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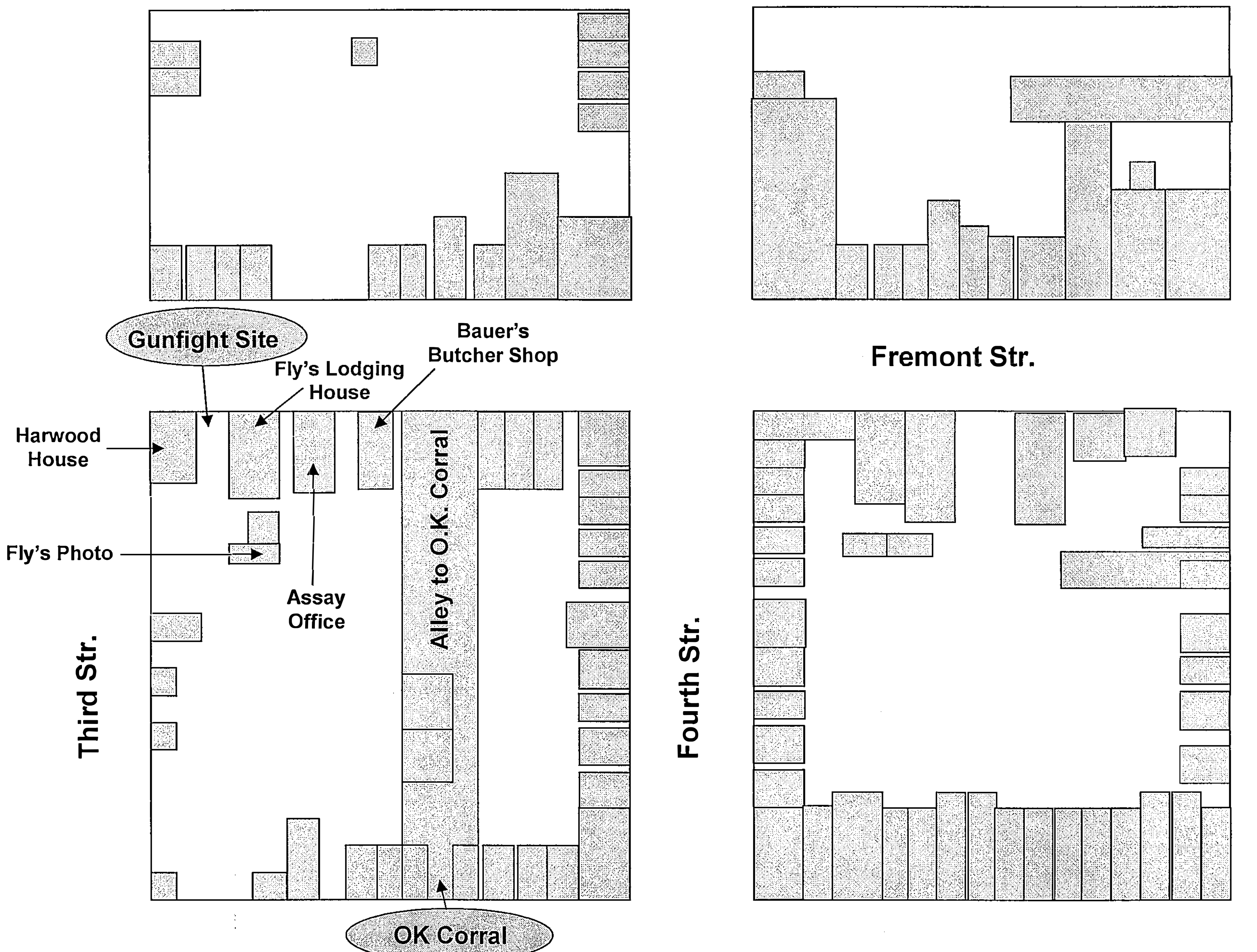
Tombstone, Arizona circa 1881



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Article

***85** THE “O.K. CORRAL PRINCIPLE” IN THE AGE OF TERRORISM: PROPOSED NEW PROTOCOLS FOR JUDICIAL NOTICE IN CASES OF ALLEGED MISCONDUCT BY LAW ENFORCEMENT

Bruce W. Burton [FNa1]

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***86** I. INTRODUCTION

"The ruling to kill Americans and their allies--civilians and military-- is an individual duty for every Muslim who can do it in any country ... [and we] call upon every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it." --Osama bin Laden [FN1]

In today's post-September 11 crisis, judicial notice is a useful tool of judicial efficiency but also a source of potential harm. The concept of judicial notice allows a court to recognize facts without resorting to proof. Ideally, courts would assume without proof only those facts that "every damn fool knows" and thus save the courts and parties both time and money in civil and criminal litigation, without having any substantive effect on the outcome of the case. [FN2] That is the ideal in theory, but in reality there is no fixed consensus about the proper use of judicial notice--the facts that courts might choose to assume can range across a wide spectrum. Judicial notice that reflects society's deep-rooted fears of crime, violence, and terrorism [FN3] can lead ***87** to one model of decision-making--the so-called "O.K. Corral" model of police encouragement. Alternatively, Americans' traditional deep fear of losing individual liberties to an overreaching and overzealous government can lead judicial notice into the opposite hazard--the "South Bronx" model, which hamstrings law enforcement at every turn.

Only a few years ago there was no real sense of urgency for such reform and a commentator might leisurely fret over the use of judicial notice in cases determining the propriety of the government's conduct when dealing with criminal suspects in garden-variety street crime and drug offenses. [FN4] Such concerns, first raised in what now seems to have been America's quiet past, appear old fashioned in the light of recent events. Neither the O.K. Corral nor the South Bronx model for judicial notice have ever been satisfactory or safe, but the risks of inflicting lasting social damage have risen exponentially since 9/11. This article argues that now is the time to establish new procedural protocols for use whenever conduct by law enforcement may have a substantive impact on individual rights or public safety.

To illustrate this argument, this article will first state the core constitutional dilemma we face as people, as defined by the insightful James Madison. Next, this article will briefly lay out the definitions and traditional features of judicial notice. Next, will be an examination the two underlying models of judicial notice in cases that examine alleged misconduct by law enforcement officials (the O.K. Corral and South Bronx models). Then the unique security problems of the Age of Terrorism will be examined and, as a way of underscoring the dangers, a quick nod of recognition will be made to the impulses toward tyranny shared even by history's leading libertarians when the nation's survival has been at stake. Finally, a new ethos for the use of judicial notice--and explicit new protocols to implement this ethos--will be spelled out for the unprecedented situation we find ourselves in.

***88** II. OUR MADISONIAN DILEMMA

Since the founding of the republic, the problem of the human condition in a free society required maintaining governance's three-legged stool, which was first prescribed by the foremost founder of America's Constitutional experiment:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [FN5] Examining a magistrate's underlying judicial assumptions (concerning criminal suspects and their criminal conduct on the one hand or the conduct of law enforcement agencies on the other) requires looking into the magistrate's worldviews about these contending factors. [FN6] Assuming that, for most of us, our attitudes result from our lives' experiences--our continuous exposure to the events around us--let us further assume the same is true for members of the judiciary. Notwithstanding all the humorous anecdotes to the contrary, [FN7] most American judges *do* live in the real world along with the rest of us. [FN8] Immersed in the affairs of daily life, we all slowly assimilate the countless bits and snippets of our shared American experience.

From our unceasing exposure to the raw material of life, most of us assemble something of a personal mosaic of attitudes and values. These personal mosaics are composed of the continuous stream of impressions--the atomic particles of experience, if you will--drawn from the contemporary culture that we experience. Part of this ongoing mosaic is made up of the information each of us assimilates ***89** concerning the daily struggles, large and small, between lawbreakers and law enforcers. [FN9]

Today our ever-changing mosaics contain images and bytes of information about lawbreakers ranging from those who commit victimless felonies to street crime to organized mobs to terrorists' monstrous conspiracies of devastation. The latter includes, the Oklahoma City bombing, the indelible TV scenes of Ground Zero on 9/11 and the horrors of terrorist strikes in Spain and Iraq. [FN10] In America's current crisis of violence, one viewpoint is that our society finds itself in a state of war--not the purely figurative, popularly debated culture war, but a shooting war--against destructive fanatical forces that menace our lives, liberty, and property. [FN11] For purposes of this article we will refer to this survival-threatening perception of our present culture as the O.K. Corral Worldview, a view best illustrated in Judge Wells Spicer's 1881 written opinion (relying heavily on Spicer's untested judicial notice of policy-making facts about frontier Arizona) in the wake of the famed shootout. [FN12]

Alternatively, one might view our most profound danger as coming not from criminal or terrorist violence, but as a mortal struggle to protect free society against the liberty-destroying overzealousness of government's public security enforcement agencies. ***90** Based mainly on the court's judicial notice of the police of the South Bronx, the federal court viewed the threat coming from serious dangers of police enforcement powers in the wake of a Bronx drug-activities investigation. For discussion purposes, we will call this liberty-threatening perception of law enforcement the South Bronx Worldview. [FN13] (It is clear that the sharp contrast between the O.K. Corral and South Bronx worldviews is nothing new to America's experiment in democracy; both prongs of the dilemma of governance trace their roots back to the Constitution's founding. [FN14])

The opposed O.K. Corral and South Bronx worldviews inform the exercise of judicial notice in cases bearing upon alleged misconduct by police. [FN15] A corollary of this thesis is that the use of judicial notice is a dual-edged sword when used in the Age of Terrorism in relation to cases of law enforcement misconduct issues, because of the inherent dilemma of self-governing presented in the Constitution itself from the earliest days of our nationhood. The O.K. Corral Worldview places heaviest reliance on Madison's opening premise concerning the need for government to control the populace, whereas the South Bronx Worldview emphasizes the second premise, the need for government to control itself. [FN16]

The third leg of Madison's stool--the needed "auxiliary precautions" if you will--are also proposed in this article. This third leg takes the form of proposals for a series of new judicial protocols which do not rely on the magistrate's untested personal assumptions about either (1) the value to society of law enforcement nor (2) the judge's personal assumptions about the risks to freedom inherent in the destructive, even predatory, potential posed by law enforcement. [FN17] These are weighty issues indeed when dealing, as we must, with the deadly serious business of the Age of Terrorism. [FN18]

***91** III. TRADITIONAL FEATURES OF JUDICIAL NOTICE

The courts' sublime role in interpreting the laws was significant almost from the start of the republic. [FN19] On a less Olympian note, the business of applying the laws at trial in daily cases is also a vital court function, and judicial notice plays a part in this function. Now, in post-9/11 America, we come to an intersection between judicial notice and assessing the conduct of law enforcement. Before examining the proper use of judicial notice in such questions, it may be useful to summarize the doctrine.

A. Purposes

A principal purpose served by judicial notice includes allowing the court to call upon our "common fund of knowledge" which can be resorted to without time-wasting formal proof. [FN20] Throughout history, judicial notice has been used by some judges in establishing facts that are regarded as indisputable and readily accessible. [FN21] Thus, the fundamental background notion of judicial notice is judicial economy. [FN22] Other purposes are serving to

infuse intellectual honesty [FN23] or provide scientific accuracy. [FN24] However, no single purpose, hence no single standard, exists for American courts at the moment. [FN25]

***92** What is also deeply troubling is the problem of individual quirkiness. Moreover, E.F. Roberts has argued cogently that the intellectual arrogance found in some judges, the pious talk of others, still others' interior untested hunches, and the flawed art of human thinking play powerful roles in the real-world judicial reasoning processes. [FN26] Even ignoring individual nuances among magistrates and looking at the overall contours of the doctrine, if judicial notice is placed along a continuum from active to passive, the least active tribunals would limit judicial notice to self-evident facts or to geographic facts known in the local trial *situs* or within the governmental or political jurisdiction or solely to historical facts not in dispute. [FN27] Moving along the continuum toward more permissive views, ***93** magistrates would include things easily found by resort to almanacs and calendars and scientific tables--readily supporting facts of which the court has chosen to take judicial notice. [FN28] Further along the continuum, by-and-large activist tribunals would employ judicial notice in adopting technical facts where an evolving level of consensus exists within the scientific community. [FN29] Even the most active courts, however, would draw the line at refusing to take judicial notice of any fact which was an "ultimate fact"--a fact which is dispositive of the case [FN30]--unless the presiding judge is also prepared to issue a directed verdict. [FN31] One judge has stated that he would personally take judicial notice of the corruptness of American business corporations basing this upon his personal knowledge of corporate practices acquired during his days in legal practice. [FN32]

Insofar as recognition of pertinent legal principles is concerned, some courts, following federal or state evidentiary rules, would limit judicial notice to recognition of the laws of the jurisdiction where the trial is being held, as well as all foreign law and international law. [FN33]

***94** B. Legislative Facts vs. Adjudicative Facts [FN34]

The distinction between legislative and adjudicative facts highlights a hazard to be avoided in the use of judicial notice. Adjudicative facts are those facts specifically necessary to settle a particular issue. [FN35] Adjudicative facts could become controversial [FN36] ***95** because they can be the material facts determinative of the case. Syllogistically, a court's taking judicial notice of adjudicative facts can be outcome conclusive. [FN37]

For a vivid illustration, in bills of attainder such as the infamous Josiah Philips case of 1778, [FN38] the facts underlying the accused's guilt (leading a band of revolutionary Virginia terrorists in widespread acts of burning, robbery, and murder) were adopted by the legislature under Thomas Jefferson's leadership as being facts of common knowledge and not necessary of any proof. [FN39] The very refusal by Josiah Philips and his pro-Tory band to face trial seemingly confirmed Philips' guilt, and at that moment he was seen as not readily subject to normal legal processes; therefore, the bill found him guilty of the facts charged. [FN40] Naturally, a legislature writing and enacting a bill of attainder is legally distinct from judicial conduct at a court trial, but such a distinction misses the point. The chief point is that in both instances the formal proof and adversarial testing of the adjudicative facts are leapfrogged and determinations drawn. Both derive from the same train of reasoning: when a court takes judicial notice of adjudicative facts in any criminal trial, it has also leapfrogged the stage of adversarial truth-testing on behalf of the parties and assumes as if legally established things which are untested factual conclusions.

By contrast to the array of facts classified as adjudicative facts, there are legislative facts. [FN41] It is legislative facts where the sources of ***96** greatest danger can lie in the Age of Terrorism if courts adopt either the South Bronx or the O.K. Corral worldviews. Legislative facts involve the court taking judicial notice of matters of public policy, criminal or civil, which undergird the principles of law that are applicable to a particular case. "Judges regularly resort to extra-writ record data" and by taking judicial notice of public policies or tendencies in the current thrust of things, a judge thereby becomes "an active participant [in lawmaking] adopting law to a volatile sociopolitical environment." [FN42] In this era of intense hazard, special attention needs to be paid to judicial decisions affecting the conduct between law enforcement and suspects.

Following is an outline of the two most vivid models of fundamentally opposed worldviews respecting the role of law enforcement: the South Bronx Worldview and the O.K. Corral Worldview. Each illustrates how the adoption among contending public policy views in the arena of law enforcement misconduct constitutes an area most strongly

calling for caution in the use of judicial notice.

IV. THE TWO DISTINCT MODELS UNDERLYING JUDICIAL NOTICE IN LAW ENFORCEMENT MISCONDUCT MATTERS

A. The O.K. Corral and Judge Spicer's Selection of the Crime Control Model for Judicial Notice

Whether an academic historian or a weekend couch potato, what American has not heard of or even witnessed re-enactments of 1881's mythic shootout near the O.K. Corral in Tombstone, Arizona? Pertinent to this discussion, shortly after the gun smoke cleared and the corpses were hauled from the scene, court hearings into the O.K. Corral incident provided a paradigm of one of the two models for the use of judicial notice in sorting out allegations of misconduct by law enforcement. [FN43] I will briefly examine this model of judicial notice (followed, by way of contrast, with a look at the celebrated 1996 decision involving a group of South Bronx drug dealers, which provides the paradigm of the opposite model). [FN44]

One windy afternoon in October 1881, in the City of Tombstone, a group of four Tombstone police officers and special deputies faced a ***97** band of five armed men known as "the Cowboys." [FN45] These two groups faced each other at close range in an open area on the west end of town between Fly's Photo Studio and the Cowboy's Dance Hall. The opposing groups exchanged less than one minute of deadly gunfire. When the shooting stopped, two of the four law enforcement officers had been wounded and three of the five Cowboys lay dead. [FN46]

Quickly mythologized as the "Gunfight at the O.K. Corral," the shootout gave rise to a coroner's inquest and three other judicial inquiries about the propriety of conduct by law enforcers. [FN47] The central question in these hearings whether the law officers' use of lethal force was justified. [FN48] If we assume that public policy in such matters generally reflects prevailing social conditions, then the permissible scope of law enforcement conduct hinged on the cultural conditions of the Arizona frontier of the 1880s. Judge Spicer's view of this ultimately controlled the outcome.

The largest and most extensive transcript of the O.K. Corral court hearings about the allegations of official law enforcement misconduct at the time of the shootout was that of a hearing before Tombstone's Judge Wells Spicer from October 31 to November 29, 1881. It involved seven attorneys and thirty witnesses who testified in person or by sworn deposition. This was in addition to documentary evidence, including statements signed by sixty-two character witnesses from Dodge City and Wichita, Kansas, supporting Deputy U.S. Marshal Wyatt Earp. [FN49] The testifying participants and eyewitnesses of the O.K. Corral shootout presented two dramatically differing versions of the actions taken by the three Earp brothers and "Doc" Holiday.

The Cowboys' version portrayed Holiday and the Earps as deputized murderers, holding governmental authority by way of the Town Marshal, Virgil Earp. The O.K. Corral survivors and other Cowboys and their allies saw this foursome as a cadre of fatally biased, quick-triggered, violence-prone, pistol-whipping, irresponsible ***98** law enforcement officers. [FN50] Backed by the town merchants and other local political powers, the four officers were determined from the outset to settle old scores with the Cowboys and permanently eliminate them for a variety of personal, business, and political reasons. These witnesses portrayed the Cowboys as long-suffering victims of Earp-led persecutions including pistol whippings, arrests, and threats. The theory their testimony advanced was that had the Cowboys surrendered their weapons, as demanded by Town Marshal Virgil Earp (pursuant to a Tombstone ordinance prohibiting carrying arms within the town limits), then they surely would have faced on-the-spot execution. [FN51]

The opposite, more pervasive scenario emphasized that the Tombstone ordinance prohibiting private persons to be armed was vital to civil order within the town. This scenario maintained that Holiday and the three Earps forthrightly approached the unlawfully armed Cowboys near the O.K. Corral to enforce the ordinance against carrying firearms and in direct response to numerous reports that the Cowboys had widely announced their intentions to kill both Virgil and Wyatt Earp. In response, the four officers sought to disarm the Cowboys with discussion and firm demands, prudently backed up by a direct show of strength. According to this view, the Cowboys were notorious bullies, rustlers, and stage robbers, who belonged to a political group that wanted to subordinate municipal Tombstone and its citizens to the designs of certain rural ranchers, such as "Old Man" Clanton and others. [FN52]

After a month of considering oral and written testimony, Judge Spicer's extensive written opinion took judicial notice, without proof or adversarial testing, of a wide array of legislative facts concerning the lawlessness generally found in parts of Arizona Territory and the accompanying hazards of law enforcement on the frontier. Further, Judge Spicer took judicial notice of similar specific facts about the Tombstone area at the time. At one point, Spicer wrote:

> [W]hen we consider the condition of affairs incident to a frontier country; the lawlessness and disregard for human ***99** life; the existence of a law-defying element in [our] midst; the fear and feeling of insecurity that has existed; the supposed prevalence of bad, desperate and reckless men who have been a terror to the country and kept away capital and enterprise; and consider the many threats that have been made against the Earps, I can attach no criminality to his [Town Marshal Virgil Earp's] unwise act. In fact, as the result plainly proves, he needed the assistance and support of staunch and true friends, upon whose courage, coolness and fidelity he could depend, in case of an emergency. In view of the past history of the county and the generally believed existence at this time of desperate, reckless and lawless men in our midst, banded together for mutual support and living by felonious and predatory pursuits, regarding neither life nor property in their career, and at the same time for men to parade the streets armed with repeating rifles and six-shooters and demand that the chief of police and his assistants should be disarmed is a proposition both monstrous and startling. In view of all the facts and circumstances of the case, considering the threats made, the character and positions of the parties, and the tragic results accomplished in manner and form as they were, with all surrounding influences bearing upon the res gestae [sic] of the affair, I cannot resist the conclusion that the defendants were fully justified in committing these homicides--that it is a necessary act, done in the discharge of an official duty. [FN53] By adopting these untested facts about the Arizona frontier, Spicer sealed the equation. If frontier law enforcement officers were in mortal danger in a jungle of lawlessness, all use of deadly force was appropriate. Accordingly, the three Earps and Holiday would be justified in shooting first, because he who hesitated died. This is not to say that Spicer was wrong in his views of 1881 Arizona; it merely shows the untested, pro-law enforcement premise underlying Spicer's approach. However, in the Age of Terrorism, a modern judge adopting facts akin to those at the O.K. Corral would similarly seal the outcome of any court inquiry into the conduct of law enforcement.

As if to underline Spicer's O.K. Corral Worldview of the frontier, and as a bloody supplement to the judicial hearings, a long series of retribution killings began. Both sides of the conflict participated. The ***100** killings took place both in Tombstone and in the surrounding area of Cochise County. First blood was drawn when allies of the Cowboys gunned down local deputy Morgan Earp, the younger brother of Town Marshall Virgil Earp and U.S. Deputy Marshall Wyatt Earp. This was shortly followed by the killing at the Tucson railroad depot of a companion of Cowboy leader Ike Clanton by Doc Holiday and Wyatt Earp. A long-lasting trail of blood ensued. [FN54]

Judge Spicer's written disposition of the case is a clear example of the "crime-control" premise used by judges in taking judicial notice of facts not in the record, relating the nature and extent of area crime to the threat it posed to civil order and law enforcement officers. [FN55]

Moreover, it is clear that many recited facts are unarguably Judge Spicer's judicial notice of the violent situation throughout the Arizona frontier of the 1880s. These obviously led him to adopt the judicial policy of what some modern commentators classify as the crime control model [FN56] in his determination of the case. [FN57]

This model consisted of a formal determination that, as law enforcers in a dangerous place and dangerous era confronted with a potentially deadly situation, the Earps and Doc Holiday "acted wisely, ***101** discretely, and prudentially, to secure their own self-preservation." [FN58] Based on this worldview, Holiday and the Earp brothers "saw at once the dire necessity of giving the first shots, [sic] to save themselves from certain death!" In addition, Judge Spicer placed heavy reliance on the "character and positions of the parties." Thus, Spicer found no sufficient evidence to bind over Doc Holiday or any of the Earps for trial. [FN59]

B. The Madisonian Logic of the Crime Control Model

The constitutional view implicitly adopted by Judge Spicer emphasized the first leg of Madison's three-legged prescription for governance. Recall that Madison's prescription for successful governance concisely articulated the crime control viewpoint: "In framing a government which is to be administered by men over men ... *you must first*

enable the government to control the governed ....” [FN60]

Inevitably, to control the governed, the ultimate authority of government rests upon its monopoly of the lawful use of coercive force. Accordingly, if the judiciary undermines the conduct of law enforcement as government's domestic mechanism for exercising coercive power, then society may fail to satisfy the first element of Madisonian self-governance. Therefore, a judge emphasizing a crime control model would see herself as acting in a principled fashion because coercive authority is vital to self-government itself; without it, self-government becomes impotent to deal with the challenges of criminal violence. [FN61]

Thus viewed, judicial notice tied to crime control supports the bedrock ordering of the state itself in a whole range of cases in which law enforcement interacts with private conduct. [FN62]

***102** C. The South Bronx Case: The Police Control Model (a.k.a. the “Due Process” Model)

A contrasting model--one of police control [FN63]--views law enforcement as either the dangerous vanguard of a police state or an instrument of suppression of a brutalized urban American underclass. [FN64] A very clear paradigm of this model used in judicial notice derives from federal district Judge Harold Baer's initial determinations in *United States v. Bayless*. [FN65] Based on media accounts characterizing the South Bronx police and their relationships with local residents, Judge Baer took judicial notice. He assumed residents in the crime-ridden neighborhood of the South Bronx correctly regarded law enforcement officers as corrupt, abusive, and violent. Based upon a documented history of neighborhood mistrust of police, Judge Baer analyzed the facts in *Bayless* and concluded that certain ***103** conduct on a South Bronx public street at 5:00 a.m. was normal, innocent conduct for area residents when confronted by police, even though on another street in another part of the city such conduct would be suspicious. Thus, Judge Baer prevented the introduction of seized evidence because of the judicially noticed police-neighborhood antagonisms. [FN66]

In *Bayless I*, several male defendants, all African-Americans, were observed placing large duffel bags into the open trunk of a red Chevrolet Caprice, an Alamo rental car bearing Michigan plates. The driver, a woman, never left the vehicle and opened the trunk by an automatic lever from inside while the car sat idling in the street. Upon the approach of officers, the defendants fled. Then, upon investigation, the officers found two duffel bags containing approximately thirty-four kilograms of cocaine and two kilograms of heroin (about 80 pounds). [FN67] Judge Baer determined that the conduct of the male suspects in fleeing the approaching police under these circumstances was normal conduct; and, as a matter of law, did not give rise to a reasonable suspicion, which would justify an investigative stop. [FN68] The judicially noticed South Bronx legislative facts about the culture and police-resident relationships, upon which he formed his opinion, were based on news accounts and were not subject to in-court adversarial testing.

