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# THE DEVIL'S DISCIPLE AND THE LEARNED PROFESSION: AMBROSE BIERCE AND THE PRACTICE OF LAW IN GILDED AGE AMERICA

*J. Gordon Hylton\**

## I. AMBROSE BIERCE AND THE ANTI-LAWYER TRADITION

**A**MERICAN attitudes toward lawyers have been persistently ambivalent. Since the early days of the Republic, successful lawyers have been afforded high social status and the citizenry has regularly turned to the legal profession for political leadership and governmental expertise.<sup>1</sup> At the same time, there has been a recurring refrain in American culture of general antipathy toward lawyers, the intensity of which seems to vary from decade to decade.<sup>2</sup> The natural aristocrat perpetually competes in the popular mind with the pin-striped shark. For every Abraham Lincoln, there is a Roy Cohn; for every Atticus Finch, an Arnold Becker.

Perhaps no American has contributed as much to literature of the anti-lawyer cause as Ambrose Bierce. Although remembered primarily as the author of a series of macabre, death-obsessed short stories, Bierce was one of the best known men-of-letters of his day as well as an influential journalist who wrote vigorously on an array of contemporary issues.<sup>3</sup> On the subject of the legal profession and the system of

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1. R. ABEL, *AMERICAN LAWYERS* 175 (1989); J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 47 (1950).

2. M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 32-58, 136-90 (1976). See also Baker, *The Lawyer in Popular Fiction*, 3 *J. POPULAR CULTURE* 493-516 (1969).

3. Bierce's interests were catholic. As M.E. Grenander has noted, "international relations, politics, religion, medicine, business, the pleasures of good food and drink, science, law, and the war between the sexes" are themes that Bierce turns to again and again, particularly in his short

justice it administered, Bierce had nothing favorable to say. In his view, "lawyers" were those "skilled in circumvention of the law,"<sup>4</sup> while a "liar" was merely "[a] lawyer with a roving commission."<sup>5</sup> "Justice," according to Bierce, was "[a] commodity which in a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service;"<sup>6</sup> "litigation" was "[a] machine which you go into as a pig and come out of as a sausage;"<sup>7</sup> and a "litigant" was "[a] person about to give up his skin for the hope of retaining his bones."<sup>8</sup> Upon learning that a San Francisco woman had filed suit against the city for injuries suffered when she fell into an open sewer, Bierce is said to have remarked, "It is surprising that the lady should have consented to go into Court; we should suppose that one adventure in a cesspool would suffice."<sup>9</sup>

A century later, Bierce's satirical barbs are still regularly cited by those looking for pithy criticisms of the American legal system.<sup>10</sup> Unfortunately, few now take Bierce seriously as a critic of the specific legal culture of his own day. His antipathy toward law and lawyers is treated as an essentially timeless disdain to be dismissed, ultimately, as the product of literary convention and a savagely misanthropic world view.

Although it is inadequate as a complete explanation of Bierce's motives, such a judgment is not without some merit. Satire was an important part of the literary tradition with which Bierce identified. Satire on lawyers, judges, and legal practices is a venerable literary convention, the forms and modes of which have been fairly stable from Roman comedy to the *commedia dell'arte* to Balzac to the present.<sup>11</sup>

forms. Grenander, *Ambrose Bierce*, in 12 *DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN REALISTS AND NATURALISTS* 33 (1982). A brief discussion of the theme of "law" in the short works of Bierce can be found in M.E. GRENANDER, *AMBROSE BIERCE* 152-55 (1971).

4. 7 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: THE DEVIL'S DICTIONARY* 187 (1911).

5. *Id.* at 191.

6. *Id.* at 176-77.

7. *Id.* at 194.

8. *Id.*

9. O'Brien, *Ambrose Bierce*, in 11 *DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN HUMORISTS, 1800-1950*, at 40-41 (1982).

10. A list of recent law review articles citing Bierce includes: Kurland, *Earl Warren: Master of the Revels* (Book Review), 96 *HARV. L. REV.* 331 (1982); Leff, *The Leff Dictionary of Law: A Fragment*, 94 *YALE L.J.* 1855 (1985); Posner, *The Jurisprudence of Skepticism*, 86 *MICH. L. REV.* 827 (1988); Posner, *Law and the Theory of Finance: Some Intersections*, 54 *GEO. WASH. L. REV.* 159 (1986); Schwartz, Book Review, 35 *HASTINGS L.J.* 233 (1983).

11. For examples, see 1 *THE WORLD OF LAW: THE LAW IN LITERATURE* 415-654 (E. London

Moreover, there was a near-pathological side to Bierce's personality that led him to develop intense antipathies. The historian Kevin Starr has written of Bierce, "He hated democracy and he hated Walt Whitman. He hated ministers. If dogs harassed him as he pedaled his bicycle along country roads, he would dismount, draw his pistol and shoot the offending animal, some times before an astonished owner's eyes. (Needless to say, Ambrose Bierce hated dogs.)"<sup>12</sup> His vitriol was hardly limited to lawyers, democrats, Walt Whitman, and ministers; it extended to policemen, doctors, businessmen, and politicians as well.

Nevertheless, it is a mistake to dismiss Bierce's writings on lawyers and the legal system as mere literary convention or a general manifestation of his misanthropic world view; beneath the humor and the bitterness of his work lay a sophisticated understanding of the shortcomings of the late nineteenth-century bench and bar. From his arrival in the state in 1866 until his removal to Washington, D.C. in 1899, he had ample opportunity, both as participant and critical observer, to monitor the way justice was dispensed in late nineteenth-century California.

Behind his sardonic attacks lay a keen intelligence, highly sensitive to the egregious gap that existed between promise and reality in his society. Furthermore (and this has never been fully appreciated), his essays and editorials on legal subjects offered concrete recommendations, many of which anticipated the reforms that would be associated with legal progressivism in the twentieth century.<sup>13</sup> To appreciate Bierce's insights nearly a century later, one must understand both Bierce's view of his own literary mission and the nature of the legal system in late nineteenth-century California.

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ed. 1960). For a discussion of Bierce's connection to the "vituperative" satiric tradition of Archilochus and Juvenal, as well as an exploration of the connections between his humor and that of Poe, Melville, Twain, Mencken, Nathaniel West, and Henry Miller, see Martin, *Ambrose Bierce*, in *THE COMIC IMAGINATION IN AMERICAN LITERATURE 195-205* (L. Rubin, Jr. ed. 1973).

12. K. STARR, *AMERICANS AND THE CALIFORNIA DREAM, 1850-1915*, at 273 (1973).

13. "Legal progressivism" refers generally to efforts of reform-minded lawyers to elevate the standards of their profession, typically by raising the requirements for admission to the bar, by adopting new measures for controlling the behavior of existing lawyers, and by modernizing outdated legal forms and procedures. This movement is generally seen as one aspect of a general middle class commitment to social reorganization in the early twentieth century. See J. AUERBACH, *UNEQUAL JUSTICE* 14-129 (1976); R. HOFSTADTER, *THE AGE OF REFORM* 148-63 (1981); J. HURST, *supra* note 1, at 276-94, 352-75; R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 116-30 (1967).

## II. THE IMAGE OF THE LAWYER IN THE WRITINGS OF AMBROSE BIERCE

While editing the weekly San Francisco *Wasp* in the early 1880s, Bierce began to embellish his column "Prattler" with a series of wittily cynical epigrams presented under the title "The Devil's Dictionary." He continued this feature in a variety of publications until 1906 when his best efforts were collected and published in book form. Many of the entries dealt with legal subjects, and perhaps best demonstrate the depth of Bierce's hostility toward legal culture.<sup>14</sup>

14. Some notable examples are:

"*Habeas Corpus*. A writ by which a man may be taken out of jail when confined for the wrong crime." 7 A. BIERCE, *supra* note 4, at 126.

"*Inadmissible*, adj. Not competent to be considered. Said of certain kinds of testimony which juries are supposed to be unfit to be entrusted with, and which judges, therefore, rule out, even of proceedings before themselves alone. . . ." [Bierce continues with a lengthy denunciation of the prohibition against hearsay evidence, a proscription that he considered contrary to reason and destitute of value.] *Id.* at 153-54.

*Law*, n.

Once Law was sitting on the bench,  
And Mercy knelt a-weeping.  
"Clear out!" he cried, "disordered wench!  
Nor come before me creeping.  
Upon your knees if you appear,  
'Tis plain your have no standing here."  
Then Justice came. His Honor cried:  
"Your status?—devil seize you!"  
"Amica curiae," she replied—  
"Friend of the court, so please you."  
"Begone!" he shouted—"there's the door-  
I never saw your face before!"

*Id.* at 186.

"*Lawful*, adj. Compatible with the will of a judge having jurisdiction." *Id.*

"*Leading question*. A leading question is not necessarily an important one; it is one that is so framed as to suggest, or lead to, the answer desired." Few other than lawyers use the term correctly. A. BIERCE, *WRITE IT RIGHT* 40 (1909).

"*Precedent*, n. In Law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. As there are precedents for everything, he has only to ignore those that make against his interest and accentuate those in the line of his desire. Invention of the precedent elevates the trial-at-law from the low estate of a fortuitous ordeal to the noble attitude of a dirigible arbitrament." 7 A. BIERCE, *supra* note 4, at 262.

"*Technicality*, n. In an English court a man named Home was tried for slander in having accused a neighbor of murder. His exact words were: 'Sir Thomas Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder and the other side upon the other shoulder.' The defendant was acquitted by instruction of the court, the learned judges holding that the words did not charge murder, for they did not affirm the death of the cook, that being only an inference." *Id.* at 340-41.

"*Trial*, n. A formal inquiry designed to prove and put upon record the blameless characters

Bierce's "definitions" voice criticisms of law and lawyers common not just in Bierce's day but throughout American history: specifically, that judges are arbitrary, that the bar lacks integrity, that common law procedure tends to be obstructionist in nature, that greedy representatives abuse the legislative process, that legal rules and legal fictions are contrary to ordinary reason, and that the legal system prefers technical niceties over substantive justice. The same themes run through the miscellaneous epigrams that pepper Bierce's writing and appear in his poetry. "Death is not the end; there remains the litigation over the estate,"<sup>15</sup> was a typically Biercean observation, while the poetic fragment "An Error" sounded a favorite theme, the corruption of the judiciary.

"I never have been able to determine  
Just how it is that the judicial ermine  
Is safely guarded from predacious vermin."  
"It is not so, my friend; though in a garret  
'Tis kept in camphor, and you often air it,  
The vermin will get into it and wear it."<sup>16</sup>

Similar examples can be found in his 1889 collection *Fantastic Fables*. Bierce's fables were vignettes used to mock (and to attack) middle class values and attitudes. The entry "Judge and Plaintiff" focused on the corruption that Bierce saw running throughout the legal system.

A Man of Experience in Business was awaiting the judgment of the Court in an action for damages that he had brought against a railway company. The door opened and the Judge of the Court entered.

"Well," said he, "I am going to decide your case to-day. If I should decide in your favor I wonder how you would express your satisfaction."

"Sir," said the Man of Experience in Business, "I should risk your anger by offering you one-half the sum awarded."

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of judges, advocates and jurors. In order to effect this purpose it is necessary to supply a contrast in the person of one who is called the defendant, the prisoner, or the accused. . . . In our day the accused is usually a human being, or a socialist. . . ." *Id.* at 349.

