</sup> Howard left the area the next day, and no law enforcement officials sought his capture.

Infuriated over the murder of their representative, Cardis, and knowing that Howard had violated the terms of the agreement signed in September, a group of approximately 200 Mexicans and Mexican-Americans gathered together to demand the imprisonment of Howard and the payment of the \$12,000 bond.<sup>58</sup> Residents feared violence was imminent, because some individuals were also demanding Howard's life or the life of his bondsmen if they did not produce him.<sup>59</sup> The group temporarily reached an agreement to refrain from action, however, after discussing the matter with Major John B. Jones, a Texas officer, and the parish priest, Father Bourgade. These two apparently convinced the leaders of the group to await a peaceful resolution in the courts.<sup>60</sup> But reports continued to surface about groups of Mexicans

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<sup>51</sup> *Id.* at 26.

<sup>52</sup> *Id.* at 28 (quoting THE MESILLA INDEPENDENT, Oct. 6, 1877).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> UTLEY, *supra* note 41, at 193.

<sup>56</sup> EL PASO TROUBLES, *supra* note 5, at 59.

<sup>57</sup> *Id.* at 62-63.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 99-100.



organizing to avenge Cardis's death. Fearing an uprising, Anglo law enforcement officials, along with some Mexican-American officials, sought military aid from the federal and state governments. A small number of troops began to gather, and Major Jones attempted to defuse the problem by arresting Howard and charging him in secret with Cardis's murder, a deal to which Howard agreed. Bail was set at \$4000, Howard was instructed to return to face charges in the District Court when it met in March, and he was let go.<sup>61</sup>

Friends advised him to leave the area for good to avoid further violence, but Howard ignored this counsel. Instead, he exacerbated the situation by returning to the area a month later, this time filing a lawsuit against a group of citizens who were purportedly planning to get salt from the beds in early December.<sup>62</sup> The frustrations among the Mexican residents had continued to grow since Cardis's death,<sup>63</sup> and Howard's return was the last straw. On December 12, a group of an estimated 400 people, of whom the majority were Mexican-American and at least one-third were Mexican citizens, began to gather in the nearby town of San Elizario, where Howard was staying.<sup>64</sup> The protesters took control of the area for five days, terrorizing the small band of Texas Rangers that was commissioned to bring peace to the area. Over the course of the week, the group killed five Anglo-Americans, including Howard and two of his bondsmen, John G. Atkinson and Charles E. Ellis. They allowed the rest of the Rangers to go free, but they reportedly ransacked the town, stealing wagons, horses, household goods, and guns estimated at a current value of between \$205,000 and \$512,000.<sup>65</sup>

The local sheriff, Charles Kerber, requested federal and state assistance to put down the riot. It was unclear whether troops could arrive in time, however, so he was authorized to recruit his own band of rangers from Silver City, New Mexico. Kerber's thirty recruits, combined with a force of federal troops, arrived shortly after the protesters had dispersed. The "invasion of San Elizario"<sup>66</sup> then commenced, as

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<sup>61</sup> SONNICHSEN, *supra* note 41, at 39.

<sup>62</sup> UTLEY, *supra* note 41, at 196.

<sup>63</sup> As Thomas Blair, the Captain of the Fifteenth Infantry of the United States Army, stated in a letter dated November 23, 1877, "A good deal of apprehension prevails among all the people. There is a strong organization of disaffected Mexicans, numbering not less than 400, probably more, whose objects are to kill Judge Howard and resist the arrest of any of themselves for participation in the arrest of Howard." EL PASO TROUBLES, *supra* note 5, at 58 (quoting Blair). Blair failed to mention that Howard himself had avoided arrest for the murder of Cardis. *See id.* at 58-59.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *Id.* The majority report estimated the damage at \$12,000, but the minority report, drafted by the Texas state representative on the Board, put it at \$31,050. *Id.* at 30. For method of conversion, see McCusker, *supra* note 5.

