Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico

Laura E. Gómez

A striking feature of the historical American criminal justice system has been the exclusion of racial minorities from decision-making positions, such as juror. In this study of criminal justice in a New Mexico county in the late 19th century, however, Mexicans are the vast majority of petit jurors, and frequently they decide the fates of European-American defendants. A regime of racial power-sharing between Mexicans and European-Americans characterized the administration of the criminal justice system. Racial power-sharing served the ends of American colonizers in legitimizing their governance after an initial violent occupation. Perhaps more surprisingly, it also served the ends of both elites and middle status Mexicans, at least some of the time. Criminal law—and, particularly, the jury as an institution—served both the colonizers and the colonized in this context.

I am indebted to the following people for commenting on past versions of this article: Khaled Abou El Fadl, Alison Anderson, Barbara Babcock, Gary Blasi, Taimie Bryant, Al Camarillo, Devon Carbado, Lawrence Friedman, Emily Garcia Uhrig, Carole Goldberg, Robert Goldstein, Antonio Gómez, Ariela Gross, Mitu Gulati, Ramón Gutiérrez, Joel Handler, Lillie Hsu, Kevin Johnson, Jerry Kang, Ken Karst, Jack Katz, Jerry López, Lynn Lopucki, Sally Merry, Eric Monkkonen, Margaret Montoya, Alfonso Morales, Sherene Razack, Cruz Reynoso, Mary Romero, Austin Sarat, David Sklansky, John Wiley, Stephen Yeazell, and several anonymous reviewers. In particular, I must thank Rick Abel, Cheryl Harris, Gillian Lester, and Clyde Spillenger for their support of this project over many years and in various forms. I am grateful for many hours of conversation with (and generous sharing of their primary research files) five historians of New Mexico: Toby Duran, Felipe Gonzáles, David Reichard, Estevan Rael y Galvez, and Robert Tórrez. I also am grateful for feedback on presentations of this and related work to audiences at the UCLA School of Law, the UCLA Sociology Department, the Stanford Humanities Center, Stanford Law School, the School for American Research, the University of New Mexico Law School, the American Bar Foundation, and the Law and Society Institute at New York University. I benefited from research or clerical assistance provided by Estela Ballon, Stephanie Bennett, Miroslava Chávez, Andrew Hernandez III, Cathie Lee, and Karen Mathews. I could not have completed this research without the skilled and tireless staffs of the Hugh and Hazel Darling Law Library at UCLA and the New Mexico State Records Center and Archives in Santa Fe. This research was supported by the UCLA Law School Dean's Fund for Research, the UCLA Academic Senate, the UCLA Institute for American Cultures, the UCLA Chancellor's Office, the Stanford Humanities Center, the Rockefeller Foundation, and the Center for Regional Studies at the University of New Mexico. Address correspondence to Laura E. Gómez, School of Law, UCLA, Box 95146, 405 Hilgard Avenue, Los Angeles, CA 90095 (e-mail: gomez@law.ucla.edu).

Law & Society Review, Volume 34, Number 4 (2000)

Introduction

Americans today tend to think of the 19th-century West as a time and place in which legal norms played little role in people's daily interactions. The words we use, for instance, "the Wild West," convey our sense that lawlessness—rather than law and order—carried the day. In part, contemporary notions of the western United States are the product of western films of the 1940s and 1950s, which have exerted a powerful influence on the American imagination. The stereotype of western lawlessness is also resonant in popular histories of such western bandits as Billy the Kid. Even historians have tended to view the West as a place in which the formal legal system had little currency. Indeed, some historians have marshaled empirical support for the thesis of western lawlessness, but they have tended to focus on locales without established native populations and historic patterns of institutionalized social control, whether informal or formal. They frequently have overlooked the dispute resolution processes of westerners native to the region, instead focusing their attention on white newcomers to the region.

In this study, I question this image of the Wild West by examining criminal justice litigation in San Miguel County, in the New Mexico Territory, during the last quarter of the 19th century. Rather than finding lawlessness, I found a great deal of interest in and activity around criminal law and its application. Most significantly, I found that the native Mexican population participated substantially in the criminal justice system by testifying in Spanish as witnesses, by serving as bailiffs in the courtroom, and by serving as grand and petit jurors. Even more surprisingly, I found that Mexican males frequently sat in judgment over European-American males, who were overrepresented among criminal defendants.[1]

[1] I use the terms "Mexican" and "European-American" to refer to the two major ethno-racial groups in San Miguel County. Members of these groups composed almost all the defendants, victims, and other participants in criminal litigation in San Miguel County. (The only exceptions were one Chinese defendant, several Chinese witnesses, and one African-American victim [see *Territory v. Yee Shun* (criminal case file no. 1307); *Territory v. Padilla* (criminal case file no. 1326)].) There is much controversy and a large body of literature about what label best describes the Spanish-speaking residents of northern New Mexico, which included San Miguel County (see Gonzáles 1993; Gómez 1986, 1992. See also Padilla 1985). Though the debate is an important one, it is not one addressed in this article. I use the term "Mexican" because it was the term that most frequently appeared in the records I consulted (in English and in Spanish [*mexicano*]) and because it most accurately describes the national origin of the original Spanish-speaking settlers of San Miguel County, who established communities in the county during Mexican control of New Mexico (1821–1846) (see Mocho 1997:198, n.26 [noting the founding of three important San Miguel County villages during the Mexican period]). The frequently used term Spanish-American (or its derivatives Hispano, Hispanic, Hispanic American) did not become popular in New Mexico's Spanish-language press until the late 19th century (Melendez 1997:59).

"Mexican" and "European-American" describe groups of people constituted as ethno-racial groups through both internal group recognition and external ascription.

The evidence I present here—drawn from primary documents, including official case files, other court records, the records of judges and lawyers involved, and contemporary newspapers—suggests that Mexicans' incorporation into the administration of criminal justice in San Miguel County illustrates a tenuous power-sharing arrangement between European-American colonizers and a large segment of the native, colonized population.

Much of the answer to what accounts for this fragile power-sharing regime has to do with New Mexico's status as a colony of the United States. In 1846, the United States declared war against Mexico (Mexican War 1846–1848) and then occupied Mexico's northern territories, in what is today the American Southwest. From 1850 to 1912, New Mexico was a federal territory, an ambiguous political status that suggests both a colonial legacy and an aspiration for territorial annexation.[2] The latter was realized when New Mexico became the 47th U.S. state in 1912 (Lamar 1966).

The problem for the Americans was not unlike that faced by other 18th- and 19th-century colonizers: How could they transform a hostile, militarized occupation into politically managed governance with consent of the natives? This problem, additionally, was complicated by two factors, less frequently presented in

These groups are marked by a set of traits related to phenotype (principally skin color), cultural characteristics (such as native language, accent, and religion), and ascribed social status. For discussions of ethno-racial group formation see Cornell & Hartmann (1998); Brodkin (1998); Omi & Winant (1994); Gregory & Sanjek (1994). I do not use either term to describe nationality or citizenship. Within the Mexican category, I include Mexican-origin residents of New Mexico regardless of their actual U.S. or Mexican citizenship or birthplace in Mexico or the United States. Indians of any tribe, whether or not they were Mexican citizens before 1846, are not included within this category. Within the European-American category, I include all European-origin peoples in New Mexico other than Mexicans; I exclude Black Americans, Indians of any tribe, or Asian immigrants to New Mexico. Importantly, then, this term includes both citizens of European countries who immigrated to the United States (and who may or may not have been U.S. or Mexican citizens) and American-born citizens of European ancestry.

[2] As historian Howard Lamar has said, the federal government's occupation and governance of the western territories was facilitated by the Northwest Ordinance Act, which "was an internal colonial system, a device for eventual self-government, a guarantor of property, and a bill of rights rolled into one act" (1966:98). As a federal territory, the President appointed (subject to Senate confirmation) New Mexico's governor, three supreme court justices, and some dozen additional territorial officers. A territorial legislature existed, divided into two houses, but its acts were subject to nullification by Congress (Ramirez, 1979:435). New Mexico Territory did not have voting representatives in Congress but did elect a nonvoting delegate to Congress. Together, these facts suggest to me that, despite the centrality of the promise of annexation, the lens of colonialism remains useful in the New Mexican context. But some scholars have argued that the fact of geographic proximity to the state asserting power over the region suggests that the Southwest is better described as involving a process of territorial annexation rather than colonization (Gonzáles 1993; see also Montejano 1987). It is important to describe the process by which the United States initially occupied the region with force and later sought political control over it as "colonialism" in that the United States was seeking control over land and natural resources. At the same time, the particular contours of the U.S. colonization of New Mexico suggest the promised annexation as an important theme that was not mutually exclusive with colonialism.

other colonial settings. First, at least some portion of the "native" population was enfranchised under the Treaty of Guadalupe Hidalgo, which ended the U.S. war against Mexico in 1848 (Griswold del Castillo 1990). In California, European-Americans succeeded in disenfranchising Mexicans and Indians fairly quickly, but Mexicans in New Mexico dominated legislatures and constitutional conventions in the postwar era (Menchacha 1993). As the majority of rights-holders, Mexican men in New Mexico Territory were able to maintain their political rights, even as they sacrificed those of the Pueblo Indians. Mexicans in New Mexico Territory asserted their mixed racial identity (as part Spanish and part Indian, as *mestizos*) to claim whiteness and to distance themselves from now-disenfranchised Pueblo Indians (who had held Mexican citizenship prior to the war with the United States). A second unusual factor influencing the transformation of the area was the designation of New Mexico as federal territory under the Northwest Ordinance Act of 1789, which put in place a legal system parallel to that of many U.S. states. It included a criminal justice system in which citizen grand juries and petit juries played central roles.

These political and institutional arrangements paved the way for Mexicans' participation in the criminal justice system in several New Mexico counties where Mexicans were the majority of rights-holders. Yet scholars have been slow to explore the impact of these comparatively unique circumstances on the operation of the American legal system in a colonial setting. Racial power-sharing in the criminal justice system proved to be an important tool in the establishment of American political authority over the region. I describe this regime as *racial* power-sharing for two reasons: first, power was allocated principally along racial lines (between the two largest racial groups in the county, Mexicans and European-Americans), rather than along some other dimension, such as social class.[3] Second, the regime evolved in a context in which European-Americans articulated an ideology of white supremacy in order to justify colonization of the area as both inevitable and beneficial because of the presumed racial inferiority of its native Mexican and Indian peoples (Almaguer 1994; Horseman 1981).

In San Miguel County, racial power-sharing transformed the criminal justice system (especially the criminal trial) into an actively utilized, publicly visible site for asserting, contesting, and resisting European-American racial dominance, Mexican self-de-

[3] I have focused on the regime of racial power-sharing that characterized the San Miguel County criminal justice system not to say that other important dynamics were not at work but to highlight racial and power dynamics in the operation of the system. My focus on power-sharing should not be taken as implying a consensus framework in which conflict was absent; on the contrary, conflict produced the power-sharing regime and remained prominent in its operation.

termination, and the legitimacy of the American state as a colonial power.

Racial power-sharing in this context served the interests of the American state by allowing the day-to-day functioning of the criminal justice system as an institution, which was key to the transition from military occupation to political colonization. It served the interests of European-American economic and political elites, whose primary concern was creating in New Mexico a political climate that allowed for exploitation of natural resources and for the indicia of statehood. Racial power-sharing served, as well, the interests of Mexican elites, which included the statehood goal and the promise of American capitalist development but which also concerned the maintenance of their elite status within the Mexican community in an era of rapidly changing political dynamics. It benefited the middle segment of Mexicans, who, by and large, filled the ranks of petit juries and who gained financially and politically through participation in a more democratic system of governance in which, at least sometimes, they were able to challenge Mexican elites and (more frequently, it seems) exert some power over lower-class European-Americans.

It is also worth considering whose interests were harmed by the regime. Lower-class European-Americans were the majority of defendants charged with and convicted of serious crimes. Significantly, the members of various Indian nations native to the region also lost out from racial power-sharing, in that they were excluded entirely from participation because of their political disenfranchisement.

The administration of the criminal justice system under such a regime reveals the complex, sometimes contradictory, nature of the law in a colonial context. Certainly, Mexicans' substantial participation served to legitimize American political authority in the region. At the same time, Mexicans' incorporation into the criminal justice system had the unintended consequence of providing a highly visible public forum for their resistance to American political authority, as well as a vehicle through which Mexican racial solidarity could be expressed and strengthened. For, even though Mexicans were co-opted as participants in the administration of criminal justice in San Miguel County, they took advantage of their positions to ensure the dominance of Spanish in court, to use legal maneuvers—such as the peremptory challenge—in race-conscious ways in order to assemble juries, and to exercise leniency and severity in race-conscious ways when dispensing punishment.

My study engages four bodies of scholarly literature and suggests ways in which they may be reconceived. In this article I challenge some of the fundamental claims of the history of criminal justice in the American West. I characterize this literature as hav-

ing two foci. Some studies of the West have focused on outlaws and their law enforcement adversaries, often overstating without empirical evidence the extent of "frontier" lawlessness (Ball 1978; McGrath 1984; White 1981).[4] Other studies have explored the nature of crime and legal relations more generally among westward-bound European-Americans, but with little attention to the impact of the law on the native and immigrant racial groups in the West (Fritz 1991; Langum 1987; Larsen 1994; Shirley 1957; Reid 1980; Dykstra 1971; Wunder 1979).[5]

In this work I also discuss a second class of literature, historical scholarship about the role of criminal justice as a key force in perpetuating social inequality. In his landmark history of American criminal justice, Lawrence Friedman (1993:82) summarized this literature by concluding that "[l]aws and legal institutions are part of the system that keeps the structure [of inequality] in place, or allows it to change only in approved and patterned ways. . . . Law protects power and property; it safeguards wealth; and, by the same token, it perpetuates the subordinate status of the people on the bottom." (See also Monkkonen 1975; Schneider 1980; Harring 1983). A subset of this literature emphasizes the function of law in sustaining the control of ideology by the ruling classes. For example, British historian Douglas Hay and others (1975:56) conclude that "the criminal law, more than any other social institution, made it possible to govern eighteenth-century England without a police force and without a large army. The ideology of the law was crucial in sustaining the hegemony of the English ruling class." (See also Thompson 1975.) Nevertheless, it is important to note that this literature is divided on whether the law can sometimes be beneficial to those outside the ruling class. E. P. Thompson has argued that law is able to mask inequality precisely because it appears to be "universal" and fair:

> If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and crite-

[4] Some of this literature focuses on outlaws in New Mexico (see Utley 1987, 1989). See also Inciardi (1977) (arguing that the research relies inordinately on folklore texts). Legal historian John Wunder has critiqued the Wild West thesis as failing to consider the law in action, especially at the level of justice of the peace courts (Wunder 1979:173); see generally, pp. 169–72 [reviewing the literature]). For additional critiques of the claim that the West was more violent than similarly situated regions, see Monkkonen (1991) and White (1991).

[5] Legal historian David Reichard (1996:xxxi) accurately problematizes this literature as focusing on "the 'transfer' of American legal institutions and norms from East to West." In addition to Reichard's work, two studies that actively engage questions of ethnic and racial conflict in western criminal justice are Crail-Rugotzke (1999) and McKanna (1997). See also Mocho (1997) and Duran (1985).

ria of equity; indeed, on occasion, by actually being just. (1975:262–63)

A third body of literature I examined, which can be seen as a subset of the second, focuses specifically on the role of criminal law in perpetuating racial oppression. Between the end of the Civil War and the middle of the 20th century, Blacks in the South were systematically excluded from service on southern grand and petit juries and often were barred from testifying against white defendants; they were disproportionately accused, prosecuted, and convicted of committing crimes against whites; and whites who committed crimes against Blacks frequently were not punished (Waldrep 1998; Flanigan 1987; Schwarz 1988; Ayres 1984; Adamson 1983).[6] In the North during the 19th century, de facto discrimination against Blacks insured that they were excluded from juries, that crimes against Black victims were infrequently or inadequately avenged by prosecutors, and that Black defendants accused of crimes against whites were punished disproportionately.[7]

Our contemporary understanding of the historical role of racial minorities in the American criminal justice system has been appropriately and powerfully shaped by African-Americans' experiences with the criminal justice system. Using blacks' experiences as a template, scholars have found that members of other racial minority groups have also been disadvantaged in their contacts with the American criminal justice system—typically, barred from jury service and from testifying in criminal trials.[8] The find-

[6] In some states in the South, substantial numbers of Black jurors served during Reconstruction, but this seems to have been a short-lived and isolated practice (Alschuler & Deiss 1994).

[7] See, e.g., Monkkonen (1995), concluding that Black murder defendants were twice as likely as white defendants to be hanged; Hindus (1980). In terms of jury service, many states in the North had distinctive requirements for Blacks to become citizens, and thereby qualify for jury service, which amounted to de facto exclusion of Blacks from the jury box (Alschuler & Deiss 1994, noting that only six states allowed Blacks to vote at the time of the Civil War and that New York imposed higher residency and property requirements for Black citizens). At the national level, only in 1880 did the Supreme Court declare laws restricting jury service to "white males" unconstitutional under the Fourteenth Amendment in *Strauder v. West Virginia* (100 U.S. 303 [1880]). During the same term, the Court did not find unconstitutional de facto discrimination that led to an all-white venire in a Virginia county where no Blacks had ever served on a jury (*Virginia v. Rives*, 100 U.S. 313 [1880]). [See also Abramson (1994).]

[8] In 1874 the Texas Supreme Court ruled that only English speakers could serve as jurors, instituting the de facto exclusion of most Mexicans from the jury box (*Lyles v. Texas*, 41 Tex. 172 [1874]). In California, statute prevented Blacks and Indian persons from testifying against whites, and the California Supreme Court interpreted the statute as also preventing Chinese persons from testifying (see McClain 1994); *People v. Hall*, 4 Cal. 399 (1854). For more general treatments of discrimination against Mexicans and Mexican-Americans in the criminal justice system historically, see Samora, Bernal & Pena (1979); Escobar (1983, 1999); Mirande (1987); Paredes (1958). For discrimination against Native Americans, see Kawashima (1986), Ross (1998). For discrimination against Chinese-Americans and Chinese immigrants in the 19th century, see McClain (1994); Friedman & Percival (1981) (detailing criminalization of Chinese immigrants); Tracy (1980:11–25).

ings of my study, however, which show, in the context of the criminal justice system, members of a racial minority group having some measure of power over members of a racially dominant group, force us to confront these previous findings and to ask what might be different about the multiracial southwestern context.

A fourth and final body of literature I examined concerns the role played by criminal law in colonization. In his landmark social history of the British Black Acts, E. P. Thompson asks whether the Janus-faced quality of the law (the law as a locus for both oppression and resistance) extends to the colonial context:

> Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. For this law has found its way to a good many parts of the globe. But even here the rules and rhetoric have imposed some inhibitions upon the imperial power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters. (1975: 266)

Thompson's reference to India's leaders identifies a theme I am most interested in: "the ambiguous and contradictory position of colonized elites" (Merry 2000:11). As anthropologist Sally Merry (2000:12) notes in her study of Hawaii, "[T]hose [elites] targeted for reform and rule responded with varying degrees of complicity, resistance, and accommodation." Herein, I take seriously the complex, even contradictory, responses of Mexican elites to U.S. colonization in New Mexico and, in particular, reveal the criminal justice system as a crucial site for these responses.[9]

The analysis and conclusions presented in this article are based on my examination of the criminal justice system in San Miguel County between 1876 and 1882.[10] In 1880, San Miguel County was one of the largest and most populous of 13 counties in New Mexico Territory.[11] Las Vegas, the county seat, was a major junction on the Santa Fe Trail, the most important commercial route connecting the United States to what was once northern Mexico. In 1880, the county's population of 20,000 (which

[9] Additional studies on law and colonialism that have influenced me include Kellogg (1995); Lazarus-Black & Hirsch (1994); Starr & Collier 1989; Stoler 1995; Comaroff & Comaroff (1997); Nader & Todd (1978); O'Malley (1983); Mitchell (1988).

[10] The 1870s were the first decade in which there were a sizable number of annual criminal prosecutions and trials in San Miguel County, making a study of this nature feasible (Criminal and Civil Record Books, 1871–1875). See also Lamar (1966:108) (claiming that "no court system worthy of the name really existed" in New Mexico before 1865); and Hunt (1961) (reporting little criminal activity in San Miguel or other First Judicial District county courts in 1864).