"*Truthful*, adj. Dumb and illiterate." *Id.* at 353.

15. 8 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: NEGLIGIBLE TALES, ON WITH THE DANCE, EPIGRAMS* 365 (1911).

16. 4 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: SHAPES OF CLAY* 361 (1910).

"Did I say I was going to decide that case?" said the Judge, abruptly, as if awakening from a dream. "Dear me, how absent-minded I am! I mean I have already decided it, and judgment has been entered for the full amount that you sued for."

"Did I say I would give you one-half?" said the Man of Experience in Business, coldly. "Dear me, how near I came to being a rascal! I mean that I am greatly obliged to you."<sup>17</sup>

Bierce's hostility toward the style of argument known as "legal reasoning" formed the basis for a second fable, "A Defective Petition."

An Associate Justice of the Supreme Court was sitting by a river when a Traveler approached and said:

"I wish to cross. Will it be lawful to use this boat?"

"It will," was the reply; "it is my boat."

The Traveler thanked him, and pushing the boat into the water embarked and rowed away. But the boat sank and he was drowned.

"Heartless man!" said an Indignant Spectator. "Why did you not tell him that your boat had a hole in it?"

"The matter of the boat's condition," said the great jurist, "was not brought before me."<sup>18</sup>

The practice of law was also a proper subject for this type of satire. In "Deceases and Heirs" Bierce addressed the way in which a lawsuit could swallow up the initial cause of action, a common event in the California courts of his day. Like much of Bierce's work, the fable revolves around a death.

A Man died leaving a large estate and many sorrowful relations who claimed it. After some years, when all but one had had judgment given against them, that one was awarded the estate, which he asked his Attorney to have appraised.

"There is nothing to appraise," said the Attorney, pocketing his last fee.

"Then," said the Successful Claimant, "what good has all this litigation done me?"

"You have been a good client to me," the Attorney re-

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17. 6 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: THE MONK AND THE HANGMAN'S DAUGHTER, FANTASTIC FABLES* 234 (1911).

18. *Id.* at 294.

plied, gathering up his books and papers, "but I must say you betray a surprising ignorance of the purpose of litigation."<sup>19</sup>

Bierce's attitude toward law and lawyers expressed in these short forms carried over into his longer writings. His poem "To an Insolent Attorney," while not a particularly successful literary effort, contains a much more detailed indictment of the legal profession than was possible in the shorter works.<sup>20</sup> The poem, originally written for newspaper publication, was addressed to the well-known San Francisco criminal defense attorney, Hall McAllister. For sixty-eight lines Bierce satirizes McAllister and his profession for attempting to raise to the level of virtue their willingness to "Calumniate and libel at the will / Of any villain who can pay the bill."<sup>21</sup> In the style of Alexander Pope, Bierce wrote:

Happy the lawyer!—at his favored hands  
Nor truth nor decency the world demands.  
Secure in his immunity from shame,  
His cheek ne'er kindles with the tell-tale flame.  
His brains for sale, morality for hire,  
In every land and century a licensed liar!<sup>22</sup>

Bierce counted the legal profession's role as "hired guns" as one of the major illnesses of society. He had no sympathy whatsoever for the argument that a client's guilt or innocence ought to be of no concern to his attorney; for Bierce the legal profession's proclaimed "neutrality" was nothing more than a sign of moral bankruptcy. The closing stanza of "To An Insolent Attorney" proclaims:

I grant you, if you like, that men may need  
The services performed for crime by greed,—  
Grant that the perfect welfare of the State  
Requires the aid of those who in debate  
As mercenaries lost in early youth  
The fine distinction between lie and truth—

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19. *Id.* at 234. Other "fables" dealing with law or legal matters in 6 A. BIERCE, *supra* note 17, include *A Hasty Settlement* (at 184-85); *The Party Over There* (at 194-95); *The Tried Assassin* (at 203); *The No Case* (at 230); *An Unspeakable Imbecile* (at 248); *A Fatal Disorder* (at 273-74); *The Justice and His Accuser* (at 276-77); *Snake and Swallow* (at 347); and *Lion and Mouse* (at 363-64).

20. 5 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: BLACK BEETLES IN AMBER* 240-42 (1911).

21. *Id.* at 241.

22. *Id.*



Who cheat in argument and set a snare  
 To take the Feet of Justice unaware,—  
 Who serve with livelier zeal when rogues assist  
 With perjury, embracery (the list  
 Is long to quote) than when an honest soul,  
 Scorning to plot, conspire, intrigue, cajole,  
 Reminds them (their astonishment how great!)  
 He'd rather suffer wrong than perpetrate.  
 I grant in short, 'tis better all around  
 That ambidextrous conscience abound  
 In courts of law to do the dirty work  
 That self-respecting scavengers would shirk.  
 What then? Who serves however clean a plan  
 By doing dirty work, he is a dirty man!<sup>23</sup>

Bierce's most successful use of the anti-lawyer theme for artistic purposes was his short story "The Famous Gilson Bequest,"<sup>24</sup> which is one of the handful of his "civilian" stories that matches the power and intensity of his Civil War tales. It also anticipates by more than two decades Mark Twain's better-known short story, "The Man That Corrupted Hadleysburg."<sup>25</sup>

"The Famous Gilson Bequest"<sup>26</sup> is the story of a small-town horse thief who, though hanged, extracts a final measure of revenge by leaving a will which plays upon the greed of his accusers. While the setting is the American west of the mid-nineteenth century, Bierce's themes originated in classical satire. Avarice is easily aroused in men; once aroused, it becomes their ruling passion. Individual greed and society's greed are closely interrelated. When the two are combined in law, social institutions are corrupted.<sup>27</sup>

23. *Id.* at 242. While McAllister was a special target of Bierce's invective, he was hardly the only one. Of the equally prominent William H. L. Barnes, a former Union general, Bierce wrote: "To W.H.L.B./ Refrain, dull orator, from speaking out,/ For silence deepens when you raise the shout;/ But when you hold your tongue we hear, at least,/ Your noise in mastering that little beast." K. JOHNSON, *THE BAR ASSOCIATION OF SAN FRANCISCO: THE FIRST HUNDRED YEARS, 1872-1972*, at 15-16 (1972).

24. 2 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: IN THE MIDST OF LIFE* 266-80 (1909).

25. "The Man That Corrupted Hadleysburg" was written in 1899 and published the following year. Bierce's story first appeared in the magazine *ARGONAUT* on October 26, 1878. See M.E. GREANDER, *supra* note 3, at 89.

26. 2 A. BIERCE, *supra* note 24, at 266-80. The phrases in quotation marks in the ensuing discussion of this short story are excerpted from this source.

27. For an insightful discussion of the story, see M.E. GREANDER, *supra* note 3, at 89-92.

The story begins with the pronouncement, "It was rough on Gilson." Gilson had been led into the western mining town of Mammon Hill that very morning by the town's leading citizen and publicly charged with horse stealing. So unanimous is the town on the question of Gilson's guilt that the sheriff begins preparation for a hanging and the undertaker employs himself, between drinks, with the construction of a pine casket. All that stands between Gilson and eternity is "the decent formality of a trial."

Gilson had come to Mammon Hill only recently, leaving his prior residence, the town of New Jerusalem, after the local vigilance committee had advised him that his prospects might be better elsewhere. Gilson, though, cannot shed his tainted reputation because a subsequent discovery of new gold fields near Mammon Hill brings most of the population of New Jerusalem to his new home. He becomes a suspicious figure in Mammon Hill, partly because of his familiarity with a sizeable part of the town's recently swelled population, and partly because he had never been known to do an honest day's work at "any industry sanctioned by the stern local code of morality except draw poker." What makes him even more suspicious is that his losings at the town's faro table clearly exceed any winnings he might have accumulated from his poker playing. The common conjecture is that Gilson is responsible for the rash of late night robberies of gold dust from the sluice boxes of the area.

No one is more convinced of Gilson's complicity in these recent events than Henry Clay Brentshaw, the town's leading citizen. His persistent avowals of his belief in Gilson's guilt, and his valuable patronage, eventually induce the operator of the town's leading establishment, the saloon, to bar Gilson from the premises. Cut off from his place of employment, Gilson is forced to look for new work. Suddenly, the sluice boxes are no longer molested. However, the lull is brief. After a few unsuccessful efforts at highway robbery, Gilson begins a new career as a horse thief, only to have it end abruptly on a misty, moonlit night when he is apprehended by Brentshaw with a bay mare belonging to a Mr. Harper in his possession. His arrest, trial, conviction, sentence, and hanging quickly follow.

However, before his execution Gilson writes his last will and testament, bequeathing everything he owned to his "lawfle execketer, Mr. Brentshaw" on the condition that Brentshaw see to his burial. While removing the body from the hanging tree, Brentshaw discovers in Gilson's pocket a codicil to the will stipulating that anyone who could

prove in a court of law during the next five years that he (Gilson) had robbed sluice boxes was to be his "heir." If his guilt could not be legally proved, the entire estate (minus court expenses) was to go to Brentshaw.

Because everyone assumed Gilson to be a pauper the will and codicil were treated as an amusing joke. Its peculiar scheme which made Brentshaw both executor and conditional legatee was approved by the provisions of a law hastily passed by "a facetious legislature." (It was later discovered that this statute also created three or four lucrative political offices and authorized the expenditure of a considerable sum of public money for the construction of a railway bridge "that with greater advantage might perhaps have been erected on the line of some actual railway.") But to everyone's surprise, a merely formal search of Gilson's papers revealed that he was far from a pauper and, in fact, had substantial financial holdings in the East.

Immediately, "the country rose as one man" to establish Gilson's involvement with the raided sluice boxes. Brentshaw, forced into the position of the defender of Gilson's integrity, was equal to the challenge. Not to be outdone, he erected a costly monument over his benefactor's grave containing an epitaph of his own composition, "eulogizing the honesty, public spirit and cognate virtues of him who slept beneath, 'a victim to the unjust aspersions of Slander's viper brood.'" He also employed the best available legal talent and for five years the territorial courts were occupied with litigation growing out of the Gilson bequest. All sides unabashedly resorted to corruption, bribery, and perjury, and the battle was not confined to the courts; it raged in "the press, the pulpit, the drawing room, the mart, the exchange, the school; in the gulches, and on street corners." The furor created by the will was unceasing, "but Mr. Brentshaw was victorious all along the line."

True, after five years Brentshaw had vanquished all of the will's challengers, but this frontier version of the chancery suit in *Bleak House* took a heavy toll. Gilson's entire estate was consumed by a procession of highly paid lawyers, bribed judges, and paid witnesses. In the process, Brentshaw ruined himself physically, emotionally, and intellectually. His once careless good humor had given place to "a fixed habit of Melancholy" and his "firm, vigorous intellect had overripened into the mental mellowness of second childhood." His broad understanding had narrowed to the accommodation of a single idea: that Gilson had in fact been innocent of everything. No longer able to grasp that this innocence was founded on perjured testimony for which he had paid

dearly, Brentshaw was overcome by remorse, convinced at last that he had hounded an innocent man to his death. In his weakened mental state he came to believe that Gilson's innocence was "the one great central and basic truth of life—the sole serene verity in a world of lies."