In his original opinion Judge Baer referred sarcastically to the lack of credibility of New York City police, characterizing their testimony with such words as “gossamer” and “suspect.” [FN69] Based upon this viewpoint, Judge Baer did not accept the officers' assertions of reasonable suspicion to stop and search. [FN70] Thus, the seized heroin and cocaine was suppressed as evidence. *Bayless I* shows a model of judicial notice that views law enforcement as a hostile army of occupation in the South Bronx--an army whose mere presence on the streets terrifies the citizenry and whose professionalism and honesty are lacking. It represents the basic police control viewpoint. [FN71] (It ***104** should be noted that Judge Baer, under bipartisan political pressures, eventually backed down and later recused himself from *Bayless II*. [FN72])

D. The Madisonian Logic of the Police Control Model

The police control model represents a judicial value system that is grounded in a fundamental skepticism toward--even suspicion of--the good faith of law enforcement officers. Unlike the crime control model, no material weight to the hazard-filled demands of law enforcement work is extended. [FN73] A jurist holding the police control model as a powerful part of his or her value system would likely stress the second portion of James Madison's famous constitutional prescription: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself* ....” [FN74]

The underscored prong of Madison's prescription requires a judge to be ever-alert for the need of government to control government. This means that the proper judicial role should be to prevent the state's monopoly upon coercive force, as expressed in police power, from destroying self-government. Law enforcement authority should be judicially checked whenever it exerts coercive force upon individual citizens. Accordingly, governmental self-control insists that use of force by law enforcement is suspect and must be narrowly and tightly restricted by the judiciary.

Jurists accepting this logic should thus be expected to exercise judicial notice, if at all, in fashions hostile toward law enforcement when making determinations respecting questions of police misconduct. Faced with issues of reasonable search and seizure, such a jurist will likely follow the same path as Judge Baer and determine that otherwise suspicious conduct by suspects was justified. This inevitably follows from taking judicial notice of reported incidents of ***105** police notoriety and the like. [FN75] Given today's broad range of cases where choice of the O.K. Corral Worldview or the South Bronx Worldview and the large-scale impact such models may have on the conduct of law enforcement, scrutiny of underlying influences at work in the judiciary is important. [FN76] The remainder of this article will ***106** examine the principles of judicial notice used in adjudications of prearrest police conduct. These suggest a series of criteria for such use of judicial notice, which are grounded in neither the O.K. Corral Worldview nor the South Bronx Worldview.

V. UNIQUE SECURITY PROBLEMS IN THE AGE OF TERRORISM

> "*In today's world, the main threat to many states, including specifically the U.S., no longer comes from other states. Instead, it comes from small groups and other organizations which are not states. Either we make the necessary changes and face them today, or what is commonly known as the modern world will lose all sense of security and will dwell in perpetual fear.*" -Martin van Creveld [FN77]

In the Age of Terrorism the rather static geopolitical formulae of the late, unlamented Cold War no longer controls. Perhaps entire nations are now presented with a unique series of challenges to their continued existence; perhaps Charles Darwin's dicta requiring adaptation to ensure success extends beyond natural selection of various biological species. [FN78] Is not some form of societal Darwinism adaptation also necessary when human institutions, even entire societies, are menaced by new challenges? [FN79] These challenges are discussed below.

***107** A. Netwar

If December 7, 1941 was America's Day of Infamy, [FN80] then September 11, 2001 was the other infamous date for our generation. This latter date marked the start of America's formal struggle for survival in a landscape dotted by a worldwide network of suicidal fanatics dedicated to their varied causes, [FN81] sharing at minimum the objective of creating fear and terror in every targeted populace. [FN82] Many of these terrorist groups are extremely well financed. [FN83] Their goal of fear is compounded by potential access to weapons of mass destruction (WMDs). [FN84]

For purposes of this discussion, a term first published in an early Rand Corporation strategic study--netwar--will be employed in a greatly expanded sense. [FN85] As used here, netwar means coordinated ***108** terrorist network assaults. These assaults can range from low-yield street crimes to apocalyptic death and destruction for the following reason: all such networked terrorist hellishness occurs in the presence of numerous access points for obtaining weapons of mass destruction, from marketplaces located on the periphery of the former Soviet Union [FN86] or creating such death-wielding weapons in tiny laboratories and scattered workshops. [FN87]

B. Potential Mission Creep

In the midst of the terrorist threat, one governmental response was the creation of a special coordinating task force that evolved into the Department of Homeland Security. [FN88] The initial response to this development was a favorable and growing wave of public endorsement. [FN89] Some observers believe another major impact is the possibility of Homeland Security mission creep. [FN90] Although the primary focus to date has been on the potential abuse of Homeland Security's aegis for unrelated political gain, [FN91] other nefarious designs regarding the abrogation of constitutional liberties lurk. [FN92] One speculates whether a continued expansion of concentrated security powers in relatively few hands will increase surveillance of citizens' communications and movements,

detentions without access to counsel or habeas corpus, or use of Homeland Security investigative powers ***109** into domestic political activities. One speculates whether despite these concerns, such "[l]iberties are of value only to the living." [FN93] The question is whether facing the possibility of mass annihilation by the forces of netwar is sufficient to justify treating the entire challenge as warfare, not crime, and curtailing America's valued individual rights. [FN94]

The natural, protective response of post-9/11 America was to gird itself for battle, realign its defenses and prepare to strike back. One major element in realignment of defenses is under the rubric of Homeland Security, charged with the mission of protecting America's 260 million people and their property against the threat. [FN95] There are concomitant dangers. Increasingly all departments of local, state, and national government are being marshaled to defend the nation from aggression against domestic targets in the name of security. [FN96] Dramatic potential for Homeland Security creep, with much potential for changing our personal freedoms, makes it vital that the use of judicial notice--from either the South Bronx or the O.K. Corral worldviews--in dealing with the alleged misconduct of law enforcement be reformed.

Unpleasantly, and only slowly being assimilated by many of us, there is a new reality. We are now faced with what the Rand study designates as the evolving definitions of security [FN97] in a time of netwar. [FN98] The focus is no longer on the security of the nation-state, but the personal security of fear-ridden individuals. [FN99] Although the sources of global terrorism may vary from religion to frustrated nationalism, from ethnic separatism to regional and ideological rivalries, the common theme in the wake of 9/11 is the use of state-sponsored or privately funded violence against civilian populations to bring about change. [FN100]

Incarceration of aliens without habeas corpus leading to national identification cards, leading to seizure of evidence and incarceration of citizens without warrants, detention of citizens without access to counsel, general preventive detention on suspicions alone--the train of potential linkages could roll on and on. Accurate and balanced judicial supervision of such snowballing possibilities could be vital to ***110** preserving a free society under law, and reliance upon untested judicial notice is no safeguard. In short, the current problems are no longer limited by the notions of a simpler era. Rather, it is imperative that we become familiar with how to deal with cunning, well funded, asymmetric strategies of attack by an entire spectrum of terrorist groups. [FN101] Netwar, both an alignment of terrorist groups and a tactic for inflicting damage, can now threaten personal violence in the forms of low-tech deliveries of nuclear, biological, or chemical weapons. [FN102] These are seen as attractive weapons for influencing U.S. public opinion and as a means of gaining the netwar's ends. [FN103]

Such threats raised by global netwar are far removed from garden-variety street crimes and Mob activities. These activities provided the earlier conflicts that formed our current notions of criminal due process. [FN104] Will the adaptive logic of Darwinian survival--the instinct to optimize one's personal situation that each of us carries as members of a society--be applied to netwar's new challenges to our personal security as the dangers of our dystopian future become more fully assimilated? [FN105] Hence, the worrisome nature of judicial notice in the post-9/11 era.

C. Living in Fear: A New Equation for Civil Society?

If civil society is indeed faced with an attitudinal shift, a movement from a quieter post-Cold War era to the Age of Terrorism, then a general perception of the dangers lurking every moment from every corner will generate new challenges. Will the public's cultural mosaic change as the dangers of netwar become better understood and more fully assimilated by all of us? Might the new threats come to be generalized and merged with all other threats--those felt by each individually and those pertaining to our shared local and national security? [FN106] Suppose our fears of violence merge in such a fashion that ***111** masses of us will fail to distinguish among the threats we feel? Suppose all dangers, great and small, become part of one psychic fabric in each of us, thus influencing our outlook on criminal due process as well as local and national security. [FN107] Will such fearful features be fixed in the psyches of all of us, including judges, as parts of the whole of society?

If these questions are answered affirmatively, then is it not likely that judicial notice will come to reflect a new set of equations along the following lines: (1) fear of violence is all about us, permeating our daily lives; (2) the feared violence emanates from many sources, from individual druggies and muggers to Mafia-connected thieves and extortionists to ruthless global netwar players; (3) law enforcement on the frontlines of combat with our array of

enemies, at the existential moment when they confront violent and criminal behavior, cannot possibly know if the source flows from garden-variety hoodlum conduct or from an organized terrorist group; (4) whatever fear-laden assumptions we make about netwar terrorists will all these, *a fortiori*, come to apply equally to all dangers of violence? Will not such a chain of events lead to a dangerous distortion in judicial notice when in cases involving potential misconduct by law enforcement?

The goal for reform of judicial notice should not be to revise the South Bronx or O.K. Corral approaches. That would be a futile effort given that underlying assumptions about optimizing our own situation and that of our society in the face of danger is grounded too deeply in instinctual, Darwinian chords of survival. [FN108] Rather, we need to revise the current uses of judicial notice as a needed step in evolution of the doctrine.

VI. THE IMPULSE TOWARD TYRANNY WHEN SURVIVAL IS AT STAKE

There exists a long litany of the pillars of English and American society choosing security over liberty when the squeeze of danger has been serious. The history of Anglo-American law contains a haunting precedent most devoutly to be avoided. During Elizabethan times, after England had emerged from years of Protestant-Catholic ***112** internal violence during the reign of "Bloody" Mary, fear of renewed conflict was everywhere. Fearful of domestic unrest, Elizabeth I and her advisors created a police state. [FN109] The Sceptered Isle was riddled with undercover spies and double or even triple agents. [FN110] Unexplained vanishing of suspects, imprisonment and torture-derived confessions, fast executions, false accusations, and communication in codes and epigrams abounded among the educated classes. [FN111]

The following cameos demonstrate a deeply rooted human tendency--shared by even our heroes of individual liberties--illustrating an instinct toward sacrificing fundamental legal rights when confronted with significant domestic dangers.

A. Thomas Jefferson

"It shall be lawful for any person with or without orders to pursue and slay the said Josiah Philips ..." [FN112]

The problem of fear is endemic in our species. Even Thomas Jefferson, *revered champion par excellence* of America's civil liberties and individual procedural rights, was not immune. During the Revolution, Jefferson, a member of the Virginia House of Burgesses, found large portions of his beloved Commonwealth sundered by rebel leader Josiah Phillips' trail of death, fire, and fear. [FN113]

"Philips' gang terrorized the area of Norfolk and Princess Anne counties from 1775 to 1778," [FN114] and despite efforts by the Virginia government, including rewards for capture, Philips proved elusive. The "desperadoes continued their depredations, launching forays from ***113** their safe harbor [Dismal Swamp] ... and continued to ransack and steal." [FN115]

Faced with domestic unrest on this scale, Jefferson, now widely regarded as one of the patron saints of America's fundamental liberties, likely instigated a sense of urgency about Philips' terrorist strikes in the revolutionary government of Virginia. Jefferson personally authored, sponsored, and achieved enactment of the Josiah Philips Bill of Attainder in the two houses of the Virginia legislature, during a single day. [FN116]

Philips enjoyed a network of supporters, relatives, and profiteers aiding him and his group. Accordingly, the key purpose of the Bill of Attainder was to suppress local support by providing "a literal license to kill *anyone* in arms with Philips or who otherwise assisted Philips." [FN117]

With the Revolutionary War in hand and times quieted, Virginia's Governor Jefferson supported prohibitions on bills of attainder declaring persons guilty of treason or felony despite five years earlier "passing just such a bill." [FN118] The crucial point is not Jefferson's sunshine theories during the calm, but rather his repressive acts during the storm. [FN119]

B. Abraham Lincoln

"The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise--with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country." [FN120] Jefferson is not alone among the Rushmore heroes that comprise America's most revered democratic leaders in yielding to the impulse ***114** for survival during a genuine national threat. [FN121] In the most dangerous crises between the American Revolution and our current Age of Terrorism stands the nation's near miss at national disintegration: the Civil War. [FN122]

The above quote is taken from Lincoln's 1863 State of the Union message to Congress, and although dealing with an emancipation scheme [FN123] and not domestic terrorism, summarizes a mindset not far distant from Jefferson's during the Josiah Philips crisis. Recall that it was Lincoln who suspended habeas corpus, originated income taxation, abrogated statutory and court-made private property laws, and preempted state governance by the national government. Lincoln passionately revealed his controlling philosophy while fighting a crisis of national survival. [FN124]

C. John Stuart Mill

"All that makes existence valuable to any one depends on the enforcement of restraints upon the actions of other people." [FN125] American presidents are not alone among the champions of humanity's civil rights who embraced the resort to force in restraining dangers. John Stuart Mill, a towering figure for all who love liberty, recognized the need for government coercion to protect the ***115** fundamental rights of individuals. Ponder, for example, Mill's famed statement quoted above. Clearly, when in crisis Jefferson, Holmes, and Lincoln embraced notions similar to those articulated by Mill, namely enforcing restraints on those persons dangerous to the balance of the people, including the harsh restraints used against domestic terrorists and suspected rebels during their active roles in government. [FN126]

D. Justice Robert Jackson

"The Bill of Rights is not a suicide pact." [FN127]

As Justice Jackson and others have argued, those who campaign for power by means of free speech, namely Hitler and his Fascists and Stalin and his Communists, are philosophically stoppable by suspending normal protections of free speech. [FN128] The test is whether the danger posed is such that totalitarians would, if they succeed in the marketplace of ideas, then close the marketplace, or worse. [FN129]

The worry is this: If free speech, the revered pinnacle of ordered liberty, can be viewed by liberty's own philosophers, to say nothing of our freedom-promoting presidents and others, as a right that is susceptible to curtailment or even denial in times of a crisis of survival, would not the same logic undercut other procedural protections? [FN130] More to the point, would such reasoning, consciously or otherwise, carry controlling weight in the thinking of a judge taking judicial notice of the dominant fears of the culture during the Age of Terrorism? [FN131] Without question, towers of dedication to ordered freedom set aside such instincts in the cases discussed. [FN132]

***116** Accordingly, why would we expect a modern judge to differ from Jefferson, Lincoln, Mill, *et al*? [FN133] The conclusion of this section is that human fears during periods of grave crisis, fears for personal survival or for that of others and even society itself, are an inevitable part of the human condition. [FN134] The challenge is to revise our notions of judicial notice to prevent such fears from achieving an unexamined dominance in our jurisprudence.

E. Liberty vs. Security: Our Hobson's Choice?

Our Hobson's choice looks scarily stark. We seem to be torn between (A) acting as a society that allows maximum physical security for the people and property that make up America or (B) preserving our traditional liberties, and if our society succumbs, at least it will entail a breathtaking display of democratic altruism. But to pose the choice so starkly is to predetermine grimly its outcome--we have seen that some of the most revered democratic figures of

American history have leaned toward curtailment of liberty in times of greatest peril. But as we have repeatedly expressed a desire to have things both ways, to enjoy the best of both worlds.

We may eventually perceive ourselves faced with a Hobson's choice in which Homeland Security mission creep could result in a bleak Elizabethan, perhaps Orwellian, future where we live in near-totalitarian conditions harboring constant fear. [FN135] But our failure to permit pervasive security may result in destruction and death on an epic scale. [FN136]

The challenge was concisely posed by the editor of *Die Zeit* following the Islamic terrorist bombing that felled the Spanish government. Because of the multi-sided nature of combating netwar's global terrorist threat Josef Joffe advised:

> ***117** You have to fight [terrorism bent on destroying the West] while respecting two rules. First, do not destroy the precious freedoms of liberal democracy while fighting their enemies. Second, if the enemy is a complicated network, the defense has to build networks of its own ... [but, warning against appeasement] Winston Churchill put it most concisely: “An appeaser is one who feeds the crocodile hoping it will eat him last.” [FN137] Naturally, these three objectives--(1) fight netwar terrorism without appeasement, (2) preserve liberal democracy, and (3) build effective networks to carry on our fight--will necessarily cause us to choose among evils. The choices we make, insofar as judicial notice affects conduct by the government law enforcement officers, should be made as other court choices are made: preferring visible and adversarial testing, not privately held beliefs of the magistrate hearing any particular case. Perhaps much about these competing choices we face is fixed in our nature, but a better-crafted use of judicial notice in our courts, as set forth in Part VII below, offers some safeguards for the second objective while still servicing the first and the third.

Are there ways we can pursue Die Zeit's second objective with inventive alternatives? In the spirit of James Madison, can we craft appropriate “auxiliary precautions” that help to maximize both our safety and our constitutional freedoms, at least in the use of judicial notice? That is the subject of the next section.

VII. CRAFTING A NEW ETHOS FOR JUDICIAL NOTICE: THE OPEN APPROACH

A. Self-Awareness and Judicial Realism

The American judiciary's self-conscious realism could provide a significant part of the answer to our current dilemma. Self-conscious realism occurs when a jurist approaches all use of judicial notice in a systematic manner, using the benefits of visibility and the adversarial process. Perhaps a system of visibility and testing of proposed judicially noticed facts would introduce a new candor in police matters. Rather than allowing myriad pieces in the hearing officer's personal cultural mosaic--politics, media trends, personal dogma, public fear--to dominate without examination, maybe openness about such elements would be helpful. Similarly, to prevent private factors--even unconscious or subconscious cultural values--from ***118** dominating below the surface in the choice of model for any particular jurist, facing a choice of police control or crime control models could be guided by a new protocol. [FN138]

Courts' choice of a police control model or a crime control model should be a product of such self-conscious examination before any decision. Rather than the choice of model--crime control versus police control--being derived from mistaken impressions or one's personal value scheme, the choice of model for purposes of judicial notice questions should be a function of all the relevant circumstances prevailing at the time and place of the alleged law enforcement misconduct. A judge should not use either model for purposes of judicial notice unless openly and self-consciously derived in the context of the case.

After visibility and testing, a judicially self-conscious choice of a crime control model in the battle zone of a frontier town, such as Tombstone, Arizona, might be appropriate. But this model may fail in ways that would make it highly inappropriate and unacceptable in other contexts. The incidence of local violence, use of weapons, frequency of arrest, injuries, or fatalities among law enforcement officers investigating or apprehending suspects involved in felonies in a particular area and at a particular moment in time, and so forth, are significant facts which could be material to the use of judicial notice.

A garden-variety stolen car chase, in a reasonably crime-controlled area, perhaps involving joyriding teenagers, may result in a different model than suspects fleeing on foot from a vehicle with a trunk full of cocaine in a neighborhood of intensive drug dealing. Officers patrolling border crossing points where drugs, illegal aliens, or even weapons frequently enter the United States, but where violence and firearms are not noteworthy incidents, may be subject to a different model than riot-stressed law enforcement after three weeks of violent confrontation. [FN139]

Whatever the choice of model in any given case, it is urged that it be made self-consciously and explicitly. Judicial notice must be taken of the times, the locale, the crime statistics, and the incidence of police-suspect conflict in the area (such as Judge Baer noted in the South Bronx) and similar matters. A self-conscious and visible trail to the choice of model--whether police control, crime control, or something else--allows appellate courts, the media, and political ***119** decision-makers to follow the court's rationale. The compelling reason for a self-conscious selection of a model is that pertinent decisions in the case can flow from that selection.

B. In Need of Formal Protocols

A trial court's selection of a model in its exercise of judicial notice is inherently a legislative choice. Clearly, the notice taken by Judge Spicer that the Arizona Territory was riddled with armed and violence-prone outlaws, and that law enforcement officers faced mortal risk in the performance of their duties, did not deal with the adjudicatory facts of who did or said what at the O.K. Corral shootout. It is a determination of legislative facts that leads to a policy choice. (Naturally, policy choices involved in judicial notice of legislative facts are present in many other areas of the law. Negligence versus strict product liability and market-share liability versus pure causation are some examples. [FN140]) In the O.K. Corral situation, the policy choice by Judge Spicer was his adoption of a crime control model. It was closely akin to the legislative facts which the Tombstone Town Council, as a legislative body, likely determined when enacting the ordinance forbidding the carrying of firearms within the town limits.

Similarly, Judge Baer's selection of a police control model in the South Bronx case was a legislative choice. The facts of widespread predatory practices and corruption of the police were legislative facts that inevitably led to Baer's adoption of a policy choice--the police control model--in dealing with the case.

In short, when a judge sits in a matter touching upon police conduct, the judge may arrive at a fundamental legislative policy via judicial notice, totally absent the usual policy making processes of legislatures. However, the current processes of judicial notice fall far short of normal legislative activities. Neither Judge Spicer nor Judge Baer gave notice of public hearings nor invited interested groups or parties to be heard. Neither trial judge had gone through the usual legislative processes of holding hearings, receiving witnesses, receiving comments from constituents, interest groups, or the media, or openly debating or amending the proposition before a final vote was taken.

Of course “judicial legislation” happens in courts all the time. The nature of the common law embraces, if nothing else, the making and changing of social policies by the judiciary, including trial court ***120** judges. [FN141] This has been true for evolutionary, incremental changes in the law, and sometimes for very dramatic, even revolutionary, changes. Sometimes, even in trial courts, judicial legislation is soundly supported by briefs and pertinent data. [FN142]

However, determinations of police misconduct present a unique species. These can involve legislative facts which go directly to the question of the government's use of coercive power, and are, accordingly, of a very special nature. When a trial judge exercises judicial notice of legislative facts in this arena, the stakes are extremely high. Few areas so directly involve the core challenge of self-government. In this group of cases, the classic Madisonian tension between government's preservation of the social order and government's potential stifling of individual rights is directly and powerfully in play. [FN143]

There exist only a few analogs to the profoundly significant questions raised by the government's exercise of coercive force. For example, in the death penalty cases, the Supreme Court has mandated the examination of pre-set factors used to guide judicial and jury discretion in imposing this ultimate sanction; the risk of bias is not acceptable and is to be avoided given the high stakes of such decisions. [FN144] As is true of all analogies, there are distinctions of importance, and the death penalty cases involved facts that are distinct from the legislative facts involved in the

crime control or police control models. But the underlying policy value is the same--whenever the state's ultimate use of coercive force upon its citizens is present, special care should be taken to avoid factually uninformed or factually biased results.

One current criticism of judicial thinking is the courts' theorizing, which is essentially divorced from solid empirical knowledge. [FN145] In a real sense, both the crime control model and the police control model are theories derived from the dilemma respecting the nature of self-government posited by Madison. [FN146] A southern Civil ***121** War leader once remarked that the Confederacy could wind up being the first nation to die from a theory. Accordingly, the open examination of realities is needed in the context of adversarial testing. Under circumstances where a trial court's use of judicial notice will lead to the court adopting a police control model or a crime control model, special protocols should be in place. Processes are needed which provide the court, for society's benefit, with the sort of legislative facts that are required of so fundamental a question of democratic governance.

VIII. REACHING THE GOAL: EXPLICIT NEW PROTOCOLS

As illustrated above, the doctrine of judicial notice is a doubleedged sword. In the area of law enforcement misconduct inquiries, the major challenge to its proper use is to address the dual challenges of Madisonian logic--enabling law enforcement to control the governed while simultaneously controlling the law enforcement. [FN147]

The main proposal made here is that judicial notice must openly address the unique situation of post-9/11 America. Today, domestic law enforcement, intelligence agencies, and the U.S. Armed Forces must deal with the lethal complexities of the Age of Terrorism. Under current circumstances, both halves of Madison's formulation for free society's survival are at risk. The time has passed since court calibrations of the delicate Madisonian balancing, required to protect ordered liberty, and national security should rest upon untested premises and shopworn truisms--the catchalls of untested "common notoriety" and "cultural cocoons," or street-wise common knowledge, or pop-sociology and psychology, should be replaced with new protocols for the exercise of judicial notice in this unique species of cases. [FN148]

Several principles present themselves and should be utilized in this task. These principles are useful irrespective of whether the facts of which judicial notice may be taken are characterized as adjudicative or legislative. In short, it should not matter whether adjudicative facts, legislative facts, scientific, sociological facts, or otherwise, are to be noticed by the court. All judicially noticed facts in law enforcement conduct questions, which may bear upon the outcome, should be treated alike as a matter of prudent policy. Such treatment would require visibility, testing, and the avoidance of any cultural cocoon that may be material.