[11] San Miguel County was located in the mountainous northeastern part of the Territory, with two relatively small counties north of it (Mora and Colfax counties) and Texas at its eastern border. Two large counties, Lincoln and Dona Ana, occupied the southeastern quadrant of New Mexico, south of San Miguel County, and Santa Fe County shared most of its western border (Beck & Haase 1969:44–45).

had grown 30% since the previous decade) was 89% Mexican and 10% European-American.[12]

During the last quarter of the 19th century, San Miguel County's economic character, like that of northern New Mexico as a whole, changed dramatically, from one based on subsistence agricultural production to market-oriented agricultural production, stock-raising, and preindustrial production (Ramirez 1979; Gonzáles 2000a; Duran 1985).[13] The extension of the first railroad into New Mexico, at Las Vegas, the county seat, in 1879 was an important catalyst for this economic transformation and also very likely heralded other social changes, including those that would have impacted the criminal justice system. My study investigates seven years of criminal justice activity, three-and-one-half years of activity before the railroad's entry and three-and-one-half years after it.[14]

Although I have made every effort to contextualize my analysis within larger regional and period dynamics, the empirical focus of this study is but a geographic and temporal slice of larger events that remain understudied. The findings I present here should not be generalized to describe the entire region (although they might be suggestive of what occurred in New Mexico Territory's other counties with similar demographic and economic profiles).[15] Neither should the reader presume that the analysis of the 1876 to 1882 period applies to earlier or later time periods in San Miguel County. As I have noted, there were substantially fewer criminal prosecutions and trials prior to 1875, and the county's European-American population was so small that comparisons with this period may be unproductive. Several rich secondary sources that highlight people and events in San Miguel County, moreover, indicate that the period of the late 1880s and 1890s witnessed increased racial, class, and partisan

[12] These population estimates are based on the 1880 census, which found that Indians, Blacks, and Asians made up less than 1% of the county's population. The remaining 99% were classified as "white" by the census, including Mexicans and European-Americans. Because of this manner of classification it is difficult to know with certainty the actual number of Mexicans and European-Americans. Therefore, I used the original census enumerations to calculate the number of Mexican and European-American residents based on surname (and in a small number of questionable cases used additional criteria).

[13] Ramirez divides New Mexico's territorial period into three political economy periods: (1) from 1846 to 1855, dominated by farm labor and subsistence agriculture; (2) from 1856 to 1880, dominated by mercantile capitalist and the livestock industry; and (3) from 1881 to 1912, dominated by wage labor and market production in the railroad, mining, mills, and service sectors (Ramirez 1979:559–67).

[14] Although there are limitations due to my examination of a relatively brief time period, the extremely detailed nature of the research (focusing on nearly 600 criminal case files as well as docket records) and the use of additional, noncourt records (especially newspaper sources) compensates for some of these limitations.

[15] Tobias Duran's research on social conflict in New Mexico during the late-19th-century period suggests that European-Americans controlled the criminal justice systems in Lincoln and Colfax counties, on the southern and northern borders of San Miguel County (1985; see also Duran 1984), to the detriment of Mexicans.

political conflict that may well have disrupted the system of racial power-sharing I describe here (see Arellano 1990; Gonzáles 2000a, 2000b; Melendez 1997; Meyer 1996; Montgomery 1995; Rosenbaum 1981; Nieto-Phillips 1997; Larson 1974). Finally, my focus is the *criminal* law in action, thus this study should not be read as drawing general conclusions about Mexicans' experiences in the American legal system outside the criminal context.[16]

In Part I, I describe the social context, with an emphasis on the unique dynamics of citizenship and race, and their interplay, in 19th-century New Mexico. I explain how the legal system functioned during the American territorial period and relate how it differed from the Spanish-Mexican legal heritage. I also provide a brief overview of my empirical data, the 598 criminal cases prosecuted during a seven-year period, discussing the most common categories of crime and most frequent forms of disposition of cases.

In Part II, I present evidence concerning the race of those prosecuted for crimes, and I consider facts that support other trends I discovered relating to crime and criminal cases. First, I discuss the likelihood that substantial numbers of transgressions by Mexicans did not make it into the formal legal system because they were handled in other, less formal, more local, forums. In particular, this probably was the case when transgressions involved intraracial (Mexican on Mexican) disputes and occurred in the small villages around the county, where the vast majority of Mexicans resided and where few Eurpoean-Americans resided. Second, I consider the criminal propensity of European-American migrants to the county, who were likely to be young males with scant social or community attachments. These factors, combined with the prevalence of alcohol use and guns and the socioeconomic status of these men, explain why European-Americans were more likely than Mexicans to be criminal defendants.

Part III presents evidence of racial power-sharing in the administration of New Mexico Territory's criminal justice system. Mexicans played significant roles in the system, roles virtually unprecedented for members of a racially subordinated group in American history. Specifically, Mexicans served as the vast major-

[16] Reichard's (1996, 2002) is the only systematic study of civil litigation during New Mexico's territorial period. Even though Mexicans were active as defendants and, less frequently, as plaintiffs, during this time, Reichard did not find anything like the kind of racial power-sharing I have described here. Beyond litigation on the civil and criminal dockets of the District Court, Mexicans frequently were parties to lawsuits (or other legal methods of determining legal title to land) in administrative hearings by the Surveyor General or in the U.S. Court of Private Land Claims (established in 1891). Research of these forums by legal historians and others yields little evidence of Mexicans' empowerment or self-determination in them and ample evidence that the law was used by European-Americans to effectively dispossess the communal land grant system that characterized real property transfer under Spanish and Mexican law (Ebright 1994; Ortiz 1980; Briggs & Van Ness 1987).

ity of grand and petit jurors, as law enforcement officials, and as witnesses. The significance of Mexicans' participation is represented in the fact that the Spanish language was the dominant language in the courtroom (and in jury deliberations), even though this was an American court operating in a colonial setting. As significant as Mexicans' participation was, however, in this section I make it clear that this power-sharing between the races was not equal. There was a limit to Mexicans' participation in that European-Americans dominated nearly all the defense attorney roles, all the prosecutorial positions, and all the trial judge positions during this era.

In Part IV, I explore the implications of this racial division of power for criminal litigation in San Miguel County. I uncover evidence of highly race-conscious strategizing in the jury selection phase. Both European-American and Mexican defendants employed race-conscious strategies. Given the predominance of Mexican petit jurors, for European-American defendants, these strategies reflected a desire to get one or two members of their group on the jury and sometimes a genuine critical mass. For Mexican defendants, race-conscious jury selection resulted with some frequency in their cases being heard by all-Mexican juries. I go on to explore the dynamics between the largely Mexican juries and the exclusively European-American judges. While direct evidence of racial distrust or animosity is not present, the patterns suggest that Mexican juries served as a powerful check on the potentially prejudicial attitudes and behavior of European-American prosecutors and judges.

In the conclusion, I elaborate on two themes. I first discuss the centrality of the fact that Mexican grand jurors and, especially, petit jurors exercised power over European-American criminal defendants. The legitimacy function of the colonial criminal justice system depended on this fact, on the grant of authority to Mexican jurors to either punish or exercise leniency toward European-American newcomers. This story tells us something, as well, about the democratizing potential of the petit jury. Even in a colonial context involving a racially subordinated native population, the jury serves as a somewhat democratic institution, allowing middle-status Mexican men an unprecedented degree of self-determination.

I. Context: Citizenship, Race and Law in New Mexico

When American military troops proclaimed U.S. sovereignty over a half-dozen New Mexican villages in 1846, they encountered a vast, sparsely populated region of northern Mexico. An estimated 133,000 people lived in the area then, in what is now New Mexico and Arizona. The population included 58,000 nomadic Indians (including members of the Navajo, Apache, Ute,

Comanche, and Kiowa tribes); 15,000 Pueblo Indians; 60,000 Mexicans; and perhaps a few hundred European-Americans (Nostrand 1992:61; Lamar 1966:92). The problem for the American colonizers was how to most efficiently rule these diverse and dispersed native populations, given limited military resources and the paucity of American settlers. Afterall, the U.S. war against Mexico had been fought to win California and solidify Texas, both of which had European-American population majorities by 1850.

The Americans' ultimate strategy was to exploit the divisions among the native population and to treat each group differently. Concerning the nomadic tribes, the policy was military conquest with genocide and later reserve containment as the goals. The policy toward Pueblo Indians was one of isolation and containment; they were disenfranchised and were encouraged to remain in their villages. The native Mexican residents were a problem in two respects. Although some may have welcomed the American military (especially their suppression of nomadic Indians), others offered substantial resistance to the American conquest.[17] Additionally, Mexicans controlled the political institutions in the Territory well into the American period.[18]

Under the Treaty of Guadalupe Hidalgo, the United States had promised citizenship to 100,000 Mexican citizens residing in the ceded territory, including the 60,000 in Territorial New Mexico. Although the California legislature was dominated by European-Americans, who handily disenfranchised most Mexicans during the postwar period, New Mexico Territory's legislature was dominated by Mexicans, and Mexican men enfranchised themselves as "white citizens."[19]

Mexicans' Presumed Racial Inferiority

Even though Mexican men enjoyed formal political equality with European-American men during most of the American territorial period, anti-Mexican racism was virulent and widespread.

[17] Many scholars have inaccurately portrayed the American occupation as "bloodless" and universally welcomed by New Mexico's native Mexican population. At best, the evidence suggests that Mexicans were sharply divided in their responses to the American armed forces. For studies of Mexican resistance, see Duran (1985); González (2000b); González (1999); Tórrez (1988); Rosenbaum (1981).

[18] As late as 1880, 34 years after the Americans assumed military control of the Territory, I estimate that no county had more than 2,000 European-American residents, with the European-American percentage of the population ranging from a low of 3% (in Valencia County) to a high of 57% in Grant County.

[19] Anthropologist Martha Menchaca (1993) has compared how the four newly Americanized jurisdictions (Arizona, California, New Mexico, and Texas) implemented the citizenship provisions of the Treaty of Guadalupe Hidalgo, specifically tracking how they treated Mexicans and Indians for citizenship purposes. She concludes that Indians who had been Mexican citizens before the American invasion (Pueblo Indians in New Mexico and Mission Indians in California and Texas) were disenfranchised under American rule, as were Mexicans in many instances.

We can glean a great deal about the 19th-century racial attitudes of European-Americans by reading the narrative accounts of early foreign visitors, who produced a substantial travel literature.[20] These early accounts were often serialized in eastern newspapers and then later published in book form. The most relevant to this study was written by lawyer William Watts Hart Davis (1982 [1857]), New Mexico Territory's first U.S. Attorney, and one of only a small number of American-trained lawyers in New Mexico.[21] Davis's account is important both because it is one of the few discussions of race by a lawyer who played a central role in the new legal system and because it provides a window onto the popular beliefs of the time.

Davis arrived in northern New Mexico Territory in late November 1864, after four weeks of difficult stagecoach travel from Independence, Missouri. His book is essentially a diary of his travels throughout New Mexico, from late February to early June, while serving as the region's first and only prosecutor in three judicial districts. His often-lively accounts give new meaning to the concept of "riding circuit" (a term describing a court that is held in different locations). He literally rode a horse great distances (1,000 miles in the First Judicial District alone, which included San Miguel County), sleeping either outdoors or in very modest indoor accommodations.

Davis's tract is both highly race conscious and racist in its portrayals of Mexicans.[22] He revealed his view that Mexicans were inferior to European-Americans both directly and indirectly. For example, he indirectly commented on the racial hierarchy he took for granted when casually describing the stagecoach crew that took him from Missouri to New Mexico: He identified whites by their last names and included details of their personalities ("Jones, a clever Kentuckian"), he identified Mexicans by their first names and racial designations ("Jose, a Mexican"), but he did not even bother to name Blacks ("the colored outdriver") (Davis 1982 [1857]:17).

Just as frequently, Davis wrote directly and unapologetically about race, seeking to explain where Mexicans fit in the American racial hierarchy. He described the origins of "the Mexican race" (after characterizing Spaniards as "a mixed race," based on

[20] For explorations of this genre, relating more generally to the entire Southwest, see Paredes (1977:24–25) (arguing that the travel genre provided literate Americans with their first views of Mexicans and "laid the foundation for enduring American concepts of [the] Mexican character"). For a critique of the travel literature's treatment of Mexican women, see González (1999:44–65).

[21] For a similar first-person account of travels in 1864 New Mexico by another lawyer, see Benedict (1956).

[22] Davis was even more racist in his portrayal of Indians, frequently remarking on their "semi-civilized" character (referring only to Pueblo Indians), as being a "primitive race," characterizing them as "drunkards" and beggars, and purporting to provide "a complete vocabulary of words in the languages of the Pueblo or civilized Indians of New Mexico" consisting of 59 total words (1982 [1857]: 22, 28, 114–15, 157–58).

their European and Moorish ancestry), as follows: "Here was a second blending of blood and a new union of races; the Spaniard, Moor, and the aboriginal were united in one and made a new race, the Mexicans" (Davis 1982 [1857]:215–16). According to Davis, the mixture had important physical results: skin that was "very dark" with "no present hope of the people improving in color," short stature, and "black hair and dark eyes."[23] Such a physical description would have been important, and even necessary, to his white, eastern audience. European-Americans needed to know where Mexicans stood relative to Blacks, and physical descriptions were crucial to such comparative categorizations.

Just as important to Davis and his contemporary audience, however, were the presumed cultural traits they believed flowed inevitably from the biological fact of race. Mexicans, according to Davis, had an "impulsive nature," were too obedient, tended toward "cruelty, bigotry, and superstition," and yet "possess[ed] the cunning and deceit of the Indian" (1982 [1857]:217). In short, Mexicans had all the worst traits of their Moorish, Spanish, and Indian ancestors, and too few of their good traits. For Davis, Mexicans were resoundingly inferior to the best American stock: "They have a great deal of what the world calls smartness and quickness of perception, but lack the stability of character and soundness of intellect that give such vast superiority to the Anglo-Saxon race over every other people" (p. 217).

An additional source of popular beliefs about Mexicans can be found in what newspapers of the day had to say about Mexicans generally, and Mexicans in New Mexico specifically. National magazines and newspapers, including the *New York Times* (6 February 1882; 8 July 1885), frequently used the label "greasers" to refer to Mexicans in New Mexico.[24] One article revealed as much in its lengthy headline as it did in its text: "GREASERS AS CITIZENS. What Sort of a State New Mexico Would Make. The origin and character of the so-called 'Mexicans' of that Territory—their hatred of Americans, their dense ignorance, and total unfitness for citizenship—the women of New Mexico" (*New*

[23] Here, Davis was talking quite seriously about skin color, but in many other points in the book, he made joking references to Mexicans' dark skin color or to Mexicans' own color-consciousness. He ridiculed "greasy" and "Indian-fied" Mexicans who tried to act white or appear lighter-skinned (Davis 1982 [1857]:316, 325).

[24] Melendez reports on an 1899 article in the *Atlantic Monthly* that was titled simply "The Greaser," concluding that "one who is dominated by the modern American spirit would be likely to predicate the downfall of the Greaser, upon one fact, that he is lacking in 'enterprise'" (1997:43–44). In addition, examples of racist characterizations of Mexicans exist in the English-language press published in New Mexico. For an overview, see Stratton (1969:117–46). "Greaser" also was used as a racial epithet in New Mexico papers throughout the territorial period, most commonly in southern New Mexico. In 1906, the *Hagerman Messenger* wrote that "the 'greaser' is doomed; he is too lazy to keep up; and smells too badly to be endured" (as quoted in Stratton 1969:132). "Greaser" was defined in an 1855 California law titled "The Greaser Act," as "the issue of Spanish and Indian blood." See also Lopez (1996:145, describing the anti-loitering law).

York Times, 26 January 1882).[25] Although written nearly 30 years later, the article is consistent with, if more virulent than, Davis's portrayal. Like Davis, the unnamed author traces Mexicans' inferiority to the problem of mixing across reified racial boundaries, referring to "the mongrel breed known as Mexicans—a mixture of the blood of Apache, negro, Navajo, white horse-thief, Pueblo Indian, and old-time frontiersman with the original Mexican stock." The list of resulting undesirable traits is familiar: too much deference and "servility," rampant illiteracy, superstitiousness, "their animal nature," and, above all, their possession of "a passionate hatred [for] everything that is known to him or her as American" (*New York Times*, 26 January 1882).[26]

Most European-American immigrants to New Mexico Territory probably harbored similar racial prejudices. One can assume these beliefs were a feature of the social landscape that colored interactions between Mexicans and European-Americans in the legal system and elsewhere in society. Although Mexican men and European-American men in Territorial New Mexico were formally equal under the law, anti-Mexican beliefs such as these created a broad gulf between the two groups. Concomitantly, social interaction between members of the two groups was exceptionally low due to residential separation, language barriers, and the Catholic/Protestant divide.[27]

According to the 1870 and 1880 federal censuses, the vast majority of San Miguel County's European-Americans lived and worked in "New Town," while a large majority of the county's Mexicans resided in one of 93 villages with fewer than 1,000 persons. Although some Mexicans lived in New Town, few European-Americans lived anywhere but there.[28]

New Town (East Las Vegas) arose in the early 1880s, when large numbers of European-Americans came to the Territory to build the railroad, to run it (after 1879), or to work in the growing service economy that sprang from it. New Town was built up around the railroad yard and depot (Reichard 2002:123, n.8).[29]

[25] A few weeks later, the *New York Times* published a lengthy letter to the Editor from L. Bradford Prince (who was, by then, Chief Justice of the New Mexico territory) under the headline *The People of New Mexico and their Territory. The Hon. L. Bradford Prince Finds Much to Admire in his New Neighbors—the Spaniards of the Territory and their Qualities as Citizens* (*New York Times*, 28 February 1882). In Part IV of this article, I discuss Prince's views about New Mexico race relations.

[26] The *New York Times* reporter targeted Mexican women for special opprobrium, claiming that they embraced "free-love principles and practice," that they readily engaged in prostitution, and that they were generally unvirtuous. See also Davis (1982 [1857]:221 ["the standard of female chastity (in New Mexico) is deplorably low"]).

[27] An important component of racial animosity and social separation was virulent anti-Catholic sentiments held by the Anglo-origin population in the European-American community. See Duran (1985); Stratton (1969:135–45).

[28] Prominent Mexican families, such as the Baca, Lopez, Manzanares, and Romero families, all had New Town businesses in this era (Reichard 1996:124).

[29] Richard Nostrand provides a description of Old Town and New Town 20 years after the era studied here: "Separated by the Gallinas River, the two communities by 1900

Architecturally, it looked like other American towns of the period, with largely Victorian-style buildings. In contrast, "Old Town" was centered around the old Spanish-style plaza, enclosed by *adobe* buildings. New Town quickly became the commercial hub—the banks were all located there, as were all the public buildings (the U.S. Post Office, the Courthouse), as well as the largest merchants and businesses that catered to the population with money to spend (hotels, saloons, and restaurants).

European-Americans who came to San Miguel County after 1870 often both resided and worked in New Town, making it entirely feasible for them to live and work in New Mexico without learning to speak Spanish.[30] By all accounts, very few Mexicans (even those who participated in the most elite political circles) spoke any English.[31] Language thus became a significant barrier to interracial social interaction. The newer immigrants often expressed disdain for acculturating to the ways of their more numerous neighbors, and refusing to learn to speak Spanish became an important symbol of their resistance.

Because only a relatively small number of European-Americans lived in San Miguel County and were concentrated in one precinct, most Mexicans were not likely to encounter European-Americans in their daily lives. This in turn meant that European-Americans' deep-seated racial prejudices were likely to persist, unchallenged by social interaction and friendships across racial groups. Although some Mexican and European-American men interacted in business dealings and even in the jury deliberation room, the existence of New Town as a European-American residential and business enclave and the persistence of language barriers conspired to cement racial divisions, which persisted into the 20th century in San Miguel County (Arellano 1990).

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were about equal in size but otherwise fundamentally different. Plaza-centered Old Las Vegas was 82.9 percent Hispano. . . . On the other hand, East Las Vegas, now a major railroad center and wool entrepot, was 82.6 percent Anglo" (1992:204). European-Americans' efforts to segregate themselves residentially from Mexicans in these railroad depot "new towns" was common across New Mexico, and these patterns of residental separation persisted well into the 20th century.

[30] Even within the same employment sectors, European-Americans and Mexicans were segregated by job, with the higher-wage, greater-authority jobs going to members of the former group (Nostrand 1992:116–17, noting, respectively, Anglo jobs [the full gamut of skilled labor and supervisory positions] and Hispano jobs [laborers or section hands] with the railroad).

[31] The first Mexican generation with a sizable segment of bilingual Spanish-English speakers came of age in the 1880s and 1890s; the same generation gave birth to a Mexican literary and press expression in New Mexico (Melendez 1997; Meyer 1996). See also, for instance, several of the Mexican witnesses before the 1902 Beveridge Committee who were born in the 1850s, testified that they learned English as young adults (Enrique Armijo, school principal; Enrique H. Salazar, newspaper editor); whereas Justice of the Peace Jesus Maria Tafolla, who was born in 1837, spoke only Spanish. *Hearings Before the Subcommittee of the Senate Committee on Territories on House Bill 12543*, 57th Cong., 2d Sess. 9, 11, 12 (1902) [hereinafter *Beveridge Hearings*].