<sup>66</sup> SONNICHSEN, *supra* note 41, at 58.

the government soldiers attempted to find those responsible for the killings, take back stolen property, and return the area to order. They managed to track down and kill some of the riot's leaders, but they also wreaked havoc on local Mexican-American families, many of whom were not associated with the uprising, as well as on non-Mexican families. A government report revealed instances of unprovoked shootings (including the killing at point-blank range of two prisoners whose hands were bound), thefts, and rapes by the soldiers. The Silver City troops, including those responsible for this violence, remained in the area through Christmas and New Year's Day, but were finally disbanded in early January.<sup>67</sup>

### III. THE SALT WAR REINTERPRETED: A LEGAL NARRATIVE

Shortly after the end of the Salt War, President Rutherford B. Hayes, at the request of the Governor of Texas, directed the War Department to form a board to investigate the conflict. The first task assigned to the board was explaining what had caused the altercation.<sup>68</sup> After hearing the testimonies of eighty-seven people, the board concluded that "[t]he causes which led to these disturbances are, it is believed, local in their character, directly issuing from a disagreement or personal feud long subsisting between two prominent and influential men," namely Howard and Cardis.<sup>69</sup> The issue of the salt beds was simply "[o]ne ground of disagreement" between the two.<sup>70</sup> The real violence occurred because the "Mexican population" sought to avenge Cardis's death, "after the fashion of an ignorant and hot-blooded race."<sup>71</sup> This narrow, racialized view of the conflict was no doubt influenced by the fact that more than half of those interviewed by the board were Anglos who sided with Howard. Of those interviewed who had Spanish surnames, an even smaller number could be considered on the "other side" of the conflict.<sup>72</sup> With a few notable exceptions, the major published accounts of the Salt War also take the position of the besieged Anglo residents as their starting points.<sup>73</sup>

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<sup>67</sup> *Id.* at 59.

<sup>68</sup> EL PASO TROUBLES, *supra* note 5, at 2.

<sup>69</sup> *Id.* at 15.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The commission heard the testimony of or took statements from thirty-seven people with Spanish surnames, out of the total of eighty-seven people questioned. *Id.* at 34-46, 65, 82-83, 118. Many of those thirty-seven sided with the Anglo majority, including: Captain Gregorio García, of the Texas Rangers; Teodora Ellis, the wife of Charles Ellis, the merchant who was murdered by the group; and Gregorio N. and Porfirio Garcia, both of whom were detained by the protesters.

<sup>73</sup> See generally SONNICHSEN, *supra* note 41; WEBB, *supra* note 11, at 345-67. Admittedly, giving an account of the Salt War from the "other side" is more difficult, given that many of the participants of the protesting group did not leave a record of their reasons for acting as they did.



But by paying attention to some evidence that the board missed altogether, using additional sources, and putting the event into the larger historical context of injustice in the Texas-Mexico borderlands, one can deduce a counternarrative of the Salt War. A few authors, writing in the revisionist tradition of Chicano history, have hinted at this narrative.<sup>74</sup> This alternate account takes as its starting point the perspective of the Mexican and Mexican-American residents and assumes that conquest, colonization, and white supremacy were the underlying subtexts of the conflict. This line of revisionist history makes an important contribution by placing the altercation in its broader context of the experience of a newly colonized people.

Yet the Chicano historical accounts do not delve into the role of law — and, more specifically, the role of legal consciousness — in the conflict. These accounts insist that the Chicano protesters were not motivated by any “ideology.” Rather, as Rodolfo Acuña writes, it “was an emotional response to oppression.”<sup>75</sup> Yet the government testimonies and other contemporary reports of the conflict reveal that there was a motivating ideology behind the so-called mob action, having to do mainly with understandings about law and justice in the community. By looking through the lens of legal consciousness, one sees clearly that the revolt was motivated not only by economic necessity and Anglo oppression, but also by particular understandings about law. The causes of the conflict were not just “local” and “personal,” but also steeped in a sense of legal injustice. Furthermore, the attempts of the Mexican-Americans to resolve the conflict were not merely reactionary and emotional, but also were linked to understandings about law and justice. By reframing this event in terms of legal consciousness, one can more clearly see the motivations of the protest-

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The commission is not necessarily to blame for this oversight, for those who had participated in the mob action under investigation would obviously be loath to appear before a federal investigatory committee.