In the story's final scene, Brentshaw returns at night to the graveyard where Gilson is buried. Obsessed with Gilson's "innocence," he broods over the inadequacy of his efforts. Meanwhile, heavy rains and a flooded creek have nearly destroyed the cemetery, and a number of coffins are exhumed. Suddenly, Brentshaw's world collapses when he realizes once again that Gilson was in fact guilty. As he stares into the mist covering Gilson's now open grave Brentshaw sees, or thinks he sees (the narrator confesses uncertainty), the ghost of Milton Gilson busily robbing the other open coffins of their dust and adding it to his own, faithfully imitating all the movements of a miner washing gold dust in his pan. The violent reversal of what had become his most cherished conviction is too much for Brentshaw. The story ends with the narrator's observation:

Perhaps it was a phantasm of a disordered mind in a fevered body. Perhaps it was a solemn farce enacted by pranking existences that throng the shadows lying along the border of another world. God knows; to us is permitted only the knowledge that when the sun of another day touched with a grace of gold the ruined cemetery of Mammon Hill his kindest beam fell upon the white, still face of Henry Brentshaw, dead among the dead.<sup>28</sup>

Like "The Man That Corrupted Hadleysburg," "The Famous Gilson Bequest" is about avarice. Both stories reflect a general disenchantment with the human race. However, Bierce's tale is also an indictment of the political and legal structures of the time. "The Famous Gilson Bequest" depicts a legal system whose primary function is to increase the opportunities for corruption. Legal institutions come into play (or even existence) only when they offer some illicit benefit to those who invoke them. Greed and the law are symbiotic. Once the town agrees that Gilson is responsible for the pilferage of the sluice boxes, his punishment is ostracism from the town's "cultural" center. The decision that he must hang actually precedes his apprehension by Brentshaw.

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28. 2 A. BIERCE, *supra* note 24, at 279-80.

Any legal protection for the accused that might exist in theory is simply ignored. The only protection afforded Gilson is the opportunity for revenge through a shrewdly drafted will.

The will's unusual distribution scheme is legitimized by an act of the town's legislature, but the implication is that the problem with the will is only an excuse to rush through an act that would drain the public coffers for the creation of a few unnecessary public jobs and the construction of a needless railroad bridge. The formal court machinery is brought into play only when it is discovered that Gilson's will has the potential of offering undeserved riches to someone. The ludicrous series of trials that follow are characterized by those features that most irritated Bierce: overpaid attorneys, corrupt judges, perjured testimony, and costly and seemingly endless litigation.

Whatever virtue or merit the town or Mammon Hill once possessed is obliterated by the fight over legal title to Gilson's assets. When the statute of limitations imposed by the will finally expires, the narrator notes that "the sun went down upon a region in which the moral sense was dead, the social conscience callous, the intellectual capacity dwarfed, enfeebled, and confused!"<sup>29</sup>

For Bierce, the legal system of Mammon Hill is a microcosm of the American legal system of the late nineteenth century. That Brentshaw was able to outdo all of his opponents in the courtroom, but lose his bounty and sanity in the process, is evidence of Bierce's disapproval of the entire mess. The existence of the so-called rule of law means nothing in practice; the blind goddess is, in fact, blind, and her supposed impartiality aids only the selfish. Brentshaw's ironic death was Bierce's commentary on the facile homily that the "end of the law is justice." Under Bierce's critical theories the use of literature for the purposes of reform was an anathema, but he was not above using his literary efforts to vent his anger with what he considered to be the legal follies of his age.<sup>30</sup>

Bierce's writings about lawyers still seem to strike a responsive chord with readers (at least with non-lawyers). However, to appreciate the extent to which they are also a specific attack on the legal system of his day, it is necessary to look at Bierce's background, his particular theories of the role of literature, and his experiences with the legal culture of California.

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29. *Id.* at 275.

30. M.E. GRENANDER, *supra* note 3, at 92.

### III. AMBROSE BIERCE: A BIOGRAPHICAL AND CRITICAL SKETCH

Ambrose Gwinnett Bierce was born on June 24, 1842 on a farm in southeastern Ohio, the son of Marcus Aurelius and Laura Sherwood Bierce, who had left their native New England for the West.<sup>31</sup> Ambrose was the tenth of thirteen children, each of whom were given names beginning with the letter A. In 1846, the family migrated to northern Indiana where Bierce grew to adulthood. In 1861, at age eighteen, he enlisted as a private in the Ninth Indiana Infantry and over the next four years was involved in some of the bloodiest fighting of the Civil War including the battles at Shiloh, Stones River, Chickamauga, Missionary Ridge, and Kennesaw Mountain. Repeatedly cited for bravery under fire, Bierce was shot in the head in 1864, survived, and returned to combat. By the end of the war he had been promoted to first lieutenant.

After the collapse of the Confederacy he briefly worked as a United States Treasury agent in Alabama before joining his wartime commander, General William Hazen, on an Army topographical mission from Omaha, Nebraska to the West Coast. (Bierce had studied engineering and surveying at the Kentucky Military Institute from 1859 to 1860 and had served as a topographical engineer on Hazen's staff.) He resigned from the army when he reached San Francisco in late 1866, apparently out of anger at not receiving a promised commission as a captain. He took a job as a night watchman at the San Francisco Mint and began to read voraciously from the works of Shakespeare, Swift, Voltaire, La Rochefoucauld, Balzac, and Thackeray. By the summer of 1868, he had begun to place his own poems, essays, and humorous sketches in *California*, *Golden Era*, *Alta California*, and other local newspapers and magazines.

In December 1868, he became the editor of the San Francisco *News Letter and California Advertiser*, the first of several journalistic

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31. The standard biographical works about Bierce are: A. DE CASTRO, *PORTRAIT OF AMBROSE BIERCE* (1929); P. FATOUT, *AMBROSE BIERCE, THE DEVIL'S LEXICOGRAPHER* (1951) [hereinafter P. FATOUT, *THE DEVIL'S LEXICOGRAPHER*]; P. FATOUT, *AMBROSE BIERCE AND THE BLACK HILLS* (1956) [hereinafter P. FATOUT, *THE BLACK HILLS*]; C. McWILLIAMS, *AMBROSE BIERCE* (1929); W. NEALE, *LIFE OF AMBROSE BIERCE* (1929); and R. O'CONNOR, *AMBROSE BIERCE, A BIOGRAPHY* (1967). Other biographical information is contained in M.E. GRENANDER, *supra* note 3, at 23-36; Davidson, *Ambrose Bierce*, in 74 *DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN SHORT STORY WRITERS BEFORE 1880*, at 21-29 (1988); Grenander, *Ambrose Bierce*, in 71 *DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN LITERARY CRITICS AND SCHOLARS, 1880-1900*, at 27-37 (1988); Nundt, *Ambrose Bierce*, in 23 *DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN NEWSPAPER JOURNALISTS, 1873-1900*, 16-25 (1983); and O'Brien, *supra* note 9, at 38-48.

posts he would hold in that city. As editor, he authored a weekly column, "The Town Crier," in which he attacked "hypocrisy, cant, and all other sham," with particular attention paid to preachers, politicians, rival editors, lawyers, police, and "all unpleasant people generally."<sup>32</sup> His first short story, "The Haunted Valley," was published in Bret Harte's *Overland Monthly* in July 1871.

The following March, Bierce and his bride of three months left San Francisco for England where he garnered some attention as a journalist and an author. He published three volumes of his own writings and William Gladstone was said to be one of his admirers. His wife's disenchantment with England, however, led them to return to San Francisco in 1875. Back in his adopted city, Bierce began a column, "The Prattler," for Frank Pixley's new magazine, the *Argonaut*. He was to remain in the Bay area until the late 1890s, save for a several month stint in 1880 in South Dakota as the general agent for a mining company.

In 1881, he became the editor-in-chief of the *Wasp*, a weekly newspaper that became a forum for his own writings and for his attacks on the "Big Four" of California—Mark Hopkins, Leland Stanford (as Bierce spelled it), Collis P. Huntington, and Charles Crocker—who through their control of the Central Pacific and Southern Pacific Railroads, dominated the state's economic and political life.<sup>33</sup> Already a member of the artistically oriented Bohemian Club, it was during this decade that Bierce became widely regarded as the first citizen of literary San Francisco.

Bierce lost his position as editor when the *Wasp* was sold in 1886, but the following year he was hired by the young William Randolph Hearst to write for the San Francisco *Examiner*. In 1892, he published his first collection of short stories, *Tales of Soldiers and Civilians* (later retitled *In the Midst of Life*), a work which was well-received on both sides of the Atlantic and which led its author to be compared favorably with Hawthorne and Poe. The remainder of the 1890s saw the publication of most of Bierce's best recognized works: *The Monk and the Hangman's Daughter* (1892), *Black Beetles in Amber* (1892), *Can Such Things Be?* (1893), and *Fantastic Fables* (1899).

In 1896, Bierce was sent by Hearst to Washington, D.C. to lead the opposition to a proposed railroad refunding act supported by Collis

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32. O'Brien, *supra* note 9, at 40. The words in quotations are attributed to Bierce.

33. An early account by a contemporary of Bierce of the deeds and misdeeds of the Big Four is found in 3 G. MYERS, *THE HISTORY OF THE GREAT AMERICAN FORTUNES* 124-45 (1910).

Huntington. The act, which would have written off 130 million dollars of government loans to railroads, was defeated in part because of Bierce's exposés of the true motive behind the bill—the greed of “railrooges” like Huntington—that appeared in the *Examiner* and the Hearst-owned *New York Journal*. In 1899, Bierce, still in the employ of Hearst, left San Francisco permanently and returned to Washington where he lived until 1913. In 1906, his best-known work, *The Devil's Dictionary*, was published (originally under the title *The Cynic's Word Book*).

After ending his association with Hearst in 1909, Bierce undertook the preparation of a twelve-volume edition of his *Collected Works*, a project that he completed in 1912. In October 1913, at the age of seventy-one, he toured the Civil War battlefields of his youth and then embarked for Mexico where he planned to join the revolutionary forces of Pancho Villa as an observer.<sup>34</sup> His last known letter was written on December 26, 1913, from Chihuahua, Mexico, a town captured by Villa on the eighth of December. Although the date and circumstances of his death are shrouded in mystery, it is most likely that Bierce was killed in the battle of Ojinaga (mentioned as his next destination in the letter of December 26th) which took place on January 11, 1914.<sup>35</sup>

Since his death, Bierce has suffered the fate afforded to writers whose lives are commonly judged to have been more interesting than the body of their written work. While his life continues to be a source of fascination for many, his works are rarely read.<sup>36</sup> Literary critics who have evaluated his work have not always been favorable in their judgments. As Marcus Cunliffe pointed out almost three decades ago, there have been two standard views of Ambrose Bierce, the writer.<sup>37</sup> According to the more favorable one, he is the best of the American writers who chose the American Civil War as the setting for their fic-

34. It was this decision that prompted Bierce's frequently cited letter to his niece in which he wrote:

Good-bye—if you hear of my being stood up against a Mexican stone wall and shot to rags please know that I think that a pretty good way to depart this life. It beats old age, disease, or falling down the cellar stairs. To be a Gringo in Mexico—ah, that is euthanasia!

THE LETTERS OF AMBROSE BIERCE 196-97 (B. Pope ed. 1922).