The Changing Legal System

In New Mexico, the Anglo-American legal system was superimposed on a centuries-old Spanish-Mexican system of law and dispute resolution.[32] Although codes and treatises of this system are useful in describing its formal workings, they fail to capture how its highly local nature shaped the law in action, a condition exacerbated by the region's distance from the capitals in New Spain, and later Mexico City and Washington, D.C. (Reichard 2001:1, 25; Weber 1982:37; Cutter 1995). Under Spain's and Mexico's governance, the local *alcalde*, and the alcalade system, settled all manner of disputes and claims.[33] Formal legal training was not a requirement for being an alcalde, and it is unlikely that any of the men in alcalde positions in New Mexico had any legal training, though all were literate and prominent men in their communities, and probably frequently were large landowners, sheep ranchers, or merchants (Reichard 1996:8).[34] Instead of relying on procedural formalities, the alcalde system put a premium on reaching a settlement that maintained the relationship

[32] The existence of an established legal system may be an important factor in distinguishing New Mexico Territory from other colonies. New Mexico was essentially a site of double-colonization by Western powers: first, the Spanish colonization of the 16th century, then the American colonization of the 19th century. The fact that a large part of the native population already was acclimated to Western political and religious institutions may well have significant implications for the later course that law played in the American colonization of the region. Cf. Merry (1992, discussing American colonization of Hawaii).

[33] Lamar describes the village alcaldes as acting "as a justice of the peace, a mayor, a probate judge, and sometimes as a militia captain" (1966:31). Justices of the peace in the colonial United States performed a similarly diverse range of duties; they "decided cases, punished criminals, assessed local taxes, administered the building and maintenance of roads, bridges, jails, workhouses, courthouses, and ferries; decided where these things would be located; set and paid bounties on game; settled quarrels and issued licenses" (Steinberg 1989:254, n.13). Legal historians have described the justice of the peace as playing a crucial role in colonial America, e.g., "[N]o other branch of government more directly affected the day-to-day lives of Americans than the judiciary in the colonial period" (Steinberg 1989:6, quoting Williard Hurst).

Gutiérrez translates "alcalde" as "chief constable" (1991:100), but I believe this term fails to capture the prestige and importance of the position in village life. Under Spanish and Mexican rule, alcaldes had a variety of duties beyond hearing civil and criminal cases; they also headed the village militia, if its formation was necessary, and oversaw administrative duties such as recording the census and collecting taxes (Gutiérrez 1991:100). For additional descriptions of the alcaldes of New Mexico, see Reichard (1996:2); González (1999:19–22).

No scholar has systematically studied the New Mexico alcalde courts, in part surely because few written records of these courts exist and because the records that do exist are not systematic (e.g., the local village alcalde position might have remained in one family for decades, and diaries reflecting this may exist, but they may not necessarily be reflective of the larger work of the alcalde courts in the region). The most pertinent gleanings about New Mexico alcalde courts that I have encountered are from Gonzalez (1999:20–27, 36–37, whose research shows that Mexican women and men actively used the alcalde forums in Santa Fe during the Mexican period) and Reichard (1996) who considers several justice of the peace courts in territorial San Miguel County).

[34] For instance, in 1876, 52-year-old Jose Ygnacio Esquibel was a Justice of the Peace in San Miguel County. The 1870 Census listed his occupation as "farmer" and estimated his real property holdings at a relatively substantial $2,000.

between the parties in a land where life was hard and highly interdependent on kin and neighbors.[35]

Although differences abounded, there was a nice symmetry between the Spanish-Mexican alcalde and the Anglo-American institution of justice of the peace.[36] Justice of the Peace Courts were established in New Mexico with General Stephen Watts Kearny's initial military occupation in 1846. In many cases, this judicial system was quite literally overlaid on the former: Most of the initial American appointees to justice of the peace positions were Mexicans who had been alcaldes in the same jurisdiction (Lamar 1966:85; Reichard 1996:24).

Despite this element of continuity, felt most acutely by Mexican residents at the level of local dispute resolution, the American occupation heralded tremendous changes in New Mexico's legal system. The Americans established a district circuit court, created county-level probate courts, and also substantially weakened the power of the local justices of the peace. Importantly, the District Courts actually functioned as two courts in one, or with two layers of jurisdiction, each operating at the county level: The District Court was the federal trial court and the Territorial-Level Trial Court. The two courts were run by essentially the same personnel and held consecutive terms in each county, with the presiding judge riding circuit.[37]

In this study, I focus on criminal cases that arose in the *Territorial* District Court in San Miguel County.[38] San Miguel County

[35] When a villager took a complaint to the alcalde, the latter called witnesses immediately and crafted a resolution on the spot. Lawyers appeared infrequently in these forums, although some parties sought assistance from a locally respected man who might have functioned in a lawyer-like fashion. Most parties appeared without any adviser; when they did have an adviser, it tended to be a local man of high social status or a man who made his profession in this way, but without formal legal training (Reichard 1996). Alcaldes' perceived disdain for procedural formalities led to contemporaneous criticism by European-American litigants. See Langum (1987); Gregg (1933 [1844]:159, 164–65). It is difficult to know whether Gregg's hostility to the courts reflected his losses in the forum or possible language or other cultural barriers that colored his understanding of processes, and/or his belief in Mexicans' racial inferiority, which is readily apparent from his diary.

[36] As late as 1865, the English version of the Territorial laws translated "alcalde" as "justice of the peace" (as the Kearny Code had done) (Rev. N.M. Stat. 126, chap. XXI, §14 [1865]). Like the Mexican alcalde institution, American Justice of the Peace Courts functioned as lower criminal courts. They were not required to record their proceedings; they operated swiftly to reach results and administered justice largely without defendants' counsel. They were officiated over by justices of peace with little or no formal legal training (Kadish 1983:414–15). The justice of the peace in colonial America might be the best analogue to the justice of the peace that developed from the foundation of the alcalde system in New Mexico. (See John Wunder [1979:xv, 9].)

[37] The presiding judge and court clerk were the same for the two courts, as were the members of the bar. The prosecutor differed, as either the U.S. Attorney for New Mexico or the New Mexico Attorney General. Although the study of the territorial courts in general is very sparse, most of it has focused on the federal district court.

[38] Thus my references to the district court, actually refer only to the *territorial* docket of the District Court (not the *federal* docket). My concentration on territorial crimes, rather than on crimes prosecuted under federal laws, removes from consideration significant numbers of criminal cases involving Indians, who generally fell under federal juris-

was part of the First Judicial District, whose presiding judge was the Chief Justice of the Territorial Supreme Court. In New Mexico, the Supreme Court heard cases in January and July, and during the rest of the year, the three justices rode circuit around the state as trial court judges, each assigned to one of three judicial districts.[39] The District Court annually held two 5- to 10-day sessions in each county, at the county seat. In addition to the presiding judge, the court clerk, the court interpreter, and some dozen lawyers rode circuit, holding court in each of the six counties of the First Judicial District.

When the District Court came to Las Vegas every March and August, the town's several hotels, boarding houses, eateries, and saloons were busy catering to court officials, jurors, witnesses, reporters, and litigants—who were themselves from around the county (and sometimes further afield). One of the most architecturally imposing buildings in the town, the Courthouse became the center of city life during those busy weeks. Trials, especially criminal trials, were a focal point of community interest. A murder trial typically drew a packed audience in the courtroom, and sometimes even dozens of spectators on the courthouse steps. Newspapers in Las Vegas, Santa Fe, and Albuquerque covered civil and criminal trials in San Miguel County as well as the more mundane happenings of the district court, extending the courtroom audience still further.[40]

In 13 sessions held in San Miguel County between 1876 and 1882, the District Court disposed of 598 criminal cases.[41] During this period, the court's criminal docket increased five-fold, from fewer than 40 cases in 1876 and 1877, more than 130 in 1880 and

diction. Additionally, the small numbers of Indians residing in San Miguel County contributed to their complete absence as defendants or victims in the cases studied. (See n. 12.)

[39] Upon his occupation in 1846, General Kearny divided New Mexico into three judicial districts, which persisted until 1887. The First Judicial District, the northern region, consisted of the counties of Colfax, Mora, Rio Arriba, San Miguel, Santa Fe, and Taos. During this era, it was not uncommon for appellate judges to also serve as trial judges in American jurisdictions [see, generally, Friedman 1993:255–58], but it nonetheless suggests that the ordinary assumptions about judicial review may not prevail.

[40] The typical path of criminal litigation was not unlike that of today: A crime was reported to the county sheriff, the district judge or a justice of the peace issued a warrant for an arrest. The Attorney General decided whether or not to file charges in the form of an information (for a small class of less serious offenses) or an indictment; and a 17-man grand jury certified or rejected each proposed indictment. In the cases of certified indictments (rejected indictments were rare), the defendant was arrested (if he was not already in custody) and sometimes posted bail; the defendant then entered a plea of "guilty" or "not guilty." If the offense occurred while the court was in session, the entire proceeding (from arrest to sentencing) might be completed within two weeks; more typically, cases that began out of session and that went to trial took 12 to 18 months to resolve. My distillation of criminal case processing in 19th-century San Miguel County is based, first, on consultation of the statutory guidelines for criminal practice, and, second, on my review of more than 600 criminal case files during this period.

[41] During this time, another 73 criminal cases came before the court but were not disposed of during the time period of this study. Since I did not collect data on how these cases were resolved, they are not included.

Table 1. Prosecutions by Crime Category, San Miguel County District Court, 1876–1882

Crime Category	Percentage (Rounded) of Crimes Prosecuted
Gambling offenses	40
Property crimes	20
Violent crimes (including assault)	16
Weapons offenses, assault and battery with words	12
Other offenses	13

1881, to more than 200 cases in 1882.[42] Over the seven years combined, the three largest crime categories were gambling crimes (40%), property crimes (20%), and violent crimes (16%) (Table 1). The great majority of criminal cases, nearly 67%, were dismissed by the trial judge (16 cases) or the prosecutor (383 cases) (Table 2).[43] In 18% of the cases prosecuted in San Miguel County, defendants pleaded guilty to the original charge or to a lesser offense.[44] Criminal trials resulted in the remaining 16% of cases. How these 93 trials unfolded is the focus of the remaining sections of this article.

[42] A comparison with the civil docket during roughly the same time period shows the civil caseload almost doubled (Reichard 1996:139, t. 5).

[43] Nearly all the criminal cases dismissed by the court (rather than the prosecutor) consisted of appeals of verdicts from justices of the peace. Prosecutors' dismissals were of three different types. *Nolle prosequi* (not wishing to proceed) dismissals were the most common; in these cases, the prosecutor changed his mind about pursuing the case. One commentator noted that, e.g., "He may not have adequately reviewed the matter before the original filing of the charge; new information or additional considerations may have come to light" (Abrams 1983:1276). Perhaps as many as one-third were dismissed via the notation "stricken with leave to reinstate." (In 50 prosecutions for violent crimes and in 87 property crime prosecutions, this notation appeared when the defendant had eluded capture and arrest by law enforcement officials.) The remaining cases dismissed by the prosecutor were "dismissed with costs to the defendant." These dismissals arose almost exclusively with respect to gambling charges. They suggest that gambling offenses were viewed as relatively minor. The dismissal with costs may have provided a win-win situation for both repeat defendants and prosecutors and for other court personnel, who recouped court fees via this method of dismissal. Nearly two-thirds of all gambling cases were dismissed, most with the defendants paying court costs.

[44] One-third of the defendants charged with gambling crimes pleaded guilty. Although direct evidence of plea bargaining is difficult to find, indirect evidence exists of cases in which defendants pleaded guilty to one charge and the prosecutor dropped the remaining criminal charges against them and of cases in which defendants pleaded guilty to a lesser offense. These cases suggest that prosecutors engaged in plea bargaining, especially with repeat offenders of gambling crimes. For gambling defendants (especially those charged with "permitting gaming") repeatedly indicted over the course of the seven years examined, costs and fines may have come to be viewed as part of the cost of doing business. For a discussion of the issues associated with identifying plea bargaining in a historical context, see Vogel (1999:9, n.2); for discussions of plea bargaining historically, see Vogel (1999); Friedman & Percival (1981); Alschuler (1979, 1983); Steinberg (1989); Friedman (1993).

Table 2. Prosecutions by Manner of Disposition, San Miguel County District Court, 1876–1882

Disposition	Raw Number	Percentage (Rounded) of Total ($N = 598$)
Dismissed by trial court	16	3
Dismissed by prosecutor	383	64
Guilty plea	106	18
Trial	93	16

II. Criminal Defendants: The Under-representation of Mexicans and the Over-representation of European-Americans

Here I explore the racial background of criminal defendants and present two related, though independently salient, findings. First, Mexicans were under-represented among those persons charged with crimes in the District Court. Second, European-Americans were over-represented among those prosecuted. To understand the significance of these claims, it is necessary to explore the basis for declaring "over-" or "under-representation." In the general population, Mexicans were 89% and European-Americans were 10% of the county's residents. However, comparing criminal defendants to the general population is a dubious practice, given that the overwhelming tendency is that those arrested for crimes are adult males (Courtwright 1996:2, 9).[45] Among adult males in San Miguel County, Mexicans comprised 79% and European-Americans 20%, according to my estimates.

If there was no relationship between race and the likelihood of being charged with a crime, one would expect to see comparable numbers of Mexican and European-American defendants. However, when I then calculated the percentages of criminal defendants by race for the universe of nearly 600 cases prosecuted during the 1876–1882 period (Table 3), Mexicans were substantially under-represented and European-Americans were substantially over-represented as criminal defendants in the three largest crime categories (violent crimes, property crimes, and gambling crimes). Mexicans ranged from a high of 60% of property crime defendants to a low of 25% of gambling defendants, compared to being 79% of the population of adult males. European-Americans ranged from a low of 40% of property crime defendants to a high of 75% of gambling defendants, compared to being 20% of the population of adult males.

In addition to suggesting that race is an important correlating variable, these findings confound the expectation (based on existing secondary literature described in the Introduction) that

[45] In the population of San Miguel County criminal cases, women were less than 1% of those prosecuted. For a comparison, see Friedman & Percival (1981:108).

Table 3. Criminal Defendants by Crime Category and Race, San Miguel County District Court, 1876–1882

Crime Category	Percentage (rounded) of Crimes Prosecuted	Percentage of European-American Defendants	Percentage of Mexican Defendants
Gambling Offenses	40	75	25
Property Crimes	20	40	60
Violent Crimes	16	50	50

members of the racially subordinate group would be over-represented among criminal defendants and that members of the dominant racial group would be under-represented. One would have predicted the reverse, given existing historical evidence about the experiences of Blacks and other nonwhite racial groups (including Mexicans).

Evidence beyond these findings, moreover, suggests that European-American defendants may have fared worse than Mexican defendants in at least some important respects. For instance, impressionistic evidence drawn from the more serious charges filed (i.e., property and violent crimes) shows that European-Americans were less likely to post bail upon their initial arrest, meaning that they were jailed while trial or other resolution of their cases was pending.[46] Additionally, European-American defendants charged with serious crimes who were tried by juries were less likely than Mexicans to be acquitted. Excluding the 80% of guilty pleas to less-serious crimes,[47] European-Americans were three times as likely as Mexicans to plead guilty to a violence or property offense, even though they were just as likely to be charged with such crimes.[48] Admittedly, this fact alone does not necessarily indicate that European-Americans fared worse than Mexicans in the criminal justice system; they may have pleaded guilty because they had better lawyers and/or because they received better deals from prosecutors than comparably situated Mexicans. Alternatively, it certainly is plausible that they pleaded guilty because they feared discrimination at the hands of

[46] This evidence may be borne out by an 1881 newspaper report. It claimed that the residents of the San Miguel County Jail at the time were as follows: "twenty-three of the jail birds are American and four Mexican" (*Las Vegas Daily Gazette*, 3 August 1881). I was not able to confirm this hypothesis by comparing, on a case-by-case basis, the Court Clerk's bail entries with the case files. (These documents may have once existed but may have been lost more frequently in cases involving European-American defendants). Additionally, the hypothesis is consistent with the prediction that European-Americans would have been less likely to have established community ties, and therefore the ability to post bail, than Mexican defendants, a situation discussed later.

[47] As I noted previously, fully 70% of these pleas were for gambling offenses. Only three of 93 criminal trials involved gambling charges, all three against European-American defendants.

[48] Again, the relatively small numbers suggest caution: there were 21 guilty pleas to violence or property crimes, with 16 European-American and 5 Mexican defendants.

majority-Mexican juries, regardless of their actual guilt or innocence.

If outcomes in capital cases are an indication, these defendants may have made the right choice. Although both European-Americans and Mexicans were just as likely to be prosecuted for violent crimes, European-Americans were much more likely to face first degree murder charges, which carried the mandatory punishment of hanging upon conviction. In the cases I studied, ten European-Americans were charged with first degree murder, compared to five Mexicans.[49] Although none of the Mexicans so charged were convicted of first degree murder, seven of the ten European-Americans were convicted and sentenced to die for their crimes.[50] One may wonder whether the race of the victims in these cases sheds any light on majority-Mexican juries' decisions, but prejudice against European-American victims or in favor of Mexican victims is not readily apparent. Of the 7 European-American defendants sentenced to die for murder, 5 killed other European-Americans and 2 killed Mexicans. Two European-Americans indicted for killing Mexican victims were acquitted. All 5 of the Mexicans charged with first degree murder killed other Mexicans, and all 5 were convicted of third, fourth, or fifth degree murder, rather than first degree murder.[51]

These data show that, among those prosecuted for crimes, Mexicans were under-represented relative to their population percentage of adult males, and European-Americans were over-represented among those prosecuted. Moreover, European-American defendants, on average, may well have fared worse than Mexican defendants.

These findings are surprising, given that Mexicans were the colonized, racially subordinate group relative to European-Americans, who were the racially dominant colonizers in the Territory. There are two explanations for these paradoxical findings. First,

[49] Two of the seven European-Americans sentenced to die received gubernatorial pardons rather than execution [Territory v. Louis Hommel (criminal case file no. 820); Territory v. John J. Webb (criminal case file no. 1029)]. Hommel was a newspaper editor of some means, though, and Webb, not affluent himself, had several well-heeled friends who posted funds for his release on bail; both men unsuccessfully appealed their convictions to the Territorial Supreme Court prior to seeking pardons from the governor.

[50] One Chinese defendant who was accused of murdering a Chinese victim also was convicted of first degree murder and sentenced to die (*Territory v. Yee Shun*, criminal case file no. 1307).

[51] The New Mexico homicide statute identified five degrees of murder, as follows: (1) first degree murder (premeditated killing), punished by death; (2) second degree murder of two kinds (killing while committing a felony, punished by 7 to 14 years imprisonment; killing with an extremely reckless state of mind, punished by life imprisonment); (3) third degree murder (assisting suicide, killing of an unborn child, etc.), 3 to 10 years imprisonment; (4) fourth degree murder (killing in the heat of passion, killing while committing a misdemeanor, etc.), punished by 1 to 7 years imprisonment; (5) fifth degree murder ("every other killing" that is not justifiable or excusable), punished by a fine of up to $1,000, up to 10 years imprisonment, or some combination of fine and prison (Chap. LI § 26, LVII [Offenses Against Lives and Persons], Gen. Laws of N.M., 257–60 [1880]).

these criminal prosecution rates very likely underestimate the number of Mexicans who committed crimes, since Mexicans' law-breaking probably was adjudicated in several less formal, more local, forums. Thus, it is not surprising that Mexicans appear less frequently as District Court defendants than their percentage of the population would suggest. Second, European-Americans' over-representation among criminal defendants may have more to do with their criminal propensity (discussed later) than with, for example, bias against them from Mexican law enforcement officials or jurors. The social and demographic characteristics of European-American men in San Miguel County made them more likely both to commit and to be charged with committing crimes.

Mexicans' Community-based Dispute Resolution

If 19th-century prosecutor and politico Thomas B. Catron is to be believed, Mexican law enforcement officials may have vigorously pursued crime committed by European-Americans out of genuine moral indignation. In 1881, in a conversation at the Hot Springs resort outside Las Vegas (apparently within earshot of a reporter), Catron told a visiting easterner that "Mexicans are not only the most law-abiding people in the Territory, but in the world. My experience in the criminal practice has taught me this and I have no doubt but that it will be sustained by reliable statistics" (*Daily Optic* [Las Vegas] 15 August 1881).[52] However, the statistics do not confirm this supposition: Mexicans were accused of committing plenty of murders, assaults, and thefts in San Miguel County, although these numbers were far below those one might have expected, given that Mexicans were nearly 90% of the county's population.

Were Mexicans, as Catron suggested, incredibly law-abiding? Or were many of their transgressions handled somewhere other than the District Court? The circumstantial evidence supports the latter hypothesis. Mexicans very likely took grievances and disputes that, under other circumstances, might have been prosecuted as crimes in the District Court to informal venues.[53] These alternative social control venues would have been the more likely sites to resolve intraracial disputes involving residents of rural Mexican villages.[54] They may have been waning in influence during precisely this era, however.

[52] Stratton similarly reports that 19th-century newspapermen "believed that the Spanish-American population was little inclined to violence and outlawry"(1969:245).

[53] Other researchers have noted the problems of drawing conclusions from county court data alone (Gaskins 1981:309, noting the importance of Justice of the Peace Courts).