<sup>74</sup> The most detailed revisionist analysis of the Salt War is found in Mary Romero, *El Paso Salt War: Mob Action or Political Struggle?*, 16 *AZTLAN: INT'L J. CHICANO STUD. RES.* 119 (1985). Other sources mention the event more briefly, including RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 74–75 (4th ed. 2000); Luna, *supra* note 30, at 125; and Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 *DENV. U. L. REV.* 1081, 1091–92 (2001). In his book on the Texas Rangers, Robert M. Utley gives a tempered revisionist account:

Revisionist historians see the Salt War as a “people’s movement” asserting deeply held traditional rights that had been trampled by the American minority and their alien laws. Americans, of course[,] . . . regarded it as the uprising of a lawless mob manipulated by scoundrels for their own benefit. It seems to have been both . . .

UTLEY, *supra* note 41, at 206.

<sup>75</sup> ACUÑA, *supra* note 74, at 74.

ers while also gaining a more nuanced picture of the interaction of legal and extralegal actions in the West during this period.<sup>76</sup>

### A. Causes of the Conflict

In most accounts, authors assume that the *mexicano* rioters were motivated primarily by two impulses: greed and vengeance.<sup>77</sup> As a deeper historical and legal reading shows, however, some members of the group were instead motivated by experiences of legal disempowerment, fears of Americanization, and understandings of custom and law under the old Spanish and Mexican legal regimes.

1. *Legacy of Spanish Law.* — The testimony of Father Ramón Ortiz, a priest from El Paso del Norte, provides a useful starting point for this counternarrative.<sup>78</sup> In his letter to the board, he noted that three centuries earlier the Governor of New Mexico, Tomás Vélez Cachupín “gave to different towns on the river, to be used in common, the salt lakes, known as the ‘Guadalupe Salt Lakes,’”<sup>79</sup> “in conformity with [the Spanish] laws governing mineral lands.<sup>80</sup> As part of the Spanish method of settlement and colonization, some lands were also granted to indigenous communities for communal use.<sup>81</sup> Father Ortiz explained further that the Mexican government, when it took control in the 1820s, “conceded to these same towns the use and produce of the same, in conformity with the same law.”<sup>82</sup> Under the Treaty of Guadalupe Hidalgo, the United States was required to honor all previous land claims, but it had not done so with regard to the salt lakes, Father Ortiz stated.<sup>83</sup>

As with other such communal land holdings, the ownership of the salt lakes did not translate into the new legal regime. Although the treaty gave original Mexican inhabitants the ability to state claims to communal lands, there was a set time period for the filing of such claims, at the expiration of which unclaimed lands became free for

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<sup>76</sup> This counternarrative does not seek to absolve the parties of responsibility for their crimes or to minimize the violence involved; both opposing forces were responsible for killing, wounding, and stealing from one another. What it does seek to do is highlight the complicated role of law in this conflict.

<sup>77</sup> It is no doubt true, as recounted in many of the testimonies, that some members of the rioting group participated simply because of the opportunities to rob and steal from homes on the American side of the border. See, e.g., EL PASO TROUBLES, *supra* note 5, at 14. Like other instances of extralegal activity, the Salt War was exacerbated by the participation of individuals who were drawn to the chaos out of personal interests.

<sup>78</sup> *Id.* at 68–69.

<sup>79</sup> Cachupín’s name is misspelled in the transcription of Father Ortiz’s testimony. On Cachupín, see TIMMONS, *supra* note 41, at 30.

<sup>80</sup> EL PASO TROUBLES, *supra* note 5, at 68.

<sup>81</sup> See Tutino, *supra* note 35, at 98–99.

<sup>82</sup> EL PASO TROUBLES, *supra* note 5, at 68.