35. An imaginative reconstruction of the final days of Ambrose Bierce is the subject of Carlos Fuentes' novel *The Old Gringo*, originally published in Spanish as *El Gringo Viejo* (1985).

36. A recent example of the fascination about Bierce's life is the motion picture, *Old Gringo* (Columbia Pictures 1989), featuring Gregory Peck as Bierce.

37. A. BIERCE, IN THE MIDST OF LIFE AND OTHER STORIES 246 (1961) (Afterward by Marcus Cunliffe).



tion.<sup>38</sup> The second, and more common, verdict is that he was "a cynical misanthrope, morbidly concerned with violent death and the supernatural."<sup>39</sup> His most fervent admirers, however, offer a third evaluation. In this view, Bierce is a major representative of the "dark" tradition of American literature. As the link between his predecessors Poe, Hawthorne, and Melville, and modern writers like Faulkner and Flannery O'Connor, Bierce's powerful psychological insights into bizarre human behavior operated as an antidote to the narrowly realistic (and essentially optimistic) outlook that dominated American literature in the period between the Civil War and World War I.<sup>40</sup>

Bierce's choice of genres did little for his critical reputation. He pledged his allegiance to what he viewed as the major tradition in English and American literature—essentially, the literary forms of the eighteenth century, especially satire—and to a finely-wrought, rapier-like prose. This commitment led him to work with what strikes twentieth-century readers as rather unconventional forms. He eschewed the

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38. Bierce was the only major American writer who both fought in and wrote about the American Civil War. On Bierce's contribution to the literature of the war, see D. AARON, *THE UNWRITTEN WAR 181-92* (1973); E. WILSON, *PATRIOTIC GORE 617-34* (1962). Bierce's only peer among American writers who set their imaginative works during the Civil War is Stephen Crane, who consciously modelled his accounts of warfare on Bierce's writings. Davidson, *supra* note 31, at 27. Bierce himself detested Crane's novel *The Red Badge of Courage*, calling it a "freak" and asserting that the only writer worse than Stephen Crane "would be two Stephen Cranes." O'Brien, *supra* note 9, at 45.

39. O'Brien, *supra* note 9, at 45. For the conventional view, see *THE LITERATURE OF THE AMERICAN PEOPLE 760* (A. Quinn ed. 1951); K. STARR, *supra* note 12. A more judicious evaluation can be found in W. BERTHOFF, *THE FERMENT OF REALISM: AMERICAN LITERATURE, 1884-1919*, at 76-79 (1965). A collection of critical essays on Bierce from his own day until the 1980s is *CRITICAL ESSAYS ON AMBROSE BIERCE* (C. Davidson ed. 1982).

40. R. WIGGINS, *AMBROSE BIERCE 44-46* (1964). In his own day, Bierce's strongest advocate among major American critics was the Baltimore-based Percival Pollard who referred to Bierce as "the one commanding figure in our time." P. POLLARD, *THEIR DAY IN COURT* (1909) (quoted in W. BERTHOFF, *supra* note 39, at 77). Foremost among recent critics arguing for a broader understanding of Bierce's work are M.E. Grenander and Cathy N. Davidson. Grenander has argued that Bierce is most properly studied in the context of turn-of-the-century literary impressionism, rather than the more mainstream American movements of literary realism and literary naturalism. Grenander justifies this characterization because of Bierce's concentration on the subjective perceptions of his protagonists and his use of moments of epiphany through which they come to understand reality. M.E. GRENANDER, *supra* note 3, at 152-55. Davidson emphasizes the "modern" qualities of Bierce's stories, i.e., "[h]is surrealistic literary techniques and rhetorical presentations of subjective and objective time," "his juxtaposition of multiple points of view and often contradictory perspectives," and "his expositions of the deceptions that the mind plays upon itself." Davidson, *supra* note 31, at 27-28; C. DAVIDSON, *THE EXPERIMENTAL FICTIONS OF AMBROSE BIERCE* (1984). Undoubtedly, much of the renewed interest in Bierce's work is the result of his popularity with contemporary writers as varied as Ryunosuke Akutagawa, Jorge Luis Borges, Brigid Brophy, Julio Cortazar, and Carlos Fuentes.

novel as "[a] short story padded"; he had no interest in drama; and, though he wrote poetry, he knew he was no poet.<sup>41</sup> Instead, he devoted his efforts to raising the aphorism, the dictionary definition, the fable, and the newspaper editorial to the level of art.<sup>42</sup>

Bierce's reputation has also suffered from his hostility to realism, the dominant literary movement of his own time. Although William Dean Howells, the dean of American realism, praised certain aspects of Bierce's work, Bierce had no use for Howells's literary theories, branding realism "[t]he art of depicting nature as it is seen by toads."<sup>43</sup> Moreover, while his stories depict the carnage of war quite graphically, Bierce was concerned with a type of psychological realism that caused him to be indifferent to (or at least to downplay) the types of realistic detail that characterized the works of contemporaries like Howells, Norris, and Herrick. His refusal to work in the realist mode has also caused most modern critics, including his supporters, to ignore the aspects of his work that operate on the level of social criticism.

#### IV. AMBROSE BIERCE IN COURT

As a newspaperman, Bierce had ample opportunity to observe firsthand the goings-on in the courts of the city of San Francisco. Furthermore, while he cultivated the image of outraged observer, he also had his own experiences with the legal system. As an abrasive writer notorious for his indifference to whom he offended, Bierce had frequent occasion to consider the legal system, either as a potential defendant in an action for libel or as a potential victim of physical retaliation. He was frequently threatened and, on at least one occasion, beaten up by

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41. 7 A. BIERCE, *supra* note 4, at 231. Bierce did acknowledge Hawthorne's distinction between the "novel" and the "romance," and he wrote sympathetically of the latter in his essay "The Novel." Grenander, *supra* note 31, at 35.

42. Recently, critics have begun to acknowledge that Bierce cannot be fully appreciated if one applies only the traditional categories. M.E. Grenander has observed that scholars and critics have "begun to recognize that their theoretical concepts must be expanded if they are to include a writer as nonconformist as Ambrose Bierce." Grenander, *supra* note 31, at 35.

43. 7 A. BIERCE, *supra* note 4, at 276. On the relationship of Bierce and Howells, see Grenander, *supra* note 3, at 33; Grenander, *supra* note 31, at 32-33. When informed that Howells, in a lecture at Columbia University, had stated that "Mr Bierce is among our three greatest writers," Bierce is said to have replied, "I am sure Mr. Howells is the other two." C. McWILLIAMS, *supra* note 31, at 219. Bierce referred to Howells and Henry James (who were apparently linked in his mind) as "Miss Nancy Howells" and "Miss Nancy James, Jr." and as "two eminent triflers and cameo-cutters-in-chief to Her Littleness the Bostonese small virgin." R. O'CONNOR, *supra* note 31, at 131, 142. Bierce also had no respect for the work of Jack London and Upton Sinclair. W. NEALE, *supra* note 31, at 299, 307.

disgruntled readers.<sup>44</sup> However, the incident that apparently had the greatest impact on Bierce was one involving a rival newspaperman, M. H. (Michael Harry) De Young of the San Francisco *Chronicle*.<sup>45</sup>

Between 1881 and 1884, when Bierce was still editor of the *Wasp*, the *Chronicle* virtually waged war against the wealthy Spreckles family of San Francisco, attacking its business dealings on 120 different occasions. Although the elderly Claus Spreckles had once attacked De Young with his cane, De Young refused to stop his printed assaults.<sup>46</sup> On November 11, 1884, the paper accused Claus Spreckles of defrauding his fellow stockholders of the Hawaiian Commercial and Sugar Company of more than one million dollars. The following day, it further declared that the conduct of Claus and the company's board of directors justified criminal prosecution. On November 20th, Adolph Spreckles, the son of Claus, confronted editor De Young of the *Chronicle* and shot him twice. Spreckles was in turn shot by George Emerson, an assistant bookkeeper in the employ of the *Chronicle*.

In December, all charges against Emerson were dismissed, and on January 31, 1885, Adolph Spreckles was tried on charges of assault with intent to commit murder. This was not the first such incident involving the De Young family. Delos Lake, a prominent San Francisco lawyer, had earlier been convicted of shooting at De Young and fined \$300, and De Young's brother, Charles, himself an editor, had been shot and killed by the son of Isaac Kalloch, a Baptist minister and a Workingman's Party candidate who successfully ran for mayor of San Francisco.<sup>47</sup> The shooting had been in retaliation for the earlier wounding of Kalloch by Charles De Young, which had occurred during an argument between Charles and Kalloch, who objected to being the target of the De Youngs' printed invective. The incidents involving the De Youngs suggested that some San Franciscans had declared open season on newspaper editors.

There was in fact no love lost between Bierce and Michael De Young. They had been at odds with each other for years; Bierce had called De Young a murderer to his face, and branded him in print as "a liar, a scoundrel and, perhaps, a coward."<sup>48</sup> Bierce's poem "A Lifted

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44. K. STARR, *supra* note 12, at 271.

45. The story of the Spreckles episode is told in D. MUSCATINE, *OLD SAN FRANCISCO: THE BIOGRAPHY OF A CITY FROM EARLY DAYS TO THE EARTHQUAKE 1849-1906* 163, 359 (1975).

46. C. MCWILLIAMS, *supra* note 31, at 167.

47. K. JOHNSON, *supra* note 23, at 18; D. MUSCATINE, *supra* note 45, at 163.

48. C. MCWILLIAMS, *supra* note 31, at 167; R. O'CONNOR, *supra* note 31, at 74.

Finger," described by one of his associates as a "terrible blast of metrical invective,"<sup>49</sup> had been written about De Young, as had his vignette "The Controversialist."<sup>50</sup> Nevertheless, Bierce could hardly have approved of the violent response of the Spreckles family.

For his defense, Adolph Spreckles employed Hall McAllister (1826-1888), probably the most prominent lawyer in California at that time.<sup>51</sup> McAllister had arrived in San Francisco in 1849 at age twenty-three, a graduate of Yale and a recently admitted member of the Georgia bar. Over the next four decades, he tried and won more cases than any other California lawyer, and he was reputed to have collected "the largest fees then on record."<sup>52</sup> Spreckles was not disappointed by his choice of McAllister. As a result of his lawyer's "melodious and persuasive eloquence" (the words are those of the prosecutor), Spreckles was acquitted of all charges.<sup>53</sup> Bierce was undoubtedly outraged by the result of the trial and the potential threat posed to other journalists by the jury's acquittal of Spreckles. It was apparently this incident, combined with other such successes by the "sanctimonious" McAllister, that provided the inspiration for Bierce's satirical poem "To an Insolent Attorney."<sup>54</sup>

A second episode that colored Bierce's views of the legal system was his involvement with an ill-fated gold mining scheme in the Dakotas.<sup>55</sup> In the spring of 1880, Bierce was appointed the general agent of the struggling Black Hills Placer Mining Company in Deadwood, Dakota Territory. Despite his relocation to the Deadwood area and his conscientious efforts to straighten out its financial affairs, the company collapsed. Not only did Bierce fail to profit from his involve-

49. A. DeCASTRO, *supra* note 31, at 74.

50. 5 A. BIERCE, *supra* note 20, at 105-06. "Bartlett of the Bulletin," the subject of *The Controversialist*, was a thinly disguised version of De Young of the *Chronicle*. P. FATOUT, *THE DEVIL'S LEXICOGRAPHER*, *supra* note 31, at 146.