***122** A. Visibility

First, there is the question as to what extent a trial court should be explicit in respecting the value premises that it adopts when it takes judicial notice of underlying societal principles. [FN149] Should a modern judge do as Judge Spicer did in 1881, and take explicit notice of the cultural conditions underlying the relationship between law enforcement and certain classes of citizens? Recall that Judge Spicer went to elaborate lengths to describe the frontier dangers. He also described the sociopolitical climate of Tombstone, plagued, as he stated, by stage robberies, rustlings, shootings, intimidation, and fear. [FN150] Judge Spicer took further judicial notice of the legislative fact that in this violent and crime-prone culture, the police authorities must, in the nature of things, be highly self-protective--the climate being one of constant, mortal danger to their own persons. [FN151]

In New York City in 1996, U.S. District Judge Baer--after opening with his ambiguous President Kennedy quote respecting pervasive myths as the great enemy of truth--exercised some visible judicial notice of a very stark set of legislative facts respecting the sociopolitical climate of the N.Y.P.D.'s 34th Precinct. [FN152] He explicitly recognized a history of alleged police corruption, abuse, and violence practiced by the officers of the 34th Precinct upon nearby neighborhoods. [FN153] From this judicially noted predicate of widespread fear and distrust of the police, Judge Baer determined that a group of suspects fleeing from approaching police was rational conduct, and, accordingly, such flight could not constitute evasive conduct leading to reasonable cause for the police to investigate further. [FN154]

In both instances, the judges were reasonably straightforward in stating their judicially noted facts. It is a central tenet that such visibility in the exercise of judicial notice is a vital, but not final, precondition. The key value of visibility is that it will help avoid unannounced, *de facto* exercises of judicial notice. [FN155]

***123** B. Adversarial Testing of the Alternatives for Judicially Noted Legislative Facts

Visibility, for its own sake, is of limited value as a workable protocol for the most effective use of judicial notice in dealing with law enforcement misconduct issues, but it does make important additional features possible. Visibility is a first step in moving the process from an informal *de facto* role to a formal *de jure* role. It is posited that the contending parties involved in a law enforcement misconduct matter could readily be invited to address the proposed judicial notice in advance of its use in the ultimate decision of the case.

For instance, if Judge Spicer in the O.K. Corral inquiry had invited the seven participating attorneys to review and argue his statements of judicial notice, these could have been subjected to adversarial scrutiny prior to the decision. Similarly, Judge Baer in the *Bayless* case might have done the same insofar as his extensive judicial notice of the South Bronx police precinct's alleged notoriety for brutality and dishonesty. Additionally, perhaps other social interests, such as the state attorney general or others with a concrete interest in the outcome, should be invited to present legislative facts in law enforcement misconduct cases.

In both instances, the court would have enjoyed the benefits of adversarial testing of the sociopolitical "facts" upon which their ultimate decisions would come to rest. Other facts are tested in the nature of our trial system, so why not these? Moreover, in Judge Baer's case, the blunt legislative fact that, prior sociological studies or not, the general public and the government leaders were not disposed to adopt the police control values, under circumstances of the large-scale drug transaction which was involved in *Bayless*, obviously carried weight as things worked out later. This may have been brought to Judge Baer's contemplation and saved the judge considerable embarrassment.

C. Neutralizing the Cultural Cocoon

Judicial notice, whether its use is *de jure* or *de facto*, derives from the reality that all social institutions--including the courts--must be run by humans who are a part of the culture served by those courts. The complex dynamics of a culture's entire fabric of shared values, its learning and lore, social and professional networks, political allegiances, and general normative standards and customs, are integral to a judge who is cocooned within the culture while also serving in the most pivotal role of its system of justice.

***124** Consider for a moment the history of members of the Chicago judiciary. [FN156] Posit a Chicago judge whose personal upward social mobility was tightly linked to an ethnic political machine with entrenched and systematic business relationships among law enforcement and organized crime. Such a judge could well be expected to come to the bench with a fundamental set of beliefs as well as attitudes. [FN157] The culture had informed such a judge of its principles long before ascension to the bench. These beliefs and attitudes might include a keen awareness that certain levels of criminal conduct were "immune" within the system of Chicago justice. [FN158] Other levels of criminal conduct were never to be tolerated, while still other levels of conduct were immune under some circumstances, but not otherwise. [FN159]

Contrast this to another Chicago judge who might have come to the trial bench or, historically more likely, to the Cook County juvenile courts, tightly linked to suburban reformers, newspapers, churches, and "legitimate" business interests. [FN160] Beliefs and attitudes of such a judge could be expected to include a fixed set of viewpoints about a wide or narrow use of judicial discretion in the trial of cases, abhorrence of political influence within the system--except, of course, for the influence of reformers and others who selected such judges--and a broad mandate to eradicate the long list of self-perpetuating urban evils as seen by the Cook County reformist groups. [FN161]

Invariably, each of these judges could be expected to think and act in some large measure as a result of his or her cultural and subcultural experiences and allegiances. This is not a Marxist view based on rigid principles of economic determinism that sees judges as being prevented from donning a disinterested and balanced judicial temperament with

their robes, uninfluenced by the prevailing economic powers. [FN162] This is a political, but even more profoundly, a psychological factor because, like most of us, the minds and values of ***125** magistrates are shaped by and rooted in the complexities of their life experience within the cocoon of their culture. [FN163]

In the narrow area of judicial hearings related to law enforcement misconduct, it is important that judicial notice be invoked independent of the cultural cocoon of the jurist. It is manifest that society is less well served when the answer to Madison's core dilemma of government may be automatically derived from the social and cultural background of the judge rather than the broader facts of the society. But how can a judge rise out of the cultural cocoon? Is not such independence an impossible dream?

Actually, it is not. Human learning and the consequent adaptability of thought and conduct are a powerful engine. Judges are as likely to learn and adapt to new concepts as others. [FN164] It is submitted that the adversarial testing of judicially noticed facts in law enforcement misconduct hearings should also include an examination of judge's cultural cocoon. This is merely accepting the realism of the exercise of judicial power.

Quite apart from all the philosophical considerations of legal realism, what if it was expected that in the testing of such facts, the judge and the parties would freely address the possible cultural bias question? For instance, in the example of the Chicago reformist judge linked to suburbs, newspapers, churches, and business groups, an inquiry as to whether proposed judicially noticed facts truly had a factual basis. Or were they merely derived from the policy viewpoints of those groups who supported the judge in question? Lawyers frequently discuss such matters about a judge's view of things when outside the courtroom. Making such discussion a part of the protocol in law enforcement misconduct questions would be simply moving this corridor talk into the adversarial pit.

Simply knowing that this type of inquiry could openly be tested would, perhaps, cause a more reflective use of judicial notice in advance. [FN165] Additionally, those judicially noticed facts, which are both supported with a credible factual basis as well as being the foundation of political policies of active leadership groups in the community, would enjoy far more solid esteem.

***126** Of course, there is another view of the matter, which could regard the airing of a judge's cultural biases as destructive of public confidence. That is the view of preserving a useful hypocrisy. In this case, the useful hypocrisy of keeping such inquiries off-limits avoids a demoralization of the public, which has a need to regard the courts--and the judiciary which peoples them--as somehow beyond the reach of prejudice-producing cultural forces. This argument is akin to objections to the principle of legal realism that judges do not merely discover law but, in fact, make law. [FN166]

IX. CONCLUSION

It can be seen in both the O.K. Corral and South Bronx worldviews that judicial notice of pertinent legislative or policy facts can be outcome determinative. [FN167] Accordingly, the following steps in judicial self-consciousness are important:

(1) The trial court should ascertain whether law enforcement misconduct would be dispositive of one or more of the issues before the court.

(2) The trial court should explicitly frame its proposed judicial notice of facts pertaining to any law enforcement matters, much in the fashion of Judge Spicer, and, to a lesser degree, of Judge Baer.

(3) Counsel for the parties should be invited to submit factual rebuttal to the judicially noted facts prior to implementation of judicial notice by the trial court.

(4) An open examination of any cultural cocoon of the judge which may affect his or her use of judicial notice should be readily accepted.

(5) All of the trial court's judicially noted facts should be explained by the trial judge in terms of the

evidence submitted, and also be subject to de novo review upon appeal. [FN168]

***127** Judicial notice can be a tool of mischief, and, unchecked, can become a universal solvent not containable in any known rational vessel of the law. Such potential for mischief is greatly magnified in a variety of settings when the doctrine of judicial notice of legislative facts is brought to bear at trial with regard to law enforcement conduct and the use of coercive governmental force. These settings may include the admissibility of seized evidence at trial, the injury to or death of suspects in civil suits against law enforcement, and many other situations. Thus, an etiquette is needed whereby the judicial notice of legislative facts pertaining to law enforcement conduct must be visible, subjected to adversary testing, and dealt with self-consciously because of the vital questions of governance that are inherent in such issues.

Times have changed, and the need to find new approaches for the making of judicial assumptions--taking judicial notice--in cases which examine the conduct of law enforcement has become as critical as the times themselves.

[FNa1]. Semi-retired Professor of Law who served as a Visiting Professor of Law, Marquette University Law School during the research and preparation of this article. The author is grateful for the assistance of Marquette and to Carrie Kratochvil; also, for style and substance advice, to Associate Dean and Director of The National Sports Law Institute Professor Matt Mitten of Marquette; Vice President and Associate Dean Mike Wheeler; Harry and Helen Hutchins; Distinguished Research Professor of Law Paul McGreal; Professor Val Ricks; and Professor Kevin Yamamoto of South Texas College of Law.

[FN1]. Osama bin Laden, *Declaration of War against the Americans Occupying the Land of the Two Holy Places*, *in* CONFRONTING FEAR, A HISTORY OF TERRORISM 405 (Isaac Cronin ed., 2002).

[FN2]. The wit belongs to the late Dean McDermott of Suffolk Law School. *See* MCCORMICK ON EVIDENCE § 551, n.1, (John W. Strong ed., West 4th ed. 1992).

[FN3]. *See* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 212-13 (Dover 1996). It is not suggested that today's threats of domestic violence are new or entirely endemic to post-9/11 America as the entire history of frontierism in American history testifies. Lynching, vigilante committees, claims associations in the Carolinas, Iowa, and California, and other forms direct justice for the frontiersman were unrestrained expressions of primitive action. More importantly, modern terrorism mixed with modern technology make the potential for lawlessness, destruction, and death on global scale a reality.

[FN4]. This article revisits some problems, and rethinks and revises their proposed solutions, originally related to garden-variety street crime and drug busts that were first raised by the author in 1999. However, the entire area is now refocused and altered in light of America's domestic security crisis of global terrorism since 9/11. For the earlier article, see Bruce W. Burton, *The "O.K. Corral Principle": Finding the Proper Role for Judicial Notice in Police Misconduct Matters*, 29 N.M. L. REV. 301 (1999).

[FN5]. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[FN6]. *See supra* note 4. The "crime control" model and the "police control" model of opposing worldviews were examined in detail in the 1999 piece.

[FN7]. *See, e.g.*, David Eccles Hardy, *Great Cases in Utopian Law*; *Aside*, *The Common Law Origins of the Infield Fly Rule*, AMICUS HUMORIAE, AN ANTHOLOGY OF LEGAL HUMOR, at 121, 145 (Robert M. Jarvis et al. eds., 2003).

[FN8]. John Donne got it right when he explained that, "[n]o man is an island, entire of itself every man is a piece of the continent, a part of the main ... involved in mankind." *See* JOHN DONNE, "From No Man Is an Island," *available at:* http://www.polyticks.com/home/Visions/NoManIsl.htm.

[FN9]. Some have direct personal experience with law enforcement and the criminal justice system. But even those Americans who lack direct contact are exposed through the popularity of vicarious experiences. Examples of these abound--Neilson ratings reveal ... news services and televised dramas, while such content also flourishes in newspapers, magazines, and word-of-mouth. Who can deny that our modern lexicon has absorbed scores of crime-related terms ("perps," "drop pieces," "finger," "narc," "rap sheet," "goombah," "Rat Squad," "pusher," "dime-bag," "drop a dime," "score," "allocute," "boost," etc.) derived from films, Court TV, documentaries, *The Sopranos, NYPD Blue, Law and Order*, and the multitude of other reality-based entertainments.

[FN10]. For an internet overview of the 9/11 attacks, losses, and rebuilding at New York City's Ground Zero, see NYNewsday.com *available at:* http:// www.nynewsday.com/news/local/manhattan/wtc; for the Spanish terrorist bombings, see "Spain Makes New Arrests in Madrid Bombings," *available at:* http:// www.twincities.com/mld/twincities/news/nation/8355630.htm?1c.

[FN11]. *See* Burton, *supra* note 4. My original article on the topic, which focused upon the proper role for judicial notice in dealing with garden-variety street crimes such as drug dealing and murder, described the dramatic contrast between the crime control model and the police control model in the use of judicial notice. (Under the rubric "police" this latter model includes all government law enforcement.) The original article also proposed a series of reforms for a more rational use of judicial notice, again dealing with garden-variety street crimes. *See* THE FEDERALIST NO. 51, *supra* note 5, at 322. Like so much else, the events of 9/11 and America's entry into the present Age of Terrorism adds significant new dimensions to the problem and demands added reforms--more accurately, added "auxiliary precautions," as James Madison would have phrased it.

[FN12]. THE O.K. CORRAL INQUEST 217-26 (Alfred E. Turner ed., 1981) [hereinafter INQUEST].

[FN13]. *See* United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996).

[FN14]. *See infra* Part IV.B.

[FN15]. Whether conventional police forces dealing with garden-variety street crime or security agencies dealing with internal and external threats, the perception of which is the greatest danger to free society--the threat or the cure--is the pivotal element in any tribunal's selection of the O.K. Corral or the South Bronx worldviews.

[FN16]. *See* JOHN KLEINIG, THE ETHICS OF POLICING 225-28 (Douglas MacLean ed., 1996). *See infra* Part IV.A. (discussing the crime control model associated with the "Spicer view"); *see infra* Part IV.C. (discussing the police control model--also referred to as the "Due Process" model).

[FN17]. *Id.*

[FN18]. *See infra* Part V.

[FN19]. *See* THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN20]. The doctrine's pragmatic element suggests that, properly used, judicial notice can vastly expedite many matters and promote judicial efficiency. However, there exists the possibility that courts will be influenced by vague circumstances in employing judicial notice and there is no agreement as to the exact parameters of the doctrine. MCCORMICK, *supra* note 2, at § 332. It is self-evident that when improperly used, judicial notice as a tool of judicial efficiency has the potential for allowing inaccuracy where cases can turn upon unexamined bias, misinformation, folk wisdom, or unrebutted or unrebuttable value systems.

[FN21]. *Id.* at § § 328, 332.

[FN22]. *Id.*

[FN23]. Intellectual honesty is an added virtue which may scrub away pretense with the acid of reality as in the famous dissent by Justice Harlan in *Plessy v. Ferguson*, when he pointed out the true status of Jim Crow laws which were designed to circumvent the post-Civil War constitutional policies against racial segregation and thereafter enforced to keep blacks separated from whites and "everyone knows" it. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting). After taking judicial notice of the politics of Jim Crow laws and their purposes, Harlan went on to add a terse summary of such a use of judicial notice: "No one would be so wanting in candor as to assert the contrary." *Id*.

[FN24]. One problem lies in the fact that, for the most part, judges are usually generalists, not trained in the theoretical sciences nor the applied sciences such as medicine. *See, e.g.*, Stephen G. Breyer, The Interdependence of Science and Law 6, Address at Annual Meeting of The American Association for the Advancement of Science, (Feb. 16, 1998), *quoted in* Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTSS L.J. 189, 211 (1998):

> Judges are not trained scientists. They inevitably lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. They typically are generalists, dealing with cases that may vary widely in respect to substantive subject matter. Their primary objective is usually process-related: that of seeing that a decision is reached fairly and in a timely way.

See MCCORMICK, *supra* note 2, at § § 330, 328. Frequently, the test for judicial notice is one of "common notoriety" of facts bearing on a litigated matter. This means that things of notoriety--facts or theories known to the judges as well as other matters apart from facts or theories not strictly included in either formal classification--are grist for the mill. These are facts, which may properly be before the court without either evidence or argument being presented. This is, of course, so vague a standard as to admit a very great deal without the customary formalities of proof. *See* Gottstein v. Lister, 153 P. 595, 602 (Wash. 1915); Chiulla de Luca v. Board of Park Comm'rs of City of Hartfield, 107 A. 611 (Conn. 1919).

[FN25]. *See* E.F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REVV. 1435 (1986). At the core of this article's criticism is the messy quandary that the limits of judicial notice are inexact. Frequently, the test for judicial notice is one of "common notoriety" of facts bearing on a litigated matter. This means that things of notoriety-facts or theories known to the judges as well as other matters apart from facts or theories not strictly included in either formal classification-are grist for the mill. These are facts that may properly be before the court without either evidence or argument being presented. This is, of course, so vague as a standard to admit a very great deal without the customary formalities of proof.

[FN26]. *Id*. at 25.

[FN27]. *See* MCCORMICK, *supra* note 2, at § 329, n.1. *See generally id*. at § § 328-335. *See also* Town of North Hempstead v. Gregory, 65 N.Y.S. 867 (N.Y. App. Div. 1900). The 1997 revisions to the Federal Rules of Evidence would allow trial and appellate courts to take judicial notice of law--foreign or otherwise--in accord with some standards of procedural fairness. PAUL R. RICE, THE EVIDENCE PROJECT: PROPOSED REVISIONS TO THE FEDERAL RULES OF EVIDENCE WITH SUPPORTING COMMENTARY, (Thomas C. Goldstein ed., 1997). More broadly, these new rules would attempt to set forth procedural etiquette for the use of judicial notice as to adjudicative facts. *Id*. at 392-405. The thrust of this article is directed towards judicial notice of legislative facts in questions of law enforcement conduct.

[FN28]. *See generally* MCCORMICK, *supra* note 2, at § § 329-332.

[FN29]. *See* MCCORMICK, *supra* note 2, at § 203. In this context, of course, there exists the added riddle--should judicial notice be taken of the scientific consensus that supports the scientific fact of which judicial notice is to be taken?

[FN30]. For example, consider Dean Carl Auerbach's 1965 classroom discussion about the theory that every issue in every legal case boils down to an A-B-C syllogism and can be briefed as such. The major premise, or A, is what the court saw as the applicable legal principle (e.g., truth is an absolute defense to libel). The minor premise, or B, is the material fact controlling of the particular case's outcome (e.g., plaintiff was convicted of child molestation). The conclusion, or C, would necessarily follow from A and B (e.g., the truth of defendant's publication about plaintiff's

child molestation conviction is an absolute defense to plaintiff's libel claim).

[FN31]. *See* MCCORMICK, *supra* note 2, at § § 328, 330; *see also* Mills v. Denver Tramway Corp., 155 F.2d 808 (10th Cir. 1946).

[FN32]. Federal Judges Association Annual Meeting (C-SPAN television broadcast, May 12, 1997) (Judge Stanley Sporkin).

[FN33]. *See* MCCORMICK, *supra* note, 2 at § 335.

[FN34]. Commentators sometimes also speak of "non-adjudicative" facts which are not legislative in the sense of determining a social policy which underpins particular rules of law, nor adjudicative in the sense of bearing upon the specific facts of the case at bar. These non-adjudicative, non-legislative facts of which judicial notice can be taken involve a range of matters. Historical facts, geographical facts, jurisdictional facts, the position and powers of principal officers of government and other questions of operative political science, the records of government offices, courts, and other bodies would fall into this category. *See* MCCORMICK, *supra* note 2, at § § 331, 335. There may be a spillover with scientific principles growing in acceptance; for example the ultimate scientific acceptance of fingerprinting, DNA, blood tests, polygraphs, ballistic reports, radar speed detectors, and voice recognition technology are a few of the evolving scientific principles that might come to be recognized through judicial notice and thereby, in a sense, set a legislative or policy standard to be used to determine future questions of admissibility, and weight, with respect to a particular case. Various tests are proposed for the admissibility of such scientific data. A key issue deals with scientific consensus. For instance, is there a sufficient consensus within the appropriate scientific community respecting DNA, for example, to render DNA identification from blood, semen, or hair admissible as bearing upon the identity of the person allegedly leaving the deposit of blood, semen or hair? The difficulty, of course, is that totality or universality of scientific acceptance within the community is not always a fixed point. Frequently, consensus is evolving, and the question becomes at what point is the scientific consensus strong enough that it should render the principle as scientifically suitable for purposes of judicial notice? Moreover, there exists a potentially troublesome area in the judicial notice of matters not found in the so-called "hard sciences" (e.g., mathematics, engineering, medicine, physics, and chemistry). These would be facts arising in the social sciences, psychology, and other behavioral disciplines. Judicial notice of scientific principles will evolve as "the tenets of science evolve." *See* MCCORMICK, *supra* note 2, at § 330. *See generally id*. at § § 203, 330, 332.

[FN35]. It seems self-evident that the personal biases of a judge present a real and present danger to justice when unchecked. As Justice Scalia put it: "What does a judge consult ... what binds biases of judges? Prevents him from simply implementing his own prejudices?" Justice Antonin Scalia, Address at Catholic University (Oct. 18, 1996) [hereinafter Justice Scalia speech]. Judicial economy contains important strands of useful pragmatism because the concept is grounded in judicial efficiency and ordinary sense.

[FN36]. *See* Justice Scalia speech, *supra* note 35. Nevertheless, judicial notice promotes judicial economy, thus important strands of useful pragmatism are inherent in the notion since the concept is grounded in judicial efficiency and ordinary sense. The doctrine allows a tribunal to dispense with time-consuming proofs of ordinary, commonly accepted data, thus conserving court time otherwise wasted to bore the jury and participants by presenting and allowing cross-examination and rebuttal of commonplace information and readily accepted scientific principles. *See* MCCORMICK, *supra* note 2, at § 329. Thus, a judge who takes judicial notice of specific adjudicative facts is subject to severe criticism. *See* Wasserman v. Bartholomew, 923 P.2d 806, 815 n.26 (Alaska 1996) (holding that trial judge improperly took judicial notice of facts within his personal knowledge respecting one's community and business involvement); Cordova v. State, 675 So. 2d 632, 635 (Fla. Dist. Ct. App. 1996) (holding that use of judicial notice to establish conclusive existence of a particular fact runs afoul of the Fifth and Fourteenth Amendments' due process rights); State v. Murnahan, 689 N.E.2d 1021, 1026 (Ohio Ct. App. 1996) (finding error and abuse of discretion for trial judge to take judicial notice of a confidential plea bargaining agreement during sentencing phase); State v. Stubblefield, 953 S.W.2d 223, 225 (Tenn. Ct. App. 1997) (implying that sentencing based upon pre-trial felony arrests, not convictions, would be improper use of judicial notice); *In re* Asbestos Litigation, 829 F.2d 1233, 1257 (3d Cir. 1987) (determining that the ultimate fact for adjudication culpability of the manufacturers for product liability was improperly reached through judicial notice of legislative facts, which should be more properly confined to determining

the rationality of a policy decision) (Hunter, J., dissenting). *See also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 69, 98-141 (1921). Judicial notice's pragmatic element suggests that when properly used judicial notice can vastly expedite many matters and promote judicial efficiency.

[FN37]. *See supra* note 30 (discussing the syllogism proposed by Dean Auerbach).

[FN38]. *See* DANIEL D. BLINKA, THE ROOTS OF JURY NULLIFICATION: JEFFERSON'S "EXPERIMENT" AND THE PROBLEM OF LAW, REASON, AND POLITICS IN THE NEW REPUBLICCC 115 (2004) (copy on reserve at the Marquette University Law Library).

[FN39]. *Id.*

[FN40]. *See* Blinka, *supra* note 38. At that moment, shortly after Philips and others were apprehended, tried, and hanged, not for the widespread terrorist activities, but for garden-variety theft charges.

[FN41]. *See* MCCORMICK, *supra* note 2, at § § 328-329, 331.

[FN42]. *Id.* at § 328.

[FN43]. Following a month of hearings, Judge Wells Spicer of Tombstone, Arizona Territory, filed his findings of fact and conclusions of law incident to the shootout at the O.K. Corral on October 26, 1881. *See* INQUEST, *supra* note 12, at 217-26. Judge Spicer's report was laden with judicial notice of facts concerning the nature of crime and law enforcement in the Territory.

[FN44]. Burton, *supra* note 4.

[FN45]. *See Gun Fight Three Die in Minute at the OK Corral*, TOMBSTONE NEWSPAPER, Oct. 27, 1881, *reprinted in* TOMBSTONE CLIPPING, at 33 (Ben T. Traywick ed., 1994). *See also* INQUEST, *supra* note 12, at 15-17.

[FN46]. *Id.*

[FN47]. *See* INQUEST, *supra* note 12, at 15. Will McLaury, thought to have financed these unsuccessful maneuvers, once wrote that the only satisfactory outcome of all the money he spent was "the death of [Deputy Town Marshall] Morgan [Earp], the crippling of [Town Marshall] Virgil Earp and death of [Earp ally] McMasters." *Id.*

[FN48]. *Id.* The anti-Earp legal maneuvers arising out of the O.K. Corral shootings included several well-financed attempts to prosecute the Earps in court, and allegedly even paid assassination attempts upon them.

[FN49]. *Id.* at 50-52, 168-71.

[FN50]. *Id.*

[FN51]. *Id.* at 13, 97-122. These "old scores" included conflicts between Ike Clanton and the Earps and Doc Holliday relating to Earp-led schemes and the "strong-arm" role of the Earps on behalf of the town's vigilante group of merchants (presenting testimony of William Allen, Wesley Fuller, William Clairborne, and Joseph "Ike" Clanton).