<sup>83</sup> *Id.*



private location. As Father Ortiz explained, the "valley Mexicans" in El Paso and El Paso del Norte were unable to support their claims with any documentation because local land titles were destroyed and stolen from the town archives during the war between the United States and Mexico.<sup>84</sup> Soldiers for the United States reportedly even used such land documents for kindling.<sup>85</sup>

Father Ortiz's explanation of the conflict was basically ignored by the government board, as well as by most historians. The only historian to mention it goes on to discredit Ortiz's account, citing the fact that he produced no evidence of this historic claim on the beds.<sup>86</sup> True or not, Ortiz's version of the history of the beds explains why the local *mexicano* population would be so disgruntled by Anglo attempts to privatize the beds. By custom and under the law of the previous two regimes, they believed that those beds should remain open for free communal use. This belief is evident not only in the words of their own accounts, but also in their actions: no Mexican-American citizen had tried to lay private claim to the beds after the annexation of the territory; to the contrary, the Mexican residents of the area — on both sides of the border, notably — had funded a road that all could use to draw salt from the lakes.<sup>87</sup>

2. *Fears of American Colonization.* — The local *mexicano* population was no doubt aware that Howard's attempt to claim the beds was not an isolated event, but rather part of a larger trend of colonization and Anglo settlement in which *mexicanos* were increasingly losing their lands in American courts. The most telling evidence of this awareness comes from the Spanish-language press. Editorials about the conflict called the Americans seeking to own the salt "annexationists,"<sup>88</sup> implying that they would not stop at procuring lands in Texas, but also wished to delve farther south into Mexico.

Mexican residents also realized, in one of the most important and most overlooked causes of the conflict, that any private claim by an American or by the American government to the salt beds would prevent use of the beds by Mexican citizens, or at the very least would entail an additional customs duty on those Mexicans seeking to take the salt. As local politician A.J. Fountain noted, the Mexican-American population feared that if El Paso County claimed the beds (a scheme that Fountain had attempted to engineer), "their friends and relatives residing in the towns on the Mexican bank of the river would be de-

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<sup>84</sup> *Id.*

<sup>85</sup> TIMMONS, *supra* note 41, at 97.

<sup>86</sup> See SONNICHSEN, *supra* note 41, at 19-20.

<sup>87</sup> *Id.* at 7-8.

<sup>88</sup> Editorial, EL INDEPENDIENTE, Jan. 12, 1878, reprinted in EL PASO TROUBLES, *supra* note 5, at 75.

prived of the privilege they then enjoyed of taking salt from the lakes."<sup>89</sup> Juan N. García, an El Paso County Commissioner, went further in an editorial published a month after the conflict, in which he noted that the "people of El Paso County have for years been aware of the fact that those lakes could be located by any man who possessed a land certificate large enough to cover them," but that none of them had acted to locate the beds so that "the people of the Mexican side" would still have the "privilege of taking salt from these lakes."<sup>90</sup>

3. *Mistrust of American Justice.* — Because *mexicanos* outnumbered Anglos in the county, El Paso politicians — most of them, by this time, Anglo — had to seek the support of Mexican-American residents. Yet few politicians earnestly supported the residents' best interests. By all accounts, Louis Cardis was an exception to this rule. The fact that Cardis was preparing a legal claim to the beds on behalf of the *mexicano* residents when Howard murdered him<sup>91</sup> added insult to injury. The population had lost not only a trusted politician, but also someone who might be able to represent their interests before American courts. To make matters worse, it appeared that no one would bring Howard to justice for Cardis's death. James Zabriskie, the collector of customs for El Paso, summarized the situation well: "[Cardis's] sudden taking off by Howard . . . aroused all the vindictiveness and revengeful feelings which had been taking shape for years against a man whom they felt had devoted himself to their destruction, and whose punishment by the court of this county they considered a visionary hope."<sup>92</sup> Furthermore, not only was Howard released on bail, contrary to the law of Texas,<sup>93</sup> but he was also arraigned in a backroom deal, orchestrated for his comfort and convenience, that lacked the typical elements of an arraignment. The arraignment was expressly engineered to avoid any participation by those most upset by the murder, namely the Mexican-American population.<sup>94</sup>

<sup>89</sup> EL PASO TROUBLES, *supra* note 5, at 129.

<sup>90</sup> *Id.* at 97.

<sup>91</sup> *Id.* at 52-53.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 17.