51. For biographical information on McAllister, see *HISTORY OF THE BENCH AND BAR OF CALIFORNIA* 417-21 (O. Shuck ed. 1901); *HISTORY OF THE BENCH AND BAR OF CALIFORNIA* 186 (J. Bates ed. 1912). McAllister's prominence is evidenced by Shuck's volume, which contains a photograph of McAllister opposite the title page. A section entitled "Men of the First Era" begins with a biographical sketch of McAllister *followed* by one of the then recently deceased United States Supreme Court Justice Stephen Field. After his death, the San Francisco Bar Association erected a larger than life bronze statue of McAllister in Golden Gate Park. K. JOHNSON, *supra* note 23, at 5.

52. D. MUSCATINE, *supra* note 45, at 359. McAllister and his wife were also the reigning king and queen of San Francisco's high society during the years following the Civil War. *Id.*

53. *Id.*

54. See text accompanying *supra* notes 20-23.

55. The full story of this undertaking is told in P. FATOUT, *THE BLACK HILLS*, *supra* note 31.

ment, but he also ended up as the nominal plaintiff in a lawsuit against the First National Bank of Deadwood. This lawsuit dragged on for nine years, and while Bierce had assigned his claim to the proceeds of any recovery, he was unable to withdraw from the litigation. Moreover, he was forced to give lengthy depositions about matters he preferred to forget, and ultimately had to pay court costs, even though he technically prevailed in the action. In the course of the litigation, Bierce came to despise Daniel McLaughlin and William R. Steele, the lawyers retained by his former employer. Because it was McLaughlin and Steele who had taken the assignment of the claim in lieu of previously unpaid fees, they had no interest in ending the litigation as long as there was any possibility of recovery.

In 1885, after four years of unsuccessful litigation, Bierce appealed to his friend Judge John H. Boalt for assistance in withdrawing from the lawsuit. To Bierce's dismay, Boalt assured him that even though he had assigned his claim to his lawyers and had been only a nominal plaintiff to begin with, he was powerless to withdraw and would be liable for court costs. Bierce certainly derived little consolation from Judge Boalt's further observation, "Your letters and evidence are so exceptionally clear and intelligent as to excite every lawyer's imagination. . . . The fact is my dear Bierce, you are a natural lawyer yourself and would have been an ornament to the profession."<sup>66</sup>

The lawsuit was finally resolved in April 1889. McLaughlin and Steele collected their fees, and Bierce was forced to pay \$213 in court costs.<sup>67</sup> While Bierce's hostility to lawyers predated his involvement in these matters, this experience did nothing to change his outlook. With some justification, it allowed him to view himself as a victim of an idiotic system in which only the financial interests of the lawyers really mattered.

## V. THE PRACTICE OF LAW IN BIERCE'S CALIFORNIA

Bierce's highly critical view of the legal institutions of his day was not simply the product of his own unfortunate experiences. It was also a public-minded reaction to the variety of factors that gave the California legal system its distinctive character and created an aura of arbitrariness around its operation. The California legal system was filled

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56. *Id.* at 150.

57. Other litigation stemming from the failure of the Black Hills Placer Mining Company continued, ultimately reaching the United States Supreme Court. See *Suessenbach v. First National Bank of Deadwood*, 149 U.S. 787 (1892).

with irrationality and contradictions; the state's courts were inefficient and obsessed with technicalities; the quality of the judiciary was low; and many California lawyers possessed few qualifications for what was supposedly a learned profession.

The problems began with the incomplete conversion from a civil law system (as had existed under Mexican rule) to a common law one. Originally a Spanish colony and then a province of Mexico, California had been settled primarily by Americans who declared their independence in 1846. The area formally became part of the United States in 1848 when it was ceded (along with most of the current American Southwest) by Mexico at the conclusion of the Mexican-American War. Its population grew dramatically after the discovery of gold in 1849, and the following year California was admitted to the union as the thirty-first state.

Although the California Constitution of 1851 officially adopted the common law as the law of the state, vestiges of the civil law system survived, most notably in the form of marital community property. Moreover, the treaty ending the war with Mexico had guaranteed that the United States would honor all existing property rights. Unfortunately, the Mexican law of real property proved largely incompatible with the common law system, and the existence of overlapping land grants guaranteed constant litigation over land titles for the remainder of the century. Few such suits could be quickly resolved; in fact, a lawsuit to quiet title to land in California lasted, on average, seventeen years.<sup>58</sup> In 1886, the California Supreme Court further complicated the issue of real property rights by ruling (to the surprise of almost everyone) that the common law doctrine of riparian rights applied in California, even though the civil rule had been followed in practice for more than three decades.<sup>59</sup>

A second problem and a source of great instability for the system of justice was the state's heritage of violence and extrajudicial dispute resolution. The skeletal legal institutions of frontier California were simply incapable of dealing with the influx of immigrants that arrived after discovery of gold. As in most frontier societies, violent crimes were common, and many Californians resorted to vigilantism when the existing legal system proved inadequate. Although the San Francisco Committee of Vigilance is the best-known of these groups, it did not

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58. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 432 (2d ed. 1985) (citing W. ROBINSON, *LAND IN CALIFORNIA* 106 (1948)).

59. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886).

lack for counterparts elsewhere in the state. In the 1850s, twenty-seven California communities had vigilante committees.<sup>60</sup> Explicit in their actions was a dissatisfaction with the existing judicial system; implicit was a widely shared belief that the demands of "justice" sometimes warranted the abandonment of the formal rule of law. Although the vigilante movement had subsided by the end of the 1860s, it left a legacy of self-help and of distrust of the formal legal machinery.<sup>61</sup>

Public respect for the legal system was also undermined by the widespread perception that the adjudicatory process was so ridden with arcane rules and procedures that most cases were decided, not upon their merits, but on legal technicalities. In one highly publicized case, the California Supreme Court overturned a criminal conviction on the grounds that the failure to identify the victim, Lee Wing, as a human being made the indictment fatally defective.<sup>62</sup> Even when the appropriate result was reached, it was often only after months, or even years, of litigation and appeals. For many lawyers, protracted litigation was not only inevitable, but also a perfectly respectable professional tool.<sup>63</sup> In the eyes of many Californians, delay, not justice, was the dominant feature of their legal system.

The adoption of the Field Code in 1873 was intended to streamline legal procedures in the state, but problems persisted.<sup>64</sup> The widely spread perception that too many cases were decided on legal technicalities ultimately led the California legislature to command the judiciary to disregard errors in pleading and practice unless the complaining party could show to the satisfaction of the state Supreme Court that he had suffered injury by reason of such error.<sup>65</sup> The statute had limited effect, however, because it was later declared unconstitutional by the

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60. L. FRIEDMAN, *supra* note 58, at 367. One historian of San Francisco has entitled chapters dealing with the legal history of the period 1850 to 1870, "No Law and Less Order" and "Judge Lynch Rides High." S. LONGSTREET, *THE WILDER SHORE: A GALA SOCIAL HISTORY OF SAN FRANCISCO'S SINNERS AND SPENDERS, 1849-1906*, at 69-90 (1968).

61. For a case study of a California community in this era that addresses the problem of social order, see R. MANN, *AFTER THE GOLD RUSH: SOCIETY IN GRASS VALLEY AND NEVADA CITY, CALIFORNIA, 1849-1870* (1982).

62. *People v. Lee Look*, 137 Cal. 590, 70 P. 660 (1902). For an assertion that this decision was representative of many in the final decades of the nineteenth century, see McMurray, *Seventy-Five Years of California Jurisprudence*, 13 CAL. L. REV. 463 (1925).

63. On the use of delay as a tactic by California trial lawyers, see R. MCGRATH, *GUNFIGHTERS, HIGHWAYMEN, AND VIGILANTES* 256 (1984).

64. L. FRIEDMAN, *supra* note 58, at 394. The Field Code was devised by David Dudley Field of New York, the brother of California's Stephen Field, in 1851. *Id.* at 391-98. For a discussion of the procedural problems discussed above in a national context, see *id.* at 398-411.

65. CAL. CIV. PROC. CODE § 475 (Deering 1886); McMurray, *supra* note 62, at 463.

California Supreme Court.<sup>66</sup> When an effort was made to form a state bar association in 1890, reform of the judiciary was a top priority.<sup>67</sup> Similarly, for the California Progressive movement of the first decade of the twentieth century, reform of the state's court procedures was an important, though ultimately unsuccessful goal.<sup>68</sup>

The problem of technicalities undermining the respect for the law was not just the result of an overly solicitous appellate judiciary. It was also a product of a system where trial judges often lacked an adequate understanding of legal procedures.<sup>69</sup> In the 1870s, the California Supreme Court reversed convictions in more than fifty percent of the criminal cases brought before it. Although the percentage declined in subsequent decades, the corresponding figure remained just under forty percent for the rest of the century.<sup>70</sup> The rate of reversal for murder convictions was almost as high as that for crimes generally. In the 1870s, two out of every five convictions were overturned; by the 1890s, the rate was still one out of four.<sup>71</sup> The source of the "problem" was almost always the failure of the lower court to follow proper procedures—eighty-three percent of all reversals were for procedural reasons.<sup>72</sup>

The judges themselves did little to improve the situation. Although there is no reason to think that California judges were any more corrupt than judges in other states, their alleged ties to powerful economic interests were a frequent source of complaint. Such criticisms were not without substance. In the 1880s, for example, the judges of the California Supreme Court held annual passes entitling them to free travel on the Southern Pacific Railroad and were widely believed to be under the control of that railroad.<sup>73</sup> Bierce shared this view, reflected in his epi-

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66. *San Jose Ranch Co. v. San Joaquin Land & Water Co.*, 126 Cal. 322, 58 P. 824 (1899).

67. Lieb, *Needed Reform in Our Judiciary System*, in THE CALIFORNIA STATE BAR ASSOCIATION, PROCEEDINGS OF THE FIRST ANNUAL MEETING 29-32 (1890).

68. G. MOWRY, THE CALIFORNIA PROGRESSIVES 82 (1951).

69. McMurray, *supra* note 62, at 449.

70. The exact percentages of reversals were 52.4% for the 1870s, 38.3% for the 1880s, and 38.9% for the 1890s. Vernier & Selig, *The Reversal of Criminal Cases in the Supreme Court of California*, 20 J. AM. INST. CRIM. L. & CRIMINOLOGY 60, 63 (1929).

71. *Id.* at 64. The percentages were 39.7% for the 1870s and 25.4% for the 1890s.

72. *Id.* at 65. Of 728 cases reversed between 1850 and 1900, 605 were reversed for procedural reasons.