[54] Few written records exist to establish with specificity the role played by these other institutions, but some evidence suggests their importance for policing Mexicans' behavior during this time. Newspapers of the era are of little use because coverage of

To appreciate the crucial role played by less formal social control forums, we should return briefly to the county's spatial demography in 1870. San Miguel County residents lived in one of more than 90 villages (each designated as a census precinct) (Ninth Census of the U.S., 205 Table III (1870) (Territory of New Mexico)). Only nine communities had more than 500 residents, and 17 had fewer than 100 residents; Las Vegas was the only town with more than 1,000 residents. Although the district court records do not permit systematic determination of residence of defendants or crime victims, residents of Las Vegas and the other eight communities of more than 500 persons appeared more frequently in the court records than did residents of the majority of smaller villages. The county's relatively small European-American population (3.5 percent in 1870, and 10 percent in 1880) was geographically concentrated in Las Vegas and the other eight most populous communities. When we consider social control forums other than the district court, then, we are essentially exploring the means of dispute resolution in Mexican villages, some of them relatively distant from the district court headquartered in Las Vegas.

In small, cohesive communities, victims and offenders alike may have a great deal invested in seeking conciliatory resolutions that facilitate the continuation of long-standing relationships between individuals and among extended families.[55] Such an approach, moreover, would have been consistent with the general aims of more formal, legal resolution of disputes in the Spanish-Mexican legal culture (Langum 1987:30–31; Cutter 1995:82–83; Reichard 1996). The most effective form of punishment may well have included public shaming, achieved through local gossip circles (González 1999). Ramon Gutiérrez's (1991) important analysis of the Spanish colonial period in New Mexico stresses the centrality of honor as a cultural value. One of the key features of honor was that it was dispensed by others; therefore, the informal processes of community shaming and gossip would have been effective means of redressing some types of transgressions (Gutierrez 1991:177).

In other instances, villagers may have chosen to take concerns to communally recognized leaders, such as the *mayordomo*

crimes is virtually absent before 1875, and after that time they focused on the District Court (Stratton 1969:177). While he hypothesizes that this is because editors, as a group, were not concerned with lawlessness, I would suggest that a better explanation is that European-American editors were not concerned with Mexican on Mexican crime. When the population of European-Americans reaches sizable numbers and begins to appear in the district court, newspaper editors wrote extensively about crime. In any event, newspapers before or after 1875 shed little light on the local, informal resolution of crimes committed by Mexicans.

[55] These goals frequently are present whenever parties have an interest in continuing the relationship, e.g., among business associates. See Macaulay (1963:55, describing Wisconsin corporate sales agreements); Ross (1980:240–41, 275–76, describing insurance adjusters); Ellickson (1991, describing California ranchers' settlement of disputes).

of the *acequia* or to the leader of the local *Penitente* chapter.[56] The mayordomos may have been asked to resolve disputes or perceived injuries linked to water or other natural resources; and the Penitente members may have been asked to mediate grievances (such as intrafamily matters) that in other circumstances would have been taken to a parish priest.

Additionally, Catholic clergy also undoubtedly played a role in punishing antisocial behavior. In Mexican communities large enough to support active, ongoing parishes, priests were among the most important leaders in the community.[57] Priests facilitated dispute settlement among their parishioners and functioned as the gatekeepers to the Catholic ecclesiastical courts.[58] Mexicans brought a wide array of disputes to the church courts, including many that might have been adjudicated by the district courts as either civil or criminal cases. Women, either directly or via their fathers or other male relatives, initiated many cases alleging abuse or neglect by their husbands and sought redress for sexual assault.[59] In her important study of how the early nineteenth century women of Santa Fe used the local church and the local *alcalde* courts, Deena González (1999) found that it was not uncommon for parties to pursue the same claim simultaneously in both church courts and alcalde courts. For Mexican women and men of northern New Mexico, it appears that the local alcalde courts emerged as an important forum for settling disputes of all kinds, very likely including those that otherwise might have made their way to the District Court as criminal cases.

After the American occupation, justices of the peace had jurisdiction over criminal cases, such as assault and battery with words and larceny of property valued at $50 or less. In addition, when it came to more serious crimes, such as rape or murder, the local justice of the peace routinely functioned to control access

[56] *Acequia* refers both to "the actual irrigation channel and to the association of members organized around it." The *mayordomo* is the elected manager of the irrigation ditch (Crawford 1988: xi, xii). The *Penitentes* "are men of Hispanic descent who belong to a lay religious society of the Roman Catholic Church" that is headquartered in Santa Fe, New Mexico (Weigle 1976:xi). These were two of the key local organizations in many well-established northern New Mexico communities, and they continue to be important today in many communities.

[57] It is not known how many Catholic priests served in San Miguel County. Wright (1998) reports that a priest was permanently appointed to the San Miguel parish in 1812, and he would likely have been the only priest among the communities that later became San Miguel County. No information about the late 19th century was reported.

[58] In theory, local priests submitted cases to the bishop or diocesan authorities; New Mexico's isolation, however, produced a situation in which local priests often constituted the whole of church adjudication. According to Gonzalez (1999), who reviewed a random sample of ecclesiastical cases from Santa Fe in the period 1810–1840, litigants often sought redress simultaneously in church and civil arenas.

[59] I use this broad term to include all cases in which women alleged inappropriate sexual encounters, including rape and offenses that we would consider today less serious such as promising marriage to obtain consensual sex (see Gutiérrez 1991:211, documenting a 1725 case).

to the District Court, hearing initial complaints, initiating official investigation of crimes, or signing arrest warrants. Aside from statutorily granted jurisdiction, in the insular Mexican villages of San Miguel County, the local justice of the peace probably resolved many more disputes that otherwise might have mushroomed into District Court criminal cases.

Legal historian David Reichard found that the two most commonly litigated criminal cases in the justice of the peace courts were assault and battery with words and theft of animals.[60] Although he did not note the trend with regard to these crimes specifically, Reichard found that justices of the peace often sought to resolve complaints amicably in order to preserve the relationship between parties (pp. 159–60). For this reason, parties usually elected to have their case tried by the justice himself, but they also had the right to a jury trial. The Kearny Code, and later the Territorial legislature, gave litigants the right to appeal verdicts from Justice of the Peace and Probate Courts to the District Court. The standard of review was *de novo*, meaning that the District Court judge could try the matter anew, as if it had not been litigated in the lower courts.[61]

Appeals to the District Court provide an additional window onto criminal litigation in Justice of the Peace Courts.[62] Among nearly 600 cases, at least 25 defendants appealed their convictions by justices of the peace to the District Court.[63] In contrast to the general pool of defendants, Mexicans outnumbered European-Americans three to one among defendants appealing convictions from justices of the peace.[64] It was not always possible to determine the originating precinct, but of those that can be identified, most of the appeals came from one of three Las Vegas precincts. Only a handful of appeals came from more rural pre-

[60] Reichard (1996:157, n.6) reviewed the record books of four different justices of the peace in Las Vegas (1879–80, 1905–06) and the village of Los Alamos (1858–59, 1865–67). He concluded that there were significant differences between the more rural Los Alamos and more urban Las Vegas justice of the peace jurisdictions. The validity of this claim, however, must be questioned, given his inability to compare the two jurisdictions during the same time periods. This illustrates the limitations of using justice of the peace record books; the scarcity of extent records makes it impossible to adequately control for important factors such as change in personnel, locale, and time.

[61] See chap. XXI, § 34, Rev. N.M. Stat. 130 (Probate Court Appeals [1865]); chap. XXII, § 81, Rev. N.M. Stat. 162 (Justice of the Peace Appeals [1865]).

[62] These cases, of course, are not a random sample of criminal cases adjudicated by justices of the peace in San Miguel County. It is impossible to know how these cases differ from those typically adjudicated in these humble courts, which generally met at the justice's home.

[63] A precise count has been hampered by the loss of the District Court Clerk's Record Books for the March 1880, August 1880, and March 1881 terms.

[64] Given the small numbers of appeals from justice of the peace courts, one should be cautious in drawing conclusions from these data. However, given the 89% majority Mexican population, the data might indicate that Mexican defendants in the justice of the peace courts, as compared to European-Americans, were more likely to be satisfied with their treatment in those courts (or felt more constrained not to protest the results there).

cincts such as Los Alamos, Anton Chico and Tecolote, and the vast majority of the thirty or so precincts never registered an appeal from a justice of the peace verdict.

On the one hand, this may call into question my earlier claim that justices of the peace were a favored site for dispute resolution in the more rural, isolated parts of San Miguel County. Alternatively, it may reflect the relatively high cost of appealing from the more distant precincts. A third possibility is that losers in the justice of the peace courts attempted to make the best of their fates, weighted as they still were with community censure. While there is too little evidence to say which of these interpretations is the most accurate, the small number of appeals suggests that Mexicans actively engaged *both* local Justices of the Peace and the County District Court as forums for resolving their grievances. These two venues were intricately linked during the Territorial period, rather than being separate spheres of state-sanctioned social control.[65]

In the cases I reviewed, three of the defendants' appeals, first tried before justice of the peace juries, went on to be tried before juries in the District Court. In two, Mexican lawyer Jose D. Sena represented Mexican defendants Faustin Lucero and Pablo Armijo, who allegedly had assaulted Mexican victims (Territory v. Lucero, case file no. 1220, [1881]; Territory v. Armijo, case file no. 1221 [1881]).[66] The third appeal that went to trial involved a claim by Lorenzo Arnuelas that Robert Thornton had verbally threatened him and pistol-whipped him (*Territory v. Thornton*,

[65] A third litigation forum introduced by the American colonizers was the County Probate Court. Probate judges (often known during this period by their closest Spanish-Mexican legal system counterpart, *el prefecto*) were locally elected and thus were heir to Mexican community legitimacy (at least among voting males). In San Miguel County during the territorial period probate judges were usually Mexicans. New Mexico Probate Courts had jurisdiction over a wide range of matters, well beyond serving as the forum for the disposition of property of the deceased and adjudication of wills. Among the 600 criminal cases disposed by the District Court between 1876 and 1882, none were appeals originating from the San Miguel County Probate Court. Legislation passed in 1860 and 1864 gave probate judges jurisdiction over debts and replevin actions of $500 or less, disobedient minors, vagrants (defined to include prostitutes), and criminal matters concurrent with justices of the peace (assault and battery with words, minor larceny). (Probate Courts, ch. XXI Rev. N.M. Stat. 120–34 (1864).) While we know even less about the nature of minor criminal matters heard in this court than we know about those heard before justices of the peace, it seems probable that some persons may have preferred this forum to the District Court (or, for that matter, their local justice of the peace). Among the 600 criminal cases disposed by the District Court between 1876 and 1882, none were appeals originating from the San Miguel County Probate Court.

[66] Although the files are extremely thin (as was typical with cases appealed from justices of the peace)—making it difficult to know anything more about the circumstances surrounding these fights among men—Sena actively defended his clients. Lucero was convicted and was fined $25 (the same verdict the jury had reached under Justice of the Peace Pablo Ulibarri), but not before Sena had tried to select a fair jury and put the defendant on the stand to testify. In the Armijo case, Sena peremptorily challenged five American jurors before seating an all-Mexican jury; the jury found Armijo guilty, but perhaps expressed some ambivalence when they fined him only $10.

case file no. 1041 [1881]).[67] All three cases suggest that cases initially litigated in Justice of the Peace Courts sometimes involved male honor and carried high emotional stakes—high enough to post bonds and hire lawyers that may well have cost more than the $25 fine that each of these defendants received. Whereas the three appeals that were tried a second time in the district court involved male honor challenged with physical confrontation, a disproportionate number of appeals from Justice of the Peace Courts involved female honor and shame. Whereas Mexican women were 1% of criminal defendants overall, they were 25% of the known defendants who appealed their convictions in Justice of the Peace Courts.[68] In all but one instance, these defendants sought to reverse their convictions (by Justices of the Peace or juries in those courts) for assault and battery with words against other Mexican women.[69] For example, in 1876 Paublita Sanches complained before Justice of the Peace Jose Ygnacio Esquibel, in Las Vegas, that Viviana Griego had insulted her. Although a jury agreed with Sanches, Griego hired the territory's leading attorney, Thomas B. Catron, and appealed to the district court. Under *de novo* review, Judge Waldo was free to disregard the jury's verdict in the justice of the peace court; he did so and dismissed the case.[70]

I have discussed informal forums (community gossip; acequia and penitente organizations; parish priests), as well as forums

[67] Arnuelas went immediately to Las Vegas Justice of the Peace Antonio Jose Campos, who promptly summoned Thornton, and then fined him $25 for the incident. Arthur Morrison, who at the time was justice of the peace in the other Las Vegas precinct, which included New Town, paid the $150 bail required for Thornton (whom he employed) to appeal to the District Court. In the District Court trial, Thornton admitted that he threatened Arnuelas, but claimed that he had done so at Morrison's direction, as reprisal for Arnuela's assault of Morrison. A jury of 10 Mexicans and 2 European-Americans, all of whom likely would have known Morrison, if not the defendant, acquitted Thornton. Morrison was married to a native of New Mexico, and his ties to the Mexican community were old and strong.

[68] Only one European-American woman was a criminal defendant in this period—Mollie Deering, who was indicted, along with her boyfriend William Truelove, for assault with intent to kill Joseph Morely (Territory v. Truelove & Deering, criminal case file no. 1213 [1881]). Among crimes with victims, I estimate that women were 10% of all crime victims.

[69] See Territory v. Salazar, criminal case file no. 830 [1876]; Territory v. Griego, criminal case file no. 833 [1876]; Territory v. Maestas, criminal case file no. 841 [1876]; Territory v. Gallegos, criminal case file no. 883 [1877]; Territory v. Jaramillo et al., criminal case file no. 1355 [1882]. The remaining case also involved honor, but the complainant, Teodocio Lucero, likely was the defendant's, Perfilia Martinez, former lover, as indicated by his expressed concern for "a minor, Casimiro Lucero," whom the 1880 Census listed as Lucero's three-year-old son. According to census records, both Lucero and Martinez were married to other persons, but this case suggests that they had an adulterous relationship (Territory v. Martinez, criminal case file no. 1354 [1882]).

[70] Judge Waldo and the other presiding judges showed relative willingness to dismiss verdicts from the justice of the peace courts; of the 598 cases disposed, judges dismissed only 16 total, but eight of these were cases appealed from justice of the peace courts. Given the nature of these cases, involving highly gendered evaluations of honor and reputation and, in some cases, the involvement of juries, the judges' tendency illustrates their social distance from Mexican litigants and jurors.

less formal than the District Court (ecclesiastical and justice of the peace courts). As important as I believe these community-based venues were for handling Mexican villagers' transgressions, other evidence persuades me that their existence does not fully explain Mexicans' underrepresentation among criminal defendants prosecuted in the District Court.

First, it is unlikely that very serious crimes—such as forcible rape, homicide, and theft of valuable property—were processed in these less-formal venues. Even though Mexicans composed 50% and 60% of the defendants for violent crimes and property crimes, respectively, they still were significantly under-represented as 89% of the county's population in 1880.

Other trends suggest that the District Court may have been gaining on the more traditional local forums during this period of rapid social and economic transformation. For one thing, community institutions, such as the acequia associations, increasingly were embedded in larger political conflicts during this era, making it impossible to consider these venues in isolation from the District Court (Reichard 1996:177–204). (The Penitente Brotherhoods also were involved in political matters [Weigle 1976].)

Another factor was the deliberate attempt by the Territorial Supreme Court and Territorial legislature to curb the power and autonomy of justices of the peace and probate judges. As early as the 1860s, the legislature enacted laws limiting the jurisdiction of the justice of the peace and allowing for de novo appeal to the District Court. The Supreme Court issued numerous rulings around this time that further constrained the power of local justices of the peace and, to a lesser extent, probate judges (see Reichard 1996).

Finally, the docket of the District Court itself reveals that its sphere of influence may have been increasing, to the detriment of the local dispute resolution forums. As much is suggested by the presence of two categories of criminal cases that seem to be quintessential candidates for community-based, informal resolution: (1) disputes involving access to natural resources and (2) traditionally "private" offenses, including family violence and sexual crimes. (These cases are summarized in table form, see Table 4).

European-Americans' Criminal Propensity

Michael Kelliher played his last poker game on 2 March 1880. In the wee hours of that morning, a bullet from John J. Webb's pistol instantly killed him (Territory v. Webb, criminal case file no. 1029 [1880]). Kelliher had been playing poker, drinking whiskey, and generally carousing with his friend William Brinkley for several hours before the killing. Their final bar stop

Table 4. District Court Cases Involving Mexican Defendants that Appear Well-Suited for Resolution by a Justice of the Peace Court or Some Other Local Venue, San Miguel County District Court, 1876–1882

Case Number and Name	Charge	Nature of Case
844, Rudolph et al.	obstructing a public road	natural resources dispute (land)
851, Chavez	assault	natural resources dispute (water)
951, Atencio	destruction of a fence	natural resources dispute (land)
1067, Tafoya, et al.	assault	natural resources dispute (water)
1068, Baca	assault	natural resources dispute (water)
1196, Ortega	wife beating	spousal violence
1021, Abreu	assault with intent to kill	spousal violence
779, 780, Gonzales	two assault counts	spousal violence, family violence
1206, Gallegos & Sanchez	attempted murder	spousal violence
906, Dimas	rape	sexual assault/incest
919, Martin	rape	sexual assault
997, Padilla	rape	sexual assault/incest
1275, Sanchez	rape	sexual assault
1333, 1309–1311, Gonzales	rape	sexual assault

in New Town was Goodlett's Saloon, where Webb worked as a bartender.[71] Kelliher and Brinkley were freighters—wagon transporters of wholesale goods to merchants—who had arrived in New Mexico only days before.[72]

Sheriff Desiderio Romero immediately arrested and jailed Webb. Because of the timing of the crime at the outset of the court's March term, within two weeks of the killing Webb was indicted, tried, and convicted of first degree murder. Although a jury of seven Mexicans and five European-Americans sentenced him to death by hanging and the Territorial Supreme Court rejected his appeal, Webb won a commutation from Governor Lew

[71] In the 1880 Census, 33-year-old Webb listed his occupation as "police officer," despite the fact that at the time of the census he was in jail for killing Kelliher.

[72] Either Kelliher had been handsomely paid for his delivery or he was an extremely successful poker player, since he died with more than $1,000 in cash in his pocket. A member of the coroner's inquest later fled with the cash and eventually was indicted for theft but never was arrested. One newspaper reporter's theory for the killing suggested that Webb and Neil planned to rob the victim, and that the killing occurred as part of the plot. Nothing in the trial records suggests that the prosecutor subscribed to this theory. Bar owner, Robert Goodlet, also was arrested and charged with assaulting Brinkley. Goodlett moved successfully for a change of venue (to Mora County). As was not uncommon for transferred cases, I was not able to track the file to the new county; therefore, the outcome of the case remains a mystery (Territory v. Goodlett, criminal case file no. 581).

Wallace and served only a few years in prison (*Las Vegas Morning Gazette*, 8 March 1881).

Webb's trial for killing Kelliher vividly illustrates the social conditions in New Town circa 1880. The town's European-American population had nearly quadrupled with the coming of the railroad. Six months earlier, Chief Justice L. Bradford Prince had charged the San Miguel County grand jury to be vigilant in prosecuting "a crowd of rough characters, reckless of life and regardless of law" (*Weekly New Mexican* [Santa Fe], 23 August 1879).

A Las Vegas newspaper editor went so far as to demand that a new trial be granted to Webb, blaming Webb's conviction on public hysteria: "It now seems that vengeance is to be wreaked upon the head of Webb for all the crimes and misdemeanors perpetrated in East Las Vegas" (*Daily Optic*, 11 March 1880; see also 10 March 1880). In contrast, a Santa Fe newspaper commented extensively on the closing arguments in the Webb case and noted that "the great number of spectators all felt that such a complete case had been made against the defendant that it would be exceedingly difficult, if not utterly impossible, to overthrow it" (*Weekly New Mexican*, 22 March 1880).

Social tensions had developed within the European-American community between old-timers and newcomers.[73] Old-timers were European-Americans who had immigrated to New Mexico before 1870. They were 3.5% of the San Miguel County population. Many had come to New Mexico with the intention of settling permanently, which probably shaped their attitudes toward Mexicans and toward cultural assimilation generally. Their numbers in any one village were too small to form a viable expatriate community. Some of the old-timers came to establish profitable businesses, often as merchants, which motivated them to acculturate quickly, learning to speak Spanish fluently, settling in Mexican villages, and sometimes forming sexual unions with Mexican or Indian women.[74]

[73] In his study of European and American immigrants to Mexican California, legal historian David Langum distinguished between "older residents" who immigrated before 1841 and the "new arrivals" who came after that time. He concludes that "few Anglo-Americans became more thoroughly assimilated into a foreign culture than these male expatriates," whom he described as becoming Mexican citizens, marrying Mexican women, becoming Catholic (if they were not already), and speaking Spanish fluently (Langum 1987:21) *Cf.* González (1999:39-78) (arguing that the distinction tends to be over-emphasized). Virtually none of the European-American newcomer defendants appear in the census records of 1880, testifying to the transient nature of this population. In contrast, many of the old-timers appeared in either the 1870 or 1880 census and regularly served as jurors. It is probable that some newcomers were indigent and free counsel was provided for them this reason.