<sup>94</sup> As Joseph Magoffin recalled, the leader of the original Ranger party, Major John B. Jones, admitted that "it would be necessary . . . to have Judge Howard arrested." *Id.* at 80. Jones did this, with Howard's full cooperation, in a nighttime meeting at the office of one of the justices of the peace, Guadalupe Carbajal. Jones "desired to know whether he could admit [Howard] to bail and waive examination" and explained "that the public mind was very much excited[,] and that he did not know what might be the result if there was a prolonged examination in the case." *Id.* Carbajal agreed with Jones's request and released Howard on bail, which Magoffin and another Ranger paid (despite the fact that Magoffin, at Jones's request, had brought the original complaint against Howard). As Magoffin later recalled, "[a]t the time Howard gave bail there was no prosecuting officer on the part of the State, district, or county present." *Id.*



Even before killing Cardis, Howard had already infuriated the Mexican and Mexican-American populations by having Gándara and Juárez arrested for allegedly saying that they were going to take salt from the lakes. In their arraignment, Howard dropped the charges against Gándara after Gándara said that he had no intention of breaking the law. Juárez, too, denied that he had talked about getting salt, until Howard provoked him by laughingly stating that he would have to drop charges against him as well.<sup>95</sup> Upon hearing Howard's derisive laughter, Juárez retracted his earlier plea of not guilty, rising in anger and stating that "[i]f the town goes [to the salt beds], I will go."<sup>96</sup> Juárez reportedly also challenged Judge García's right to try him.<sup>97</sup> Judge García charged Juárez with a \$200 fine, which Juárez refused to pay.<sup>98</sup> Juárez was then imprisoned.

The arrest and imprisonment of Juárez rankled the Mexican-American population because it was perceived as unjust and illegal.<sup>99</sup> It also must have frustrated the populace that the arbiter in the case, Judge García, was himself Mexican-American and yet seemed to act, as some would later testify, "under Howard's dictation."<sup>100</sup> The justice of the peace who released Howard on bail was also of Mexican descent. Hence there were two legal injustices, rarely noted by Anglo writers, that especially angered local Mexican residents: the release of Howard, a known murderer, on bail without a proper examination; and the arrest of two Mexicans for a crime that did not exist on the law books. As the Judge Advocate General of the War Department, William Dunn, noted in his addendum to the government report, "the Spanish-American populace naturally thought they saw that there was no equality of justice, and felt compelled to take the law into their own hands."<sup>101</sup>

<sup>95</sup> *Id.* at 118.

<sup>96</sup> *Id.* at 72.

<sup>97</sup> See SONNICHSEN, *supra* note 41, at 25.

<sup>98</sup> EL PASO TROUBLES, *supra* note 5, at 55.

<sup>99</sup> It is interesting to note that some Mexican residents linked the conflict directly to the arrest of Gándara and Juárez, an action by Howard that had obviously been underestimated in its power to enrage the populace. See, e.g., *id.* at 5, at 72 (stating that "as to the first causes of the troubles of this place, the origin was on account of the salt lakes . . . when two citizens of this town . . . were cited to appear in [the office of the justice of the peace]" (quoting the testimony of Vidal García)).

<sup>100</sup> *Id.* at 55.

<sup>101</sup> *Id.* at 4. The majority report did condemn the justice system for failing to punish Howard for Cardis's death. The report stated:

[T]he death of Cardis at the hands of Howard seems to have been premeditated murder, a crime for which there is no bail provided by law. Yet Howard, after its commission, and without being confined, or examined in the presence of a prosecuting officer[,] . . . was suffered to give bail and go free.

*Id.* at 17 (citations omitted).

Another motivation for the protesters' extralegal action was their certainty that even the Rangers, who were supposedly there to keep the peace for all, were actually hirelings for Howard. When local *mexicano* residents heard in early November that Captain Jones of the Texas Rangers intended to assemble a group of Rangers to keep the peace in the area, an estimated seventy persons gathered to express their unwillingness to be enlisted into such a group. As an alternative, the residents requested the right to assemble their own group, headed by their own officers, to be deputized as Rangers.<sup>102</sup> When Jones refused this request, they asked that federal, rather than state or local, troops be brought in.<sup>103</sup> Jones again refused. He instead assembled a group of local men, with John Tays — the brother of the town's Episcopal priest and a man with no previous military service — as its head.<sup>104</sup> Jones ignored the advice of the town's Collector of Customs, Joseph Magoffin, to appoint Captain Gregorio García (the father of county judge Gregorio N. García)<sup>105</sup> to head the team. García had already led a company of Rangers, was an experienced fighter, and had helped keep law and order in the county during the previous weeks.<sup>106</sup> Jones stated that he did not appoint García because he wanted to employ "American citizens or people who had not mixed themselves up in the trouble if they could be got."<sup>107</sup> His version of "American citizens," at least based on the makeup of the resulting force of twenty men, included no people of Mexican descent.