[FN52]. *Id.* at 13, 97-122. One powerful piece of evidence in Judge Spicer's hearings was the fact that Cowboy leader and provocateur Ike Clanton, unarmed at the time of the shootout, was not fired upon by the Earps but allowed to leave the scene. *Id.* at 11-13, 36 n.3, 223. The Cowboys' sponsors, the ranchers, pursued designs to control the prime land within the city and to become the force behind local government. *Id.* at 13-14.

[FN53]. INQUEST, *supra* note 12, at 220, 224-25.

[FN54]. During the ensuing months, Wyatt Earp and Doc Holiday, sometimes accompanied by a deputized posse,

appear to have eliminated such noted Tombstone area Cowboys as "Indian Charlie" Cruz, "Curly Bill" Brocius, "Johnny Ringo," and Frank Stillwell. *See* JOSEPHINE EARP, I MARRIED WYATT EARP 79 (Glenn G. Boyer ed., 1976).

[FN55]. Was Spicer only informed by personal bias or was he a competent jurist? The few known facts are that he had practiced law in Utah prior to coming to Tombstone. In 1875, he defended an accused in a massacre of immigrants. By 1881, the time of the O.K. Corral shootout, Spicer was a fifty-year-old lawyer and justice of the peace for Cochise County, Arizona Territory. Moreover, there is current historical evidence that justifies Spicer's characterizations of the crime problem in Tombstone and the surrounding counties. *See* EARP, *supra* note 54, at 109 n.1. *See also* Angelo Patane, *Old Fashioned Justice: Law and (Dis) Order on the Arizona Frontier*, 34 ARIZ. ATT'Y 26 (1998); *see also* INQUEST, *supra* note 12, at 13, 21. From its creation by President Lincoln in the 1860s and until the 1890s or even later, the Arizona Territory was the genuine Wild West. Shootouts, stage robberies, Indian attacks, stabbings, vigilante justice, lynchings, and heavily armed citizens made Tombstone "a fundamentally lawless community." *Id.*; *see also* INQUEST, *supra* note 12, at 13, 21. Note that only four months before the O.K. Corral hearings, Spicer handled the trial of Tombstone mayor on felony charges of criminal malfeasance related to a business partner of the Earp brothers. *See id*. at 11. Judge Spicer was well known for being politically opposed to the defendant Mayor Alder Randall, regarding him as a fraud, liar, and a front for hoodlums in public land deals. *See id*. Spicer said as much in his written findings of the case. Yet Judge Spicer discharged the defendant on a technically strict reading of English common law and the territorial statutes of Arizona, failing to find in either that official malfeasance, nonfeasance, or misfeasance were classified as felonies. *See id*. at 12. Such a scrupulous judge would be an unlikely candidate four months later to abuse knowingly the power of judicial notice.

[FN56]. As contrasted to a "due process" or police control model discussed *infra* Part IV.C.

[FN57]. *See* KLEINIG, *supra* note 16, at 225-28; *see also* EARP, *supra* note 54, at 109, n.1.

[FN58]. INQUEST, *supra* note 12, at 224.

[FN59]. *Id*. at 224-25.

[FN60]. *See* FEDERALIST NO. 51, *supra* note 5 (emphasis added).

[FN61]. Such logic flows inevitably from Madison's first premise about controlling the governed.

[FN62]. American courts have used a variety of tools of judicial notice of evidentiary facts to assist law enforcement and prosecution. For example, courts have taken judicial notice of the chemical properties and uses of coca leaves. *See* United States v. Gould, 536 F.2d 216 (8th Cir. 1976); United States v. Berrojo, 628 F.2d 368 (5th Cir. 1980). *See also* MCCORMICK, *supra* note 2, at § 328 (discussing the basics of DNA analysis); *see* United States v. Beasley, 102 F.3d 1440 (8th Cir. 1996) (explaining the credibility of suspects' alibis regarding watching a televised football game); *see* People v. Burt, 279 N.W.2d 299 (Mich. Ct. App. 1979) (discussing the scientific basis and use of firearms); *see* State v. McGuire, 601 P.2d 1348 (Ariz. Ct. App. 1978) (describing the status of urban high-rises); *see In re* Malone, 592 F. Supp. 1135 (E.D. Mo. 1984) (commenting on geography); *see* United States v. Piggie, 622 F.2d 486 (10th Cir. 1980) (showing that the jury was not required to accept judicial notice as conclusive); *see* United States v. Lavender, 602 F.2d 639 (4th Cir. 1979). *See also* Gov't of Canal Zone v. Burjan, 596 F.2d 690 (5th Cir 1979); United States v. Bowers, 660 F.2d 527 (5th Cir. 1981); United States v. Powless, 546 F.2d 792 (8th Cir. 1977). For example, a court which adheres to the value system inherent in the crime control model can be expected to use judicial notice in a fashion far more akin to the dissent in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977). Thus, in *Powless*, a search-and-seizure case involving weapons and ammunition being transported in a van without license plates, the Eighth Circuit expressly used judicial notice in assessing the reasonableness of the search of the vehicle. 546 F.2d at 792. The *Powless* court took notice, as a matter of "general knowledge," of a recent history of violence, including the use of firearms, on the Pine Ridge Indian Reservation, where the van was headed when the police stopped and searched it. *See id*. at 795, n.1; *see also* United States v. Yates, 22 F.3d 981, 987 (10th Cir. 1994). Conceptually, such uses of judicial notice are predicated on the underlying social value of the crime control model as contrasted with the police control model.

[FN63]. *See, e.g.*, KLEINIG, *supra* note 16, at 225-28. The police control model (sometimes called the due process model) would emphasize the danger to constitutional liberties posed by law enforcement power and be skeptical about the good faith of law enforcement. By contrast, the crime control model--best illustrated by Judge Spicer's viewpoint--would emphasize a judicial understanding of the demands upon law enforcement and exhibit a greater acceptance of the fundamental good faith of law enforcement officers.

[FN64]. *Id.*

[FN65]. 913 F. Supp. 232 (S.D.N.Y. 1996) (Bayless I). Subsequently this decision was vacated, and Judge Baer retracted his views. Judge Baer recused himself in United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996) (Bayless II); United States v. Bayless, 926 F. Supp. 405 (S.D.N.Y. 1996) (Bayless III). It should be noted that Judge Baer's original Bayless decision acknowledged the research of a New York University L.L.M. candidate and that the decision's discussion begins with a cryptic use of President Kennedy's language about pervasive myths as the enemy of truth. *See* *Bayless I*, 913 F. Supp. at 234. Exactly what dishonest myth was being targeted by Judge Baer (or the L.L.M. candidate) is not explained, but it is likely related to the "myth" that law enforcement is the protector of public order.

[FN66]. *See* KLEINIG, *supra* note 16, at 225-28; *Bayless I*, 913 F. Supp. at 241-42.

[FN67]. *See* *Bayless I*, 913 F. Supp. at 234-35, 242.

[FN68]. *Id.* at 242.

[FN69]. *Id.* at 239. This skeptical judicial regard for the good faith, or even basic honesty, of law enforcement officer is a characteristic of the police control model. *See* KLEINIG, *supra* note 16, at 226-27.

[FN70]. *See* *Bayless I*, 913 F. Supp. at 234-35, 242.

[FN71]. Judge Baer subsequently retracted his starkly stated police control model when the White House and members of Congress began to question his fitness for the judiciary after his initial decision. *See* Monroe H. Freedman, *A Symposium on Judicial Independence: The Threat to Judicial Independence by Criticism of Judges--A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 737-41 (1997).

[FN72]. Judge Baer was ultimately unable to stand against the angry firestorm of opposition that greeted his anti-police use of judicial notice, a firestorm that echoed from the tabloid press to the corridors of the White House and Congress. Under threats that both President Clinton, who had appointed Judge Baer to the bench in the first place, and others might call for his resignation, the judge began a backwards dance. He held new hearings and issued a slew of face-saving language. Finally, he voluntarily recused himself from the case and recasting the entire incident into a decidedly pro-police result. None of this later backsliding alters the clarity of Judge Baer's initial choice of a police control model for his use of judicial notice.

[FN73]. *See* KLEINIG, *supra* note 16, at 225-28.

[FN74]. *See* THE FEDERALIST NO. 51, *supra* note 5, at 322 (emphasis added). Madison mentions the need for "auxiliary precautions" which highlights the sort of process reforms for the use of judicial notice in cases examining questions of law enforcement misconduct.

[FN75]. For instance, Judge Baer placed significant reliance on New York's Mollen Commission Report in analyzing the way South Bronx residents regarded police officers. He also relied *New York Daily News* reports about the 34th Police District Precinct's corruption, perjury, and unjustified arrests. *See* *Bayless I*, 913 F.Supp. at 232, 242 n.18.

[FN76]. The potential for the police control model to influence judicial notice as to police investigatory tactics permeates other search-and-seizure situations. *See, e.g.*, United States v. Pierre, 932 F.2d 377, 388 (5th Cir. 1991); Lykken v. Vavreck, 366 F. Supp. 585, 595 (D. Minn. 1973); H.L. "Mike" McCormick, *Excessive Force Claims under*

the Fourteenth Amendment, 29 THE URBAN LAWYER 69, 70-72 (1997). For contrast, compare the dissenting opinion in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), with the majority opinion at pages 290-93. For instance, in a checkpoint case on the Texas-Mexico boundary, a border guard stuck his face into the open window of a van while questioning the occupants and smelled marijuana. *See Pierre*, 932 F.2d at 379. In an earlier, similar case, the Fifth Circuit took judicial notice of the border guard's testimony that he always sticks his head through the open driver's side car windows in order to "judge the veracity or evasiveness of a person's response to questions." *Id*. at 389. The court determined that such conduct amounted to an unfounded search for something suspicious. Thus, the court added to the litany of facts of which judicial notice is taken in criminal cases and held that the scent of marijuana, and all evidence that it led to the guard's examination of the car's luggage, was excluded. *See id*. at 388. The impact of judicial notice is wide-ranging in the criminal law. *See* United States v. Murdoch, 98 F.3d 472, 478 (9th Cir. 1996) (demonstrating judicial notice of diagnostic standards of the American Psychiatric Association); United States v. Yates, 22 F.3d 981, 987 (10th Cir. 1994) (requiring judicial notice that a defendant's criminal conduct was ongoing and escalating in seriousness); United States v. Evans, 994 F.2d 317, 332 n.1 (7th Cir. 1993) (requiring judicial notice of high crime areas and judicial notice of drugs-weapons linkage in crime areas); United States v. Arbizo, 1991 WL 33102 (9th Cir. 1991) (illustrating judicial notice of criminal *modus operandi*); United States v. Short, 597 F.2d 1122, 1130 (8th Cir. 1979) (requiring judicial notice of the expenses of criminal incarceration). Apart from search-and-seizure questions, court inquiries respecting force by police are also subject to utilizing the police control model of judicial notice. In determining whether law enforcement officers used excessive force, there are instances of judicial notice being employed by courts in the sway of this same value system. As already noted, in the first of Judge Baer's decisions he took notice of the "abusive and violent" nature of the local precinct. *See Bayless I*, 913 F. Supp. at 241. In a civil action for damages against Minneapolis law enforcement officers, the U.S. District Court took judicial notice that the heinous misconduct of police resulting in more severe injuries frequently occurs throughout the nation, but that did not justify police conduct that is less injurious. *See Lykken*, 366 F. Supp. at 595. A contrasting example of the impact of the police control model at work was the refusal to take judicial notice of the violence and force used by criminal in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977). In that case, the court examined alleged police misconduct in dealing with a group of anti-war protestors. The majority treated the May 5, 1972 incident and police response in isolation, refusing to take judicial notice of violent mob actions from April 18 to May 5. *Id*. The dissent in *Dellums* believed that police conduct needed to be portrayed in light of the three weeks of "mob rule conditions" leading up to May 5, thus resulting in police immunity from civil damages. In short, the police control model can be used to stress prior police conduct, even geographically far-distant misconduct, and to ignore the history of private party conduct in the area. Based upon the O.K. Corral Worldview and the South Bronx Worldview, judicial notice in the examination of law enforcement conduct can range between polar extremes. The pro-police factors concerning the need for crime control taken into account by Judge Spicer in the O.K. Corral inquiry, and the antagonistic view of police as suppressors of inner-city neighborhoods whose populations are victimized, as shown in Judge Baer's opinion, exemplify the crime control and the police control models.

[FN77]. "In the Wake of Terrorism," *New Perspectives Quarterly*, Fall 1996, at 58.

[FN78]. *See* LESSER, ET AL., COUNTERING THE NEW TERRORISM at 25-26 [hereinafter RAND STUDY]; *see* JOHN VAN WYHE, THE WRITINGS OF CHARLES DARWIN ON THE WEB, *in* Chapter 2 "On the Natural Means of Selection," *available at* http:// pages.britishlibrary.net/charles.darwin/texts/foundations/foundations_02.htm.

[FN79]. The implications for dealing with terrorism as a crime problem has disadvantages in making evidence gathering and use far more cumbersome with the emphasis on individual guilt or innocence; whereas viewing the problem as one of warfare means we will be "less fastidious about evidence" and individual culpability. *See* RAND STUDY, *supra* note 78, at xii. This article does not seek to analyze or resolve this larger issue but focuses on the narrower question of judicial supervision of law enforcement conduct. However, the warfare scale of modern terrorism is a present fact. "[O]ne or two hundred terrorists are capable of delivering a mortal blow to our institutions ... Everybody will agree that the State can not let itself be brought down without defending itself; and whatever it costs, this defense is a sacred and necessary duty for everyone." Gianfranco Sanguinetti, *On Terrorism and the State*, *in* CONFRONTING FEAR, A HISTORY OF TERRORISM 75, 79 (Isaac Cronin ed., 2002); Bracewell & Patterson LLP, Robert F. Housman & The Honorable Ed Bethune, *Birth and Development of Homeland Security Law*, *in* HOMELAND SECURITY LAW HANDBOOK at 3-5, 11-13 (ABS Consulting, 2003) [hereinafter HOMELAND

SECURITY LAW HANDBOOK]; RAND STUDY, *supra* note 78, at 131-38.

[FN80]. As to World War II, see generally WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH (Ballentine Books 1990) (1960); LAWRENCE YEP, HIROSHIMA (1996); MICHAEL BESCHLOSS, THE CONQUERORS: ROOSEVELT, TRUMAN, AND THE DESTRUCTION OF HITLER'S GERMANY 1941-1945 (Simon & Schuster ed., 2002). For a concise history of the impact of 9/11 on American government and private institutions, see HOMELAND SECURITY LAW HANDBOOK, *supra* note 79, at 5-6, 21-25.

[FN81]. For an inventory of leading terrorist groups and their geographic centers, see generally RAND STUDY, *supra* note 78, at 39-67.

[FN82]. For some terrorists, the goal is programmatic and a subsidence of terrorist strikes would likely accompany achievement of those goals. *See* Martha Crenshaw, *The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice*, *in* ORIGINS OF TERRORISM 10-11 (1998). For others, the motives are entirely psychological; see JERROLD M. POST, *Terroroist Psycho-Logic: Terrorist Behavior as a Product of Psychological Forces*, *in* ORIGINS OF TERRORISM 25-27 (Woodrow Wilson Center Press 1998). *See, e.g.*, Daniel Klaidman & Peter Annin, *Under the Microscope*, NEWSWEEK, Feb. 10, 1997, at 32; Elaine Shannon, *The Gang That Couldn't Examine Straight*, TIME, Apr. 28, 1997, at 30-31; Gordon Witkin, *Black Marks for Federal Sleuths*, U.S. NEWS, Apr. 28, 1997, at 39; CARIBBEAN TODAY 8 (May 31, 1997); CNN Interactive (Jan. 30, Mar. 7, Apr. 16, 1997); Andrew Cohen, *FBI Agent Poses Threat to Case Against Suspects*, DENVER BUS. J., (June 14, 1996).

[FN83]. State sponsorship of terrorist groups is one reason cited for the increased incidence and funding. *See* RAND STUDY, *supra* note 78, at 14-15.

[FN84]. *Id*. at 37-38, 43, 71, 86-87.

[FN85]. *Id*. at 4, 45-48. The term as defined in the Rand study is broadened for purposes hereof to include not only low-intensity societal crimes and assaults by terrorist networks--at levels less than conventional warfare-- but also as a general term for terrorist networks using all forms of strategic and tactical assaults. Low-tech street violence, cyber warfare against communications and economies, and large-scale WMD death or destruction in population centers. *See id*. at 29, 18-19, 39-50, 107, 139.

[FN86]. *Id*. at 107, 139.

[FN87]. *See* HOMELAND SECURITY LAW HANDBOOK, *supra* note 79, at 37-38, 137-39, 183-84. Biological and chemical creation data can be found in RAND STUDY, *supra* note 78, at 29-32.

[FN88]. *Id*. at 3-5, 313-22.

[FN89]. *Id*. at 4-6.

[FN90]. *Id*. at 40. The inherent risks of abuse of the powers spelled out in the new homeland security laws is well known. *Id*. at 42-43. The phrase "Security Mission Creep," used in the HOMELAND SECURITY LAW HANDBOOK, *supra* note 79 at 40-41, illustrates two narrow points. First, the political cache associated with the notion of homeland security an be used as a Trojan Horse for a bevy of special interests, many of them worthy enough goals in themselves, such as environmental reforms. This can lead to the harmful result that limited funds for domestic security and the human resources to carry out the mission become diluted. Second, larger domestic security needs can get entwined, or even lost, in political gamesmanship with such special interest needs. Both are important and this article recognizes such a very real danger. But this article also uses "Mission Creep" in a larger sense as well, and raises the question of whether the security enforcement agencies of government, under the umbrella of Homeland Security, will become increasingly intrusive or demanding upon our private lives.

[FN91]. *Id*. at 40-41.

[FN92]. *Id*. at 17-21; *see also* Josef Joffe, *The Meaning of Spain*, TIME, Mar. 29, 2004, at 31; for human willingness to sacrifice traditional liberties when faced with fear of terrorism (including Thomas Jefferson's willingness), see *supra* Part VI.A.

[FN93]. *See* HOMELAND SECURITY LAW HANDBOOK, *supra* note 79 at 42.

[FN94]. *See* RAND STUDY, *supra* note 78, at v, xii. For the substantial distinction between crime control and fighting a war, see *supra* note 77, and accompanying text.

[FN95]. HOMELAND SECURITY LAW HANDBOOK, *supra* note 79, at 4-7, 42.

[FN96]. *Id*. at 11, 16, 42.

[FN97]. RAND STUDY, *supra* note 78, at 96-97.

[FN98]. *Id*. at 45-48.

[FN99]. *Id*. at 42-43, 98-99.

[FN100]. *Id*. at 14-15, 129-30, 137-38.

[FN101]. *Id*. at 8-19.

[FN102]. *Id*. at 94.

[FN103]. *Id*. at 13, 40, 71-72.

[FN104]. *See supra* Part V.

[FN105]. In speaking of tailoring new counter terrorism strategies, researchers are dealing in adaptive behavior just as fully as terrorist groups do so in seeking new Darwinian adaptations to their efforts. RAND STUDY, *supra* note 78, at 25-26, 131.

[FN106]. For example, Lederberg writes that the entire equation of society can be changed by the first successful attack by a weapon of bio-terrorism:

> I will submit there would be nothing more devastating to our security than a successful demonstration of the power of an attack with weapons of mass destruction .... [T]here's much much more at stake than the casualties that might be involved in any single incident ... We're at a turning point in what the future history of biological weapons might be."

Joshua Lederberg, *The Diversity of Bio-Weapons*, *in* CONFRONTING FEAR, A HISTORY OF TERRORISM 274 (Isaac Cronin ed., 2002).

[FN107]. *Id*. at xi.

[FN108]. *See also* Diana West, *Defining the War We're Fighting*, BLACK HILLS PIONEER, April 30, 2004 (making the point that immigration by, or conversion to, Muslim jihadist belief is proceeding rapidly in England and Europe as once predicted by historian Edward Gibbon).

[FN109]. Jonathon Dixon, *Determining the Identity of the Bard, William Shakespeare or the Earl of Oxford*, 35 RENAISSANCE 61, 56 (2004); Scott McCrea, *The Mysterious Murder of Christopher Marlowe*, 35 RENAISSANCE 61, 41-43 (setting out evidence that playwright Marlowe, a Protestant-Catholic double agent in both England and Normandy, and many of Marlowe's colleagues were officially part of Walsingham's secret service for the Queen but probably double agents for other palace factions. Marlowe likely fell victim to internal rivalries among William and Robert Cecil's secret agents, who had infiltrated Walsingham's group, and a third rival faction, Essex's secret agents).

Does this bear a resemblance to the alleged rivalries among U.S. intelligence and law enforcement agencies that have highlighted much of our post-9/11 landscape?

[FN110]. McCrea, *supra* note 109, at 42-43

[FN111]. *Id*. at 42-43, 56-57.

[FN112]. Bill of Attainder drafted by Thomas Jefferson on May 28, 1778, following Governor Patrick Henry's latest report from Colonel John Wilson of the Norfolk (Virginia) militia that the "Philips gang had ambushed and killed a militia captain less than a mile from his home [after] the slain captain had unsuccessfully tried to capture Philips." *See* BLINKA, *supra* note 38, at 112-13.

[FN113]. BLINKA, *supra* note 38, at 112-15.

[FN114]. *Id*. at 112.

[FN115]. *Id*. at 112.

[FN116]. *Id*. at 114.

[FN117]. *Id*. at 114, n. 320, and 115-116; Jack Lynch, *A Patriot, a Traitor, and a Bill of Attainder*, 24 CW JOURNAL (2002), *available at* http:// www.history.org.foundation/journal/spring02/attainder.cfm.

[FN118]. Lynch, *supra* note 117.

[FN119]. Despite later attacks Jefferson refused to repudiate or apologize for his bill of attainder. *See* BLINKA, *supra* note 38, at 118, n. 331.

[FN120]. Abraham Lincoln, Annual Message to Congress (December 31, 1862), *in* 5 COLLECT GO WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953), *available at:* http:// showcase.netins.net/web/creative/lincoln/speeches/congress.htm.

[FN121]. In urging the necessity of the stormy present as a justification for unprecedented governmental measures, Lincoln sought to resolve this classic dilemma: If the American union failed, what benefit could then come from "adhering to a fallen Constitution?" Frank J. Williams, *Abraham Lincoln and Civil Liberties: The Corning Letter*, *in* JUDGING LINCOLN 60 (2002). The political doctrine of necessity is best illustrated in this context by Justice Holmes' dictum in *Abrams v. United States*, 250 U.S. 616, 630 (1919), where he advised never to suppress loathsome opinions "unless they so imminently threaten immediate interference with ... law that an immediate check is required to save the country." *Id*.

[FN122]. *See* JAY WINICK, APRIL 1865, THE MONTH THAT SAVED AMERICA xv, 351-65 (2003) (detailed recounting of how Robert E. Lee personally snuffed out Jefferson Davis' plan for the South to fight using guerilla-style warfare following Appomattox).

[FN123]. The specific occasion was Lincoln's proposal for "remunerative emancipation" of the Southern slaves; Lincoln's goal was to energize the Congress, to avoid narrow legal doctrines, and act with sweeping boldness. *See* 5 COLLECT GO WORKS OF ABRAHAM LINCOLN, *supra* note 120.

[FN124]. In the intense domestic fire of Civil War America Lincoln found it necessary to propose or take drastic measures affecting search and seizure, habeas corpus, income taxation, and the like. When the Supreme Court (Chief Justice Taney of *Dred Scott* fame) ruled that Lincoln's suspension of habeas corpus exceeded his executive authority, Lincoln and the War Department ignored the Court. (Habeas corpus was not restored until after the Civil War in 1866.) *See* Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No.9-487).

[FN125]. JOHN STUART MILL, ON LIBERTY (1859), *available at* http:// www.bartleby.com/66/4/39504.html

[FN126]. The American military arrested 13,000 alleged Southern sympathizers under martial law beginning in 1861.

[FN127]. Chief Nuremberg Prosecutor, Supreme Court Justice, and Attorney General, Robert Jackson's position was that totalitarian tyrants such as Hitler would, once empowered, destroy the civil freedoms of others. *See* EUGENE GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE 169-74 (2003).

[FN128]. *Id.* Dean Carl Auerbach has made the point in Cold War-era comments that the underlying logic of John Stuart Mill's true position on free speech was not categorical; he argued that Mill would deny the right of free expression to those who, once empowered, would use their power to end the right of free speech for others. Auerbach's premise is consistent with the John Stuart Mill and Robert Jackson positions.

[FN129]. GERHART, *supra* note 127.

[FN130]. The logic flows along an *a fortiori* path that, if the respected First Amendment right cannot be absolute where national survival is at risk, then why should not other liberties be subject to the same qualification?

[FN131]. Would a judge, ruling on warrants, search and seizure, use of force, informed statements to authorities, habeas corpus, and similar governmental conduct questions, be greatly tempted to adopt a wide-gauge crime-and-terrorism control model? Doing so in response to the sort of fear for the long-term survival of the country and its constitutional protections underlying the actions and words of Jefferson, Lincoln, Jackson, and Mill discussed *supra* Part VI.A.-D.