[74] I have noted Arthur Morrison's and Milner's marriages to Mexican women who were natives of New Mexico. Both spoke Spanish fluently, as well (many of Morrison's justice of the peace records that made their way to the District Court were kept in Spanish); in both families, the children had Spanish given names. González (1985, 1999) reports that, in 1850, 239 European-American men were married to Mexican women, but she notes astutely that this amounted to only 2% of Mexican women who had intermarried. She argues persuasively that historians have tended to romanticize and overestimate

After 1870, a different breed of European-American was attracted to New Mexico. Many more men came as part of the military campaigns known as the Indian Wars (and many of them as Civil War veterans), and some of these men stayed after they completed their military service (Duran 1985:119). The lure of the economic exploitability of New Mexico's natural resources brought those seeking their fortunes in farming, mining, ranching, and business. Fundamentally, they were of a very different class position than men like Catron, who had training in a profession and/or some capital or goods (in Catron's case, two wagonloads of flour to sell [Westphall 1973]) with which to begin a business.

Some newcomers were drawn to the region as a way station between the Midwest and California. Others came to make their fortunes in the increasingly publicized mining sector. Still others, especially those from Texas and Oklahoma, came as laborers for cattle ranchers. With the first rail service to New Mexico Territory in 1879, the newcomers' passage was considerably easier and more affordable. One historian has noted that travel into New Mexico via railway changed the psychology of immigrating for European-Americans; travel by train made moving to New Mexico much less of a change of life and much easier to second-guess—if one came on the train, one could return on the train if things did not go as planned (Nieto-Phillips 1997:134, 137).

More so than the old-timers, the newcomers lived in communities segregated from the settled Mexican villages. Unlike Mexican natives or new Mexican or European-American residents who settled in the established Mexican villages, the European-American newcomers did not have access to locally based, informal venues for dispute resolution. Because they were transplants to the community, often intending to stay only briefly, and bereft of the kinds of social ties that promote informal social control, these men were targets for the criminal justice system.

Even more than these demographic and social characteristics, however, the newcomers for additional reasons were marked as "the rough characters" (according to Chief Justice Prince), the unwelcome criminal element. The old-timers viewed the newcomers as prone to deviance and crime and as appropriate targets for aggressive law enforcement and prosecution (Duran 1985, esp. p. 119). There is some evidence that early 1880s newcomers to Las Vegas fit that description.

Examination of the trial against Webb, who had killed the poker-player Kelliher, illustrates well the tensions within the European-American community. Both newspapers and court mo-

the importance of interracial marriage. Nonetheless, some number of European-American men, especially among those who migrated to New Mexico Territory before 1870, married or formed less-formal household relationships with the native Mexican and Indian women of New Mexico. (See also Nieto-Phillips 1997:134.)

tions noted the packed courtroom and crowds outside the courthouse, indicating intense community interest (*Daily Optic* [Las Vegas], 10 March 1880; *Weekly New Mexican* [Santa Fe], 22 March 1880). All 14 witnesses were European-Americans, and this may have been the first criminal trial in which New Town was utterly divided over the outcome.

Webb drew support from two factions that espoused law and order platforms, albeit of different sorts. One faction sided with him because he had been a law enforcement officer; he had been appointed a local "peace officer" in the past (there were no officially appointed police officers as late as 1881), and his defense asserted that he had killed Kelliher in an effort to keep the peace in the saloon. Webb also was known to have been at the head of several recent lynching parties formed by European-American residents when they felt the law had not responded quickly enough to alleged wrongdoers.[75] We can reconcile Webb's seemingly contradictory roles, as peace officer and lynch-mob leader, only if we understand the division between the old-timers and the newcomers, who had come to New Town primarily with the railroad-spawned growth of the late 1870s. In documents appealing his conviction, Webb waxed indignant about the jury that accepted the testimony of Kelliher's friend, whom he called "a stranger to this community." The irony, of course, is that Webb himself was a relative newcomer to New Mexico. Mexicans native to the region very likely viewed him as a stranger, yet the influx of newcomers in the late 1870s allowed him to claim the status of a relatively rooted resident.

Three characteristics of the European-American newcomers (in whose ranks I count both Webb and Kelliher, although Webb was relatively more established in the community) correlated with certain types of antisocial behavior that frequently was criminalized. First, they were economic migrants, and, as such, many did not come to settle permanently, but only to sample the wages and living and move on. Second, many newcomers were young men, and this age group commits most crimes in almost all societies. Third, most European-Americans who came to Las Vegas during the railroad boom came alone—they were unmar-

[75] Lynching occurred regularly in New Mexico during this period, but it is unclear whether it occurred at rates higher than was typical for the size of the population and the era, during which lynchings were a regular feature of American life. Moreover, lynchings in New Mexico were not exclusively used by European-Americans against Mexicans. Duran (1985) identifies a few racially charged lynchings in Colfax and Lincoln counties in which European-American mobs tortured and hanged Mexicans, but Tórrez based on a region-wide survey, has concluded that, in New Mexico during the territorial period, most lynchings were committed by European-American mobs against European-American victims. In San Miguel County, he reports nine lynchings during the study period, all with European-American victims. No persons were indicted for these murders in the District Court. Further research must be conducted to explore the links between extralegal executions and the criminal justice system, but references to the threat of lynching in change of venue motions and in newspapers suggests that this would be a fruitful inquiry.

ried and socially unattached; so, they lacked even the most basic social networks in their new community.[76] These factors combined to foster a propensity to engage in behaviors that easily drifted from the zone of male socializing to violence to illegal behavior.

Three types of crime prominent in these court records are especially associated with the single, young males who came to Las Vegas as economic migrants. In some cases, these young men were offenders, and at other times they were crime victims, but in both respects they contributed to the overall level of crime and violence in San Miguel County, and especially in New Town. During the period studied, gambling became the hallmark vice crime—and a reason for jailing (and earning fines from) undesirable characters. Gambling could easily lead to violence because of the combustible combination of alcohol, male pride, and easy access to pistols. For instance, in 1876 Louis Hommel was indicted for playing cards, carrying arms, and assault with intent to kill Theodore Wagner, with all three offenses occurring at Wagner's East Las Vegas hotel and saloon (Territory v. Hommel, criminal case file nos. 697, 698, 700).

The most frequent type of violent crime prosecuted was some version of assault (either aggravated assault or assault with intent to murder, kill, or maim), which often arose from drinking and fighting with friends or associates. In these cases, "youthful irresponsibility and intoxication combined with the need to demonstrate courage to produce a violent confrontation . . . involving alcohol, gambling, or some other vice in which socially marginal men suddenly turned on one another with deadly weapons in response to an insult, curse, jostle, or dispute over a small sum of money" (Courtwright 1996:92).

A third category of crime was especially associated with European-American newcomers: crime for economic gain. Train, stage, and bank robberies come to mind when one thinks of this type of offense and the famous outlaws of the Wild West (Inciardi et al. 1977). Even though these kinds of crimes were not nearly as prevalent as suggested by American folklore, they did appear occasionally on the District Court docket.[77]

Thus European-American newcomers fit a social and demographic profile that made them more likely to be arrested and

[76] Courtwright identifies high male-to-female gender ratios as a strong predictor of violence and criminal behavior, noting that "the Wild West of fact and legend was the bachelor West, the domain of the miner and cowboy and gambler. It was not the West of the banker and merchant and family farmer, men with wives and children and something to lose" (Courtwright 1966:65).

[77] For instance, "Billy the Kid" was a defendant in three cases reviewed in this study; both cases were dismissed because he was never arrested (Territory v. William Bonny, alias The Kid, case file nos. 1005, 1185, 1200). In another case, an associate of Billy the Kid's, David Rudabaugh, was a defendant (Territory v. Rudabaugh, case file no. 583). The quintessential outlaw crime of train robbery appeared only once among 93 trials examined here (Territory v. Stokes & Mullen, case file no. 408).

prosecuted for crimes: They were economic migrants who were largely young, single males with only weak networks of social ties and support. Essentially, they lived without the usual sources of informal social control, such as family, community, or church. Other historians of crime in the West have noted the association between these factors and high rates of violence. Richard White has summarized the literature by stating that frontier violence was the domain of "young, single men, and these young men were often drunk" (White 1991:329; see also Monkkonen 1991, noting that "the frontier was populated by young single males, the single demographic group most likely to offend criminal laws"; McGrath 1984; Lingenfelter 1974).

However, no study has traced such "frontier violence" directly to crimes prosecuted in the formal criminal justice system, as seems to be the case with European-American newcomers in San Miguel County.[78] Surely this occurred because, in contrast to the settings identified in the literature, newcomers came into a region long-settled by Mexicans, who had long-standing, institutionalized mechanisms for checking antisocial behavior. Furthermore, even some three decades into the American colonization of the region, these informal social control forums may account for both the underrepresentation of Mexicans and the over-representation of European-American criminal defendants (whose racial status made them poor candidates for the informal social control venues).

III. Racial Power-Sharing in the Criminal Justice System

Grand and Petit Jurors

In 1881 Vidal Rivera, a "farm laborer" (1870 Census), was tried for stealing 15 head of cattle from Desiderio Aguilar, a small-scale rancher. Two witnesses testified for the prosecution: the victim, Aguilar, and a Mr. Tapia, who testified that he bought the allegedly stolen cows from Rivera. Although Rivera was represented by two court-appointed lawyers (Jose D. Sena and Thomas Conway), the defendant did not testify, and no other defense witnesses were called. According to a local newspaper, the jury took less than 30 minutes to convict Rivera and to fix his punishment at two years imprisonment in the Nebraska State Penitentiary (*Las Vegas Morning Gazette*, 10 March 1881).[79]

[78] Courtwright looked at docket records in selected western towns, but it does not appear that he has examined closely criminal case files or trial records. He concludes that in some towns "cattle-town justice" evolved, whereby law enforcement officers sought to control, segregate, and profit from "cowboy vice sprees," rather than to discourage them. He notes that many such towns depended on revenue from cowboys and other transient male laborers (Courtwright 1966:98).

[79] It was the jury's prerogative to assess punishment upon a guilty verdict (Revised New Mexico Statutes, chap. LII, §14 [1865]), but it was up to the trial judge to decide

None of the facts reported thus far make this case noteworthy: Rivera's sentence was not atypical, and the trial and jury deliberations were not unusually short. Instead, the case is significant because it was the first criminal case in San Miguel County to be tried by a jury composed of more European-Americans than Mexicans (Territory v. Rivera, criminal case file no. 1090); and, during the seven years examined for this study, Rivera was the only one of 93 criminal defendants tried by a majority European-American jury.

Indeed, at least one-third of the criminal trials were tried by *exclusively* Mexican juries (32 of 91 jury trials).[80] Another 30 cases were tried before majority-Mexican juries with some European-American representation (including nine trials with one European-American juror, ten trials with two European-American jurors, five trials with three European-American jurors, four trials with four European-American jurors, and two trials with five European-American jurors).[81] Overall, Mexicans outnumbered European-Americans four to one among the more than 400 men who served as grand or petit jurors in the San Miguel County District Court between 1876 and 1882.[82] The proportion of Mexicans among known petit and grand jurors (80% and 86%, respectively) roughly corresponds to their percentage in the electorate (e.g., adult male citizens).

Mexicans' numerical dominance of juries, then, is not surprising given their enfranchisement as citizens. Nevertheless, Mexicans' presence on petit and grand juries *is* surprising, given their status as members of a racially subordinated group. The presence of substantial numbers of jurors who were racial minorities is unprecedented in American history.[83] Moreover, when the fact of majority-Mexican juries is combined with the fact that such juries frequently decided the fate of European-American

where time would be served, if imprisonment were part of the penalty. New Mexico Territory did not have a penitentiary until 1884.

[80] Information exists about the jury's racial composition for 63 of the 91 (69%) jury trials between 1876 and 1882 in San Miguel County. This information was derived from a variety of sources, including the jury list (if the criminal case file contained one), notes from the judge's docket book, the clerk's record book, and, in a few instances, from newspaper articles.

[81] New Mexico petit juries in the District Court consisted of 12 men who had to reach a unanimous verdict (Revised New Mexico Statutes, chap. LXXI, §10 [1865]).

[82] I created a list of all grand and petit jurors called to service in court sessions in the years 1876–1882. Available records varied by term of court, but the utilized sources include docket books, clerks' journals, judges' docket books, and documents in individual criminal case files. Because some sources were missing, the actual number of jurors was probably more than 400. 80% of the names on this list were Spanish surnames. Petit jurors whose names appear on this list did not necessarily serve on a jury but were summoned for the venire. For example, Manuel Baca was paid $20 for 10 days of service as a petit juror in August 1879 but was not selected for a jury.

[83] Cf. Alschuler & Deiss (1994, noting limited instances in which juries *de medietate linguae* [juries composed half of Americans and half of countrymen of the alien defendant] have been employed in the United States).

defendants, we have the beginnings of an explanation for this American anomaly. Certainly, the existence of majority-Mexican juries in the Territory was in part a response to colonial demographics: There simply were not enough European-American colonizers to make the system work; if there were to be jury trials, there would be Mexican juries. At the same time, jury service was a way of incorporating Mexicans into the American judicial system and political process more generally.

Mexicans' incorporation, which I describe here as power-sharing, had two distinct impacts. On the one hand, incorporation of the racially distinctive natives smoothed the colonial takeover, fostering legitimacy among natives for the new state. On the other hand, I found evidence that jury service gave Mexicans a measure of self-determination, group power, and perhaps even the basis for future organizing as a racially distinctive group in opposition to European-American elites. In these ways, Mexicans' jury service and other forms of participation in the criminal justice system had unintended consequences for the larger context of political struggle between colonizers and natives, European-Americans and Mexicans.

Although said derisively, a Las Vegas newspaper editor's remark about jurors' motives probably had some truth to it: "The jurors march in solemn procession to the Exchange Hotel where many of them get the best meals they have had for a year" (*Daily Optic*, 8 March 1880). In an economy in which it was increasingly difficult to survive via subsistence farming and ranching and one in which wage labor positions for Mexicans were still scarce, appointment as a grand or petit juror at compensation of $2 per day may have been downright lucrative. Thus, for the typical ten-day court session, a juror earned $20 in cash.[84] In this era, $20 could by a 250-pound sack of wool, two large calves, seven weapons (two double-barreled rifles and five pistols), or almost one month of full board (three meals a day) at the Grand View Hotel (Griego 1981:39–40; *Las Vegas Daily Gazette* 23, Aug. 1882). Who could not partake of such amenities?

Eligibility for jury service was restricted to citizens (white males over 21) who had resided in San Miguel County for at least the six months preceding the term of court in which they would be summoned. Eligible jurors had to be "owners of real estate" and "heads of families." Both the residency and head-of-family requirements probably proved a barrier to jury service for most

[84] Only the most well-off merchants appear to have sought to be excused from jury service with any regularity (presumably, they would have lost more money by being absent from their work), and even these men served regularly. Of course, the idea that citizens would desire to serve as jurors (for financial reasons or any reason) is at odds with the contemporary experience, in which as many as 60% of jurors called for service request that they be excused (Van Dyke 1983:935). Jury service today pays well below the minimum hourly wage (Van Dyke 1983:935, noting that federal jurors are paid $30 daily, or $3.75 per hour).

newcomer European-Americans, thus effectively restricting jury service to old-timer European-American and Mexican men. Most Mexican men of a certain age would not have had trouble meeting either the residency or the head-of-family requirements, since they were likely to have been long-time, stable residents of the county. However, many otherwise qualified Mexican natives and European-American newcomers may have been ineligible because of the property requirement.

Although some might view the property ownership requirement as reflecting governing elites' desire to restrict jury service to wealthy men, this effect is not so clear. First, the tax records show men who paid as little as a few dollars per year in property taxes as qualified jurors. For instance, in 1879 Jesus Maria Gallegos, who listed his occupation as "farmer" and "laborer," respectively, in the 1870 and 1880 censuses, paid $5.40 in property taxes; he was summoned as a petit juror during the same year ("Taxes Collected, 1879–1880." San Miguel County Assessor, NMSRCA).

Since it was not uncommon for Mexican families of varying classes to own at least a narrow tract of land along a waterway, used for subsistence farming, the property requirement may not have proven to be a barrier to jury service by a large segment of Mexican men. Second, an examination of the politics of jury selection (as distinct from eligibility for jury service) reveals that jury service was used as a form of political party patronage, and this function would have militated in favor of extending the opportunity beyond elite circles.

Although the statute regarding jurors specified who was eligible for jury service, it was left to judicial and county officials to summon grand and petit jurors from the thousands of eligible citizens in the county for each specific court term. The process by which this occurred reveals much about political and racial dynamics in San Miguel County.

It was the county clerk's job to update regularly the list of eligible jurors.[85] Next, the Jury Commission, appointed each term by the presiding judge of the District Court, used the clerk's list of eligible jurors to generate a list of 17 grand jurors and 24 petit jurors to serve at the impending term of court. The Jury Commission itself consisted of the presiding judge, the probate judge, and "three persons of honor and respectability" appointed by the presiding judge (Rev. N.M. Stat. 492, chap. LXVIII, § 1 [1865]). The three presiding judges were European-Americans

[85] In order to do this, the county clerk had to rely on a range of documents prepared by other government officials, including census records (to determine heads of families and age) and tax assessments (to determine property ownership), as well as his personal knowledge of the community. During the period of study in San Miguel County, most of these positions (county clerk, tax assessor, census enumerators) would have been filled by Mexicans.

during this period, and almost all the probate judges who served during this period were Mexican;[86] it appears that judges sought to replicate this racial equilibrium in their appointments of citizen Jury Commissioners. For instance, in only one of the 14 court terms did the presiding judge appoint three citizen members from the same racial group.[87] Typically, the court alternated between citizen panels consisting of two Mexicans and one European-American or panels with two European-Americans and one Mexican.

Such race-conscious appointments allowed European-Americans to achieve parity with Mexicans among jury commissioners despite being, at most, only 20% of eligible jurors. Concerted race balancing such as this may well have been typical in San Miguel County during this period, and at the Territorial level more generally (see Stratton 1969:127). For instance, the presiding judge may well have taken race into account in appointing grand jury foremen. Once again, European-Americans were exceptionally well-represented in these influential positions; they were five of the twelve known grand jury foremen during this era, despite being only 14 percent of grand jurors overall.[88]

Jury Service and Stratification within the Mexian Community

Turning now to the intraracial dynamics of jury service among Mexicans, higher status, wealthier Mexicans were more likely to serve as jurors, particularly as a *grand* juror, and working-class Mexicans appear to have served as petit jurors as a form of political party patronage. These differences are related to both social class and social status within the Mexican community. Many scholars discussing the topic of class and status have written about Mexican society in New Mexico as divided between two class segments, the upper class (*los ricos*, the rich) and the masses

[86] The one exception was Charles Blanchard, a probate judge in 1880. Blanchard was married to an old-timer who married a native New Mexican woman (who was half Mexican and half Canadian), according to the 1870 Census.

[87] The first term studied, in August 1876, had jurors selected by a Jury Commission that included three Mexican citizens. This likely reflects the still small European-American population in the county at this time (prior to the beginning of railroad construction and the economic growth spawned by it).

[88] Whereas foremen of petit juries were elected by their peers, grand jury foremen were judicially appointed. Census information shows that Mexican grand jury foremen had relatively elite class positions. Francisco Manzanares was a merchant who employed one servant, according to the 1880 census. Demetrio Perez was in his late 30s when he served as grand jury foreman and had considerable wealth, compared to other county residents, with an estimated $1,000 in real property and $800 in personal property in 1870, and five servants in his employment. He also had been clerk to the Probate Court, an Assistant United States Marshal, and a census taker in 1870. Eugenio Romero estimated his real property at $7600 and personal property at $7400. While in 1870 he described himself as a "farmer," ten years later he listed his occupation as "merchant and stock raiser," reflecting his mobility during that time period. (Unfortunately, the 1880 census did not ask for estimated real and personal property, making explicit comparison with 1870 estimates impossible.)

(*los pobres*, the poor). Little empirical evidence exists to support arguments about this, or an alternative, class or status stratification system in 19th-century New Mexico.

The ricos/pobres dichotomy may obscure more than it helps illuminate the class structure of the county in this period. San Miguel County was leading New Mexico Territory in the transition to an economy that had more features of a modern, capitalist economy, such as wage labor employment options in the railroad, agricultural, ranching, and service sectors. A second factor important in conceptualizing class inequality was the opportunity for mobility presented to Mexicans, both to those who entered business partnerships with European-American lawyers, merchants, and bankers, and to those who secured viable wage labor positions. While I do not want to overstate the possibilities for class mobility, it is important to recognize that this was a period in which regimes of stratification (both economic and status based) were in flux.

Some evidence suggests that jury service was reserved for Mexican men with economic and social connections to governing elites. This fact seems most evident with respect to service as a grand juror, for reasons that one might expect. Via their indictment role, grand jurors put the community's stamp of disapproval on particular behavior or on a particular individual, thus serving a symbolic function. At the same time, majority-Mexican grand juries functioned as the Mexican community's voice with respect to prosecutor-initiated indictments in cases that involved Mexican victims and defendants, European-American victims and defendants, or interracial crimes.