Once assembled, this local troop of Rangers gave local Mexicans the undeniable impression that they were there not to see justice done for Cardis's murder, nor to protect the residents' interests, but rather to serve at Howard's desire. Jones was in continual contact with Howard, brokering his legal deal and warning him of threats to his life.<sup>108</sup> Tays sent Rangers to accompany Howard "on business," even providing a group to travel with him when he set out in the second week of December to stop the group of Mexicans going to get salt from the beds.<sup>109</sup> When the mob laid siege to the Rangers' quarters in mid-December, this sense of mistrust of law enforcement was one of its major frustrations. Members of the group told as much to Captain Blair, the federal officer sent to help keep the peace, when he met with them during the days of siege. Blair said that he found the group "much ex-

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<sup>102</sup> *Id.* at 100.

<sup>103</sup> SONNICHSEN, *supra* note 41, at 37.

<sup>104</sup> *Id.*

<sup>105</sup> Montes, *supra* note 46, at 6.

<sup>106</sup> UTLEY, *supra* note 41, at 194.

<sup>107</sup> EL PASO TROUBLES, *supra* note 5, at 79-80.

<sup>108</sup> UTLEY, *supra* note 41, at 205.

<sup>109</sup> EL PASO TROUBLES, *supra* note 5, at 80.



cited over the fact that Howard, who had taken a life, was permitted to be at large, while two of their number, who had only said they would go for salt to his salinas had been arrested, tried, and sentenced to imprisonment."<sup>110</sup> When Blair cautioned them that firing upon Tays and his Rangers was a mistake, they answered that Tays was a "good man, against whom they had nothing[,] . . . but why was he defending Howard?"<sup>111</sup>

### B. Attempts To Resolve the Conflict

Accounts of the Salt War typically focus on the violence of the "wild, fanatical, and brutal mob"<sup>112</sup> rather than on efforts made by Howard's opponents to come to a nonviolent resolution. By looking more broadly at the various ways in which the *mexicano* community sought to resolve the conflict, one sees clearly that they resorted to extralegal actions only after legal remedies had been exhausted.

The *mexicano* community sought its first legal solution in late September, after the arrests of Gándara and Juárez and the subsequent imprisonment of Juárez. Word of this occurrence must have traveled fast, for a group of an estimated two hundred Mexicans and Mexican-Americans gathered that night to free Juárez from jail and to demand Howard's arrest for what they saw as an unjust and illegal action. A small contingent went to the home of Porfirio García, the justice of the peace, to demand a warrant for Howard's arrest. García refused, stating that he could not legally issue a warrant.<sup>113</sup> In response, the group detained García under armed guards in the local jail. The contingent next went to Porfirio's younger brother, Gregorio N. García, who was the county judge who had presided over Gándara's and Juárez's arraignment.<sup>114</sup> He, too, refused the citizens' request, saying that they would need a legal complaint in order for him to issue a warrant. The group left but later returned to detain Judge García and put him in jail along with his brother.<sup>115</sup>

Two days later, the group located Howard at Sheriff Kerber's house. The mob imprisoned the two García brothers, Howard, and Howard's friend, John McBride, in the house of a local woman, Doña Apolonia Luján, for several days.<sup>116</sup> As one contemporary wrote, the

<sup>110</sup> *Id.* at 55.

<sup>111</sup> *Id.* at 56. On December 11, some leaders of the group had told a local county commissioner, Juan N. García, that they believed that "the rangers were illegally organized, were not State troops, and were under pay from Howard." *Id.* at 96.

<sup>112</sup> *Id.* at 22.

<sup>113</sup> SONNICHSEN, *supra* note 41, at 26.

<sup>114</sup> EL PASO TROUBLES, *supra* note 5, at 106.

<sup>115</sup> *Id.* at 107.