[FN132]. *Id.*

[FN133]. It is submitted that unspoken, untested fears of a magistrate could tilt the selection of crime-and-terrorism control models in taking judicial notice, hence the need for special protocols.

[FN134]. If such informed, stalwart defenders of civil liberties succumbed to fear, then all the more reason to expose these fears to adversarial testing in court.

[FN135]. Recall how the "Ministry of Love" handled indictments and prosecutions in Orwell's bleak totalitarian state. GEORGE ORWELL, 1984,8 (Signet 1985) (1949).

[FN136]. *See* HOMELAND SECURITY LAW HANDBOOK, *supra* note 79, at 183-84, 143-45; RAND STUDY, *supra* note 78, at x-xi, 94, 139.

[FN137]. Joffe, *supra* note 92, at 31.

[FN138]. For the logic of not allowing untested fears, such as that underlying Jefferson's bill of attainder conduct or that of Lincoln, Holmes, Mill, and Jackson to inform the magistrate's choice, see *supra* Part VI.A-D.

[FN139]. *See* United States v. Pierre, 932 F.2d 377, 388 (5th Cir. 1991); Dellums v. Powell, 566 F.2d 167, 211-14 (D.C. Cir. 1977) (Tamm, J., dissenting).

[FN140]. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443-44 (Cal. 1944) (Traynor, J., concurring); Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).

[FN141]. *See* CARDOZO, *supra* note 36, at 69, 98-141.

[FN142]. *See* Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'YY 595 (1992) (focusing on the proper use of judicial notice when judges "make facts").

[FN143]. *See* THE FEDERALIST NO. 51, *supra* note 5, at 322 (Madison's call for "auxiliary precautions" is the sort of process reform required for the use of judicial notice in cases examining questions of law enforcement misconduct, which are discussed in this article).

[FN144]. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).

[FN145]. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 5 (1998).

[FN146]. *See supra* Part IV.D.

[FN147]. *Id.*

[FN148]. *See generally* MCCORMICK, *supra* note 2.

[FN149]. *See* E.F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REVV. 1435 (1986) (arguing that the intellectual arrogance found in some judges, the pious talk of others, interior untested hunches, and the flawed art of human thinking play powerful roles in real-world judicial reasoning processes).

[FN150]. *See supra* Part IV.A.

[FN151]. *Id.*

[FN152]. *Bayless 1*, 913 F. Supp. at 242, 234 nn.12-13, and 17-18; *see also supra* Part IV.C.

[FN153]. *Bayless 1*, 913 F. Supp. at 242, 234 nn.12-13, and 17-18.

[FN154]. *Id.*

[FN155]. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 166-71 (1982) (discussing similar principles while arguing for judicial openness as to statutory-legislative interplay).

[FN156]. *See* Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. OF AM. HIST. 619, 619-35 (1970).

[FN157]. *Id.*

[FN158]. *Id.*

[FN159]. *Id. See also* Roberts, *supra* note 149.

[FN160]. *See* Haller, *supra* note 156.

[FN161]. *Id.*

[FN162]. Dean Carl Auerbach's 1965 classroom critique of the anti-Marxist conventional wisdom pertaining to judiciaries' economic determinism. Auerbach's central point was that it is a straw case to argue that a classical Marxist sees judges tied to their social class of origin (i.e., landowning gentry). Classical Marxism would see the judges as instruments of the state which is largely controlled by, and responsive to, the dominant economic class (i.e., owners of industrial capital).

[FN163]. *See* CARDOZO, *supra* note 36, at 167-77.

[FN164]. *See generally* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER

SELF (1993).

[FN165]. "Human beings have the capacity to break free from the patterns of thought into which they have been born and, by imagining a different world, change it." A quote sometimes, perhaps erroneously, attributed to Professor Jay Kenneth Koch of Columbia University.

[FN166]. *See* Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'YY 595 (1992) (focusing on the proper use of judicial notice when judges "make facts").

[FN167]. *See* INQUEST, *supra* note 12, at 25-26; *Bayless I*, 913 F. Supp. at 241-42.

[FN168]. MCCORMICK, *supra* note 2, at § 333. Also note the similarity of the proposal to the notice, reasoned decisions, and comment principles under the Administrative Procedures Act. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § § 8.4.3, 9.3, 10.02, 2.1.4 (1993).

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Book Review

*60 MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP BY STEVEN LUBET YALE UNIVERSITY PRESS, NEW HAVEN, CT, 2004. 252 PAGES, $30.00

Henry S. Cohn [FNa1]

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Northwestern University law professor Steven Lubet has taken an interest in the events, legal and otherwise, surrounding the American West's most famous gun battle - the shootout at the O.K. Corral. The shootout, which took place on Oct. 26, 1881, was between Wyatt Earp and his party, and the McLaury and Clanton brothers. *Murder in Tombstone* concentrates on the legal consequences facing Earp after he prevailed in the bloody altercation.

Lubet begins his narrative with a description of the site of the gunfight - Tombstone, in the Territory of Arizona. Tombstone in the 1880s was a typical frontier mining town in some ways, filled with fortune-seekers, rowdies, and fast entertainment. The customs of well-bred society meant little to some residents. But Tombstone was also a booming town, and bankers, ranchers, and merchants were among those who, seeking a stable community, supported strict enforcement of the criminal law and the pro-business platform of the Republican Party.

Wyatt Earp was an experienced lawman who migrated to Tombstone in 1879 to join his brother Virgil, then a deputy U.S. marshall. Among the troublemakers whom Virgil and Wyatt had to control were a band of cattle rustlers called the Cowboys, who stole cattle from nearby Mexico and smuggled them into Tombstone.

Virgil Earp represented the federal jurisdiction in Tombstone, but the territorial government had appointed Johnny

Behan sheriff of the county. Behan was an adept politician, a Democrat who had won appointment from Arizona's provisional governor, John C. Frémont. In 1856, Frémont, an explorer and popular hero, had been the first Republican candidate for president. Behan took a less confrontational attitude than the Earps took toward the Cowboys, and the sheriff apparently ignored some of the cattle rustlers' illegal activities.

The shootout on Oct. 26 was the culmination of a year-long series of incidents between the Earp brothers and two Cowboy families, the Clantons and the McLaurys. Just before the bullets started flying, Virgil had been told that Ike Clanton had taken to the streets and was threatening to kill the Earps. Virgil, Wyatt, a third brother, Morgan, and Wyatt's unsavory friend, Doc Holliday, set off to find Ike. Sheriff Behan met them along the road and tried to stop them, saying that he would handle the situation and disarm ***61** Ike and anyone with him. Virgil ignored Behan and approached the corral, where he found Ike and Billy Clanton as well as Tom and Frank McLaury. Did Virgil ask his opponents to disarm? Did the Cowboys reply by opening fire? We have no clear answers to these questions. All we know is that the Earps and Holliday began to fire their guns. After "thirty shots in thirty seconds," Virgil and Morgan were badly wounded, and Billy Clanton and Tom and Frank McLaury were dead. Wyatt Earp, Doc Holliday, and Ike Clanton were not injured, Clanton having run out of the corral during the fight.

The next event in the drama was the convening of a coroner's jury to fix blame for the incident. The verdict was inconclusive, but Ike Clanton filed a petition asking that the Earps and Holliday be charged with murder. Apparently, under Arizona law, the filing of the charge by Clanton, a person of interest, had the same legal effect as if the charge had been brought by Behan, an officer of the court. The law required a preliminary hearing before a justice of the peace - a procedure that usually consisted of brief testimony by a few prosecution witnesses and a determination by the justice of the peace of whether "sufficient cause" existed. In this instance, however, the parties agreed to a full hearing of the issues at the preliminary hearing instead of a trial. The prosecution therefore did not follow its customary practice at preliminary hearings of holding back evidence until the trial. The defense had good reason to believe that the assigned justice of the peace, Judge Wells Spicer, tended to favor the Republican Party, the town's business interests, and harsh law enforcement. And Spicer would rule on any charge of overzealousness by the lawmen; that matter he would not leave to a populist jury.

Lubet, well skilled in the art of advocacy, shows how the system worked against the prosecution and how the prosecutors' own errors compounded these structural difficulties. The prosecution team was led by Lyttleton Price, a Republican chosen by Governor Frémont. As a Republican, Price was distrusted by the Cowboys and their followers, who were antibusiness Democrats who feared that the lead prosecutor would not press hard for a conviction of the Earps, because the Earps were law enforcement officers. Ike Clanton arranged to have his personal attorney, Ben Goodrich, act as Price's assistant. To add to this potential for conflict, in the middle of the hearing, the prosecution also added to its team Will McLaury, another surviving brother, who was an attorney in Fort Worth, Texas. McLaury kept pounding the drumbeat for revenge and demanded taking certain legal actions - such as calling Ike Clanton as a witness - that later came to hurt the prosecution.

The Earps chose an attorney with an excellent reputation, Tom Finch. He had mastered courtroom techniques, especially the art of cross-examination. In the 19th century, lawyers did not have access to the facts of a case in advance; instead they used a cross-examination method known as "provables." The lawyer would present hypothetical situations to the witness and obtain his or her reaction. Sometimes the witness was tripped up while responding to the provable. Johnny Behan, for example, testified for the prosecution as to Virgil Earp's eagerness to take on Ike Clanton but, under defense attorney Finch's cross-examination, Behan admitted that Virgil had demanded that the other side give up its weapons before the battle started. Ike Clanton was caught wildly speculating that the shootout was Wyatt Earp's attempt to conceal his involvement in a robbery and murder that had taken place earlier that year.

When it came the defense's turn to present evidence, Finch, with the approval of Judge Spicer, made use of a statute governing the preliminary hearing to allow Wyatt Earp to testify by reading a prepared statement. Obviously, Finch had prepared the statement in advance. The statement, which was not subject to cross-examination, flatly stated that the Earps and Holliday had fired only when fired upon and had acted in self-defense. Scholars ever since have debated Judge Spicer's interpretation of the statute that allowed Wyatt Earp to testify via a prepared statement.

The prosecution also had the opportunity as the proceeding came to an end to ask for an amended indictment to

include a manslaughter charge. A manslaughter conviction would have meant a lengthy prison sentence for the Earps and Holliday. But, because Will McLaury was on the prosecution team, and he sought solely the death penalty, no motion to amend the indictment was made.

The collapse of the prosecution's case made it easier for Judge Spicer to decide whether sufficient cause existed. Spicer criticized Virgil Earp for overreacting to the threat from the Cowboys, but he did not find sufficient cause for a murder charge. The courtroom proceedings thus came to an end, but there were further ramifications - ambushes and gunfights in the following months in which first Virgil Earp was wounded, then Morgan Earp was killed. Wyatt Earp sought revenge against those thought to be involved and killed one of the Cowboys.

In describing the legal fallout from the gunfight at the O.K. Corral, Lubet offers a thorough and lucid presentation. His most riveting analysis is reserved for two underlying themes that he links to the failed prosecution of the Earps and Doc Holliday.

The first theme is Judge Spicer's and attorney Finch's previous experience arising from the 1857 Mountain Meadows massacre that had left 100 people dead. The massacre involved a Mormon attack on a wagon train that the Mormon establishment had intended as a signal to Washington that it found the growing federal regulation in Mormon territory unacceptable. Responsibility for the attack was not pressed until after the Civil War. In 1874, one member of the Mormon attack group, John Lee, was charged with murder and executed by federal authorities. Judge Spicer, then practicing law in Utah, served as Lee's attorney and watched with disgust as Brigham Young and other powerful Mormons agreed to cooperate in Lee's prosecution, so long as there was no investigation of the Mormon higher ***62** echelon. According to Lubet, Spicer had received an unforgettable lesson in the misuse of political power by prosecutors, and he applied that lesson in the Earp hearing. Defense attorney Finch had been a close adviser to the Mormons during this same time period and knew of Judge Spicer's bias against prosecutors.

The second theme brings a romantic, Hollywood aspect to the story. In 1879, Josephine Marcus, an 18-year-old Orthodox Jewish woman living with her parents in San Francisco, ran away to Arizona with a troupe of actors. In Tombstone, she met Johnny Behan, who wooed her, followed her back to San Francisco, and talked her into returning to Tombstone with him. By 1881, however, the love affair had fallen apart. Wyatt Earp came on the scene and Josephine turned her attentions to him. Lubet believes Josephine's having taken up with Earp was a reason for Behan's dislike of Earp and for his willingness to testify that Earp was the aggressor at the O.K. Corral.

Josephine Marcus and Wyatt Earp stayed together for 50 years. Leaving Tombstone to avoid any further blood-letting after Judge Spicer's decision, the couple traveled throughout the Southwest and California. They took part in get-rich-quick schemes and tried to market the legend of Wyatt Earp. Lubet's book includes a photograph of Wyatt Earp taken in 1928, a year before he died, which makes it difficult to believe that he was anything but a banker or someone's kindly grandfather. Upon his death, Josephine had Wyatt cremated and his ashes buried in the Marcus family plot. The Jewish cemetery, south of San Francisco, still has streams of visitors who want to stand at the "hallowed site" of Wyatt Earp's resting place.

With stories such as these, Lubet skillfully relates the interplay of frontier lawlessness and justice in the old West.

[FNa1]. *Henry S. Cohn is a judge of the Connecticut Superior Court.*

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Trial
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Department

Book

***70** MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP STEVEN LUBET YALE UNIVERSITY PRESS WWW.YALEBOOKS.COM 253 PP., $30

Sara Hoffman Jurand [FNa1]

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Cowboys, gunfights, renegade lawmen-the legends of the Wild West have fascinated historians, authors, and directors for years. The stories of Wyatt Earp and his brothers, as well as Dodge City and Tombstone and the infamous gunfight at the O.K. Corral, are particularly popular.

But the myriad books and movies ***71** about them focus on the mythic characters, the uncertainty of safety and justice on the frontier, and the intertwining conflicts that men tried to resolve with guns.

These accounts give little attention to the trial that followed the gunfight. This trial, Steven Lubet argues, was the key to the Earp legend: Had it gone differently, Wyatt and his brothers would not be remembered as venerable lawmen. Instead, they would have been hanged and forgotten by history.

In *Murder in Tombstone*, Lubet, a law professor at Northwestern University, examines the trial in depth, praising the advocacy skills of the Earps' attorney, Tom Fitch. The prosecutor had the upper hand, Lubet argues, but didn't play it. Fitch took advantage of these inadequacies and saved his clients from hanging on the gallows.

The proceeding was actually not a trial but a preliminary hearing before a justice of the peace, Wells Spicer, to determine whether a crime had occurred and whether there was “sufficient evidence” of the defendants' guilt.

The hearing should have been quick and tidy; the case looked destined for grand jury charges and a trial. Instead, the proceeding turned into the longest preliminary hearing in Arizona history, with 30 witnesses testifying over 30 days. In the end, all charges against the men were dropped.

For those not familiar with the story, Lubet begins by introducing Wyatt Earp; his brothers, Virgil and Morgan; and his friend John “Doc” Holliday. The Earp brothers had worked in law enforcement but moved to Tombstone, Arizona, to pursue business opportunities. Virgil was soon named a federal marshal and eventually deputized his brothers to help him bring the town's unruly elements under control.

They had particular trouble with “the Cowboys,” a loosely federated band of cattle rustlers, including Ike and Billy Clanton and Tom and Frank McLaury.

Public hostilities and personal disputes flared for months between the Cowboys and the Earps and Holliday. These came to a head on October 26, 1881, when the lawmen confronted the Clantons and the McLaurys, allegedly to disarm them. When the smoke cleared, the McLaurys and Billy Clanton were dead; Virgil and Morgan Earp and Holliday were wounded.

Although the people of Tombstone initially praised the marshal and deputies for ridding the town of the disruptive Cowboys, public opinion soon turned against them. The Earps and Holliday were charged with first-degree murder.

That, Lubet argues, was the prosecution's first mistake. Had it pursued manslaughter charges, the preliminary hearing probably would have gone the other way: There was plenty of evidence that the Earps and Holliday, though

trying to enforce the law, had acted recklessly. However, there were too many conflicting stories over what happened-who shot first and whether the defendants were acting in self-defense-to support a charge of premeditated murder.

Lubet's story reads like a Wild West novel, even as he moves to transcripts of witness testimony and examines legal strategies. The outcome is not a surprise, but the book is a compelling read nonetheless, a fresh look at a familiar story.

[FNa1]. SARA HOFFMAN JURAND *is an associate editor of* TRIAL.

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Article

*1 THE FORGOTTEN TRIAL OF WYATT EARP

Steven Lubet [FNa1]

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MURDER IN THE STREETS OF TOMBSTONE

It is early afternoon on a fateful day--October 26, 1881--in the frontier town of Tombstone, Arizona. Four heavily armed men have decided to take the law into their own hands. Gamblers and possibly thieves, a notorious gunslinger among them, they are determined to take vengeance for a series of trivial insults and imagined threats. Ignoring the orders of the county sheriff, they march grimly to an alley between a rooming house and a photographer's studio. There they catch sight of their intended victims--four unarmed men, two of whom they had already pistol-whipped that day, who are trying desperately to saddle their horses and ride out of town ahead of the trouble. It was not to be. With cool precision, the killers stride down the alley, guns ready, while horrified townsfolk watch from the nearby buildings. Barely pausing to shout an angry taunt--"The fight has commenced! Go to fighting or get away!"--they begin firing at their cornered prey. In less than half a minute it is over. Three men lie dead or dying from multiple gunshot wounds; only one has managed to escape. Arrogantly and unemotionally, the leader of the gang again brushes off the bewildered sheriff: "I won't be arrested, but I am here to answer what I have done. I am not going to leave town."

For most readers, the preceding narrative will seem both familiar and dissonant--almost, but not quite, a story that has been heard many times before. And well it should, because it is an account of the legendary "Gunfight at the O.K. Corral," though not told from the customary perspective of the cele ***2** brated Earp Brothers. Rather, it is the losers' story, as it would have been related by partisans of the Clanton and McLaury brothers, three of whom were "hurled into eternity" by the bullets of the Earps and Doc Holliday. Of course, the losers' story is barely acknowledged today. Wyatt Earp is a hero, Doc Holliday an intriguing rogue, and the Clantons and McLaurys are identified, if at all, simply as generic bad guys. In gunfights as in war, the winners write the history.

Wyatt Earp, it turns out, won the historic gunfight in two different venues. As we all know, his first victory came in the dusty streets of Tombstone, Arizona. But he also won a second and equally important fight--at least as far as his legend is concerned--in a territorial courtroom. Wyatt Earp and his companions were prosecuted for murder in the weeks following the gunfight. The charges were ultimately dismissed by Judge Wells Spicer, but not before many days of testimony from eyewitnesses who swore that the Earps had gunned down unarmed men begging for their lives. The charges were taken so seriously that at one point Judge Spicer revoked bail for Wyatt and Doc, ordering them to jail on the prosecution's motion that "the proof so far was conclusive of murder." [FN1]

Wyatt Earp would be remembered far differently today if he had been hanged as a murderer, rather than glorified as the definitive frontier marshal. So it is not hard to see that his myth depends as much on the outcome of the trial as it does on his survival of the shootout. [FN2] Trials, like gunfights, tend to have two sides. And as we shall see, the context can be nearly as important as the events themselves.

*3 TRIAL THEORY, THEN AND NOW

The best trial lawyers are storytellers. They take the raw and disjointed observations of witnesses and transform them into coherent and persuasive narratives. They develop compelling theories and artful themes, all the better to advance a client's cause. "Give me the facts," says the attorney, "and I will turn them into the best possible case."

But trial lawyers are not only storytellers. In addition, they are legal technicians, taking the raw observations of witnesses and organizing them into coherent, legally meaningful narratives. You can tell a terrific story and

nonetheless lose your case--especially if you have failed to shape it in a way that will be convincing to the trier of fact. This is a lesson that has been learned time and again, often through bitter experience.

In the forgotten trial of Wyatt Earp, the prosecution seemed to hold a winning hand, but the defendants nonetheless walked free. That result was attributable not so much to the lack of evidence as it was to a failure in the quality of advocacy. This is not to say that the Earps were indeed guilty-- that determination is irrevocably obscured by the passage of 120 years--but rather that a talented prosecutor, armed with a coherent theory and a persuasive story, could have won the case.

There are three structural devices that can add great power to the presentations of trial lawyers: theory, theme, and frame. A "theory of the case" provides the necessary bridge between the drama of the story and the requirements of the law. A winning case theory has internal logical force, explaining why the discrete facts, however interesting they may be, actually add up to "proof." Popular imagination notwithstanding, a trial is truly something more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts. Unless that link is supplied by a comprehensive theory of the case, even the most rip-roaringly exciting story may come to nothing when the verdict is returned. This turned out to be the key deficiency in the Tombstone prosecution. Though witness after witness testified that the Earps shot the Clantons and McLaurys without provocation, the prosecutors were never able to explain why the lawmen would have descended to murder. In the absence of a motive, the Earps' claim of self-defense could not be effectively ***4** refuted. In other words, the prosecution could not bridge the gap between description (the shooting) and proof (of murder).

Just as a case theory rests on logic, a trial theme appeals to moral force. Rather than explain why a particular verdict is dictated by the facts and the law, a theme shows why it should be entered, why it is the right thing to do. An effective theme allows the judge or jury to believe in the underlying righteousness of the verdict. The most compelling themes invoke shared values and civic virtues--honor, duty, friendship, commitment. Such themes can be forceful as rhetorical devices, though they have little if any independent legal weight. A trial theme underscores the theory of the case by showing why the desired verdict is both decent and good, as well as legally necessary. In Tombstone, the defense succeeded in developing a classic theme-- "Law and Order." The defendants claimed that they were protecting the town from marauding bandits, requiring stern measures to keep the peace. In contrast, the prosecution was not able successfully to articulate a competing set of values, attempting instead simply to let the facts speak for themselves. But, as they were to learn, facts do not speak for themselves at trial; they are always interpreted within the particular context of the case. This brings us to the concept of "story framing," which is perhaps even more important than theory and theme.

The trial process has always attempted to recreate the past, but it is an imperfect process at best. Witnesses may testify about what they saw and did. Documents and physical objects may be placed in evidence. Experts may provide relevant opinions and conclusions. In the end, however, there is an insurmountable barrier. The factfinder--judge or juror--was not at the scene of the events. Not having been there, he or she cannot actually know what happened. Rather, the factfinder must ultimately deduce or suppose what happened, based not only on the evidence presented but also upon judgment, interpretation, common sense, and other insights. This is an inevitable feature of historical fact finding--the use of one's experience and intuitions to deduce what must have happened.

The trial evidence allows a judge, as in the case of the Tombstone trial, to begin creating a mental image of the circumstances, people, locations, objects and transactions in question. That image, however, will necessarily be incomplete, since it is beyond human capacity to describe--or absorb--all of ***5** the millions of discrete details that comprise every set of events. The missing details, and inferences drawn from them, will be filled in, however, by the judge's memory and imagination. If the gunfight occurred on a dusty street, the judge will imagine or recall a particular dusty street--filling in details consistent with that image.

That act of imagination or vision constitutes a story frame, the context in which the factfinder determines what must have happened in the incident described by the evidence. To use a contemporary example, recall that the prosecution in the O.J. Simpson case labored long and hard to create what might be called a "domestic violence" frame. At the very outset of the trial, prosecutors introduced evidence of Mr. Simpson's ill treatment of his wife, his past threats, and her fear of him. The purpose of this evidence was to support the conclusion that, given his jealousy, anger,

and violent nature, he must have been the murderer. In contrast, the defense developed a counter-story, the "police prejudice" frame, intended to advance the theory that the officers must have contrived or mishandled the DNA and other evidence against Mr. Simpson.

Neither side had the benefit of direct evidence, which increased the importance of the competing frames. There were no eyewitnesses to the murder, nor was there any direct testimony that police officers had indeed monkeyed with the evidence. Instead, the jurors were asked to reach a conclusion based upon an accumulation of circumstances, in light of their own judgment and past experiences. As everyone knows, the "police prejudice" frame proved convincing and Mr. Simpson was acquitted.

The story frame may well be the trial lawyer's most powerful rhetorical tool because of its extraordinary effectiveness in the battle for the factfinder's imagination. Once a judge or juror begins to envision events in a certain context, new information will tend to be evaluated in that same context. A thought experiment makes this point more evident.

Imagine that the defendant in a criminal case is known to be a street gang member. An image immediately springs to mind. He slouches, he is rude, he is disrespectful of the law and susceptible to peer pressure. Even if jurors do not prejudge his guilt, they will probably regard him poorly--assuming that they know the answers to many questions about him. How does he dress? What sort of hours does he keep? How ***6** much does he care about school? What does he do when he hangs out with his pals? How honest is he? Does he value the rights and property of others? The answers--or at least the suppositions-- are pretty obvious if the defendant is a known "gang banger." The jurors will tend to look at the case in a "street gang" sort of way.

But now suppose that the defendant belongs to a youth club or a neighborhood association. Suddenly, the image changes. He is more clean-cut, more responsible, more diligent in school, less aggressive toward strangers. His clothing, attitudes, and pastimes will all be imagined differently, simply because of the introductory description. The initial image dictates, or at least suggests, a variety of assumptions about the defendant's attitude, conduct, and character. Jurors will begin with a different outlook if they approach the case from a "youth club" perspective.

These assumptions are not immutable. They can be overcome or dispelled. But a lawyer who can engage (and maintain) the factfinder's imagination will obviously enjoy a significant advantage. That is the power of story framing.