In order to assess the degree of elitism in these appointments, I have closely examined the sub-set of 258 grand jurors who served during the period. It was likely that thousands of men were eligible jurors, since some 5,000 met the citizenship requirements, but of those who served as grand jurors, only 155 men filled the 258 possible grand jury positions during the seven years studied. Twenty-two men served twice during the study period, and eight men served three or more times.[89] Compared to 130 Mexican grand jurors, 25 European-American grand jurors were somewhat more likely to repeat grand jury service during the period, suggesting that there was a smaller pool of European-American men viewed as community representatives or as politically reliable by the staunchly Republican jury commissioners.

Additionally, there is evidence of concentration of influence by family among Mexican grand and petit jurors that is entirely

[89] See Edward Ayres (1984) for a comparison of grand jurors in Georgia between 1890 and 1990. Relative to that study, San Miguel County shows a high degree of concentration of the same men repeatedly filling grand juror openings. This may well be testament to the sense of unease that gripped the county during this period of rapid economic and social change.

absent from the pattern displayed by European-Americans. For example, members of the Baca, Romero, and Ulibarri families amounted to half of the grand jurors who served more than once during the period.[90] Similarly, members of these families were 14% of all jurors (grand and petit combined). (The rate of repeat jurors was higher among petit jurors than among grand jurors, with 40% of the former serving as a petit juror more than once.)[91] These figures suggest that jury commissioners viewed the roles of grand and petit juror as important and desirable, and that the commissioners functioned as gatekeepers in the award of these appointments.

A second important division among Mexicans was political party affiliation.[92] During the period of this study, Mexicans who were members of the Republican Party dominated powerful positions such as probate judge, jury commissioner, and grand jury foreman. Although Mexicans were solidly Republican in most New Mexico counties with Mexican majorities at this time, there was a substantial Democratic contingent among Mexicans in San Miguel County. The fact that the Democratic Party had made serious inroads into the Mexican community in the county probably heightened the use of jury service as a form of party patronage. This interpretation is consistent with greater concentration of jury service (both grand and petit) among fewer eligible citizens who were members of the Republican Party, regardless of their class status.[93]

Lorenzo Labadie was San Miguel County sheriff and president of the county Republican Party in 1875. He had a tremendous, direct influence over criminal justice in five of eight district court terms between 1879 and 1882: he was a jury commissioner for two terms (August 1879, March 1880), he sat on three grand juries (August 1879, August 1881, and August 1882, when he was foreman), and he sat on six petit juries in March 1879. Trinidad Romero, of the solidly Republican Romero clan, was active in Republican Party politics at the county and territorial levels, and he no doubt used his party connections to select jurors as a commissioner in 1879 and 1881. His brother Eugenio Romero, a dele-

[90] I have judged family membership by common surname, thus actually underestimating the degree of these families' actual influence, which would have included connections to other families by marriage, other social ties, or economic ties. It is possible, however, that persons may have shared a surname but had different family origins. Given the insularity of Mexican communities, I do not think this is likely.

[91] 5% of those men who served as jurors during this period served four or more times. Two jurors, Lorenzo Labadie and Vidal Ortiz, served as jury commissioner, grand juror, or petit juror seven times between 1876 and 1882.

[92] Political parties did not emerge as important in New Mexico politics until the late 1860s. For a general discussion of pervasive political party patronage in territorial New Mexico, see Stratton (1969:82–83).

[93] In his research on one Mexican Republican leader in the 1890s, sociologist Felipe Gonzales found numerous requests from working-class men in San Miguel County to serve as jurors (personal communication with author).

gate to the Territorial Republican Convention in 1875, was summoned for grand jury service in 1876 and served as grand jury foreman in 1878.[94] Labadie and Romero were among the Republican Party leaders who controlled grand and petit jury service in San Miguel County.[95]

Much study is needed to further specify the origins and manifestations of fierce party cleavages among Mexicans in New Mexico during the Territorial period, but I believe that Republican Party leaders controlled most elected and appointed county offices at this time, and that they frequently used jury summons as a form of patronage. Both European-Americans and Mexicans certainly would have attempted to use party loyalties to fullest advantage, in combination with race, class, status, and other important characteristics.

My claim here is not so much that these men's social power or status stemmed from their jury service (although that is possible), but that Mexican men parlayed their status and position in other areas into a role that was financially profitable, and, more important, being a grand or petit juror allowed them some degree of community self-determination during a period of rapid social change. Once in the position of juror, they had a unique opportunity to come face-to-face with European-American judges and lawyers and the American criminal justice system itself. Certainly, they formed opinions about that system and likely related them to their families and local communities.

Law Enforcement Officials, Witnesses, and Interpreters

In addition to the central roles they played as grand jurors, passing on indictments, and petit jurors, deciding defendants' guilt, Mexicans were empowered in other ways in the criminal justice system. During the period of study, all of the elected sheriffs of the county were Mexican, and they were also the majority of deputy sheriffs and jailers. These men had the power to arrest, and they also executed important functions after indictment, including certifying and collecting bail and enforcing sentences. The position of County Sheriff apparently was quite lucrative (be-

[94] In 1870, Romero described himself as a "farmer" and estimated his combined property worth at $15,000, but in 1880 he described himself as a "merchant and stockraiser," and was headquartered in a new town named after him (Romeroville).

[95] Moreover, at least one prominent, successful Mexican sheep rancher, Bernardo Griego, who by all estimations would have been a shoe-in for jury service, never was summoned to serve during this period. By 1878, he was married and the father of his first child (thus, meeting the family head requirement for juror eligibility), was a landowner in the county (meeting the property ownership requirement), owned 300 sheep, and employed several laborers (Griego 1981:14, 18–19). He described himself as a Democratic Party precinct leader and was at the peak of his wealth and influence during the 1880s, yet never was summoned as a grand or petit juror. As a Democrat, Griego likely was closed out of jury service dominated by local Republican jury commissioners.

cause the sheriff collected a portion of fines assessed) and sought after.

Mexicans also dominated among courtroom law enforcement officials: Of 61 known bailiffs during the period of this study, all but two were Mexican.[96] Like jurors, bailiffs were paid wages of $2 daily, which probably made this another job with which local Republican Party leaders could reward the loyalty of Mexican villagers. About a half-dozen bailiffs were needed during each term of court, with one each assigned to assist and monitor the petit and grand juries. Moreover, positions as bailiffs were not merely desired by Mexican laborers, since several justices of the peace also served in this capacity.

Additionally, Mexican men and women frequently testified as witnesses. Outside of the occasional female defendant or female victim, this was the only institutional role that women played in the criminal justice system. Mexican women rarely testified as defendants, testified only slightly more frequently as victims, but they testified quite regularly as general witnesses for either the prosecution or defense and in either grand jury proceedings or trials.[97] Given the *de jure* and *de facto* restrictions on the testimony of racial minorities in the late 19th century, it is significant that Mexican men and women in Territorial New Mexico testified generally and that they routinely testified against European-American defendants. Like jurors and bailiffs, witnesses were paid for their crucial role in the criminal justice system ($1.50 per day, plus compensation for miles traveled from their home to the courthouse in Las Vegas.

As late as the turn of the century, most Mexican witnesses still testified in Spanish in United States courts in Territorial New Mexico. Their testimony was translated into English by an official court interpreter, appointed at the outset of each term of court. The court interpreter, and the grand jury interpreter, were central members of the team of court officials who rode circuit, along with the presiding judge, clerk, prosecutor, and defense attorneys. In addition to translating Spanish-speaking witnesses' testimony into English, the court interpreter translated the judge's and lawyers' English statements into Spanish, for the benefit of the majority-Mexican petit jurors.[98] The grand jury interpreter translated the prosecution's case into Spanish and trans-

[96] This is three-quarters of the bailiffs during the period, but there is no reason to believe that the race of the unknown bailiffs would have differed significantly from those names available in the historical record.

[97] I did not systematically track male and female witnesses, but neither the clerk's records nor the existing trial transcripts revealed testimony by any European-American women during this time period.

[98] In 1881, a Supreme Court opinion affirmed the right of jury service by monolingual Spanish speakers. (*Territory v. Romine*, 2 N.M. 114 [1881]). Two of 93 trials in this study involved three-way translation (Territory v. Hennesy [English, Spanish, Italian] and Territory v. Yee Shun [English, Spanish, Chinese]).

lated grand jury witnesses' testimony into Spanish or English, as necessary. Translators were only rarely used during grand or petit jury deliberations. Existing evidence strongly suggests that, during this time period, these deliberations were conducted in Spanish, since those European-Americans summoned for jury service generally were bilingual.[99]

In all but one of 14 terms studied, both the court and grand jury interpreters were Mexican. During most of the terms, Mexican lawyer Jose D. Sena rode circuit with the court as the court-appointed interpreter, even while he actively represented more than 20 defendants during this era. Simultaneous translation of grand jury and courtroom proceedings in Spanish and English served several crucial functions. First, translation was essential to the functioning of the system, since it was dependent on the participation of monolingual Spanish-speaking jurors and witnesses. Few Mexican jurors or other participants would have spoken English, much less been fluent enough to comprehend the more formal, technical English of the courtroom. Although it was much more common for European-American jurors to speak Spanish fluently, this was rare for judges, and there is mixed evidence about the Spanish-language capabilities of other European-American participants (defendants, lawyers, witnesses).

In addition to being evidence of the pivotal role played by Mexican jurors and witnesses, the centrality of Spanish in the courtroom was indicative of the ownership of cultural space. The appointment of an official court interpreter and the simultaneous, two-way translation between Spanish and English conveyed the message that the courtroom was an institutional/political space in which Mexicans and European-Americans shared power.[100] Moreover, in the less formal domains of the criminal justice system (such as grand and petit jury deliberation rooms), the dominant language in Territorial New Mexico was Spanish, not English.[101]

[99] In only one of 93 San Miguel County trials was there evidence that jury deliberations conducted in Spanish proved problematic due to European-Americans' language limitations. In the 1881 trial of deputy Nicolas Griego for allowing a prisoner to escape, a jury of 10 Mexicans and two European-Americans returned to court to ask to hear jury instructions a second time and to request the assistance of a translator. The judge refused the second request and the jury returned later that evening without reaching a verdict (*Daily Optic* [Las Vegas], 1 August 1881). During the next term of court, Griego was retried and acquitted by an all-Mexican jury (Territory v. Griego, criminal case file no. 1187).

[100] In his analysis of the Spanish-language press in New Mexico, Gabriel Melendez similarly has argued that the formation and maintenance of newspapers in the Spanish language, under the leadership of Mexican editors, played an important role in affirming Mexicans' cultural and political resistance to American domination (Melendez 1997:7). For discussions of the thriving Spanish-language press in New Mexico in the late 1880s and through the early 1900s, see Melendez 1997; Meyer 1996.

[101] Even *written* verdicts were returned in Spanish in most cases; this was uniformly the case with Mexican foremen and very frequently the case with European-American foremen as well.

Judges, Prosecutors, and Lawyers

Despite Mexicans' empowerment in the criminal justice system, as indicated both by the centrality of the Spanish language and the predominance of Mexicans among jurors and law enforcement officers, European-Americans dominated what were arguably the most powerful positions in the system: judges, prosecutors, and defense lawyers. The formal processes for appointing judges and prosecutors, the informal operation of the legal profession, and the extremely politicized nature of judicial and prosecutorial appointments operated together to reserve these positions for European-Americans. Effectively, there was a glass ceiling on Mexicans' participation in the legal system.

As a federal territory, New Mexico's governor, three Supreme Court justices, and a host of other officials were appointed by the President and confirmed by the Senate. (The Territorial governor appointed prosecutors.) This political structuring of judicial appointments in the Territory caused these positions to be used as rewards for political loyalty (similar to how we think of most ambassadorships today). During the 66-year period in which the President appointed Supreme Court justices to New Mexico Territory, only one Mexican was appointed, and he was appointed in the first year of the American occupation.

During the period of this study, three chief justices of the New Mexico Supreme Court served as presiding judges in the San Miguel County District Court: Henry L. Waldo (1876–1878), Lebaron Bradford Prince (1879–June 1882), and Samuel B. Axtell (August 1882–May 1885).[102] All three were European-American men who had never set foot in New Mexico Territory before their appointments and who were unable to speak even rudimentary Spanish.[103]

Three European-American attorneys general prosecuted cases in the San Miguel County District Court between 1876 and 1882: William Breeden (1876–1877, 1882), Henry L. Waldo (1878–1880), and Thomas B. Catron (1880–1881). The position of Attorney General, appointed by the governor, was an influential political post during this period. Attorneys general supplemented their salaries by continuing their law practices while serving as public prosecutors, and it appears that this position may have helped them to generate additional legal business.

Two stories of the appointment of an attorney general and a judge illustrate the fact that these positions were both extraordi-

[102] A fourth chief justice, Charles McCandless, served in New Mexico for six months, but never held court in San Miguel County.

[103] Of the three, Prince became the most fluent Spanish speaker. He apparently quickly picked up the language during his first year in New Mexico and continued to work at improving his skills. He took notes during trials that included vocabulary lists of new Spanish words; later during his judgeship, he sometimes took notes in Spanish, when witnesses testified in that language.

narily politicized and highly desired in late 19th century New Mexico. In 1878, Henry Waldo reportedly left the position of chief justice because it did not pay enough (and because it left him little time to pursue other means of earning money). He formed a partnership with then–Attorney General William Breeden and soon took on the territory's biggest client—the Atchison, Topeka and Santa Fe Railroad. Almost immediately upon Waldo's leaving the bench, Breeden resigned his position as attorney general, and Governor Axtell appointed Breeden's law partner, Waldo, to the position. In 1881, Prince resigned his position as chief justice in order to seek the Republican Party's nomination as New Mexico's non-voting congressional delegate. The President appointed Axtell to replace him as chief justice.

These judges and attorneys general, all European-American men who had come to New Mexico Territory relatively recently, were pivotal players in the infamous "Santa Fe Ring," a powerful political machine in Territorial New Mexico for several decades in the late 19th century.[104] The Ring was a clique of mostly European-American men who were among the Territory's highest officials (one historian reports that all governors were members until 1885).[105] Lawyers, especially Thomas B. Catron, were prominent in the group. Because of the absence of large corporations (other than the railroads) and financial institutions (the banks were locally owned and managed), most lawyers did not seem to view their legal practices as the main source of their livelihood. Catron epitomized the lawyer who doubled as politician, businessman and especially land speculator.[106]

Mexicans were only slightly better represented among First Judicial District defense lawyers than they were among its judges and prosecutors. Of two dozen attorneys who tried criminal cases in San Miguel County during the period, only three were Mexican, and only one, Jose D. Sena, represented more than one de-

[104] A complex discussion of the Santa Fe Ring is beyond the scope of this article, but it is an important part of the context of the administration of criminal justice, both because of the centrality of Ring members who also were trial judges and prosecutors and also because of the power it exerted over other relevant political institutions, such as the Territorial Legislature, the New Mexico Bar Association, the Territorial Republican Party, and the San Miguel County Republican Party. Whereas Mexicans were well represented in the legislature and in county offices like probate judge and county commissioner (and in the Republican Party structure at both the territorial and county levels), they were largely excluded from the Santa Fe Ring (Gonzales 2000a; Lamar 1966, Stratton 1969).

[105] The first governor to break from the Ring was Governor Edmund G. Ross, appointed by Democratic President Warren G. Harding. Members of the Ring and its newspaper (The *Santa Fe New Mexican*) nicknamed "Montezuma Ross" because of his desire to curb their influence (Westphall 1973:199).

[106] Catron initially acquired title to land as payment from Mexican clients who were unable to pay him in cash. He eventually became the largest landowner in the state, and he also had major investments in banking, mining and ranching enterprises in New Mexico (Westphall 1973).

fendant at trial.[107] All of Sena's clients who went to trial were Mexican, which may suggest that Mexican defendants preferred to work with Mexican attorneys, although they apparently had few to choose from. In his research on civil litigation in San Miguel County during the territorial period, legal historian David Reichard (1996) has similarly noted the dominance of European-Americans in the legal profession. He argues persuasively that European-Americans specifically sought to exclude Mexican lawyers, as well as Mexicans who practiced law as "advisers," in the justice of the peace courts.

IV. Criminal Trials as a Site for Conflict and Legitimacy

Jury Selection

Given the salience of race in late-19th-century Territorial New Mexico's society and the racial power-sharing regime I have described, one would expect that race-consciousness influenced litigants at each stage of the criminal trial. Only a portion of the 93 trials reviewed for this study presented stakes high enough and issues complicated enough to warrant sophisticated litigation strategies. Moreover, the parties involved were likely limited in other ways in mounting an aggressive defense (lack of financial resources, for instance). For instance, only 13 of 93 defendants moved for a change of venue (requesting that their trial be moved to another county due to prejudice on the part of likely jurors). European-American defendants were more than twice as likely as Mexican defendants to seek a transfer; the small number of these cases, however, makes it difficult to draw strong conclusions.

I estimate, in comparison, that strategizing over jury selection occurred in as many as half of the 91 jury trials that I examined. Jury selection emerges as a crucial stage in the trial process, with each side jockeying to assemble twelve men whom it feels will be receptive to its case. In late-19th-century San Miguel County, there was as much variation in this process as one would find in today's courtrooms: Some juries were assembled rapidly and without controversy; in other cases, the process of selecting and questioning jurors was drawn out and contentious.

The parties could attempt to influence the composition of the jury in two ways. First, they could ask that a juror be excused "for cause"—because he either failed to meet the statutory qualifications (i.e., not the head of a family) or because he was linked to one of the parties in such a way that suggested his prejudgment of the case. A second avenue for excusing jurors was the

[107] Sena represented 20 defendants, or more than 20% of those defendants who went to trial. (This number includes a handful of cases in which Sena worked jointly with Thomas Catron.)

use of the peremptory challenge, which allows a party to dismiss a potential juror without having to provide any justification or rationale for doing so.[108] During this era in San Miguel County, race-conscious jury selection was commonly employed by members of both racial groups and by both the defense and the prosecution.[109]

Jury selection afforded defendants the opportunity to select a jury of peers who, presumably, having something in common with the defendant, might be more willing to accept his account of the alleged crime.[110] Some Mexican defendants who wished to be tried by an all- or majority-Mexican jury used their peremptory challenges to strike the relatively small number of European-American jurors likely to be on any San Miguel County venire. Some European-American defendants who felt their chances at trial would be enhanced by a jury with more members of their own racial group used their peremptory strikes against Mexicans.[111] Defendants' desires about the racial composition cer-

[108] Generally, defendants are allowed more peremptory strikes than the prosecution; in Territorial New Mexico in 1880, the prosecution was limited to 3 peremptory challenges, while the defense could exercise from 5 to 12, depending on the seriousness of the charge: in capital cases, the defense could exercise up to 12 peremptory challenges; in cases involving crimes punishable by imprisonment, the defense was allowed 8; and in cases involving crimes punishable by fine only, the defense had 5 such challenges (Rev. N.M. Stat., chap. LVII, §18–19 [1865] [Practice in Criminal Cases]; see also Gen. Laws N.M., chap. LVII [1880]). There were no limits on the number of for-cause excusess, but each one had to be approved by the trial judge.

[109] Although on its face this does not appear to be a novel or at all surprising claim, I contend that it is an important one for several reasons. First, since my review of the literature suggests that the incorporation of members of a racial minority group in large numbers as petit jurors is virtually unique in United States history, it is important that we assess its potential impact on criminal procedure. Second, much as we might take for granted the idea that race matters in contemporary criminal trials, there is little empirical evidence on the question from historical contexts. Finally, scholarship on the history of race and the criminal jury is generally lacking (Alschuler & Deiss 1994:867, noting the absence of historical research on the American criminal jury).

[110] Of course, we cannot assume that members of the defendant's racial group would have been predisposed to empathy for the defendant; nor can we speculate on how race loyalty may have mattered in intraracial cases (those involving a defendant and victim of the same race). My claim here is that large numbers of Mexican and European-American defendants appear to have wanted to be tried by juries with as many members of their race as possible. This may have reassured them about the potential for being treated fairly, rather than necessarily functioning to alter their odds of success. In cases with facts that implicated race loyalty, one can expect that these feelings would have been heightened. For a discussion of related issues in the contemporary context, see Johnson (1993).

[111] Stronger evidence of European-American defendants' race-conscious litigation strategies during the Territorial period comes from three efforts to challenge the eligibility of Mexican jurors that all resulted in appellate opinions that affirmed the convictions. None of these cases originated in San Miguel County, so I do not discuss them in detail. See *Carter v. Territory*, 1 N.M. 317 (1859, challenging Mexican juror's status as an American citizen); *Territory v. Young et al.*, 2 N.M. 93 (1881, challenging Mexican juror's status as property owner); *Territory v. Romine*, 2 N.M. 114 (1881, challenging conviction by an all Spanish-speaking jury). Mexican defendants' agency is illustrated by the one appellate case that challenged a European-American juror's eligibility. Defendants Crescencio Lopez and Manuel Casias were charged with cattle rustling in Colfax County; the Territorial Supreme Court remanded the case because the District Court improperly allowed a petit

tainly may have been heightened in cases involving interracial defendant-victim pairs or fact patterns that implicated racial disputes or hostilities, but such desires may have existed in the run of the mill, intraracial criminal trial as well.