<sup>116</sup> *Id.* at 72.

group "organiz[ed] a Court of their own [and] tried [the men] for wrongs (real or supposed) done to them."<sup>117</sup> A contingent of the mob wanted to kill Howard on the spot, but its leaders understood that this could be an unwise move. Four of these leaders — Macedonio Gándara, Ambrosio Orgino, Desidero Apodaca, and Cisto Salcedo — went to see the parish priest, Father Bourgade, for assistance in brokering a peaceful resolution.<sup>118</sup> They were eventually joined by Louis Cardis, who, ironically, intervened on Howard's behalf. After much wrangling, the group agreed that they would free Howard if he would agree to their terms: to never return to the county; to post a bond to this effect; to let the courts decide the matter of the salt lake; to "forget all that has passed"; and to admit that his prosecution of Gándara and Juárez had been unjust.<sup>119</sup> The García brothers were allowed to go free once they resigned their offices.<sup>120</sup> In addition, as Gregorio N. García recalled, he had to add a postscript to his resignation stating that he was wrong and that the mob was right.<sup>121</sup> Leaders of the group also demanded that García hand over the arrest papers filed against Gándara and Juárez. García told them that he would give them only copies, because the originals belonged to the court. The group insisted on having the originals, however, and García, wanting his freedom, gave them up.<sup>122</sup>

Assuming that Howard would honor the agreement despite having signed it under duress, the mob disbanded after his release. Others involved in brokering the agreement, including Cardis, assumed that peace would now prevail.<sup>123</sup> They were thus quite surprised when Howard returned less than a week later, this time accompanied by twenty federal cavalymen supposedly in the area merely to keep the peace, not to protect Howard. Three days later, Howard murdered Cardis. Infuriated, Mexicans and Mexican-Americans gathered anew, primarily under the leadership of Cisto Salcedo and Francisco "Chico" Barela. When Major Jones arrived, he met with a small committee of the mob, who produced a copy of the Texas Constitution and claimed that it gave them the right to assemble and bear arms.<sup>124</sup> When Jones insisted that their actions were unlawful and that they should allow courts to settle the matter, some members responded that they had no hope that this would work. They had the right, they continued, to col-

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<sup>117</sup> MILLS, *supra* note 8, at 151.

<sup>118</sup> EL PASO TROUBLES, *supra* note 5, at 99.

<sup>119</sup> The document was reportedly drafted by Mauro Lugare. *Id.* at 107.

<sup>120</sup> SONNICHSEN, *supra* note 41, at 28.

<sup>121</sup> EL PASO TROUBLES, *supra* note 5, at 107.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 62.

<sup>124</sup> *Id.* at 99.



lect the bond that Howard had promised to deliver if he returned, because, as Father Bourgade recalled them saying, "they were the people and the people were the law."<sup>125</sup> But after Jones promised to arrest Howard and have him tried for Cardis's murder, the group agreed to disband and act peacefully.

Jones made good on his promise to have Howard arrested, but he conducted a backroom hearing much to Howard's advantage, letting Howard go free on bail despite the fact that he was a known murderer. Still, no violence issued from the growing mob until a group of Mexicans decided to travel to the beds to get salt and Howard filed suit against them (accompanied, on his way to the courthouse, by a team of Rangers). The siege truly broke out a few days later; several days of threatened violence ended in the death of Howard and some of his bondsmen.

Even amidst this violence, however, there seemed to be some restraint. The mob could easily have murdered all of the Rangers and those sequestered with them, but they stopped with Howard, McBride, who was Howard's salt agent, and Charles Ellis and John Atkinson, both of whom, according to one account, had acted abusively toward the *mexicano* population.<sup>126</sup> When some among the mob wanted to continue the carnage, Barela stopped them. As Mary Antonio Cooper, an eyewitness to the violence, recounted: "Barela then stepped forward, opened his shirt front and said, 'No; no other man shall be killed, and if you propose to kill anybody else I will take out my people and fight you all.'"<sup>127</sup> The next day the leaders released the Rangers, confiscating their arms but allowing them to take their horses. Before departing, the Rangers were asked if they had been working for the state or for Howard<sup>128</sup> and were forced to sign a blank piece of paper.<sup>129</sup> Presumably, the leaders thought that having the signatures might prove useful to absolve them of their actions.