The frame, or context, in the Tombstone trial turned out to be essential to the court's decision. Defense counsel was able to draw upon a frame that characterized Tombstone as a town virtually under siege by lawless men such as the Clantons and McLaurys. With that as a backdrop, the actions of the Earps-- no matter how aggressive or belligerent--would tend to be interpreted as necessary steps for the protection of civil society. Not having seen the showdown himself, Judge Spicer would never be able to know who actually drew his weapon first in the split second when the gunfight began. Instead, he could only decide what must have happened when Tombstone's town marshal ordered the rowdy Cowboys to drop their guns. Did they submit as ordered or did one of them make a foolish, false--and ultimately fatal--move? The answer to that frame-dependent question would decide the entirety of the case--and there lies the fate of Wyatt Earp.

BOOMTOWN

The Earp brothers--Wyatt, Virgil, Morgan, and James--arrived in Tombstone in the fall of 1879. Although Wyatt and Virgil had already achieved considerable reputations as lawmen***7** in Kansas, they came to Arizona not as peace officers but as fortune seekers. [FN3] Their various investment plans enjoyed varying degrees of success, and they eventually found themselves once again employed in law enforcement.

Tombstone itself was every bit the frontier boom town portrayed in the Western movies. Sitting on a high plateau and surrounded by rugged mountains, the town was a scant thirty miles from the Mexican border, a fact that would assume some importance in the clashes that led to the famous gunfight. The economy of Tombstone was based primarily on mining the rich veins of silver found in the nearby hills. [FN4] By the time the Earps arrived, capital was flowing into Tombstone from Boston, Philadelphia, Chicago, and New York. [FN5] Along with the influx of capital

came the businessmen's predictable desire for stability and order, another factor in the coming battle and its denouement.

The wealth of the silver mines also brought "development." Though the Earps spent only two years in Tombstone, they saw its population grow from 1200 to at least 6000, with some estimates placing the peak population at 10,000 or more. [FN6] There were saloons, hotels, theaters, French restaurants, oyster bars, an opera house, a photographer's studio, even ice cream parlors and a "New York-style cigar shop." [FN7]

But the Easterners were not the only relative newcomers to the Arizona Territory. There were also the "Cowboys," a loose gang of "rootless ex-cowhands and saddle tramps [who] gravitated toward the small towns of southeastern Arizona, attracted to the climate and the relative lack of law enforcement on either side of the [Mexican] border." [FN8] Most of the Cowboys, ***8** including the Clantons and McLaurys, came from Texas; some were Confederate veterans. The Cowboys, it seems, had a penchant for conducting cattle-stealing raids into Mexico. [FN9] Eventually, their rustling led to a virtual border war, much to the dismay of the mine owners and townsfolk, not to mention the federal authorities.

With so much money to be made and such a volatile and transient population, the civic life of Tombstone was unruly and divided. Although the factions tended to shift somewhat, it is fair to say that they broke down roughly along regional, economic, and political lines. On one side there were the town-dwelling, Republican, Eastern-oriented business interests. On the other side there were the Cowboys and their sympathizers. [FN10] Mostly Southerners and Democrats, they lived on ranches and in the small satellite towns in the countryside surrounding Tombstone. [FN11] To rural Arizonians, cattle theft from Mexico was barely a crime, [FN12] and more than a few of the local ranchers were eager to acquire the stolen livestock at bargain prices.

In the fractious and disorganized politics that characterized the Arizona Territory, each side had its own claim to law enforcement: the Tombstone town marshal was generally elected by Republicans while the Cochise County sheriff was an office for the Democrats. [FN13] In the struggle for legitimacy, however, the Easterners held the trump. The territorial marshal was a federal official appointed by Republican Governor John ***9** Fremont. [FN14] (This, of course, riled the Cowboys, former Confederates who detested the encroachments of federal power.) There were even dueling newspapers in Tombstone. The Epitaph was Republican and pro-business, and consequently pro-Earp, while the Nugget tended to support the Democrats and the Cowboys. [FN15]

The Earps might not have had advance knowledge of Tombstone's various conflicts, but it was always clear which side they would be on. They were staunch Republicans. Virgil and James fought in the Union army; Wyatt attempted to enlist but was too young. Coming originally from Iowa, and most recently from Kansas, they were considered Easterners by Arizona standards (then as now). Most importantly, they stood for law and order. Virgil and Wyatt had served as peace officers in the railheads of Dodge City and Abilene where their primary task was keeping a tight rein on rowdy Texas trailhands, an experience that could not have endeared them to the ex-Texan Cowboys. The wild card of the Tombstone deck, in more ways than one, was John Henry "Doc" Holliday. A well-known gambler and gunslinger, [FN16] notorious for carrying a nickel plated revolver, Doc Holliday was a native of Georgia and the son of a Confederate officer. Nonetheless, Doc allied himself with the Earp faction, by virtue of his long and close friendship with Wyatt.

By 1881, three of the Earp brothers had set aside most of their assorted business speculations in favor of full-time work as peace officers, which was the job they did best. [FN17] Virgil, the oldest of the brothers, had secured a federal appointment as deputy territorial marshal for southeastern Arizona, and was also acting town marshal (sometimes called chief of police) for Tombstone. Wyatt and Morgan served as Virgil's special deputies. All three brothers occasionally rode shotgun for the stage lines in and out of Tombstone, and there is good reason to believe***10** that Wyatt additionally worked as an undercover "detective" for the Wells Fargo Company. [FN18]

The Earps' rival in law enforcement, and Wyatt's rival in other ways as well (more on that later), was Sheriff John Behan of Cochise County--a Southerner, a Democrat, and a Cowboy sympathizer. [FN19] Behan played a crucial role in both the gunfight and the trial. If things had turned out differently in either arena, we might hail him today as "brave, courageous, and bold." As it is, he is barely remembered.

SOMEBODY ROBBED THE BENSON STAGE

This being a Western epic, the story would not be complete without a stagecoach robbery. And indeed, stage holdups were a constant problem for Tombstone, with each side often blaming the other for the crimes--though the accusations often seemed grounded as much in politics as in reality. [FN20] It was just such a robbery that set in motion the chain of events that would lead to the gunfight at the O.K. Corral.

On March 15, 1881, four outlaws attacked the Tombstone-Benson stage. Though the robbery was unsuccessful, leaving behind a Wells Fargo shipment of at least $26,000, the bandits killed the driver, Bud Philpot, as well as one of the passengers. [FN21] Two posses were formed as soon as the news of the murders reached Tombstone. One posse, under the leadership of Virgil Earp, included Wyatt and Morgan, Bat Masterson, Doc Holliday, and a Wells Fargo agent named Marshall Williams. [FN22] The other was headed by none other than Sheriff Johnny Behan.

The Earp posse managed to track down and apprehend a man named Luther King. Luther confessed his involvement (though claiming he had only held the horses) and implicated three others still at large, all with known Cowboy associations: Harry Head, Billy Leonard, and Jim Crane. Behan soon arrived***11** on the scene and argued in favor of releasing King, but the Earps insisted that he be arrested. Turning the prisoner over to Behan and a deputy, the Earp posse continued to hunt for Head, Leonard, and Crane. [FN23]

Returning to Tombstone after several days of hard riding, the Earps learned that King had escaped from Behan's loosely guarded jail. More dismaying, they discovered rumors flying around town that they themselves might have been responsible for the robbery. At one point Behan actually arrested Doc Holliday for the crime, based on an affidavit extracted from Doc's girlfriend, Big-Nose Kate Elder, who seems to have been drunk at the time. The charge had to be dropped, however, when "Kate sobered up and recanted." [FN24]

Even with Doc's release, rumors continued to spread about the murder of Bud Philpot, making the capture of Leonard, Head, and Crane a matter of both pride and honor (and maybe more) for the Earps and Holliday. [FN25] By the end of the summer, however, all three robbers were dead. In June, Leonard and Head were gunned down in an internecine Cowboy feud. [FN26] In August, Crane was killed in the Guadalupe Canyon Massacre by Mexican soldiers who crossed the border to apprehend cattle rustlers; [FN27] the other victims included Old Man Clanton, father of Billy and Ike. [FN28] There followed a series of retaliatory raids that inflamed the border. This cycle of cross border violence and reprisal sent "shock waves through the Governor's Office and all the way back to the White House." [FN29] There were calls for military intervention and for more vigorous law enforcement by the local federal marshals, meaning Virgil Earp and his deputized brothers. [FN30] This, of course, would only heighten tension between the Cowboys and the Earps.

***12** In the midst of all of this, and before the massacre at Guadalupe Canyon, Wyatt Earp made a deal with Ike Clanton. Figuring that Ike might have information about Crane's whereabouts, Wyatt proposed to give Ike the hefty reward offered by Wells Fargo, if Ike would snitch on his sometimes-pal. The deal had to be kept secret, since Ike could hardly let it be known that he had agreed to inform on a fellow Cowboy. As for Wyatt, he was apparently willing to forego the reward money in exchange for an opportunity to arrest Crane. As Wyatt later explained, "I had an ambition to be sheriff of this county in the next election, and I thought it would be a great help to me with the people and businessmen if I could capture the man who killed Philpot." [FN31] Of course, the bargain between the Cowboy and the lawman fell through when the Mexican army dispatched Crane at Guadalupe Canyon, but it nonetheless turned into a source of continuing friction between Wyatt and Ike, resulting in a deadly confrontation later that year.

In the following months, more stages were robbed, [FN32] more outlaws escaped, and more tension built between the Earps and the Cowboys. The Earps attempted to enforce federal law and the Cowboys, with the apparent toleration if not outright support of Sheriff Behan, were having none of it. In one well-reported incident, Frank McLaury and several other Cowboys confronted Morgan Earp on Tombstone's main street. "I'm telling you Earps something," McLaury boasted, "you may have arrested Pete Spence and Frank Stilwell, [FN33] but don't get it into your heads that you can arrest me. If you ever lay hands on a McLaury, I'll kill you." [FN34] Similar threats were made to Virgil, who was acting town marshal at the time. [FN35] It was clear that a showdown was coming, and in the small hours of

October 26, 1881, it began.

***13** PRELUDE TO A SHOWDOWN

Tombstone lived on a 24-hour schedule. The bars, theaters, gambling halls, and opium parlors all operated around the clock, as trail hands and miners were ever-anxious to sample the pleasures of the town. So it was not surprising when, nearing midnight on October 25, Ike Clanton and Tom McLaury rode into town with a wagon-load of beef (remember, they were rustlers) and immediately headed for their favorite gambling halls. At about 1:00 a.m. on October 26, Ike showed up at the Alhambra saloon for "lunch," where he ran into Doc Holliday. The two began a shouting match, instigated by a drunken Ike, who apparently suspected that Wyatt (and Doc) were going to expose his deal to betray Crane. As Ike continued to mouth threats, Doc taunted him to make good: "[You] son of a bitch of a Cowboy, go heel [arm] yourself." [FN36] Morgan Earp, also present in the Alhambra, told Clanton to leave.

Not long after, Ike confronted Wyatt in the street, telling him that they would soon have to go "man for man." According to Wyatt, he replied "Go home, Ike, you talk too much for a fighting man." [FN37]

Then, in either a temporary gesture of conciliation or in a bizarre continuation of the feud by other means, nearly all of the principals repaired to the Occidental saloon to play poker. Johnny Behan, Ike Clanton, Tom McLaury, Doc Holliday, and Morgan, Virgil, and Wyatt Earp sat at the same table for nearly five hours; history did not record the name of the big winner. [FN38] Though the game was peaceful enough, Ike followed Virgil into the street once it was over, this time threatening Doc Holliday, "The damned son of a bitch has got to fight." [FN39]

Virgil Earp went home to sleep, but Ike Clanton did not. Instead, he roamed the streets of Tombstone, openly carrying a gun and continuing to threaten the Earps and Holliday. At noon, he was standing in front of a saloon waving a Winchester rifle. Reports of Ike's aggressive behavior came to the Earps, who could not ignore such a flagrant breach of the peace and ***14** violation of the gun ordinance. They began to search for Ike, finding him on Allen Street. Virgil quickly grabbed the rifle from Ike's hand and just as quickly used his own revolver to club Clanton to the ground. [FN40]

Bleeding from a scalp wound, Ike continued the verbal assault, "If I had seen you a second sooner, I'd have killed you." [FN41]

"You cattle thieving son-of-a-bitch," shouted Wyatt, "you've threatened my life enough, and you've got to fight." [FN42]

"Fight is my racket," replied the still angry Cowboy, "and all I want is four feet of ground." [FN43]

Wyatt openly challenged Ike Clanton, "You damned dirty cow thief, you have been threatening our lives, and I know it. I think I would be justified in shooting you down any place I should meet you. But if you are anxious to make a fight, I will go anywhere on earth to make a fight with you." [FN44]

In an odd scene that could not be repeated today, the Earps brought the disarmed Cowboy before a magistrate, who fined Clanton on the spot ($25 plus costs) and set him free. Virgil Earp even asked Clanton where he would like to pick up his confiscated guns.

On leaving the courthouse, Wyatt was confronted by Tom McLaury who continued Ike's threats. McLaury was not visibly armed, but Wyatt took no chances, pulling his pistol and striking the Cowboy across the head. [FN45]

By this time, everyone in Tombstone knew that a fight was brewing. There were dozens of eyewitnesses to the following events, many of whom later gave accounts to the press and the court. People virtually lined the streets to see what was going on. And what they saw could not have been encouraging, since Ike and Tom, now joined by their brothers, Billy Clanton and Frank McLaury, proceeded to Spangenburg's gunshop. Virgil and Wyatt stood outside, watching the Cowboys load their ***15** weapons. [FN46] Virgil wasted no time walking to the nearby Wells Fargo office to borrow a short barreled shotgun. [FN47]

The Cowboys headed to the O.K. Corral, located at the end of Fremont Street. [FN48] They were overheard threatening to shoot the Earps on sight, a fact that was reported to Virgil by a bystander named H. F. Sills. [FN49] Eventually, the Cowboys moved to a vacant lot behind the corral, adjacent to Camillus Fly's photography studio.

Spotting John Behan, Virgil asked the county sheriff to help disarm the Cowboys. Behan refused to help the Earps, but did go to the corral to talk to the Clantons and McLaurys. Frank McLaury, however, refused Behan's request to give up his weapons, saying he would not be disarmed unless the Earps were as well. [FN50]

Meanwhile, Virgil and Wyatt, standing near Hafford's Saloon at the corner of Fourth and Allen Streets, were joined by brother Morgan and Doc Holliday. Virgil handed the shotgun to Doc, and the four men began their famous shoulder-to-shoulder walk toward the corral. Behan tried to intervene, but the Earps strode past him. According to both Virgil and Wyatt, Behan falsely claimed to have disarmed the Cowboys--perhaps setting up the Earps for an ambush--though this is one of the many disputed facts that have never been fully resolved. [FN51]

Arriving at the lot, Virgil announced, "Boys, throw up your hands. I want your guns." [FN52] Then, someone fired a shot and, in Ike Clanton's phrase, "the ball opened." [FN53] Within thirty seconds, the most famous gunfight in American history was over. But who started it, and why? And could it have been avoided even as the Earps faced down the Cowboys at that last, critical moment? It would take a trial to answer those questions, even though many events of the gunfight itself were more or less uncontroverted.

***16** THIRTY SHOTS IN THIRTY SECONDS

Two pistol shots were fired almost simultaneously, followed by perhaps thirty more from both sides, as well as two blasts from the Wells Fargo shotgun. [FN54] Frank McLaury was killed on the spot, Tom McLaury and Billy Clanton were mortally wounded [FN55]--all three men "Hurled into Eternity," as the Tombstone Epitaph reported the following morning. [FN56] Virgil, Morgan, and Doc were also wounded, though not too seriously. Ike Clanton, the man who started it all, ran for cover and escaped unharmed. [FN57]

***17** Wyatt, the only participant who was not hit, was soon confronted by Behan. "Wyatt, I am arresting you," he said. "For murder." [FN58]

Wyatt Earp would have none of it. "I won't be arrested. You deceived me, Johnny, you told me they were not armed. I won't be arrested, but I am here to answer what I have done. I am not going to leave town." [FN59] Behan backed off, though not for long.

While most of Tombstone's citizenry supported the Earps, the Cowboy faction had its defenders as well. [FN60] The bodies of Tom, Frank, and Billy were displayed outside the local undertaker's establishment, propped up beneath a sign reading "Murdered in the Streets of Tombstone." [FN61] Their funeral was attended by thousands of mourners, as the town band led the cortege to the graveyard on Boot Hill. [FN62]

Within a few days of the gunfight it became clear that the Earps' chief accuser would be Sheriff John Behan. According to Behan, Billy Clanton had called out to the Earps, "Don't shoot me, I don't want to fight," and Tom McLaury had cried "I have got nothing," while opening his shirt to show that he was unarmed. [FN63] With some elaboration, this would become the anti-Earp story, as developed by the prosecution at the hearing before Judge Spicer (the pro-Earp story was told by the defendants themselves).

Who fired the first round? Did Frank McLaury shoot first, or at least draw his gun, prompting Wyatt to return fire in self-defense? Or was it an unprovoked Doc Holliday, wielding his notorious nickel plated revolver against men who had no desire to fight? That was the crucial issue confronting Tombstone as the inquiry into the gunfight proceeded. The rest of the details receded in significance compared to that one question: who drew first? As is so often the case, the presence of numerous eyewitnesses only added to the confusion, since their accounts were sharply at odds. The task of judgment fell to Justice of the Peace Wells Spicer. In order to determine what happened, he had to decide whom to believe.

***18** THE PROSECUTION BEGINS

On October 31, 1881, Ike Clanton filed murder charges against all three Earp brothers and Doc Holliday, a coroner's inquest having heard from nine witnesses who swore that the Earps had provoked the fight. [FN64] The city council had already suspended Virgil as town marshal, pending the outcome of an investigation. [FN65] Wyatt and Doc were arraigned and bail was set at $10,000 for each of the defendants, including Virgil and Morgan, whose wounds prevented them from appearing in court. [FN66] As was required by territorial law, the initial step in the proceeding was a preliminary hearing, which began immediately. [FN67] The sole legal question was whether the defendants would be held for trial in the district court.

The District Attorney at the time was Lyttleton Price. A Republican who might otherwise have been thought to support the Earp faction, he was obligated to lead the prosecution. Friends and supporters of the dead Cowboys raised $10,000 so that several private lawyers could assist the prosecution, including Ben Goodrich, a native Texan and former Confederate officer. [FN68] On the third day of the hearing, another lawyer arrived from Texas--William McLaury, brother of Frank and Tom. Will McLaury was immediately made an associate prosecutor, a task he accepted with all the passion one would expect under the circumstances:

> ***19** This thing has a tendency to arouse all the devil there is in me--it will not bring my brothers back to prosecute these men but I regard it as my duty to myself and family to see that these brutes do not go unwhipped of justice . . . . I think I can hang them. [FN69] The Earps were represented by Tom Fitch, a native New Yorker [FN70] whose personal history was as colorful as might be expected of a criminal defense lawyer on the Arizona frontier. He had previously worked as a newspaper reporter and had served in the California legislature. He had also been elected to Congress from Nevada (where he had reportedly made friends with Mark Twain). After a stint in Utah as counsel for the Mormon Church, he moved to Tombstone in 1877, where he served in the territorial legislature. Doc Holliday was separately represented by another local attorney, T.J. Drum. [FN71]

The first prosecution witness was William Allen, a friend of the McLaurys, who testified that he had followed the Earps down Fremont Street and heard one of them call out, "You sons-of-bitches, you have been looking for a fight!" [FN72] At the same time, "Tom McLaury threw his coat open and said, 'I ain't got no arms!' . . . William Clanton said, 'I do not want to fight' and held his hands out in front of him." [FN73]

The prosecution theory became rapidly clear. As much as the Cowboys might have misbehaved and postured earlier that day, they brandished no guns and posed no actual threat. Instead, it was the Earps who stalked the Cowboys, determined to have it out with them, firing before the Clantons and McLaurys even had a chance to surrender. As to the critical question of the first shot, Allen believed that it came from Doc Holliday ("the smoke came from him"), and that the second shot also came from the Earp party. [FN74]

That latter point was pivotal to the prosecution. Virgil Earp was well-respected in Tombstone, even by most of his political adversaries. Holding the position of both town and federal marshal, it would be hard to tar him--or by extension, his ***20** brothers--as a wanton killer. In contrast, Doc Holliday was widely regarded as a renegade, "the fastest, deadliest man with a gun" in Tombstone, [FN75] so it would be far easier to target him as the instigator of the crime.

Moreover, it does not appear that Doc was actually deputized when he joined Virgil Earp's posse. [FN76] At the very least, it might be seen as criminally negligent for Virgil to bring the notoriously erratic Doc into what was already a tense situation. And of course, if Doc Holliday could be shown to have opened fire, that would explain the shots from the Cowboys that wounded Virgil and Morgan. So Doc Holliday--and his nickel plated gun--became the cornerstone of the prosecution's case

Other damning witnesses followed, including Martha King, a Tombstone housewife who observed the Earp party on their way to the showdown. Before the fight ever started, she heard one of the Earps say, "Let them have it," to which Doc Holliday replied, "All right." [FN77]

Sheriff John Behan testified over a period of several days, explaining that he had tried to stop the Earps, who shoved him aside. Proceeding to the scene of the fight, he heard Wyatt yell, "You sons-of-bitches, you have been looking for a fight," and another of the Earps ordered the Cowboys to "Throw up your hands." [FN78] Then the firing began.

> I saw a nickel-plated pistol in particular [which] was pointed at one of the party. I think at Billy Clanton. My impression at the time was that Holliday had the nickel-plated pistol. I will not say for certain that Holliday had it. These pistols I speak of, were in the hands of the Earp party. When the order was [given] to "Throw up your hands," I heard Billy Clanton say, "Don't shoot me, I don't want to fight." Tom McLaury at the same time threw open his coat and said, "I have nothing" or "I am not armed," or something like that. . . . My attention was directed to the nickel-***21** plated pistol for a couple of seconds. The nickel-plated pistol was the first to fire, and instantaneously a second shot--two shots right together simultaneously--these two shots couldn't have been from the same pistol--they were too near together. The nickel plated pistol was fired by the second man from the right, the third man from the right fired the second shot, if it can be called a second shot. Then the fight became general. . . . The first two shots were fired by the Earp party. [FN79] The sheriff damningly added that at least two of the Cowboys, Ike Clanton (who survived) and Tom McLaury (who did not), had been unarmed, [FN80] and that "there was as many as eight or ten shots before I saw arms in the hands of any of the McLaury or Clanton party." [FN81]

Behan's testimony allows for two possibilities, one bad for the Earps and the other worse. The worst interpretation, of course, is that the town marshal called for the Cowboys to surrender, and then shot them down when they raised their hands as told. But if that was too harsh, the prosecution could fall back on the theory that Virgil, at least initially, might really have meant to disarm the Cowboys, but recklessly fell to shooting when he heard the report of the "drunken, dangerous dentist's" [FN82] infamous weapon. Behan's repetition of "nickel-plated pistol" was obviously meant to drive home Doc Holliday's role, since everyone in Tombstone knew that only he used such a gun. [FN83]

When Behan was tendered for cross-examination, the defense faced a difficult decision. His well-known antagonism toward the Earps would lend support to a claim of bias, but as sheriff of Cochise County he nonetheless brought a good deal of credibility to the stand. Could the defense afford to attack him head on, claiming that he had adjusted his story to convict the defendants? There was plenty of ammunition to that effect. For example, Behan had apparently given an interview to the ***22** Tombstone Nugget immediately after the gunfight, in which he informed the paper that "Frank McLowry [sic] made a motion to draw his revolver" just before the shooting began, [FN84] an observation conspicuously at odds with his "nickel-plated" testimony at trial. There was also the matter of Behan's Cowboy associations and sympathies, including the fact that his deputy, Frank Stilwell, had twice been arrested by Virgil Earp for robbing the Bisbee stage. [FN85] At one point Behan had operated a Faro table at a local saloon--law enforcement and gambling not being regarded as mutually exclusive professions on the frontier. But Wyatt broke the bank at Behan's table, putting him out of business and no doubt occasioning some resentment as well. [FN86]

And there was one more plausible line of cross-examination, this one potentially explosive. Since the fall of 1880, Behan had been living with a woman named Josephine "Sadie" Marcus, a dancer and actress from San Francisco who had come to Tombstone with a traveling production of Gilbert & Sullivan's H.M.S. Pinafore. The daughter of a middle-class German-Jewish family, Josephine was obviously adventurous and said to be stunningly beautiful. Bat Masterson described her as "the belle of the honky-tonks." [FN87] By the time of the trial, however, it appears that Josephine's affections had strayed in the direction of Wyatt Earp.