73. K. STARR, *INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA* 200 (1985). According to historian George Mowry, "As for the state judiciary, it was the considered opinion of Dr. John R. Haynes [a California progressive] that the Southern Pacific's domination of no other arm of state government was as complete or as pernicious." G. MOWRY, *supra* note 68, at 14.



taph for the state's most prominent judge, Justice Stephen Field of the United States Supreme Court. Of Field, Bierce wrote:

Here sleeps one of the greatest students  
Of jurisprudence  
Nature endowed him with the gift  
Of juristhrift  
All points of law alike he threw  
The dice to settle  
Those honest cubes were loaded true  
With railway metal.<sup>74</sup>

But even more than its alleged ties to the state's plutocracy, the authority of the California judiciary was undermined by the requirement that judges be elected by popular vote.<sup>75</sup> (This, of course, was not unique to California; in the late nineteenth century, it was the most common method of judicial selection.<sup>76</sup>) Forced to compete for votes, California judges normally allied themselves with a particular political party, which in the wide-open political battles of late nineteenth-century California undermined a judge's ability to command the respect of the large numbers of citizens who dissented from his chosen political position.<sup>77</sup> Although it did little to change the situation, the state constitutional convention of 1878 was reportedly motivated in part by a general distrust of the state judiciary.<sup>78</sup>

The career of California Supreme Court Chief Justice David S. Terry illustrates many of the features that served to undermine respect for the legal system. Terry joined the state's highest court as an associate justice in 1855, then the following year became involved in a dispute with the San Francisco Vigilance Committee which resulted in Terry's stabbing a member of the committee. The victim was seriously wounded, and Terry was taken into custody by the vigilantes. Only the recovery of his victim allowed Terry to escape trial and, presumably, execution for murder. Terry felt under no obligation to resign from the Court, and the following year he became chief justice. He did resign in 1859, so that he could challenge United States Senator David C. Brod-

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74. 4 A. BIERCE, *supra* note 16, at 349.

75. McMurray, *supra* note 62, at 449-50.

76. L. FRIEDMAN, *supra* note 58, at 371-73.

77. See McMurray, *supra* note 62, at 448-50. The point here is not to argue that all these features were unique to California; they were in fact present in different degrees in all American jurisdictions.

78. K. JOHNSON, *supra* note 23, at 9.

erick to a duel. The duel took place, and Broderick was killed.<sup>79</sup>

After the outbreak of the Civil War, Terry left California to fight for the Confederacy. When the war ended, he migrated to Mexico, only to return within a year to California. (His arrival coincided with Bierce's.) He resumed his law practice, appearing frequently before the highest state and federal courts. In 1878-1879, he played a prominent part in the California Constitutional Convention.<sup>80</sup>

In 1886, Terry married, and took up the cause of, the controversial Sarah Hill who for several years had been immersed in litigation involving the issue of whether she had been legally married to William Sharon, a wealthy California mine owner and banker who was also a United States Senator from Nevada. (In 1885, Bierce had written of Mr. Sharon: "Served in the Senate, for our sins, his time / Each word a folly and each vote a crime."<sup>81</sup>) After being rejected by Sharon, with whom she had been romantically involved, Hill had made public various letters purporting to demonstrate that she and Sharon had been secretly married. She then filed for a divorce claiming her share of the marital property. A state court recognized the validity of the alleged marriage and awarded her a divorce, but a federal court, basing its jurisdiction on the diversity of citizenship of the parties—although Sharon spent most of his time in California, he was a Senator from Nevada—ruled that no marriage had existed. In the midst of litigation, Sharon died, but Hill continued to pursue her claim.

The new Mr. and Mrs. Terry eventually developed a particular animus for Terry's former California Supreme Court colleague, Stephen Field, then a justice of the United States Supreme Court, whose circuit-riding duties regularly brought him back to California. Although Field was not the judge who originally ruled against Hill, he did hand down a ruling in 1888 upholding the previous federal court finding that no valid marriage had ever existed. Because of a technicality, Mrs. Terry's appeal of the earlier federal court decision proved to be defective, and Field's ruling left her without further legal recourse. It also resulted in an outburst in the courtroom that featured Mrs. Terry openly accusing Field of taking bribes from Sharon's relatives and Mr. Terry knocking a tooth out of the mouth of a federal marshal.

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79. For a biographical sketch of Terry, see C. SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* 74-75, 321-61 (1969).

80. *Id.* at 328-29.

81. P. FATOUT, *THE DEVIL'S LEXICOGRAPHER*, *supra* note 31, at 146 (quoting *Wasp*, Jan. 3, 1885). See *supra* text accompanying note 33.

In response, Field sentenced both to jail terms of three and six months, respectively, for contempt of court.

After his release from jail, Terry made a number of public threats against Field. When the two accidentally confronted each other in August 1889 in the dining room at the Lathrop, California train station, Terry struck Field on the head from behind with his hand. In response, Field's bodyguard rose to his feet, drew his pistol, and killed the apparently unarmed Terry. Sarah Terry swore out a complaint charging both men with the murder of her husband, and the following day a justice of the peace in Terry's home town of Stockton issued arrest warrants for Field and his bodyguard. Field was formally arrested, but was released immediately by a writ of habeas corpus obtained from the United States Circuit Court of California of which he was the senior member. While there was no serious effort to prosecute Field, the issue of whether his bodyguard could be tried by a California state court in the face of a federal writ of habeas corpus ordering his release ultimately reached the United States Supreme Court.<sup>82</sup> While Terry's career was clearly a colorful one, it was not one likely to increase the public's respect for the legal system.

For all the controversy that surrounded his career, Terry was one of the state's most prominent attorneys. The typical California lawyer of the Gilded Age was much less successful and probably even less well-respected. In this regard, the bar reflected the wide-open nature of California generally. In an era when bar admission standards were minimal everywhere and the number of lawyers was steadily increasing, California stood near the front of American jurisdictions in terms of the ease of bar admission and ahead of all jurisdictions in the number of lawyers per capita.

The most remarkable feature of the California bar was its sheer size, at least compared to the state's total population.<sup>83</sup> Nowhere in the

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82. *In re Neagle*, 135 U.S. 1 (1890). The power of the federal court to issue the writ was upheld by a 6-2 vote, with Justice Field abstaining.

83. The 1850 United States Census recorded 191 lawyers in the state, one for every 485 residents (1:485). By 1860, the number had increased to 894 and the ratio to 1:425; by 1870, to 1,115 and 1:502; by 1880 to 1,899 and 1:455; by 1890 to 3,228 and 1:376; and by 1900, to 4,278 and 1:355. Between 1870 and 1900, roughly the period of Bierce's residency, the population of California increased by 165%, but the number of lawyers nearly quadrupled. The population figures for this and following paragraphs were calculated by the author based on statistics taken from the published reports of the United States Census for the period 1850 to 1900. In chronological order, the census reports, from which these figures were derived are: *THE SEVENTH CENSUS OF THE UNITED STATES: 1850, AN APPENDIX 976* (1853); *POPULATION OF THE UNITED STATES IN 1860*, at 523-24 (1864); *NINTH CENSUS: THE STATISTICS OF THE POPULATION OF THE UNITED STATES*

United States was there a greater concentration of lawyers. Bierce maintained that the pioneer had been followed to California, not by law and order, but by the harlot and the "jack-leg lawyer."<sup>84</sup> Whether or not this was true, nineteenth-century California did attract an extraordinary number of lawyers.<sup>85</sup> Between 1870 and 1900, the greatest concentration of lawyers in the state was in the San Francisco Bay area.<sup>86</sup>

722, 799 (1872); STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS 733, 760, 811, 902 (1883); REPORT ON POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS, 1890, pt. 2, at 536-37, 728-29 (1897); SPECIAL REPORTS: OCCUPATIONS AT THE TWELFTH CENSUS 230-35, 720-25 (1904).

84. S. LONGSTREET, *supra* note 60, at 44. The full quotation, delivered at the bar of San Francisco's Palace Hotel is: "Following the pioneer came not law and order but first the harlot, then the jack-leg lawyers, and corruption of governing bodies by the boodle grabbers." The source of this quote is the daybook of "R.J.," a socially active wine merchant in San Francisco from 1859 to 1910 who was a distant relative of the author Longstreet's mother. His name is withheld. *Id.* at xiv.

85. The sheer size of the California bar, relative to its population, can be seen in the following table comparing the size of the California bar in 1890 with the American bar as a whole and the bars of twelve selected states.

STATE	POP. 1890	LAWYERS	RATIO
California	1,213,398	3,228	376:1
New York	6,003,174	11,194	536:1
Texas	2,234,527	3,555	629:1
Indiana	2,192,404	3,208	683:1
Iowa	1,912,297	2,800	683:1
Pennsylvania	5,258,113	6,735	781:1
West Virginia	762,794	937	814:1
Massachusetts	2,238,947	2,589	865:1
Virginia	1,655,980	1,650	1004:1
Alabama	1,513,401	1,313	1153:1
South Carolina	1,151,149	772	1491:1
UNITED STATES	62,947,714	89,630	702:1

The per capita ratio of lawyers was higher in California than the other examined states in every census year from 1850 to 1890.

	1850	1860	1870
California	497:1	466:1	502:1
Texas	485:1	425:1	797:1

Between 1850 and 1860, the ratio for Texas was only slightly lower than for California. However, by 1870, Texas had fallen behind, 1:797 to 1:502. After 1870 none of the examined states ever approached the figure for California. *See* sources cited *supra* note 83.

86. The San Francisco bar grew from 433 lawyers in 1870, to 661 in 1880, to 843 in 1890, and to 1202 in 1900. The manuscript census returns for 1880 also record another 171 lawyers in nearby Oakland and Alameda County for a total of 832 lawyers in the Bay area, a number representing 43.8% of the lawyers in the state. *See* sources cited *supra* note 83. For the number of lawyers in Oakland and Alameda County, see L. FRIEDMAN & R. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 57 (1981).

As a body, the California bar of the late nineteenth century was composed primarily of white California-born males. Foreign-born attorneys accounted for only 10.4% of all lawyers in 1870, and while their percentage rose to 14.0% in 1880, it subsequently declined to 12.3% in 1890 and then to 10.8% in 1900.<sup>87</sup> In contrast to the state as a whole, the number of foreign-born attorneys in San Francisco increased sharply between 1880 and 1890, rising from 8.1% of the total to 17.8% before declining to 14.1% in 1900.<sup>88</sup> The number of women and racial minorities in the legal profession was minimal. Prior to 1878, admission to the bar had been restricted to white males,<sup>89</sup> but after the limitation was repealed by the California legislature only a handful of individuals from the excluded groups entered the profession.<sup>90</sup> In 1890, the California bar included eleven women, five blacks, and no orientals. By 1900, these numbers had risen only slightly, to 60, 6, and 4 respectively.<sup>91</sup>

The minimal standards for admission to the California bar helped facilitate its rapid growth. In the second half of the nineteenth century, there were no formal educational prerequisites for bar admission and no minimum period of law study. The only requirements were that the applicant be twenty-one years old, of good moral character (which was to be established by "satisfactory testimonials" produced by the applicant), and possess the "necessary qualifications of learning and ability."<sup>92</sup> Applicants seeking admission to the bar had several alternatives. Those who sought to be admitted to practice before all courts in the state, including the state supreme court, were examined orally in open court by the justices of the supreme court on the opening day of each of the court's six annual sessions. The statute provided that the applicant was to "undergo a strict examination," but there is little evidence that the justices used the oral examination to exclude any marginally

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87. See sources cited *supra* note 83.

88. *Id.*

89. CAL. CIV. PROC. CODE §§ 275-76, 279 (Haymond 1872).

90. Act of April 1, 1878, reprinted in ACTS AMENDATORY TO THE CODES OF CALIFORNIA 1877-1878, at 99 (1878). Sections 275 and 279 were amended to permit non-white males and women to practice law. CAL. CIV. PROC. CODE §§ 275, 279 (Deering 1886). If the caricature that appeared in the February 19, 1881 issue of the *Wasp* expresses the sentiments of the paper's editor (Bierce), then Bierce thought very little of the idea of women lawyers. The drawing portrays Clara Shortridge Foltz and Mary McHenry, two of the early women lawyers in California, clad as dance hall girls performing on stage before judge and jury. The drawing is reprinted in K. JOHNSON, *supra* note 23, at 13.