Beyond the tactical advantage for specific defendants, jury composition carried a larger symbolic value as well. For Mexicans, their continuing power on petit juries may well have constituted a form of self-determination in a rapidly changing society that included the influx of unprecedented numbers of European-American migrants.[112]

One of the most interesting trials in which race seems to have played a role in jury selection was the 1880 trial of John Webb for the murder of Michael Kelliher. Because all twelve of the witnesses in the Webb trial were European-American, and since the crime involved no Mexicans and occurred in New Town, there might seem little here that would cause a defense attorney to be wary of Mexican jurors. Yet, perhaps it was precisely these facts that motivated Webb's lawyers to successively strike Mexican veniremen and maximize the number of European-American jurors.[113] Moreover, some evidence suggests that Webb may have been less-than-popular in the Mexican community because of the leadership role he played in organizing lynching parties.

The defense peremptorily challenged nine jurors, all of them Mexican. The prosecution peremptorily challenged one European-American juror and no Mexicans. Two jurors were excused for-cause (one Mexican and one European-American). Only 12 jurors remained in the venire to constitute the jury after this con-

juror who was not a head of family (he boarded with coworkers, *Territory v. Lopez et al.*, 3 N.M. 156 [1884]).

[112] That said, it is also important to acknowledge that potential jurors' racial status did not appear to be an issue in every case. Cases involving European-American defendants and few challenges were not uncommon. See, e.g., Territory v. Palmer, in which the defense excused no jurors peremptorily, excused only one (Mexican) for cause, and seated a jury with one European-American (criminal case file no. 1356 [1882]). Similarly, only one potential juror was excused by either side in Territory v. Ingo (criminal case file no. 1357 [1882]). The prosecution apparently convinced the all-Mexican jury that Ingo had dressed in women's clothing to lure "drunken men into back alleys and out-of-the-way places where he could easily rob them" (*Las Vegas Daily Gazette*, 26 March 1882). Even in these cases, however, we cannot dismiss the possibility that defendants and their attorneys may have wanted to avoid the appearance of race-consciousness in jury selection before a jury that they knew would ultimately be majority-Mexican.

[113] I have reconstructed the jury selection process (including peremptory strikes and for-cause excuses) from a document labeled "jury list" that was created by the court clerk. The jury list indicates the order in which jurors were called from the venire for the specific petit jury and appointed to the jury. It also shows those jurors who were struck from the petit jury, always noting whether a potential juror was struck by the defense or the prosecution, and sometimes, but not always, noting whether the strike was peremptory or for-cause. Jury lists survive in about two-thirds of the 91 cases tried by juries. An additional source of information about jury selection for cases tried in 1879, 1880, and 1881 were notes from Chief Justice Prince's Minute Books. The significant number of cases in which data on jury selection are missing and the limitations of the existing facts suggest caution in overinterpreting these data. At the same time, I know of no other study that has attempted to map jury selection patterns historically.

tentious process. The jury ultimately included five European-Americans and seven Mexicans.[114] Even though the defense tried to increase the odds of acquittal via race-conscious jury selection, Webb was convicted of first degree murder and sentenced to death.

It appears that Mexican defendants and the lawyers who represented them were making race-based judgments about jurors at least as often as European-American defendants. Yet race was only one factor among many that prosecutors and defense attorneys assessed when assembling a jury. For example, in his trial for the rape of 11-year-old Eustacia Marin, Luciano Padilla clearly put much effort into assembling the best jury he could by moving to excuse for-cause 20 Mexican jurors (Territory v. Padilla, criminal case file no. 997 [1879]). The defense also challenged peremptorily four European-American jurors, to finally assemble an all-Mexican jury. In the end, the defense's carefulness in jury selection may have paid off. Although Padilla was convicted, he was convicted of the lesser offense of assault with intent to commit rape instead of rape.

In addition to the fact that Mexicans seemed to use race in jury selection as much as European-Americans did, the attorney who most consistently and ardently challenged jurors (on both for-cause and peremptory bases) was Mexican lawyer Jose D. Sena, who began his career in the District Court as an interpreter, riding circuit with Judge Prince across the first judicial district. Sena was one of only three Mexican lawyers who appeared in the San Miguel County District Court during this time period, and he was the only one who represented more than one criminal defendant.

Between 1879 and 1882, Sena represented 20 defendants before the District Court; all but one were Mexicans. In addition to offering his clients communication in unaccented Spanish, as someone native to the region he had a competitive advantage over the other lawyers in better knowing the Mexican communities of the First Judicial District. He frequently drew on this knowledge to make legitimate arguments for excusing Mexican jurors for-cause; he knew how individuals, families, and villages were connected, and he brought this knowledge into the courtroom no matter how minor the case.

Teofilo Abreu was a Mexican defendant who may have benefited from Sena's forceful advocacy. Abreu was a member of one of New Mexico's oldest and most respected families, who had re-

114 "The jurors were made up of Americans and Mexicans; the former being Geo. A. Dinkel, C.E. Wesche, May Hays, of this city, T.N. Hartman of San Miguel, and J.H. Taylor formerly of Taylor's Ranch. We did not obtain the name of the seven Mexican jurors." It is notable that the newspaper talked bluntly about the race of the Webb trial's jurors, thereby acknowledging the centrality of race. Equally telling, however, was the editor openly acknowledging that he had little interest in the identity of the Mexican jurors (*Las Vegas Daily Optic*, 10 March 1880).

sources sufficient to hire both Sena and former prosecutor Catron to represent him. In summer 1879, and again in winter 1880, Sena and Catron defended Abreu against the charge of assault with intent to murder his wife, Perfecta Mascarenas (Territory v. Abreu, criminal case file no. 1021). In the first trial, the defense peremptorily challenged 4 jurors, including three European-Americans. Race clearly seems to have been a factor in these strikes in that the 3 European-American jurors came up consecutively, with each challenged until a string of 7 Mexican jurors were called (2 of whom were peremptorily challenged by the prosecutor). The first jury, consisting of 11 Mexicans and one European-American, could not reach a verdict, resulting in a short-term victory for Abreu. His lawyers immediately moved for a venue change to San Miguel County.[115] In the second trial, the defense challenged 6 jurors, 5 of them European-Americans, while the prosecutor peremptorily challenged 3 Mexican jurors (without challenging any European-Americans). The second time around, the jury of 2 European-Americans and 10 Mexicans convicted Abreu and sentenced him to prison for one year.

There also is evidence that jury selection strategies reflected broader resistance to European-American domination. In 1877, Sena represented four prominent Santa Rosa men against the charge of "carrying arms": Guillermo Giddings, Lorenzo Labadie, Tranquilino Labadie, and Jose Manuel Lucero (see Territory v. Giddings; Lorenzo Labadie; Tranquilino Labadie; and Jose Manuel Lucero, criminal case file nos. 884, 874, 868, and 869, respectively, NMSRCA).[116] (Lorenzo Labadie's prominence is indicated by the fact that he served as a grand or petit juror [usually, grand] four times and once as a jury commissioner during the period of this study.) All four defendants were acquitted by all-Mexican juries.

One can read these cases as evidence of the continuing influence of elite Mexicans, even in an American criminal justice context. However, they also can be read as constituting racially based protest to some aspects of the criminal justice system. The European-American prosecutor's prerogative to pursue cases against Mexican men without going to the grand jury for an indictment—for the minor charge of carrying arms, for instance (Rev. N.M. Statutes LXI § 20 [1865])—may very well have impugned Mexican men's honor and sense of authority in their local communities.

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115 The change of venue motion itself likely was an effort to decrease the likely presence of European-Americans on the petit jury, since San Miguel County had a smaller population of European-Americans than Colfax County, the site of the first trial.

116 Although he was European-American, Giddings was an old-timer who was married to a Mexican woman, and had hispanicized his first name from "William" to "Guillermo."

Whether an activity, in a particular instance, is seen as a crime depends on the position of those assessing it. In other words, the construction of an activity as a "crime" is contextual and variable. Douglas Hay makes the point this way:

> Whether sheep stealing was legitimate or not depended on whose sheep were stolen, by whom, and what the relation of the two was known to be. It depended as well on whether many in the community felt themselves exposed to that particular form of theft, which in turn could be a reflection of the distribution of wealth or the structure of common rights. In short, agreed distinctions about the legitimacy of certain offenses, or offenses in certain circumstances, obtained in particular villages, trades, and streets of cities. (1980:73)

From this vantage point, these all-Mexican juries may have similarly been resisting the state's pursuit of Mexicans for what they viewed as the fundamental right to bear arms. These jurors may have held the right more dearly in the context of encroachments of European-Americans.[117]

Here, one might analogize to Hobsbawm's (1969) notion of prepolitical rebellion by bandits. In his study of crime in 19th-century Ohio, historian Eric Monkkonen operationalized such offenses as "crimes involv[ing] the attempts of people without access to the power structure to affect and control various aspects of their social or economic life" (1975:57). Although these four men had access to the power structure in some respects, in one sense they were more deeply embedded in the old, pre-American power structure. For them, pursuing these minor charges to trial, and for the Mexican juries who acquitted them, this may have been a way of resisting the new European-American power structure and maintaining self-determination over what they perceived as a basic right.

Effect of Judges' and Prosecutors' Race on Criminal Litigation

The three presiding judges and three prosecutors who served during this era all were European-Americans. How did this fact affect litigation? The effective exclusion of Mexicans from these positions may have led Mexican defendants, jurors, and witnesses to be distrustful of the American judicial system because its most powerful positions were reserved for European-Americans. European-American judges and prosecutors may also have revealed racial biases in favor of their own group and against Mexicans in the execution of their duties.

[117] Legal historian Lawrence Friedman invites us to consider acquittals as statements of resistance: "But when we are told that juries refused to convict, we are naturally led to wonder: Who were these jurors, really, and why did they let the defendants go? The answer is: they were members of the community, and they had their own set of norms" (1993:185).

One possible indication of Mexican defendants' distrust of European-American judges can be seen in their efforts to try to insure the largest possible numbers of Mexicans on their juries. Similarly, no Mexican defendants waived their right to a jury trial. I also looked for evidence of the effect of race on jury nullification trends: Did all-Mexican juries acquit Mexican defendants partly in response to their distrust of European-American prosecutors and judges?[118] Of course, it is impossible to prove that jury nullification occurred, but one may infer it from the acquittals in the arms carrying cases, given that evidence of guilt was clear based on eyewitness testimony of the sheriff who saw the defendant with the weapon.

Other trial evidence suggests at least the possibility of nullification and the link to race-conscious strategies on the part of Mexican defendants and jurors. Mexican defendants were acquitted at a higher rate than European-American defendants, although it certainly is possible that case differences (such as the severity of the crime, the victim's status, etc.) rather than defendants' race account for the difference. Short of acquittal, but possibly still showing a race-based animosity toward European-Americans and favoritism toward Mexicans, juries' responses to murder cases may be revealing. Although more than half of the European-American defendants tried for first degree murder were convicted and automatically sentenced to death, none of the Mexican defendants charged with first degree murder was convicted.[119]

The legal system's own regime of checks and balances may well have diminished the importance of Mexicans' exclusion from the positions of judge and prosecutor. Of course, power of the presiding judge was considerable, extending from the very power to assemble the grand jury and petit jury venire (via selection of citizen jury commissioners for each term), to the power to unilaterally rule on parties pre-trial and trial motions to the extremely important role of instructing the jury on the law governing the case, to rulings on post-verdict motions. In the context of Territorial New Mexico, the presiding judge also knew he would be one member of the three-judge appellate panel that would hear a defendant's appeal. Despite the tremendous powers, the presiding judge was in some respects effectively checked

[118] Jury nullification occurs in one of the following three scenarios: (1) the jury does not believe the defendant's behavior should be criminalized in general, and so acquits; (2) the jury wants to send a message to a representative of the state involved in the case, and so acquits; (3) the jury feels great compassion for the defendant, and so acquits (Dressler 1995:5). See also Barkan (1985, discussing jury nullification in the Vietnam draft cases).

[119] Robert Tórrez argues that Mexicans responded negatively to the 1847 trials of defendants who participated in the anti-American resistance movement by later refusing to apply the death penalty to Mexican defendants. Studying the entire Territorial period, Tórrez (1988) concludes that Mexican jurors were reluctant to convict when the punishment automatically would be execution.

by the petit jury. Stephen Yeazell has described the jury as playing "a complicated role, simultaneously functional and symbolic, checking judicial power and strengthening judicial institutions, reshaping law as it gives a remarkable efficacy to the legal regime" (1990:88; See also Friedman 1993:245 [arguing that power balance between judge and jury shifted in the late 19th century]). In jury trials, the citizens' jury retained the power to evaluate the evidence to decide the facts, decide the defendant's guilt or innocence, and, if the former, determine punishment from within statutory guidelines. Mexicans may well have resented the reservation of judgeships for European-Americans, but Mexicans also retained considerable countervailing power through their numerical domination of juries during this period.

Similarly, even though prosecutors were uniformly European-American in Territorial New Mexico, they did not retain the authority to indict without the approval of majority-Mexican grand juries. Prosecutors were allowed to file informations for a small number of petty crimes, such as gambling and weapons violations, but otherwise had to seek grand jury approval for indictments. There is nothing in the record to suggest that majority-Mexican grand jurors did not take this role seriously, or that the grand jury functioned as a rubber stamp for the prosecutor, comparable to the view of contemporary grand juries. San Miguel County grand juries did not frequently reject prosecutors' bills for indictments, but they did so occasionally (in 14 cases), suggesting that they were aware of their power to do so (cf. Israel 1983:811 [noting frequency of grand jury rejections of prosecutors' requests for indictment in colonial America]). Thus majority-Mexican grand juries in San Miguel County were positioned to function as a check on the European-American prosecutors.

This system of checks and balances, fundamental to Anglo-American criminal procedure, also affected the second potential area of impact: judges' and prosecutors' potential opportunities for either race-conscious or racist (anti-Mexican) execution of their roles. In San Miguel County, the large number of Mexicans present in the courtroom as court officials (interpreters and bailiffs), jurors, and witnesses, likely would have constrained outright racism by judges and prosecutors.

Although evidence to confirm the claim would be hard to come by, one can imagine that European-American judges and prosecutors would have been sensitive to the appearance of racial prejudice and would have sought to minimize it, whether out of the desire to be genuinely inclusive of Mexicans or the fear that Mexican grand or petit jurors might make reprisals in the form of politically motivated refusals to indict or convict.

Another source of evidence of the anti-Mexican bias of European-American judges might be cases in which they potentially usurped the power of juries, which we know were all- or majority-

Mexican in the vast majority of criminal cases tried by juries. The record reveals a handful of cases that raise the possibility of judicial behavior that was motivated by anti-Mexican racism. More than anything, it reveals that racial conflict in Territorial New Mexico was inextricably intertwined with political conflict of a more general nature and its link to battles over land, capital, and other material interests. New Mexico's Supreme Court justices—who often parlayed their judicial appointments into political appointments (or vice versa)—participated directly in these political battles.

For instance, Chief Justice Henry L. Waldo, who served as the presiding judge in San Miguel County for four terms included in this study (1876–1878) and also as New Mexico Attorney General, publicly supported vigilante action against alleged cattlerustlers (during the "Colfax County Wars" of the 1870s) when he was a member of the Territorial Supreme Court. Later, he overturned the conviction of a European-American defendant who had been convicted (by a majority-Mexican jury) of fifth degree murder for his role as a leader of a lynching party that tortured and killed a Mexican man in Colfax County. During the trial, Samuel B. Axtell joined predominantly European-American Colfax to predominantly Mexican and Indian Taos County in an apparent effort to ensure European-American representation on the jury (Duran 1985; see also Poldervaart [1999(1948)] and Stratton 1969:177–78).

Chief Justice Samuel B. Axtell (Territorial Governor from 1874 to 1878) served as presiding judge in San Miguel County for one term during the study period (in August 1882). Axtell had a reputation as a stout anti-Catholic that many contemporary observers took as a more general anti-Mexican stand (Poldervaart (1999[1948]:121–22). With respect to the law, he frequently took positions that were unsupported by legal precedent or practice.[120] For instance, as governor, he pardoned, *before* conviction, a well-heeled European-American defendant who had accidentally killed a young Mexican woman at a Santa Fe ball.[121]

In an even stronger sign of his willingness to buck convention, while presiding over a civil trial in San Miguel County in the late 1880s, an amateur judicial biographer describes the following scene:

[120] Poldervaart draws this conclusion about Axtell's judicial behavior: "Axtell . . . determined that justice should be done in his court, regardless of legal technicalities. Whenever he had the opportunity he endeavored to acquaint himself with the details of the case before it came to trial, and then, during the proceeding, he would devote all his efforts to bring out the merits of the case, regardless of legal procedure as it is ordinarily practiced, in order that right might prevail" (1999 [1948]:125).

[121] Axtell was criticized in local newspapers for the action, but it was not otherwise disturbed (Poldervaart 1999 [1948]:101–03).

> [T]he defendant was a poor man whose farm was in jeopardy and who was not represented by an attorney. Seeing that the case would surely go against him unless he did obtain legal counsel, Judge Axtell descended from the bench and began cross-examining, opening with the stinging remark that "it takes thirteen men to steal a poor boy's farm in New Mexico." On conclusion of the evidence, he instructed the jury to find a verdict in behalf of the defendant. When the foreman announced a disagreement, the judge discharged the jury, announced a verdict in behalf of the defendant, and warned the sheriff never again to permit a single one of the discharged veniremen to serve on a jury in San Miguel [C]ounty. (Poldervaart 1948:126)

In this case, the facts are insufficient to assert racial bias in terms of the outcome of the particular case (since we do not know the races of the parties, facts that might allow us to make some inferences), but they show that Axtell was willing to publicly admonish predominantly Mexican juries.

In another San Miguel County criminal case that occurred outside the scope of this study (after 1882), Axtell increased a Mexican defendant's sentence from 40 to 60 years imprisonment when the defendant, asked by Axtell whether he had anything to say, responded that his conviction was unjust (presumably, Axtell would have liked him to have shown remorse) (Poldervaart:128). None of these stories relate to criminal cases presided over by Axtell during the August 1882 San Miguel County term of court, but they nonetheless suggest that it was possible for a judge to use his position inappropriately to reflect his personal political agendas, including agendas that may have been contemporaneously interpreted as anti-Mexican.

Chief Justice Prince as Racial Pragmatist

If Axtell had a polar opposite on the bench and in the governor's seat, it would have been Chief Justice L. Bradford Prince, who presided over the San Miguel County District Court for 7 of the 14 terms studied (January 1879–June 1882). Like Axtell, Prince too went from the judiciary to the executive branch; he was appointed governor of New Mexico Territory in 1889. In contrast to Axtell, Prince was a stickler for legal procedure and the rule of law,[122] and he championed the rights of New Mexico's Mexican citizens. He regularly defended Mexicans in New Mexico against disparagement in the eastern press and in Congress. Prince also cultivated the role of amateur historian, and in so doing sought especially to uncover what he described as New

[122] There is evidence of this from a number of sources, including Prince's many Territorial Supreme Court opinions. During his first year in New Mexico, in five days he single-handedly compiled a revised edition of the Territory's statutes, which had not been undertaken since 1865 (Kerson 1997:37).

Mexico's "Spanish heritage."[123] I describe Prince as a racial pragmatist because he justified a benefit to the racially subordinate group (Mexicans) on the basis of its instrumental utility to European-American elites, who sought to make New Mexico Territory look as much as possible like a state (including having a functioning criminal justice system) in order to gain statehood. Prince knew these goals were unattainable without the incorporation of Mexican elites and middle-status Mexicans. He advocated a regime of racial power-sharing.

Racial power-sharing did not go uncontested by European-Americans, and Chief Justice Prince frequently defended the regime. One pivotal test of its resilience came in 1881, when European-American defendant Richard Romine had been convicted by an all-Mexican jury of the first degree murder (with a hammer) of Patrick Rafferty, also European-American. The murder occurred in 1877 in Grant County, a county formed in 1868 after silver was discovered there, and the New Mexico county with the greatest proportion of European-American residents. Romine successfully moved the court to transfer the case from Grant County, which was 57% European-American in 1880, to Dona Ana County, where European-Americans were 5% of the population.[124]

He was represented on appeal by Catron's law firm, probably the most powerful group of lawyers in the state, who argued that the verdict should be set aside because "the jurors who sat in the trial of this case were Mexicans, and none of them understood the English language, in which the proceedings at the trial were had" (Territory v. Romine, 3 N.M. 114 [1881], quoting appellant's brief). In its appeal, the defense drew heavily on an 1874 case in which the Texas Supreme Court ruled that trial by jurors who did not speak English violated the law and, therefore, reversed the defendant's conviction for murdering a Mexican man (*Lyles v. Texas*, 41 Tex. 172). Attorney General William Breeden's response to the Texas precedent was, "The jury was a lawful one; whether they understood English or not is of no consequence."