Wyatt himself was still living with a woman named Mattie Blaylock, often referred to as his second wife (and therefore called Mattie Earp) though there is no record of a marriage. [FN88] But it seems clear that Wyatt was seeing Josephine at the time. [FN89] According to the memoirs of Virgil's wife, Allie:

> ***23** We all knew about it, and we knew Mattie did too. That's why we never said anything to her. We didn't have to. We could see her with her eyes all red from cryin', thinkin' of Wyatt's carryin'-on. I didn't have to peek out at night to see if the light was still burnin' at daylight when I got up. Everything Wyatt did stuck the knife deeper into Mattie's heart. Polishin' his boots so he could prance into a fancy restaurant with Sadie. Cleanin'

his guns to show off to Sadie. You never saw his hair combed so proper or his long, slim hands so beautiful clean and soft. [FN90] In the end, Wyatt succeeded in "stealing" Josephine from Johnny Behan. [FN91] As much animosity as Behan might have felt toward the Earps because of their law enforcement and gambling conflicts, it would have paled in comparison to his romantic rivalry with Wyatt for the woman Bat Masterson called "the prettiest dame" in Tombstone. [FN92]

Tom Fitch must have been tempted indeed to attack Behan on cross-examination. Could he make the sheriff contradict himself? Would Behan even be able to maintain composure if confronted with the story of Wyatt and Josephine? But that tactic also had its risks. Taking aim so directly at a prosecution witness might suggest weakness in the defense case. And bringing Josephine into the trial would surely breach Victorian decorum, not to mention the possibility that it might backfire by making Wyatt himself look like a two-timer.

At least in part, Fitch opted for a safer course that challenged Behan concerning the "nickel-plated" gun. Holliday was known to have carried a shotgun into the fight, so where did the revolver come from? Why would a man, with a shotgun in his hand, stop to pull out a pistol? And since the shotgun was unquestionably fired twice in the course of a thirty-second battle, how could Doc Holliday have started the fight with a ***24** nickel-plated pistol? Behan had no good answer, [FN93] a deficit that has undermined the prosecution theory from that day to this.

But Fitch could not restrain himself entirely, and the cross-examination he conducted on bias was not nearly so effective. Did Behan meet with Billie Allen before trial to coordinate their testimony? "No," said the sheriff. [FN94] Had the witness contributed to the fund collected to pay the private prosecutors? "I have not contributed a cent, nor have I promised to." [FN95]

Venturing into the rivalry between Behan and the Earps, the defense made only slightly more headway:

> Were not you and Wyatt Earp applicants to General Fremont for the appointment of sheriff of Cochise County, and did not Wyatt Earp withdraw his application upon your promise to divide the profits of the office and did not you subsequently refuse to comply with your part of the contract? [FN96] Behan admitted the existence of the bargain, but claimed it fell apart because of Wyatt, [FN97] at one point adding cryptically, "something afterwards transpired that I did not take him into the office." [FN98] Whatever the reason for the failed arrangement--jealousy, perfidy, fortuity--it did not terribly undermine Behan's testimony about the gunfight.

In addition to Behan and Allen, two more witnesses testified that the Earp party, and Holliday in particular, fired the first shots and that the Clantons and McLaurys had raised their hands at Virgil's command before they were gunned down. [FN99] The evidence was sufficiently compelling that Judge Spicer revoked bail for Doc and Wyatt and remanded them to jail (because of their wounds, Morgan and Virgil were still confined***25** to bed at the time). [FN100] In a bitter irony, they were taken into custody by Johnny Behan and remained in his charge for the next sixteen days. [FN101] Recognizing the perils inherent in the situation, over a dozen Earp supporters stood guard in front of the jail, lest any Cowboy enthusiasts be tempted to take the law into their own hands. [FN102]

The capstone of the prosecution case should have been the testimony of Ike Clanton, the only Cowboy who survived the gunfight. After giving his occupation as "stock raising and cattle dealer," [FN103] he provided an account consistent with the other prosecution witnesses, a story filled with high drama and professions of personal courage. The Earps had bullied and intimidated the Clantons and McLaurys for nearly twenty-four hours before the battle, though Ike himself had "never threatened any of the Earps nor Holliday." [FN104] The fight itself was started by Doc and Morgan, quickly followed by a barrage from Virgil and Wyatt, [FN105] despite the unarmed Cowboys' efforts to surrender. [FN106] According to Ike, he heroically tried to take Wyatt out of the fight:

> He shoved his pistol up against my belly and told me to throw up my hands. He said, "You son-of-a-bitch, you can have a fight!" I turned on my heel, taking Wyatt Earp's hand and pistol with my left hand and grabbed him around the shoulder with my right hand and held him for a few seconds. While I was holding him he shot. . . . I then went on across Allen Street . . . . As I jumped into the door of the photograph gallery, I heard some bullets pass my head. [FN107] ***26** At this point the prosecution case was strong on details and weak on

motive. Five separate witnesses had testified that the Earps started the fight and that the Cowboys were either unarmed, had tried to surrender, or both. But something was lacking. It was unlikely that Judge Spicer would conclude that Virgil Earp was a cold-blooded killer who murdered the Cowboys for sport. After all, Virgil was a well-respected lawman, holding the positions of both town and federal marshal, with no record of extravagant force. It would be unconvincing to make him out simply as trigger-happy, especially since the most damning eyewitnesses were all known adversaries of the Earps. The case against the defendants would only be truly coherent if the prosecution could explain why the Earps would suddenly turn from peace officers into assassins.

The defense set out to underscore that deficit in the cross-examination of Ike Clanton. First, however, there would be a bit of impeachment, as Clanton was compelled to admit that, contrary to his direct examination, he had indeed threatened the Earps during the night before the gunfight. [FN108]

Tom Fitch next went to work, asking Ike Clanton about the agreement to rat on Leonard, Head, and Crane, the Cowboy robbers of the Benson stage. [FN109] The defense theory was that Ike's overnight rampage against the Earps was motivated by the fear that he might be discovered as an informer. It was no surprise, therefore, that Clanton, while admitting an approach by Wyatt, denied making any such deal. [FN110]

Ike Clanton continued, claiming that Wyatt and Morgan had secretly confided in him that the Earps themselves, along with Leonard, Head, and Crane, had been responsible for the stage holdup and the murder of Bud Philpot. [FN111] He added that the Earps had “piped off” the money to Doc Holliday (whom Clanton later accused of being the man who actually shot Philpot). [FN112] Wyatt, fearful that Leonard, Head, or Crane might squeal, had offered Clanton $6000 to help liquidate them. Ike, ***27** however, told Wyatt, “I was not going to have anything to do with helping to kill Bill Leonard, Crane, and Harry Head.” [FN113]

There was the missing motive. The Earps, having divulged their secret criminality to Ike Clanton, now had to eliminate him in order to avoid detection. Said Ike,

> I found out by Wyatt Earp's conversation that he was offering money to kill men that were in the attempted stage robbery, his confederates, for fear that Leonard, Crane and Head would be captured and tell on him, and I knew that after Leonard and Head was killed that some of them would murder me for what they had told me. [FN114] That would explain why the Earps, and especially Holliday, fired so quickly, refusing the offer of surrender by the Clantons and McLaurys. It would also explain Ike's earlier claim that Wyatt seemingly risked his life by firing at the unarmed, fleeing Ike Clanton, rather than at the other Cowboys who had drawn their guns and were returning fire.

This testimony posed a challenge for the defense, confronted with the demanding task of showing that the alleged confessions of Wyatt, Morgan and Doc had never occurred. It is always tough to prove a negative, and tougher still on cross-examination. Tom Fitch chose sarcasm as his weapon, hoping to make clear that Ike's story was not worthy of belief. “Did not Marshall Williams, the agent of the [Wells Fargo] Express company at Tombstone, state to you . . . that he was personally [involved] in the attempted stage robbery and the murder of Philpot?” “Did not James Earp, a brother of Virgil, Morgan, and Wyatt, also confess to you that he was [a] murderer and stage robber?” [FN115]

It wasn't great cross-examination, or even admissible, [FN116] but it made the point. The validity of the prosecution now hung on the extraordinary story of Ike Clanton.

***28** THE DEFENSE RESPONDS

Throughout the prosecution case, defense counsel made a series of tactical decisions. Behan was handled fairly gingerly on cross-examination, the subject of his pro-Cowboy partisanship barely being raised. [FN117] In contrast, Ike Clanton was allowed to ramble on in an anti-Earp tirade, a move that was no doubt intended to give him enough rope to hang himself figuratively, rather than hang the Earps in reality. But perhaps the boldest strategy came into play when Wyatt himself took the stand as the first witness for the defense.

Rather than proceed in standard question and answer format, Wyatt took advantage of a territorial law that allowed a defendant in a preliminary hearing to give narrative testimony without facing cross-examination. [FN118] In fact,

Wyatt began reading from a lengthy prepared statement, which both surprised and outraged the prosecution. Perhaps the defendant can avoid cross-examination, they claimed, but he should not be allowed to write out his testimony in advance. Judge Spicer, however, ruled that "the statute was very broad [and that] the accused could make any statement he pleased whether previously prepared or not." [FN119]

Early in his narrative, Wyatt set the scene, describing the Clantons and McLaurys as dangerous criminals who contributed to the atmosphere of lawlessness surrounding Tombstone:

> It was generally understood among officers and those who have information about criminals, that Ike Clanton was sort of chief among the cowboys; that the Clantons and McLaurys were cattle thieves and generally in the secret of the stage robbery, and that the Clanton and McLaury ranches were meeting places and places of shelter for the gang. [FN120] Then he brought up the matter of the Benson stage robbery and the murder of Bud Philpot, explaining the soured deal ***29** with Ike Clanton and reinforcing the Cowboy's reasons for threatening the Earps just prior to the gunfight:
>
> I had an ambition to be Sheriff of this County at the next election, and I thought it would be a great help to me with the people and businessmen if I could capture the men who killed Philpot. There were rewards offered of about $1200 each for the capture of the robbers. . . . I thought this sum might tempt Ike Clanton and Frank McLaury to give away Leonard, Head, and Crane, so I went to Ike Clanton, Frank McLaury . . . when they came to town. I had an interview with them in the back yard of the Oriental Saloon. I told them what I wanted. I told them I wanted the glory of capturing Leonard, Head, and Crane and if I could do it, it would help me make the race for Sheriff at the next election. I told them if they would put me on the track of Leonard, Head, and Crane, and tell me where those men were hid, I would give them all the reward and would never let anyone know where I got the information. [FN121] Wyatt proceeded to outline a long history of threats against the Earps by the Clantons and McLaurys, including many that had occurred in front of witnesses. [FN122] He detailed the crimes of other Cowboys as well, as though to emphasize guilt by association:
>
> "I knew all these men were desperate and dangerous men, that they were connected with outlaws, cattle thieves, robbers and murderers. . . . I heard of John Ringo shooting a man down in cold blood near Camp Thomas. I was satisfied that Frank and Tom McLaury killed and robbed Mexicans in Skeleton Canyon." [FN123] A prudent lawman could draw only one conclusion. "I naturally kept my eyes open and did not intend that any of the gang should get the drop on me if I could help it." [FN124]

Wyatt was adamant that the Cowboys had initiated the confrontation, threatening Morgan, Doc, and Wyatt at various times, including an incident in the Oriental Saloon when Ike, ***30** wearing his six shooter, warned, "You must not think I won't be after you all in the morning." [FN125] Ike had been even more explicit to Ned Boyle, a bartender, who had reported to Wyatt that Ike had said, "As soon as those damned Earps make their appearance on the street today the ball will open, we are here to make a fight. We are looking for the sons-of-bitches!" [FN126]

Next came the subject of Behan's betrayal of his fellow lawmen. Wyatt recounted that as the Earps marched down Fremont Street headed for the O.K. Corral, Behan called out, "I have disarmed them." [FN127] Wyatt continued, "When he said this, I took my pistol, which I had in my hand, under my coat, and put it in my overcoat pocket," [FN128] thus making himself an easier target for the Cowboys who had not been disarmed at all. [FN129]

Arriving at the lot behind the corral, "Frank McLaury and Billy Clanton's six shooters were in plain sight." [FN130] Virgil called to the Cowboys, "Throw up your hands, I have come to disarm you," [FN131] but instead, Billy Clanton and both McLaury brothers went for their guns:

> I had my pistol in my overcoat pocket, where I put it when Behan told us he had disarmed the other parties. When I saw Billy Clanton and Frank McLaury draw their pistols, I drew my pistol. Billy Clanton leveled his pistol at me, but I did not aim at him. I knew that Frank McLaury had the reputation of being a good shot and a dangerous man, and I aimed at Frank McLaury. The first two shots which were fired were fired by Billy Clanton and myself, he shooting at me, and I shooting at Frank McLaury. I don't know which was fired first. We fired almost together. The fight then became general. [FN132] As to Ike Clanton's testimony, Wyatt's

attitude was at first dismissive:

> After about four shots were fired, Ike Clanton ran up and grabbed my left arm. I could see no weapon in his ***31** hand, and thought at the time he had none, and so I said to him, 'the fight had commenced. Go to fighting or get away,' at the same time pushing him off with my left hand . . . . I never fired at Ike Clanton, even after the shooting commenced, because I thought he was unarmed. [FN133] Later, he became contemptuous: "The testimony of Isaac Clanton that I ever said to him that I had anything to do with any stage robbery . . . or any improper communication whatever with any criminal enterprise is a tissue of lies from beginning to end." [FN134]

Wyatt added two statements that may provide a certain insight into the conduct of the trial. First, he addressed the legal justification for his actions:

> I believed then, and believe now, from the acts I have stated and the threats I have related and the other threats communicated to me by other persons, as having been made by Tom McLaury, Frank McLaury and Ike Clanton, that these men last named had formed a conspiracy to murder my brothers, Morgan and Virgil, Doc Holliday and myself. I believe I would have been legally and morally justified in shooting any of them on sight, but I did not do so, nor attempt to do so. I sought no advantage when I went as deputy marshal, to help to disarm them and arrest them. I went as a part of my duty and under the direction of my brother, the marshal. I did not intend to fight unless it became necessary in self-defense and in the performance of official duty. When Billy Clanton and Frank McLaury drew their pistols, I knew it was a fight for life, and I drew in defense of my own life and the lives of my brothers and Doc Holliday. [FN135] Finally, Wyatt commented on the broken deal with Sheriff Behan, saying cryptically that Behan's sworn claims about the reasons "for not complying with his contract [were] false in every particular." [FN136]

The story was powerfully told, but not without undertaking a certain risk. True, the narrative testimony insulated ***32** Wyatt from what might have been a withering cross-examination at the hands of Will McLaury, but only at the cost of suggesting that he might have something to hide. Furthermore, the decision to have Wyatt read his statement had its own drawbacks. [FN137] Would Judge Spicer believe that the words were actually Wyatt's? Surely, one can see counsel's guiding hand in some of the language. It seems almost impossible that the relatively unschooled Wyatt Earp would have been able to summarize so neatly the law of justifiable homicide:

> I sought no advantage when I went, as deputy marshal, to help to disarm them and arrest them. I went as a part of my duty and under the directions of my brothers, the marshals. I did not intend to fight unless it became necessary in self-defense or in the rightful performance of official duty." [FN138] Might the judge also infer that the very details of the narrative had been composed (and therefore improved) by the attorneys? We can only speculate about counsel's reason for adopting this maneuver, but it is made all the more enigmatic by the wide-open approach taken by the defense to the balance of the proceeding. Rather than limiting their evidence at the preliminary***33** hearing, keeping their cards close to the vest, and saving their key witnesses for a possible trial, Fitch and Drum opted to present a full-fledged case. They called another eleven witnesses in addition to Wyatt, all of whom were readily tendered for further questioning by the prosecution. [FN139] Even Virgil Earp, so badly wounded that court had to convene at his bedside, was subjected to the rigors of cross-examination. [FN140] Why was the defense so much more protective of Wyatt than of Virgil? Were they worried that Wyatt would lose his temper under questioning from Will McLaury? Or were they afraid that he would be forced to make damaging admissions? Perhaps he knew something that his brother did not?

It was Wyatt who had the most pointed rivalry with Johnny Behan, including their failed agreement to split the proceeds of the job of Cochise County sheriff. What might the prosecution have discovered by inquiring into Wyatt's mysterious assertion that Behan's "reasons given by for not complying with his contract are false." [FN141] Recall that Behan's own testimony on this point was equally obscure: "Something afterwards transpired that I did not take him into the office." [FN142] Could this all have been an effort to shield the reputation of Josephine Marcus? Though the romantic triangle might well have been the best means to expose Behan's duplicity, defense counsel neither questioned Behan on the subject, nor did they put Wyatt in a position to be questioned about it himself. Was the lawman willing to hazard his own freedom--as well as that of his brothers and friend--in the name of gallantry? [FN143]

***34** And there is at least one more possibility. It was Wyatt who had first hand knowledge of the aborted arrangement with Ike Clanton for the betrayal of the Benson stage robbers. Perhaps there was more to that story than Wyatt was willing to tell. While it seems unlikely that Wyatt was actually involved in the murder of Bud Philpot, his connections to Leonard, Head, and Crane might have been closer than he cared to admit--at least while he was on trial for his life. Perhaps Wyatt's version of the ill-fated deal might have unraveled if probed too searchingly on the stand.

Wyatt Earp's prepared statement provided a coherent narrative of the defendants' theory, though his refusal to be cross-examined could not help but make it somewhat suspect. Given the explicit testimony of Behan and company, would Judge Spicer be willing to dismiss the charges based on an account that could not be tested in court? Surely the easier course of action would be to bind the defendants for trial, subjecting Wyatt, Virgil, Morgan and Doc to the uncertain mercies of an Arizona jury. To avoid that danger--and it was a danger, given the jury pool in Cochise County--defense counsel would have to provide witnesses who could demonstrate the indicators of credibility that Wyatt's testimony had eschewed.

After producing several witnesses to support or bolster the details of Wyatt's story, the defense heightened the trial's drama by calling Virgil Earp to the stand. Well, not exactly to the stand. The town and federal marshal was too severely injured***35** to come to the courthouse, so Judge Spicer reconvened the hearing in Virgil's room at the Cosmopolitan Hotel. [FN144]

Virgil affirmed Wyatt's testimony about Behan's treacherous claim to have disarmed the Cowboys, and explained his own unsuspecting response:

> I had a walking stick in my left hand and my right hand was on my six-shooter in my waist pants, and when he said he had disarmed them, I shoved it clean around to my left hip and changed my walking stick to my right hand. [FN145] When he came in sight of the Cowboys, however, it was obvious to Virgil that they were well-armed. Billy Clanton and Frank McLaury had their hands on their six-shooters and Tom McLaury was reaching for a Winchester rifle on a horse. Virgil called out, "Boys, throw up your hands. I want your guns." At that point, "Frank McLaury and Billy Clanton drew their six-shooters and commenced to cock them, and [I] heard them go 'click-click.'" [FN146]

Virgil still attempted to avoid a fight. "At that I said, throwing both hands up, with the cane in my right hand . . . 'Hold on, I don't want that.'" [FN147] But to no avail. Billy Clanton fired his pistol and Tom McLaury drew the rifle from its scabbard, using the horse as a shield. On cross-examination, Virgil agreed that Wyatt had also fired an initial shot, simultaneously with Billy Clanton. [FN148]

Several more defense witnesses followed, upright citizens of Tombstone including two bartenders (an honorable and important profession in territorial Arizona), the town clerk, an army surgeon, and a hotelkeeper. Several testified that the Clantons and McLaurys had threatened violence against the Earps; others had seen the Cowboys, including the supposedly unarmed Tom McLaury, carrying guns just before the shootout.

For example, hotelkeeper Albert Bilicke testified that he had seen Tom McLaury at Everhardy's butcher shop shortly before the fight. "When he went into the butcher shop his right-hand pants pocket was flat and appeared as if nothing ***36** was in it. When he came out his pants pocket protruded, as if there was a revolver therein." [FN149] This evidence was not devastating, but the prosecutor (who should have known better) could not bring himself to leave it alone:

> How did it happen that you watched him so closely the different places he went and the exact position of his right-hand pantaloons pocket when he went into the butcher shop and the exact form of a revolver in the same right-hand pocket when he came out? [FN150] Asked to explain his answer, Bilicke took full advantage of the prosecutor's classic mistake:

> Every good citizen in this city was watching all those cowboys very closely on the day the affray occurred, and as [Tom] was walking down the street my attention was called to this McLaury by a friend, and so it

happened that I watched him very closely. [FN151] At a stroke, the defense theory crystallized. The Cowboys were a menace to the "good citizens" of Tombstone. They had to be watched and kept under control, meaning that Virgil Earp had only been doing his job. [FN152] As will become evident, Judge Spicer was keenly attuned to such testimony.

Next to the Earps themselves, the most important defense witness was H. F. Sills, a railroad engineer from New Mexico who just happened to be visiting Tombstone on October 26. A complete stranger in town, he had no prior contact with either the Earps or the Cowboys. [FN153] Sills testified that shortly after arriving in Tombstone he passed by the O.K. Corral and overheard one of the Cowboys talk about killing "the whole party of the Earps" on sight. [FN154] Later, when the fight began, he saw ***37** Virgil raise his cane and he believed that Wyatt and Billy Clanton had fired the first shots. [FN155]

Sills' testimony was significant for two reasons. First, he was one of the few truly neutral witnesses at the hearing. Nearly everyone else was closely identified with one side or the other. And being neutral, it was particularly significant that Sills undercut the "nickel-plated pistol" theory by testifying that Wyatt and Billy Clanton fired first. By taking Doc Holliday out of the picture, he deprived the prosecution of its possible fallback position that the unstable gunslinger had impulsively fired as the Cowboys tried to surrender-- which would make Virgil, at a minimum, criminally negligent for enlisting the erratic Holliday's assistance in the first place. But if it was Wyatt who shot first, Judge Spicer could only find for the prosecution if he concluded that the deputy sheriff was a deliberate murderer--a strikingly harder story to sell. [FN156] Of course, the prosecution would have no case at all if Billy Clanton or Frank McLaury could be conclusively shown to have fired the first shot. Even the staunchest Earp partisans were unwilling to go completely out on that limb. The best they could hope to establish was that Wyatt and one of the Cowboys fired almost simultaneously.

The prosecution cross-examined Sills relentlessly, hoping either to shake his story or to expose some hidden bias. Neither tactic worked. [FN157]

The defense also called Addie Bourland, a dressmaker who lived across from Fly's photography studio, the scene of the gunfight. [FN158] Though Miss Bourland was not able to say who started the gunfight, she stated that she did not see the Cowboys with their hands in the air. [FN159] This testimony was obviously important to Judge Spicer, who took the extraordinary step of visiting her at her home during a break in the trial. Following that ex parte interrogation, Spicer recalled Miss ***38** Bourland to the stand, over the strenuous objections of the prosecution, and proceeded to question her himself. [FN160] Could she be more explicit about the beginning of the fight? "I didn't see anyone holding up their hands," she said. "They all seemed to be firing in general, on both sides. They were firing on both sides, at each other; I mean by this at the time the firing commenced." [FN161]

Then the prosecution, having been granted further cross-examination, blundered in a manner still all too familiar to contemporary trial lawyers, by asking one question too many. What had Miss Bourland told Judge Spicer during their private interview? "He asked me one or two questions in regard to seeing the difficulty, and if I saw any men hold their hands, whether I would have seen it, and I told him I thought I would have seen it." [FN162]

Until that moment, it was possible that Miss Bourland had simply missed the Cowboys' gesture of surrender, in what was, after all, merely a thirty-second confrontation. It was the improvident cross-examination that allowed her to shore up her testimony by adding that "I would have seen it" if it had happened.

ARGUMENTS MADE . . . AND ARGUMENTS NEGLECTED

The defense rested, turning the case over to the prosecutors for rebuttal. Will McLaury and Lyttleton Price now faced a decision of their own. An adverse decision at this point would terminate the proceeding, never allowing them to present further evidence to a jury. What could they do to reinvigorate their case, which had been badly damaged by the defense presentation? Should they recall Johnny Behan, allowing him to refute the charges in Wyatt's statement (and perhaps to expose Wyatt as an adulterer)? Could they locate additional witnesses who might impeach the reputations of Sills and Bourland? Was there more to be offered regarding the deal between Wyatt and Ike? And was there anything at all more to be said about Ike's claim that the Earps' attack was an effort to silence him concerning their

participation in the Benson stage robbery?

***39** Any testimony along those lines would have enhanced the prosecution theory, but it seems that there was no such information at hand. Instead, they called a single rebuttal witness, a butcher named Ernest Storm who had purchased the McLaurys' beef shortly before the gunfight. Mr. Storm offered the nearly irrelevant testimony that Tom McLaury did not appear to be armed when in Storm's shop at "about two or three o'clock in the afternoon." [FN163] Storm somewhat refuted Albert Bilicke's testimony that McLaury had emerged from the butcher shop with a pistol visible in his front pocket, but not with any great force. The balance of the defense case was untouched.

Many lawyers believe that it is essential to call at least one rebuttal witness, if only to make sure of having the crucial last word. Nonetheless, the prosecution here may actually have damaged itself by closing its case with a witness who had so little to say.

Looking back on the Tombstone murder trial, it is interesting to note the evidence that appears to have been omitted in the month-long hearing. From the defense side, relatively little was made of Sheriff Behan's connection to the Cowboys, including the arrest of his own deputy for robbing the Bisbee stage. In fact, the very idea of an organized outlaw faction was barely developed, save for an inaccurate reference to Ike Clanton as "sort of chief among the cowboys." [FN164] True, many defense witnesses testified that the Clantons and McLaurys themselves were dangerous habitual criminals, but the larger story of nearly open communal warfare stayed out of the record. [FN165]

***40** The prosecution, of course, was hardly eager to underscore the connection between the victims (not to mention its own key witnesses) and the epidemic of cattle theft, border raids, stagecoach robberies, and occasional murders that had plagued the growing community. On the other hand, the deep divisions in Tombstone society might have been used to strengthen their case as well. What else could explain the Earps' posited determination to gun down the unarmed Cowboys? Without more context, the prosecution was left arguing either the implausible theory that the entire gunfight was a plot to shut up Ike Clanton, or the less culpable theory that a jumpy Doc Holliday had started the battle, drawing the Earps in almost by misadventure.