91. See sources cited *supra* note 83.

92. See sources cited *supra* note 90.

competent candidate. Because of the limited time available, examinations tended to be brief; often a single question sufficed.<sup>93</sup> An 1881 survey of bar admission standards in the United States reported that the examination in California was "said to be confined to the most elementary subjects."<sup>94</sup>

Those who sought to avoid the examination by the supreme court could instead present themselves to the district or county court in which they desired to practice. There the local judge would administer an examination similar to that required for admission by the supreme court.<sup>95</sup> The only disadvantage to this method of admission was that each time a lawyer desired to practice in a new district, he had to submit to an additional examination. For practice in the state's lowest courts—the justice courts—no examination was required at all, so long as the individual seeking to represent a party obtained a valid power of attorney.<sup>96</sup>

It was also possible to secure admission to the bar without any examination. Lawyers licensed in other jurisdictions were automatically admitted to practice upon a showing of their license and "satisfactory evidence of good moral character."<sup>97</sup> After 1878, graduates of Hastings, the law school of the University of California, were also admitted without examination, a practice referred to as the "diploma privilege."<sup>98</sup> Admission without examination was so common that between 1905 and 1910, only 335 of the 1036 lawyers admitted to practice by the District Court of Appeals for the Second District were actually examined. The rest were admitted either by producing a license from an-

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93. REPORT OF THE FIRST ANNUAL MEETING OF THE CALIFORNIA STATE BAR ASSOCIATION 25 (1901). For a discussion of the bar admission procedure in California at this time, see L. FRIEDMAN & R. PERCIVAL, *supra* note 86, at 58-59; Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 THE BAR EXAMINER 15 app. at 72-73 (1977).

94. F. Wellman, *Admission to the Bar*, 15 AM. L. REV. 295, 302 (1881).

95. CAL. CIV. PROC. CODE § 277 (Haymond 1872). The 1886 Code preserved this alternative, subject to the requirement of "strict examination in open court, and not otherwise." CAL. CIV. PROC. CODE § 276 (Deering 1886).

96. CAL. CIV. PROC. CODE § 96 (Deering 1886).

97. CAL. CIV. PROC. CODE § 279 (Haymond 1872); CAL. CIV. PROC. CODE § 279 (Deering 1886). The statute did reserve the right of the court to examine an applicant as to his qualifications, but this option was rarely exercised. Stevens, *Admission and Disbarment of Attorneys at Law*, in CALIFORNIA BAR ASSOCIATION, PROCEEDINGS OF FIRST ANNUAL CONVENTION 21, 33 (1910).

98. 1877-1878 Cal. Stat. 533-34. The act also provided that the diploma privilege was subject to the right of the Chief Justice of the State to order an examination, as in ordinary cases of applicants without the diploma.

other state or by the diploma privilege.<sup>99</sup>

The ease with which one could be admitted to the bar was rooted in widespread belief in nineteenth-century America that law should be an egalitarian profession.<sup>100</sup> If nothing else, this attitude guaranteed that many lawyers would begin their careers with only minimal preparation. While in some parts of the United States informal pressure may have discouraged marginally prepared individuals from entering the ranks of the bar, no such pressure existed in California. Although the following evaluation of the state of legal training in 1881 was written by a Nebraska lawyer, it applied with equal force to California.

There is great difficulty in compelling adequate preparation for admission to the bar in the western states. The pressure of young men is excessive. The profession here is full of men without considerable general culture. They cannot, therefore, well appreciate it, nor are they naturally disposed to require it of others. Those of them who, by force of their own character and labor, have to a degree supplied the deficiencies of early training and duly value the advantages of adequate preparation for the bar, are vastly outnumbered by those who have not attained to the elevation of a due estimate of those advantages.<sup>101</sup>

The legal profession was as egalitarian in its formal organization as it was in its admissions policy. There was no state bar association to set standards for professional conduct, and while there were a few local associations, like the San Francisco Bar Association organized in 1872, they were usually elitist organizations with little interest in opening their membership to the bar as a whole.<sup>102</sup> Needless to say, there was

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99. Stevens, *supra* note 97, at 33.

100. For a summary of attitudes toward the process of bar admission in the nineteenth century, see J. Hylton, *The Virginia Lawyer from Reconstruction to the Great Depression* 62-93 (1986) (Ph.D. dissertation, Harvard University).

101. *Appendix to the Report of the Committee on Legal Education and Admission to the Bar*, 4 REP. A.B.A. 237, 300 (1881) (quoting James M. Woolworth).

102. L. FRIEDMAN & R. PERCIVAL, *supra* note 86, at 62. The early San Francisco Bar Association has been described by its historian as a "rather exclusive men's social club" that counted no more than a quarter of the city's lawyers among its members. K. JOHNSON, *supra* note 23, at 20. Efforts to form a state-wide association failed in 1889 and 1901, before succeeding in 1909. *Id.* For the results of these efforts, see CALIFORNIA STATE BAR ASSOCIATION, PROCEEDINGS OF THE FIRST ANNUAL MEETING (1890); CALIFORNIA BAR ASSOCIATION, CONSTITUTION, BYLAWS AND PROCEEDINGS (1909); CALIFORNIA BAR ASSOCIATION, PROCEEDINGS OF THE FIRST ANNUAL CONVENTION (1910); REPORT OF THE FIRST ANNUAL MEETING OF THE CALIFORNIA STATE BAR ASSOCIATION (1910).

no official code of ethics governing professional behavior. The modern day law "firm" also did not exist in California. Partnerships of more than two lawyers were very uncommon and the typical attorney practiced on his own.<sup>103</sup>

One consequence of the mushrooming number of lawyers was an intense competition for legal business. While a few lawyers, particularly those who could attract corporations as clients, accumulated substantial fortunes, a far larger number had a very difficult time surviving economically. Lawrence Friedman and Robert Percival, describing the competitiveness of law practice in late nineteenth-century California, have written:

[F]or many lawyers, professional life was a rat race, with very little cheese at the end. It was easy to get into the profession, but hard to get rich, and easy to drop out. Some men barely hung on; they had to scramble for work on the margin of legality and even lower in public esteem.<sup>104</sup>

Many lawyers were little more than collection agents, while others were forced to solicit clients wherever they could find them, an activity that often earned them the contempt of the public. The city police courts were one such place. Struggling lawyers, waiting around the court to buttonhole clients, were a familiar sight to the journalists of Bierce's San Francisco.<sup>105</sup> Another source of clients was the San Francisco waterfront. As one San Francisco historian has written:

A contingent of barhopping lawyers snared unhappy crewman whom they convinced to bring suits against shipowners responsible for the harsh treatment they had received. When the court awarded a judgment in a sailor's favor, his attorney pocketed the cash, which always managed to coincide exactly with the amount of his fee.<sup>106</sup>

While there is little hard data on the income of lawyers in this period, there is evidence that the number of economically marginal lawyers was significant. The 1890 United States Census recorded that 2.1% of California lawyers were unemployed during the previous year,

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103. L. FRIEDMAN & R. PERCIVAL, *supra* note 86, at 61-62. For a listing of individual lawyers and law partnerships in California, see the AMERICAN LAW DIRECTORY (1890).

104. L. FRIEDMAN & R. PERCIVAL, *supra* note 86, at 61.

105. *Id.* at 62.

106. D. MUSCATINE, *supra* note 45, at 203.



and in 1900 the number was 2.7%.<sup>107</sup> While these percentages are small, they suggest a problem of much greater dimensions. Because virtually all lawyers were self-employed, to be "unemployed" would be to have given up on the possibility of attracting clients. For every "unemployed" lawyer, there were no doubt dozens of "underemployed" ones. Moreover, there was a growing perception on the part of the bar itself that the state's egalitarian system of bar admissions had created a serious problem of overcrowding in the profession.<sup>108</sup>

Finally, the highly publicized financial success of many California lawyers was derived from sources other than the practice of law. For example, William Sharon, the alleged first husband of Sarah Hill, was a native of Carrollton, Illinois who had studied law with Edward Stanton, Lincoln's Secretary of War. During his first twelve years in San Francisco he amassed a fortune of \$250,000 as a merchant and real estate entrepreneur, but he never practiced law.<sup>109</sup> Leland Stanford had been admitted to the bar in New York in 1848, but when he came to California in 1852, he first entered the grocery business. Although he was worth more than \$10 million dollars by 1871, his legal career was limited to a short stint as justice of the peace.<sup>110</sup>

## VI. AMBROSE BIERCE AS SOCIAL CRITIC

Viewed in light of contemporary circumstances, the motivation behind Bierce's criticism of law and lawyers becomes far more apparent. Although his short imaginative pieces and stories have proved to be more memorable, Bierce devoted considerable attention to legal matters in his editorial writing. Rather than merely lampoon, Bierce was willing to enter the political fray and offer substantive corrections to the abuses he denounced.

An unfortunate side effect of the focus on Bierce's imaginative writing has been the scant attention that critics and historians have

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107. See sources cited *supra* note 83. The national figure was 1.8%.

108. CALIFORNIA BAR ASSOCIATION, PROCEEDINGS 208, 256-58 (1918).

109. D. MUSCATINE, *supra* note 45, at 297-98.

110. *Id.* at 331, 362. For a series of biographical profiles of leading California lawyers of the late nineteenth century, see HISTORY OF THE BENCH AND BAR OF CALIFORNIA (O. Shuck ed. 1901); HISTORY OF THE BENCH AND BAR OF CALIFORNIA (J. Bates ed. 1912). Financial opportunities to be derived solely from a law practice were limited. On the practice of law in nineteenth century California, see generally G. BAKKEN, PRACTICING LAW IN FRONTIER CALIFORNIA (1991); C. FRITZ, FEDERAL JUSTICE IN CALIFORNIA, THE COURT OF OGDEN HOFFMAN, 1851-1891 (1991); C. ROGERS, A COUNTY JUDGE IN ARCADY: SELECTED PRIVATE PAPERS OF CHARLES FERNALD (1954).

paid to the full range of his writings, despite their acknowledgment that the bulk of his work was done as a journalist and social critic. The few critics who have studied his journalistic and critical work have not always given him sufficient credit for his insights. In discussing Bierce's commentary on public events, Edmund Wilson observed that "[h]e seems interested in denouncing political corruption mainly from the point of view of its giving him an opportunity to imagine macabre scenes in which the miscreants are received in Hell or left to survive alone in a universe divested of life."<sup>111</sup>

This, however, is not quite fair to Bierce. Bierce's essays on social issues convey an impression of himself which is different from his conventional image. "Bitter Bierce," the scoffer and scorner, is of course still there, but his concerns are far more practical and immediate. What one finds in these essays is not the misanthropic figure outside the American mainstream cultivating his eccentric tastes for the bizarre, but rather a perceptive critic of the excesses and abuses of the Gilded Age. Although he often delighted in pointing out the shortcomings of his contemporaries, and his cynicism led him time after time to reject all reform movements as misguided, his essays and journalistic writings reveal that his vision of humanity did, to a certain degree, transcend the alienation and disaffiliation that are associated with his more purely literary efforts.