One is left to wonder why the Territory's prosecutor did not provide a rationale for this assertion, but perhaps one can infer his reasoning from his concomitant argument that the court should reject the claim on technical grounds: Because Romine himself had been the source of the change of venue to a county with an overwhelming Mexican majority. The court might have disposed of the case in this manner, but it chose not to and in-

[123] Prince's publications on New Mexico include the following: *History of New Mexico* (1883); *Spanish Mission Churches of New Mexico* (1915); *The Struggle for Statehood, 1850–1910* (year unknown); and *Stone Lions of Cochiti* (year unknown).

[124] Grant County's European-American population is based on an estimate from the 1880 census tabulations; Dona Ana County's polulation is based on my recount of data from the original 1880 enumeration.

stead issued an opinion, authored by Prince, affirming the conviction and (from my perspective) extolling the virtues of the racial power-sharing regime.

Prince's opinion provided a practical reason for including Mexicans as jurors: There were not enough European-Americans (or Mexicans who spoke English) in the Territory:

> We cannot shut our eyes to the peculiar circumstances this territory, taken from the Republic of Mexico in 1846, and nearly all of whose inhabitants in the years first succeeding the annexation, understood no English. Even at the present time the preponderance of Spanish speaking citizens is very large; and in certain counties the English speaking citizens possessing the qualifications of jurors, can be counted by tens instead of hundreds. In at least three of the courts of the territory [county courts] at the time of this trial below [1878], it may be said without hesitation, that a sufficient number of English speaking jurors could not have been obtained to try any important case which had attracted public attention. (*Romine*, p. 123)

Prince continued, offering a second rationale for the presence of Spanish-speaking jurors:

> . . . [I]t would have been manifestly unjust to the great majority of the people of the territory, had such a requirement as language been made. Either they would have had to be tried in a language which they did not understand, or else a double system would necessarily have been established, including an English speaking jury for English defendants, and a Spanish speaking jury for Spanish defendants; and if the theory had been carried to its logical conclusion, an English speaking judge to address the English jury, and a Spanish speaking one to instruct the Spanish jury. (*Romine*, p. 123)

Prince is certainly correct that such a dual system would have been unjust, but it also would have been impolitic. It would have been consistent with the establishment of New Mexico as a colony of the United States, but not as a territory that was to become a state. The latter mattered a great deal to the European-American elites and probably to Mexican elites as well. It was important that New Mexico look as much as possible like its neighbors to the east (Oklahoma, Texas), and the system of racial power-sharing helped by allowing a criminal justice system to function. Romine's challenge to racial power-sharing was not the last such challenge, but it offered the opportunity to articulate the goals of such a system at an important political juncture.[125]

Given Prince's support for racial power-sharing, we would expect to find sparse evidence of his usurpation of Mexican juries,

[125] In 1902 and 1905, in the midst of congressional debate about statehood for New Mexico, there were serious challenges to the rights of Spanish-speaking citizens to continue to serve as jurors (see Beveridge Hearings [1902]). In 1905, legislation was introduced in Congress which would have restricted jury service to citizens who could speak English fluently.

and this is the case. Five cases where such an interpretation is possible yielded relatively little evidence of a racist or race-conscious motive. In one case, Prince publicly castigated an all-Mexican jury's verdict as too lenient and lamented his inability to alter the verdict. Anacleto Chaves admitted stabbing Ramon Gallegos in a brawl, and Gallegos later died from the wound defense (Territory v. Chaves, criminal case file no. 1219). Five eyewitnesses (four Mexican and one European-American) testified at the trial, with some suggesting that the defendant was the clear aggressor and others making out a case of self-defense. The jury apparently was persuaded by the defense account of the fight, bringing in a verdict of fifth degree murder to be punished with a $100 fine.[126]

But in a lambasting that was published in both of Las Vegas's English-language daily newspapers, Justice Prince expressed outrage at the jury for its verdict.

> The jury for reasons which the court does not know, chose to fix the penalty at a fine of *one hundred dollars*, and there is no power in the court to change it. But I cannot let this occasion pass without saying that I consider that the imposition of this fine, under the circumstances, is an outrage upon public sentiment and a disgrace to the county of San Miguel. (*Daily Optic*, 17 August 1881, italics in original; see also *Daily Gazette*, 18 August 1881)

Coupled with frequent criticism of majority-Mexican juries by the European-American press, Prince's condemnation of this particular jury may have been interpreted as anti-Mexican. During the District Court's August 1881 term in San Miguel County, when Prince castigated the jury's verdict in the Chaves case, the Las Vegas Daily Gazette was emboldened enough to join him in criticizing it, saying "A few juries should be hung in effigy as an indication of public sentiment on recent verdicts (August 19, 1881)."[127] On the other hand, it is by no means clear that Prince

[126] A $100 fine was substantially less than the sentence in the one other murder case that resulted in conviction for the lowest degree of murder, and it was even considerably less than the punishment in the several convictions for fourth degree murder. Yet it still was within the statutory limits for the crime, and it was well within the range of typical sentences for the comparable, though less serious, crime of assault with intent to commit murder (one year imprisonment). For instance, in the latter category (five convictions by juries in the study), Marino Leyba was fined $80 for assaulting with intent to murder Lincoln County Sheriff Pat Garrett, and Guadalupe Campos was fined $50 for the same offense against Jose Chacon (so was Nerio Montoya for the same crime against an unknown victim); only Teofilo Abreu was imprisoned for the same offense against his wife (respectively, Territory v. Leyba, 1246; Territory v. Campos, 985; Territory v. Abreu, 1021).

[127] It is very unlikely that the newspaper editor was talking about a different case, although the Chaves case was not mentioned by name. There were seven trials during that term, two resulting in acquittals and four in guilty verdicts. Both acquittals involved Mexican defendants accused of stealing animals from Mexican victims, and both were tried by all-Mexican juries (Territory v. Gonzales, 1016; Territory v. Serrano and Lucero, 1197). Judging by the surviving files and Prince's Judge's Minute Book, neither case generated a lengthy trial, nor much interest on the public's part, and Prince himself took scarcely any notes during the trials. Two of the trials that resulted in convictions involved

had any racial animus in making the criticism, since one may interpret his criticism as advocating on behalf of the Mexican victim.[128]

In four additional trials that I scrutinized, Judge Prince may have played a role in efforts to divert a verdict by a majority-Mexican jury. In two cases, both involving Mexican defendants, Prince allowed defendants to change their pleas to guilty, after a jury had been selected but before any evidence had been heard (Territory v. Campos, criminal case file no. 1007; Territory v. Acosta, criminal case file no. 1058). In these cases, it is possible that Judge Prince played little role and that the prosecution and defense reached an agreement on their own. Moreover, since both cases involve Mexican defendants, if Prince did play a role, it was solicitous of Mexican defendants, not animated against them.

In the only case involving an interracial defendant-victim pair that I consider here, Judge Prince oversaw a last-minute change in plea from not guilty to guilty. Martin Kozalowski, who had pleaded not guilty to the murder of Jose Dolores Archuleta, was allowed to reenter his plea as guilty to fourth degree murder; Kozalowski then was sentenced to two years imprisonment (Territory v. Kozalowski, criminal case file no. 925). Kozalowski was born in Poland and had immigrated to New Mexico before 1879.

It had taken the full morning of 13 March 1879 to seat the jury, after a round of aggressive lawyering: 8 peremptory challenges by the defense (6 Mexicans, 2 European-Americans), 5 peremptory challenges by the prosecution (3 European-Americans, 2 Mexicans), 7 jurors excused "for cause" by Justice Prince (4 Mexicans, 3 European-Americans), and 3 members of the venire found by Justice Prince to be unqualified to serve (2 European-Americans, 1 Mexican).[129] In the end, an all-Mexican jury was assembled.

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defendants' appeals of minor (as judged by the resultant fines of $10 and $25) offenses tried initially in Justice of the Peace Courts, so they were unlikely to have generated the interest or ire of the local press (Territory v. Lucero, 1220; Territory v. Armijo, 1221). If the press was complaining about juries' leniency, they could not have been talking about the one first degree murder conviction against Kelly or the conviction against Pando for cattle stealing, for which he was punished with two years imprisonment (Territory v. Kelly, criminal case file no. 1153; Territory v. Pando, criminal case file no. 1215).

[128] The same cannot be said for the English-language press. They did not shy away from harshly criticizing public officials or private citizens, including jurors. See criticisms of specific juries in Santa Fe County discussed in the *Santa Fe New Mexican*, 26 February 26 and 12 March 1877 (quoted in Poldervaart 1999 [1948]:100–01). And, although they sometimes did not specifically mention race, they often wrote openly about their views of race relations in New Mexico. Recall newspaperman Louis Hommel, whom we earlier met as the defendant in the murder of deputy sheriff Lino Gonzales. Writing as the editor of *The Chronicle* in 1885, he called his competitor, the *Daily Optic*, "the Mexican-hating sheet of Las Vegas." He pointed out that editors of the *Daily Optic* had gone so far as to endorse the campaign to disqualify Mexican jurors, believing that "no Mexican should be selected as a jury man who cannot speak the English language."

[129] Judge's Minute Book, March 1879. L. Bradford Prince Collection, NMSRCA. This was the only case in which I encountered the notation of "not qualified," in Prince's hand, next to the names of potential jurors. Because the presiding judge participated in

The prosecution called three witnesses—two eyewitnesses who testified that Kozalowski had shot Archuleta while they all were at Kozalowski's house and a medical doctor who testified that the gunshot wound had caused the death of the victim. Both eyewitnesses testified that Kozalowski was drunk. Justice Prince interrupted the second witness to ask, "At the time of the conversation, was the defendant conscious?" to which the witness gave an equivocal response.[130] Nonetheless, at the end of the prosecution's case, Justice Prince allowed the defense to reenter a plea of guilty to fourth degree murder. In this case, Prince's intervention in the examination of a witness is, at the least, highly unorthodox (especially for Prince). Additionally, this case generated some racial animosity. The chain of events may well have appeared to the audience of predominantly Mexican grand and petit jurors and witnesses to have been evidence of Prince's loyalties to European-American defendants.

A final case that I discuss involves both a European-American defendant and victim. John Matthews went to trial for the 1879 murder of John Rhein (Territory v. Matthews, criminal case file no. 929). Matthews had migrated to New Mexico from Texas and resided in New Town for less than six months when he claimed to have accidentally shot his friend and companion Rhein. The two men had been saloon-hopping on the day of the killing, and several witnesses testified that they aggressively entered Dolan's saloon. Specifically, Rhein entered ahead of Matthews, cocking his gun several times as he walked into the saloon, causing most of those present to duck under tables. Matthews claimed that he had inadvertently shot the pistol, with no intention of hitting his friend. After deliberating for two and one half hours, the jury returned a verdict of guilty of murder in the second degree.

Matthews immediately moved for a new trial, and Justice Prince granted the motion on the spot.[131] The next day, Matthews pleaded guilty to murder in the fourth degree and Prince sentenced him to one and one half years in prison. While this analysis leads to questioning Prince's motives, it is difficult to conclude that race was the motivating factor. Still, his action is puzzling, especially given his own charges to grand juries to "send a message" to European-American newcomers in East Las

selecting the members of the venire, as an automatic member of the Jury Commission, this seems strange; however, in this case, Justice Prince was presiding in San Miguel County for the first time, so the jurors' list would have been assembled without his input. The record does not contain information about why these jurors were disqualified, but at least one, B. Ilfeld, was very likely not the head of a household (as the minor son of prominent merchant Charles Ilfeld).

[130] Tiburcio Valencia testified in Spanish and stated that he was unable to understand conversations at the crime scene between the defendant and his minor son, which were in English. Saul Dean testified in English.

[131] Chief Justice Prince noted the jury's verdict with an exclamation mark. Prince did not routinely use such punctuation in his notes (Prince, Judge's Minute Book, March 1879. L. Bradford Prince Collection, NMSRCA).

Vegas. Perhaps the jury wanted to use the case to send a message, precisely this message. Perhaps the jury did not quite believe Matthews' story that the gun had gone off accidentally.[132]

I offer one final vignette about Prince that, at a minimum, raises questions about the ability of European-American judges to consciously mask their true preferences in legal rulings. In the case I previously spoke of, in which Webb killed Kelliher, Webb was convicted by a majority-Mexican jury of first degree murder and was sentenced to hang. Chief Justice Prince served as both the trial judge in the case and the author of the Territorial Supreme Court opinion affirming Webb's conviction. As the author of the appellate decision, Prince wrote, "There is nothing in the record that casts the slightest suspicion on the integrity of the jury; and the fact that they found the defendant guilty of murder in the first degree, and that the court below refused a new trial, leaves us to infer that in the minds of the judge [Judge Prince, that is]and jury trying the case there was no reasonable doubt of the prisoner's guilt" (*Territory v. Webb*, 3 N.M. 147 [1881]).

In essence, this is a strong statement about the integrity of Mexican jurors, one that resonates with Prince's racial pragmatism. After presiding over Webb's conviction and affirming his appeal, however, Prince lobbied the governor to grant clemency to Webb so that he would not be executed. In this case, Judge Prince did not feel compelled to use his power as a trial judge or as an appellate judge to grant leniency toward a European-American defendant; he knew, however, that ultimate power to do so rested in the hands of a European-American governor, whom he could attempt to influence.[133] In other words, part of the exercise of power by exclusively European-American trial and appellate judges in New Mexico Territory was in orchestrating the appearance of neutrality and fairness, even when one had sentiments about the case and perhaps especially when one knew European-Americans had ultimate control (as the governor did in this case).

[132] A Santa Fe newspaper, reporting on the district court's San Miguel County term, stated matter-of-factly that Matthews' killing of Rhein was "an accidental shooting," but this is a factual conclusion about which people might have disagreed. Unlike most newspaper accounts of violent crimes or trials, the article did not mention the victim's name, instead referring to him as follows: "the person shot was [Matthews'] friend and companion." The newspaper mentioned but did not opine about either the ultimate plea and sentence or Justice Prince's unusual action in the case. Santa Fe N.M., 22 March 1879.

[133] According to the newspaper report, in Governor Wallace's commutation of Webb, he reasoned that "the prisoner was an officer charged with duties similar to those of a policeman, always difficult of performance but in Las Vegas at the time of the killing both difficult and dangerous," he cited the split decision on appeal (one justice voting to reverse the conviction), and he also noted "a strong request for clemency by the Chief Justice who tried the case [Prince]" *Las Vegas Morning Gazette*, 8 March 1881, quoting from the commutation dated 5 March 1881.

Conclusion

I have argued that a tenuous regime of racial power-sharing characterized the administration of criminal justice in San Miguel County between 1876 and 1882. Power to determine who would be arrested, indicted, and punished for crimes was distributed along racial lines, between Mexicans and European-Americans. The system existed within a larger context of white supremacy that justified the American colonization of the Southwest and the racial subjugation of its native Mexican and Indian populations. Mexicans, at least partly because they distinguished themselves from Pueblo and other Indians in the region, had significant power in the criminal justice system via their positions as more than 80% of grand and petit jurors, their roles as law enforcement officers and witnesses, and because of the centrality of the Spanish language in court proceedings.

The regime of racial power-sharing reflects the intensity of racially based social conflict in Territorial New Mexico. Despite an ideology of white supremacy that designated Mexicans as racially inferior, in New Mexico Territory they used their population dominance, their racial background (as mestizos, persons of mixed Indian-Spanish ancestry), and the framework of rights negotiated by the Mexican nation-state at the end of its war with the United States to negotiate power-sharing in the criminal justice system and in other realms.

Evidence of the centrality of racial divisions persisted when I explored the potential impact of power-sharing on criminal litigation and procedure. Race-conscious jury selection, and especially its prevalence as a tactic by the one Mexican defense lawyer who appeared with frequency in the San Miguel County District Court, suggests that race remained salient to the historical actors even after they had negotiated a kind of cease-fire over overt racial conflict in the political realm (via the power-sharing regime). Moreover, the absence of direct evidence of racially biased behavior by European-American judges or prosecutors may be testimony to the powerful role that majority-Mexican grand and petit juries played in, quite literally, watching and checking the power of European-American prosecutors and judges. Majority-Mexican juries as well probably functioned as a check on European-American judges, in at least some cases. In other instances, judges may have recognized the value of maintaining the appearance of race-neutrality.

The power-sharing regime was tenuous for two reasons. First, and perhaps most important, the regime did not provide for equal administration of the criminal justice system between Mexicans and European-Americans. Instead, Mexicans were essentially excluded from the most powerful positions in the system—those of judge, prosecutor, and defense lawyer. European-Ameri-

cans, as elected and appointed officials outside New Mexico, controlled judicial and prosecutorial appointments, which they reserved for members of their own racial group during this era. Thus, the administration of criminal justice in San Miguel County was characterized by *joint* power-sharing between Mexicans and European-Americans, but not by *equal* power-sharing.

A second respect in which the racial power-sharing regime was tenuous had to do with the continuing struggle to legitimize the still-new American criminal justice system. Although by 1876 Americans had controlled New Mexico for 30 years, fully functioning criminal justice systems were relatively new in most New Mexico counties. In San Miguel County, under-representation of Mexicans as criminal defendants may well have served as a proxy for the extent to which Mexicans (especially those involved in intraracial crimes) were not willing to rely upon the American criminal justice system.

But this era was a transitional period. At least some intra-Mexican crimes—disputes over land and water, intrafamily and sex-related offenses (see Table 4, p. 831)—which would have previously been processed in less formal, local forums were now increasingly being brought to the formal criminal justice system. But since Mexicans were still under-utilizing the American criminal justice system, it was crucial for its legitimation that it allow Mexicans to indict and punish European-American offenders. Whether European-American defendants were charged with crimes against other members of their race or against Mexicans, it was majority- or all-Mexican grand or petit juries that indicted and punished them. Because of this fact, and, importantly, because Mexicans also had the power to exercise mercy over European-American defendants, the system's legitimacy was enhanced.[134]

The history of Mexicans in the American criminal justice system of San Miguel County, New Mexico Territory, tells us something, as well, about the role of law in establishing colonial authority. One of the more striking features of the racial power-sharing regime here was Mexicans' dominance of petit juries, who disproportionately tried European-American defendants. One would have predicted that European-Americans, as the racially dominant group, would have exercised jury power over the racially subordinate group, Mexicans. One also would have predicted that the European-American colonizers would have limited the power and participation of the native Mexican population. Certainly, this was true in Territorial New Mexico with respect to members of the various Indian tribes native to the region. Mexicans were able to achieve a better position as a racial group, however, because they could occupy a middle racial sta-

[134] For a discussion of the utility of mercy for rulers, see Hay (1975:40–49).

tus, pointing to Indians as below them in the racial hierarchy. Moreover, the paucity of European-American settlers meant that Mexican men dominated those spheres—such as the jury—in which citizenship (as a "white" male) mattered.

In Territorial New Mexico, the colonial context came face to face with the U.S. criminal justice system by virtue of the decision by Congress to govern New Mexico under the Northwest Ordinance Act. That decision set in motion the institutionalization of a legal system modeled on that of the U.S. States, including a jury system in which grand juries and petit juries played key roles. Via the petit jury, middle-status Mexicans in New Mexico exercised power not only over their peers but also over lower-class European-American defendants, and—less frequently to be sure—over higher-status Mexican defendants. Whether these jurors used their power in racially self-serving ways is only one issue; regardless of the answer to that question, it is telling that they could exercise the power at all, whether in the service of punishment or leniency.

The history of the judicial system in Territorial New Mexico allows us to examine the jury in a new context, in an American colony. In this setting, the jury, like the law, overall, played dual, sometimes contradictory, roles. On the one hand, the jury system functioned to incorporate Mexicans into the American polity as citizens, thereby enhancing the legitimacy of the colonizing state. This particular vehicle for incorporation was perhaps unmatched in its impact. It offered both material and symbolic rewards because it literally brought the American state and its legal system into the daily lives of the native Mexican population. In this respect, the institution of the jury was a boon both to the American colonizers of the Territory and to the European-American and Mexican economic elites who supported the American political and economic agenda. On the other hand, the jury provided Mexicans with a level of self-determination and power that seems at odds with the colonial mandate of disempowering the native population.

In a sense, once released, the institution of the jury was uncontainable. Self-determination and democracy grew in unexpected ways. For Mexican men, the jury provided political experience and contact with the American state, but they were co-opted in the process. At the same time, Mexican lawyers, criminal defendants, witnesses, jurors, and law enforcement officers took what they could from the new institution. Certainly, jury service brought much-needed money into households, and, as an opportunity for civic participation, it also may have brought status to the male participants. In this way, it served as a training ground for political participation and activism, which would be put to use, particularly, in the last decade of the 19th century and the early decades of the 20th century, when a Spanish-language press

thrived in New Mexico and when Mexican ethno-racial identity reached a watershed.

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