If one takes into account these additional details of the Salt War, it is clear that extralegal violence, the focus of most accounts of the War, was intermingled with attempts to use formal legal process. This combination indicates that those involved were not simply "ignorant" of the laws of the United States and Texas, as some historians have argued,<sup>130</sup> but rather were attempting to weave legal formalities into

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<sup>125</sup> *Id.* at 100.

<sup>126</sup> *See id.* at 66 (testimony of E. Stine).

<sup>127</sup> *Id.* at 74; *see also id.* at 82 ("[Barela] told them that if they killed one more man he would turn his own command on them." (quoting the testimony of Lieutenant Tays)).

<sup>128</sup> *Id.* at 57. Unfortunately, there is no indication in the sources of the Rangers' answers to this question.

<sup>129</sup> *Id.*

<sup>130</sup> *See, e.g.,* WEBB, *supra* note 11, at 357.

their actions — for example, by citing the state constitution, producing signed contracts, and procuring legal papers. As David J. Langum notes, the inclusion of such legal formalities and references to legal “rights” indicates that there was “an engrafting of notions of ‘law’ carried beyond the territorial limits of formal jurisdiction and into the realm of cultural norm.”<sup>131</sup>

Perhaps most importantly, implicit in the group’s lawless actions was a larger sense of the need for lawful justice. Its actions were guided by a community understanding of justice, with a specific vision of right and wrong: Howard and his supporters had wronged the local community by attempting to lay claim to a communal resource, unlawfully arresting two local residents, and then murdering a community leader — and getting away with it. When attempts to fashion a legal remedy failed, the protesters resorted to violence, but even this violence was interspersed with attempts at nonviolent resolution. Thus “lawlessness,” even in a violent episode such as this, rarely meant a lack of legal consciousness among indigenous residents of the West or among newcomers.

#### CONCLUSION

At first glance, the El Paso Salt War appears to be an all too familiar chapter in the history of law in the West: a contest over natural resources pitting native residents against eager newcomers and resulting, inescapably, in violence. A more careful study reveals a complicated portrait of the interactions between law and society. How did law function during this historical episode? Certainly members of both the Anglo and *mexicano* communities seemed to understand the utility of legal process and procedures and attempted to shape the law to yield a preferred outcome. Members of both groups also resorted to extralegal violence when the law ran out or was deployed unjustly. What is significant is that the law played such a central role in the culture of this border region — which has been considered a remote and isolated outpost — and in the culture of the Anglo and *mexicano* communities.

Not surprisingly, the government board assigned to investigate the event missed the complicated role of law in the conflict. The board concluded that such battles were not over in the borderlands. The next item to come under debate, it predicted, was water. “The Rio Grande,” the board noted, “is utterly insufficient to irrigate this extensive valley, where the yearly rain fall measures but a few inches. As time progresses and the country is opened by accessions to its populations[,] . . . the question must grow in importance, and may occasion

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<sup>131</sup> LANGUM, *supra* note 2, at 7.



trouble beyond the reach of diplomacy to settle."<sup>132</sup> Rather than pointing to possible legal resolutions of such problems, however, the board proposed a turn to military force: "This sad result, so serious to these people, so injurious to all, might be warded off, at least delayed, by the moral effect of a single battalion [of the federal military]."<sup>133</sup> President Hayes's administration took the board's recommendation seriously, re-establishing a federal military presence at the once-abandoned outpost of Fort Bliss.<sup>134</sup>

The board's failure to address the legal problems and possibilities and its turn to force were indicative of the increasing hegemony of the Anglo-American legal system in the borderlands. Members of the board did not assume that the contest over resources was one between equals, but rather that it was one that American military force would have to — and could legitimately — bring to an end. Such an attitude foreshadowed the coming twentieth century, during which the once-fluid border would become increasingly calcified as the U.S. government deployed the law to prevent the continued development of a cross-border community.

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<sup>132</sup> EL PASO TROUBLES, *supra* note 5, at 18.

<sup>133</sup> *Id.*

<sup>134</sup> UTLEY, *supra* note 41, at 204.

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