Bierce's views on the American legal system appear most highly developed in the essay "Some Features of the Law," which first appeared in book form in 1909 in his *The Shadow on the Dial and Other Essays*.<sup>112</sup> In more than thirty pages, Bierce sets down his objections to the contemporary state of legal affairs. The style is sarcastic, but the purpose of the essay is clearly not to parody but to convince. While no one would ever mistake "Some Features of the Law" for Oliver Wendell Holmes Jr.'s *The Common Law*, it does reflect an awareness of the historical dimension of Anglo-American law and of the actual day-to-day operations of the courtroom and the law office. Divided into eleven sections, "Some Features of the Law" marches through Bierce's own bill of particulars against the legal system.

The essay begins by questioning the "incomputable additions"

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111. E. WILSON, *supra* note 38, at 624.

112. 11 A. BIERCE, *THE COLLECTED WORKS OF AMBROSE BIERCE: ANTEPENULTIMATA* 99-129 (1912). "Some Features of the Law" was probably compiled from earlier newspaper writings. On Bierce's journalistic efforts, see Berkove, *The Man with the Burning Pen: Ambrose Bierce as Journalist*, 15 J. POPULAR CULTURE 34-40 (1981).

made to the law by lawyers and judges. For Bierce, "law" properly meant statutes (which, he insisted, were bad enough). What he objected to was the body of additional "law" created by judicial interpretations of existing statutes. Once on the books this "body of superingenious writings" could be used as authority for setting aside any statute (i.e., legitimate law) with which the judge hearing a case might disagree. Although this objection was probably inspired by the actions of the California Supreme Court in the 1880s and 1890s, it hardly originated with Bierce. The antidemocratic implications of the law-making power of American judges had been under attack since the days of the early Republic and was behind the recurrent codification movements in the nineteenth and twentieth centuries.<sup>113</sup> While far from a crusading democrat, Bierce disliked the arbitrary exercise of power, and he seized upon judges as a particularly attractive target. However, the blame for the situation as Bierce saw it did not rest entirely with judges and lawyers. Indeed, he wrote, "They only create and thrust it down our throats; we are guilty of contributory negligence in not biting the spoon."<sup>114</sup>

Criminal procedure was a topic that interested Bierce a great deal. Although the United States Supreme Court had ruled in *Hurtado v. California*<sup>115</sup> (a case arising out of a murder in Bierce's San Francisco) that the procedural protections of the Bill of Rights of the United States Constitution did not apply to cases in state courts, the California courts were receptive to certain types of civil liberties claims by criminal defendants, particularly from those whose convictions involved procedural irregularities (hence, the high incidence of reversals). On the other hand, they tolerated other types of infringements of the rights of the accused. Bierce's criticisms of the existing practices seem to have been motivated, as one might suspect, more by his disapproval of the illogic of the system, than by a concern for the defendant. Nonetheless, his criticisms do illustrate an awareness of the unfairness of the existing system that escaped many of his contemporaries.

In successive parts of the essay he attacked numerous features of the criminal trial. Among these were the practice of sentencing convicted criminals before they had exhausted all rights to appeal; the use of the preliminary hearing before trial to attack the credibility of witnesses; the defendant's privilege against self-incrimination (which

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113. L. FRIEDMAN, *supra* note 58, at 403-07.

114. 11 A. BIERCE, *supra* note 112, at 100.

115. 110 U.S. 516 (1884).

Bierce thought was a bad idea); the admissibility of evidence of past moral indiscretion for the purpose of discrediting a witness's testimony; and the unregulated power of judges to imprison participants in a trial for contempt of court.

Bierce also used this essay as a forum to voice his disenchantment with the legal profession. Although he professed to have no remedy, he characterized the entire court system as being "perpetuated, altered and improved" for the financial benefit of lawyers. As he put it:

The laws are mostly made by lawyers, and so made as to encourage and compel litigation. By lawyers they are interpreted and by lawyers enforced for their own profit and advantage. The over-intricate and interminable machinery of precedent, overrulings, writs of error, motions for new trials, appeals, reversals, affirmations and the rest of it, is mostly a transparent and iniquitous system of exaction. . . . The lawyers have us and mean to keep us.<sup>116</sup>

And, because of their ability to manipulate language toward their own ends, lawyers were able, according to Bierce, to place themselves effectively beyond the control of legislative enactment. If the bar was to be taken to task, Bierce suggested, it would only be through the force of public pressure.

Bierce did think that some of these excesses could be controlled. In the defense of accused criminals, he argued, attorneys ought not to be allowed to take cases unless they were convinced of their client's innocence. In his mind, the advantages to the cause of justice would be substantial. He was vague on how such a prohibition would be enforced, but he seemed to think that it could be accomplished by permitting the cross-examination of attorneys in the presence of a jury with the view of testing their credibility. Such a procedure would, Bierce thought, both insure an ethical elevation of the legal profession and lead to the conviction of a higher percentage of the guilty. Here again, Bierce's actual concern for the accused offender was minimal. In his words, "Justice itself may be promoted by acts essentially unjust."<sup>117</sup>

In the final five sections of the essay he offered a number of specific proposals for legal reforms. In regard to the divorce laws of the day, he called attention to the common feature under which the unsuccessful respondent in a divorce proceeding was forbidden to remarry

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116. 11 A. BIERCE, *supra* note 112, at 101.

117. *Id.* at 111.

during the life of the successful complainant, while the latter was subjected to no such disability. Bierce denounced this as unreasonable and "unrighteous." In typically Victorian fashion he assumed that the unsuccessful party would always be the husband, and he ominously cited the "distinct interest" in his ex-wife's death given the husband by these statutes as a factor strongly supportive of their repeal. (Bierce's own marriage ended in divorce.)

He also opposed the contemporary proposals that "modern" penal codes ought to reflect a recognition of gender through the imposition of less severe sentences for female offenders. This, Bierce thought, was ludicrous. With even greater fervor he returned to a familiar theme in his imaginative writing—the control of the living by the dead. Perhaps the strongest objection Bierce had toward the legal practices of the day was the law's willingness to give force to provisions in wills disinheriting any legatee who attempted to contest the will. To do so only perpetuated injustice, he argued, and in the process only benefited those testators who actually were "daft, or subjected to interested suasion, or wantonly sinful."<sup>118</sup>

Criticism of the reverence of Anglo-American law for the last will and testament of the deceased (regardless of the circumstances under which it was executed) was frequently voiced in Bierce's day, as in our own.<sup>119</sup> Few, however, have ever stated their objections as forcefully and as eloquently as Bierce when he wrote, "The dead have too much to say in this world, at the best, and it is tyranny for them to stand at the door of the temple of justice to drive away the suitors that themselves have made."<sup>120</sup> The control of the living by the dead may have been an inevitability in Bierce's fiction, but it was not something that Bierce the social critic could tolerate.

Bierce also argued against the evidentiary rule that prohibited hearsay testimony; called for the press to exercise greater scrutiny of the "corrupt practices in our courts of Law"; and advocated the appointment, rather than the election, of judges, arguing that such a change would markedly reduce the amount of corruption in the judicial system. In sum, "Features of the Law" treats a wide range of legal topics from the perspective of the intelligent layman who has no patience with the unfairness and delay that in his mind characterized the legal institutions of his day.

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118. *Id.* at 122.

119. L. FRIEDMAN, *supra* note 58, at 422-27.

120. 11 A. BIERCE, *supra* note 112, at 122.

Bierce was not alone in his critique of the legal system of California of his day. One can find a similar portrayal in the works of contemporary writers as varied as Gertrude Atherton and Bret Harte.<sup>121</sup> Moreover, many of Bierce's concerns were ultimately embraced by large numbers of lawyers who began to question the continued viability of an essentially unregulated profession.

Although "reform" of the legal profession occurred more slowly in California than in other parts of the United States, the California bar ultimately took on a distinctly different organizational character in the first two decades of the twentieth century. A statewide bar association was organized, the oral examination for admission to the bar was replaced by a written one, and the responsibility for the exam was transferred to a board of bar examiners.<sup>122</sup> The state also streamlined its judicial proceedings and did away with the popular election of judges. Whether such changes altered the nature of lawyers themselves is an open question.

While Bierce's role in these changes, all of which came after he left California, is impossible to calculate, his persistent criticisms of the previous system definitely contributed to the movement for reform. On occasion, the rhetoric of reform-minded lawyers had a Biercean ring, as in 1900, when the Committee on Legal Education of the California State Bar Association pronounced:

This seems a reasonable condition [a proposed prerequisite of a high school education for bar admission] if the law is to justify its position as a learned profession, and we are not to countenance the idea, so common in America, that it is the birth right of every American citizen to address a jury, and to jeopardize the interests of those unsuspecting persons, who, for once at least, are willing to entrust their interests or welfare to the ignorant and the unscrupulous.<sup>123</sup>

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121. G. ATHERTON, *THE CALIFORNIANS* (1898) (focusing on the corrupting power of money on, among other, the aristocratic lawyer, Colonel Jack Belmont). On Atherton, see K. STARR, *AMERICANS AND THE CALIFORNIA DREAM, 1850-1915*, at 345-64 (1985). For an example of Harte's depiction of California lawyers, see Harte, *Colonel Starbottle for the Plaintiff*, in 1 *THE WORLD OF LAW* 555 (E. London ed. 1960) (illustrating the irregular procedures of a legal system not far removed from the frontier).

122. For the changes made in the organization and structure of the California bar in the early decades of the twentieth century, see C. Gelb, *Self-Regulating Professions and the Public Welfare: A Case Study of the California State Bar* (1957) (Ph.D. dissertation, Harvard University).

123. *REPORT OF THE FIRST ANNUAL MEETING OF THE CALIFORNIA STATE BAR ASSOCIATION* 20 (1910).

## VII. CONCLUSION

Read in light of the conditions that characterized the California legal system of his day, Bierce's writings on law take on a concreteness that is lacking when they are considered out of their historical context. Because anti-lawyer sentiment is a constant strand of American discourse, the temptation is to ignore the specific motives behind it and to assume that whatever the merits, the complaints are identical from one time and place to the next. Bierce's work presents us with a reminder, however, that the history of the bench and bar in America has been a controversial one, that past professional norms have been quite different from their present day counterparts, and that lay critics of the legal profession can play an important role in the alteration of those norms.

Bierce's writings about law may not be examples of great literature, but they are valuable social documents. They serve as an index to the nature and scope of anti-lawyer sentiment in the late nineteenth century, and, equally important, they give us an indication of the breadth of Bierce's intellectual concerns. Far from being only a misanthrope or iconoclast who could cast nothing more than a vote of dissent to the values and aspirations of his day, Bierce was a perceptive social analyst who was able to effectively satirize the hypocrisy of contemporary social arrangements and, beyond that, was prepared to suggest alternatives. Order, reason, and justice—which would later be called procedural due process—were the qualities that Bierce found missing in the law and in society generally. His own program for reform, however tentative or cynically advanced, evidenced a pragmatic vision for which he is rarely given credit. While Ambrose Bierce had little respect for the bench and bar, his critique of law and lawyers, spread brilliantly across the full spectrum of his written work, requires us to respect him as one of the foremost critics of the legal system of Gilded Age America.