THE COURT DECIDES

Judge Spicer delivered his decision on November 30, 1881, and it happened that the story frame made all the difference in the case. He was troubled by the inclusion of Wyatt and Doc in Virgil's posse, given the evidence of their history of bad blood with the Cowboys:

> In view of these controversies between Wyatt Earp and Isaac Clanton and Thomas McLaury, and in further view of this quarrel the night before between Isaac Clanton and J.H. Holliday, I am of the opinion that the defendant, Virgil Earp, as chief of police, subsequently calling upon Wyatt Earp and J.H. Holliday to assist him in arresting and disarming the Clantons and McLaurys--committed an injudicious and censurable act . . . . [FN166] But it turned out that he was troubled more by the deeper background of the fight, and he did not confine himself to circumstances that had been introduced at trial:
>
> [Y]et when we consider the conditions of affairs incident to a frontier country; the lawlessness and disregard for human life; the existence of a law-defying element in [our] midst; ***41** the fear and feeling of insecurity that has existed; the supposed prevalence of bad, desperate, and reckless men who have been a terror to the country and kept away capital and enterprise; and consider the many threats that have been made against the Earps, I can attach no criminality to [Virgil's] unwise act. In fact, as the result plainly proves, he needed the assistance and support of staunch and true friends, upon whose courage, coolness and fidelity he could depend, in case of an emergency. [FN167] Remarking that there were "[w]itnesses of credibility" [FN168] on both sides, Spicer nonetheless rejected the argument that the Cowboys had been shot while trying to surrender: "Considering all the testimony together, I am of the opinion that the weight of evidence sustains and corroborates the testimony of Wyatt Earp, that their demand for surrender was met by William Clanton and Frank McLaury drawing or making motions to draw their pistols." [FN169]

But this conclusion alone should not have been sufficient to free the defendants. The proceeding was simply a

preliminary hearing, held only for the purpose of determining whether there was sufficient evidence to warrant a full trial. Ordinarily, the existence of "witnesses of credibility" would be enough to allow the prosecution to go forward, with the "weight of the evidence" being left for decision by the jury. In this case, however, there was an added element. The Earps claimed lawful justification for the shootings. That, as Judge Spicer determined, was a legal defense well within his jurisdiction to decide:

> Was it for Virgil Earp as chief of police to abandon his clear duty as an officer because its performance was likely to be fraught with danger? Or was it not his duty that as such officer he owed to the peaceable and law-abiding citizens of the city, who looked to him to preserve peace and order, and their protection and security, to at once call to his aid sufficient assistance and persons to arrest and disarm these men? ***42** There can be but one answer to these questions, and that answer is such as will divest the subsequent approach of the defendants toward the deceased of all presumption of malice or of illegality. When, therefore, the defendants, regularly or specially appointed officers, marched down Fremont Street to the scene of the subsequent homicide, they were going where it was their right and duty to go; and they were doing what it was their right and duty to do; and they were armed, as it was their right and duty to be armed when approaching men whom they believed to be armed and contemplating resistance. . . . To constitute the crime of murder there must be proven not only the killing, but also the felonious intent. . . . [I]n looking over this mass of testimony for evidence upon this point, I find that it is anything but clear. [FN170] Considering "the conditions of affairs incident to a frontier country," [FN171] Judge Spicer would require specific evidence of intent before he would order the lawmen to stand trial. But here the prosecution failed badly, offering only the allegations of Ike Clanton, which the Judge rejected in their entirety:
>
> The testimony of Isaac Clanton, that this tragedy was the result of a scheme on the part of the Earps to assassinate him and thereby bury in oblivion the confessions the Earps had made to him about "piping" away the shipment of coin by Wells Fargo & Co. falls short of being a sound theory, [[on] account of the great fact, most prominent in this matter, to-wit: that Isaac Clanton was not injured at all, and could have been killed first and easiest, if it was the object of the attack to kill him. He would have been first to fall, but, as it was, he was known or believed to be unarmed and was suffered and, as Wyatt Earp testified, told to go away, and was not harmed. [FN172] Which led inexorably to a single result:
>
> In view of all the facts and circumstances of the case, considering the threats made, the character and positions of the parties, and the tragic results accomplished in manner ***43** and form as they were, with all surrounding influences bearing upon the res gestae of the affair, I cannot resist the conclusion that the defendants were fully justified in committing these homicides--that it [was] a necessary act, done in the discharge of an official duty. [FN173] All charges against the Earps and Holliday were dismissed. [FN174]

WHAT WENT WRONG?

With "witnesses of credibility" on both sides, the preliminary case against the Earps should have belonged to the prosecution. Their burden was relatively modest, requiring only the production of sufficient evidence to merit a complete trial. And in fact, at one point Judge Spicer virtually ruled that the prosecution had met its burden, when he revoked bail for Wyatt and Doc and remanded them to custody.

So what went wrong?

For one thing, the defense strategies all paid off. By producing a maximum series of favorable witnesses at the preliminary hearing, rather than reserving them for trial, the defense succeeded in creating a favorable frame for Judge Spicer's evaluation of the facts of the case. The same approach underscored the "civic" nature of the Earps' actions, since many of their witnesses were solid, town-dwelling citizens: an army surgeon, [FN175] various hotel- and saloonkeepers, [FN176] a dressmaker, [FN177] even an assistant district attorney, [FN178] a probate judge, [FN179] and ***44** the clerk of the board of supervisors. [FN180] Though some of the witnesses were clearly central to the defense, others seemed cumulative or even superfluous. It seems highly likely that the parade of notables was intended to influence the court in ways that were not strictly evidentiary. [FN181]

When it came to evidence, the defense also succeeded when it chose a "minimalist" approach. The narrative statement of Wyatt Earp apparently did not backfire. More importantly, the risky decision to take it fairly easy on Johnny Behan seems to have worked out as intended. In determining the significance of the evidence, Spicer stated that he gave "as much weight to the testimony of persons unacquainted with the deceased or the defendants, as to the testimony of persons who were companions or acquaintances, if not partisans of the deceased." [FN182] By this he could only mean that he accepted the testimony of Sills and Bourland, rather than John Behan's. The further implication is that the judge was convinced that Sheriff Behan was a companion, perhaps even a partisan, of the slain Cowboys. The defense could have pounded away further at the connection, but in this case understatement appears to have worked well.

Though Judge Spicer was said to lean "toward the Republican law-and-order crowd," [FN183] he was still willing enough to ship Wyatt Earp and Doc Holliday off to the cold and perilous comforts of John Behan's jail. In fact, the trial began with a defense challenge to Spicer's jurisdiction, claiming that as a justice of the peace he lacked authority to preside over the hearing. [FN184] Whatever his biases, they were not so pronounced that the Earps considered their exoneration a mere formality.

But as much as he might have aspired to objectivity, Spicer had to be aware of Behan's sympathies even in the absence of explicit courtroom proof. Living in Tombstone, he must have known about the lawlessness in the surrounding countryside, ***45** including the various stage robberies, raids into Mexico, and outright murders that had been attributed to the gang of Cowboys. [FN185] Indeed, as the murder hearing was about to begin, Tombstone Mayor John Clum was requesting federal troops to help safeguard the town against the potential outlaw threat. [FN186] It should have come as no surprise, therefore, when Spicer characterized the Clantons and McLaurys (and their friends) as "reckless men who have been a terror to the country and kept away capital and enterprise." [FN187] The defense did not have to prove that the Cowboys meant trouble for Tombstone, it was in the juridical air. [FN188]

It was the task of the prosecution to neutralize this judicial bias--possibly by distancing the victims from the Cowboy circle, conceivably by showing that the gang was more myth than reality. Perhaps that goal could not have been accomplished at all, but it certainly could not have been achieved through timid measures. The prosecution did attempt to establish that the Clantons and McLaurys had only been in a few "rows," [FN189] but they never presented a sustained counter-narrative to the Earps' story (and Spicer's evident assumption) [FN190] of Tombstone-in-peril.

To persuade Judge Spicer to rule against the "regularly or specially appointed" peace officers, the factual assertions of partisan witnesses were bound to be insufficient. To win, the prosecution needed a compelling theory that explained not simply how but also why the Earps would murder the Cowboys.

***46** One such theory has since been offered by Earp researcher Paula Mitchell Marks. She suggests that the fight may have grown out of the Earps' efforts to ingratiate themselves with Tombstone's financial interests, either to enhance Wyatt's chance of being elected county sheriff or simply to remain in the good graces of the local mine owners and businessmen. [FN191] In either case, points could be made by coming down hard on the Cowboys and impressing the locals with their "tough brand of police work." [FN192]

So when Ike Clanton showed up in Tombstone on October 26, mouthing threats and displaying his weapons, the Earps responded with force, buffaloing first Ike and then Tom McLaury. The Clantons and McLaurys, however, did not have the good sense to get immediately out of town. Instead, they gathered at the O.K. Corral, at least two (and possibly three) of them armed, in seeming defiance of Virgil Earp's lawful, though excessive, authority. The Earps and Holliday then marched over to the lot on Fremont Street, perhaps intending only to intimidate the Cowboys, perhaps intending to administer new beatings, but not with the settled purpose of committing murder. Unfortunately, things got out of hand; either the Cowboys did not respond quickly enough or the Earps and Holliday were too jumpy. Guns were drawn and shots were fired, the first shot coming from the volatile Doc Holliday. After that, the fight "became general" and the Cowboys' fate was sealed.

We can never know whether Marks's suppositions are historically true; they have been rejected by other researchers. [FN193] As advocacy, however, her proffered theory has the advantage of plausibility. To sustain a finding of probable cause, Judge Spicer would only have to believe that the Earps were over-aggressive and reckless,

not that they were assassins. Consequently, Ike Clanton's wild charges would have been irrelevant to the case, making it far less likely that the prosecution would fall along with Ike's flimsy credibility. Of course, the great drawback to the theory is that it would only support a charge of manslaughter, not murder (at least against the Earps; a murder charge against Holliday might still have been a possibility). ***47** But a tempered case was exactly what the prosecution needed in the first place. The murder charge was almost certain to fail, given the Earps' badges and Judge Spicer's predisposition. [FN194]

Why did the prosecution choose to "roll the dice," gambling that they would succeed in proving murder at the cost of abandoning the more promising manslaughter charge? Though documentary evidence is lacking, it seems a good bet that Will McLaury, aggrieved and vindictive over the killing of his two brothers, played a key role in pushing the prosecution to pursue its immoderate, and ultimately unsuccessful, approach. McLaury had a great emotional stake in proving that his brothers were innocent victims and the Earps vicious killers, leading him to accept uncritically Ike Clanton's fanciful claims. [FN195] The virtues of familial loyalty aside, the prosecution team clearly could have benefited from more detached associate counsel.

THEORIES OF THE CASE

For most of the last century, frontier historians have debated the fine points of the gunfight at the O.K. Corral. Hollywood, of course, has been firmly in the pro-Earp camp, at least since the 1950s when Burt Lancaster won "The Gunfight at the O.K. Corral," and Hugh O'Brien brought the role to television in "The Life and Legend of Wyatt Earp." Most recently, Kevin Costner and Kurt Russell have starred as Wyatt--a hero, of course--in separate feature films. Historians Allen Barra and Casey Tefertiller more or less concur with the general tenor, if not necessarily the documentary accuracy, of the Hollywood portrayal, concluding that the Cowboys started the fight and ***48** the Earps had to end it in order to carry out their duties as lawmen. [FN196] Other researchers, such as Paula Mitchell Marks, are decidedly more skeptical, suggesting that the Cowboys were mostly a nuisance and that the Earps gunned them down in an unnecessary show of force (and lied about it afterward). [FN197]

While the weight of opinion seems to favor the Earps, a review of the lawyering at the preliminary hearing certainly allows the possibility that the revisionists may have a point. To be sure, the accounts of John Behan and Ike Clanton, if believed, could support a murder conviction, but their stories are made suspect by obvious (and not so obvious) bias and self-interest. And in any event, the testimony of the unquestionably impartial H. F. Sills would seem at least to create reasonable doubt no matter what Behan and Clanton had to say. [FN198] The murder story was just too intricate, requiring that every dispute be determined in favor of the prosecution in order to justify a decision adverse to the Earps. Thus, the most cogent account of the Earps' guilt would have to focus on a lesser crime such as manslaughter--not so as dramatic as outright murder, but still a serious felony.

In advocacy terms, the best cases are both "simple" and "easy to believe." A simple story makes maximum use of undisputed facts, while relying as little as possible on evidence that is either hotly controverted or inherently unbelievable. In the same sense, a story cannot be easy to believe if it depends on implausible arguments or if it requires proof that the opposing witnesses have lied or falsified evidence. Trials can sometimes be won by stories that fail the tests of simplicity and ease, but it will be an uphill struggle indeed. The best and most effective trial theories are "able to encompass the entirety of the other side's case and still result in . . . victory by sheer logical force." [FN199]

A simple story actually seeks to narrow the scope of disagreement between the parties by incorporating (and accommodating) as many of the other side's facts as possible. No matter how vigorously presented, the murder case against the ***49** Earps and Holliday could never be simple. It required the resolution of too many contradictory facts: Who made the first move? How serious were the Cowboys' threats? Did Sheriff Behan mislead the Earps? If the judge believed Virgil and Wyatt concerning any one of these questions, the prosecution would fail. At trial, that is the cost of complexity.

A manslaughter prosecution, however, would have had the simple virtue of making most of those questions irrelevant. Indeed, it could have accommodated nearly all of Wyatt's and Virgil's testimony concerning Ike's threats, the march down Fremont Street, and even the eventual moment of truth. Imagine how effective the prosecutor's final argument could have been pursuant to a manslaughter charge:

> Wyatt and Virgil Earp claim that the Clantons and McLaurys reached for their guns, but sometimes you see what you want to see. After spending the previous night and morning brutalizing Ike Clanton and Tom McLaury, the Earps were ready for a showdown. They wanted to have it out with the Cowboys once and for all. So when Tom McLaury threw back his jacket to show that he was unarmed, the Earps and Holliday just couldn't wait to start shooting. Even a moment of calm hesitation would have shown that Tom had no weapon, but the defendants were all fired up. They didn't wait, they didn't think, they just started shooting. And that is manslaughter in this territory. In a murder prosecution, any number of smaller questions might also have turned the case in favor of the defense, but they simply vanish in a manslaughter case. For example, one of the greatest weaknesses in the murder case was Johnny Behan's inability to explain how Doc Holliday could have fired--in the space of twenty-five seconds--both a shotgun and a nickel-plated pistol. But that anomaly has no bearing on the lesser charge, since the alternative--that Wyatt fired the first shot--can be made equally probative of manslaughter.

If the murder case was not simple, even less was it easy to believe, resting as it did on both implausible elements and the necessity of harsh judgments. Ike Clanton's outlandish story ***50** may have been the death knell of the prosecution case. [FN200] Of course, even fantastic tales may sometimes be true, but it was just too much to ask of Judge Spicer that he believe that Deputy Marshal Wyatt Earp would have helped rob the Benson stage and have confided the deed to the disreputable Ike.

In this case, it appears that the prosecution might have put the conclusory horse ahead of the theoretical cart (or perhaps stagecoach). If indeed the Earps were murderers (and Will McLaury certainly was not about to see it any other way), then there had to be a reason. And if there had to be a reason, then Ike's story was probably the best they could muster. A more fruitful approach, however, would have been to consider the plausibility of the alleged motives before deciding the nature of the offense to be charged. Such an analysis would have revealed that there was scant motive for murder, but that the underlying reasons for manslaughter might well be established.

The prosecution case was not easy to believe for yet another reason. It required the judge to conclude that Wyatt and Virgil lied on the stand. In contrast, a manslaughter theory could have accommodated virtually all of the Earps' testimony, perhaps even turning it against them. For example, Wyatt testified that Frank McLaury and Billy Clanton had their six-shooters in "plain sight" as the Earps approached the Cowboys. When Virgil called for them to hold up their hands, "Billy Clanton and Frank McLaury commenced to draw their pistols." [FN201] Wyatt continued, "I had my pistol in my overcoat pocket, where I put it when Behan told us he had disarmed the other parties. When I saw Billy Clanton and Frank McLaury draw their pistols, I drew my pistol." [FN202]

But Wyatt also testified that he succeeded in getting off the first shot, an impressive achievement given that he had to pull his weapon out of his overcoat pocket, while Frank and Billy already had theirs out and in plain sight. Could it be that Wyatt was a bit readier to begin firing than he admitted or recalled?***51** Or perhaps the Cowboys were not really reaching for their pistols after all, as evidenced by the fact that Wyatt apparently had plenty of time to pull his six-shooter out of his pocket after he saw them move their hands. In either case, there is a feasible implication that Wyatt acted recklessly, shooting without thinking. Importantly, Judge Spicer could have come to that conclusion without assuming that Wyatt lied on the witness stand.

HISTORY'S CLAIMS

Trial lawyers understand how difficult it is to recreate the past even a few months or years following the events themselves. After nearly 120 years, it seems impossible to determine with certainty exactly what happened in Tombstone that October afternoon. It is clear, however, that many contemporary observers--not limited to the Cowboy crowd--then believed that the Earps acted with unnecessary brutality. One newspaper, for example, reported in mid-hearing that "public sentiment, which was at first in [the Earps' and Holliday's] favor, has turned now since the evidence shows that it was the gratification of revenge on their part, rather than desire to vindicate law which led to the shooting." [FN203] Nonetheless, the prosecution badly overplayed its case, leading to Judge Spicer's exoneration of the defendants. Today, the Earp brothers and Doc Holliday are lionized as the heroes of the O.K. Corral, the few dissenting revisionist voices being drowned out by the accolades of history.

[FNa1]. Professor of Law at the Northwestern University School of Law. This paper has been presented to faculty workshops at the University of Iowa (the state of Wyatt Earp's birth) and the University of Colorado (the state of Doc Holliday's burial). I am grateful to Richard Delgado and Fred Lubet for their helpful comments on an earlier draft of this article, to William Springer for research assistance, and to the Northwestern University Class of 1962 Reunion Gift Fund for its generous support.

[FN1]. See Casey Tefertiller, Wyatt Earp: The Life Behind the Legend 136-37 (1997).

[FN2]. Even survival plus acquittal might not have been enough to secure his legend. The Earp persona was further magnified by his longevity. Not only did he live until 1929, but he also made his home in Los Angeles where he was able to spin his stories of the frontier days for writers and movie stars, Tom Mix among them. His story, which took him from Dodge City to Tombstone and eventually to Alaska, was made even more engaging by the presence of real-life characters with names like Doc Holliday, Big-Nose Kate, Curly Bill Brocius, Johnny Behind-the-Deuce, Old Man Clanton, Bat Masterson, Buckskin Frank and Johnny Ringo. No doubt, the existence of an extensive written record-- newspaper reports of the gunfight and the transcript of Judge Spicer's hearing--also contributed to the long-term popular fascination with Earpiana.

[FN3]. Wyatt later told Stuart Lake, his biographer, that he had gone to Tombstone with "no thought of a peace officer's job." Allen Barra, Inventing Wyatt Earp: His Life and Many Legends 97 (1998). Indeed, the Earps brought with them a string of thirty thoroughbred horses, with which they intended to start a stage coach line, only to be frustrated when they discovered that Tombstone was already well-served by several firmly ensconced stage lines. See id. at 98.

[FN4]. See generally Paula Mitchell Marks, And Die in the West: The Story of the O.K. Corral Gunfight 24-25 (1989).

[FN5]. See Barra, supra note 3, at 94.

[FN6]. See id.

[FN7]. Id. at 95.

[FN8]. Id. at 103. At the time, the word "cowboy" had not yet come into general use to refer to the men who drove cattle for a living--they were usually called cowhands, drovers, or stockmen. The term "Cowboy" was slightly derisive and eventually became nearly synonymous with cattle rustler. The Tombstone Cowboys themselves embraced the description, rather in defiance of conventional society. Adopting the approach of Allan Barra, I capitalize "Cowboy" to distinguish the disreputable louts from honest, hardworking ranch hands--the cowboys we have all come to know and admire. See id. at 104.

[FN9]. See Tefertiller, supra note 1, at 41.

[FN10]. See id. at 40.

As Tombstone grew into more of a town, a new breed of badmen in the Arizona backcountry grew into more of a problem. They started as a small collection of misfits, disenfranchised cowhands who drove the herds in from Texas.... Gradually, the townsman took to referring to all the backcountry troublemakers as cowboys, distinct from the ranchmen who raised cattle.

Id.

[FN11]. Some of the towns had names like Pick-'Em-Up and Stink-'Em; others were more mundane, including Watervale, Richmond, and Austin City. See Alford E. Turner, The O.K. Corral Inquest 175 (1981).

[FN12]. See generally Barra, supra note 3.

[FN13]. See generally Tefertiller, supra note 1.

[FN14]. See Barra, supra note 3, at 127.

[FN15]. See Marks, supra note 4, at 147. See also Tefertiller, supra note 1, at 68 (discussing the Republican Epitaph).

[FN16]. Holliday was also a dentist, having studied at a dental college in Philadelphia before heading west. See Marks, supra note 4, at 35.

[FN17]. The sole exception was James, who tended bar in a saloon and was not involved in the defining gunfight.

[FN18]. See Wells Fargo's History Pages (visited Oct. 3, 2000) <http:// www.wellsfargohistory.com/states/Ariz1.htm>.

[FN19]. See Barra, supra note 3, at 161-62. See also Tefertiller, supra note 1, at 111. Some researchers, however, question the extent of Behan's actual association with the Cowboys. See Marks, supra note 4, at 127-28.

[FN20]. See Barra, supra note 3, at 141-46.

[FN21]. See id. at 139-40.

[FN22]. See id. at 140.

[FN23]. See id. at 141-43.

[FN24]. Id. at 145. Wyatt posted a cash bond for Doc in the amount of $5000.00. See id.

[FN25]. See Marks, supra note 4, at 151-52.

[FN26]. See id. at 152-53.

[FN27]. The Mexican Army was acting in reprisal for an earlier incident, usually called the Skeleton Canyon Massacre, in which as many as nineteen Mexican nationals had been murdered by a band of Cowboys, said to have included the McLaury brothers. See Barra, supra note 3, at 154-56.

[FN28]. See id. at 148-49.

[FN29]. Id. at 156.

[FN30]. Id. at 156, 162-63.

[FN31]. Id. at 159.

[FN32]. Including the robbery, on September 8, 1881, of the Sandy Bob stage from Tombstone to Bisbee, in which the prime suspect was Frank Stilwell--one of Johnny Behan's deputy sheriffs! See id. at 159-63.

[FN33]. Stilwell was Behan's deputy, arrested by Morgan Earp for robbing the Bisbee stage. See id. at 160.

[FN34]. Id. at 161.

[FN35]. See id.

[FN36]. Id. at 165. It was illegal to carry a gun in Tombstone, and it is most likely that both men were unarmed. See

id. at 166.

[FN37]. Id. Wyatt later recalled, "I told him I would not fight no one if I could get away from it, because there was no money in it." Marks, supra note 4, at 198.

[FN38]. See Barra, supra note 3, at 167.

[FN39]. Id.

[FN40]. See id. at 169. In frontier slang, Virgil "buffaloed" him.

[FN41]. Id.

[FN42]. Id.

[FN43]. Id.

[FN44]. Id. at 169-70.

[FN45]. See id. at 170.

[FN46]. See id. at 171. Mr. Spangenburg, however, refused to sell a weapon to Ike Clanton, though that was probably unknown to the Earps at the time. See id. at 171-72; Turner, supra note 11, at 114.

[FN47]. See Barra, supra note 3, at 171.

[FN48]. See Marks, supra note 4, at 210.

[FN49]. See Barra, supra note 3, at 1-3.

[FN50]. See id. at 172.

[FN51]. See id. at 174.

[FN52]. See Turner, supra note 11, at 193.

[FN53]. Id.

[FN54]. See Tefertiller, supra note 1, at 122-23.

[FN55]. See id. at 124.

[FN56]. See Barra, supra note 3, at 175.

[FN57]. The following morning, the Tombstone Nugget ran this account of the gunfight:

[W]hen within a few feet of them the marshal said to the Clantons and McLowrys: "Throw up your hands boys, I intend to disarm you."

As he spoke Frank McLowry made a motion to draw his revolver, when Wyatt Earp pulled his and shot him, the ball striking on the right side of his abdomen. About the same time Doc Holliday shot Tom McLowry in the right side, using a short shotgun, such as is carried by Wells-Fargo & Co.'s messengers. In the meantime Billy Clanton had shot at Morgan Earp, the ball passing through the left shoulderblade across his back, just grazing the backbone and coming out at the shoulder, the ball remaining inside of his shirt. He fell to the ground but in an instant gathered himself, and raising in a sitting position fired at Frank McLowry as he crossed Fremont Street, and at the same instant Doc Holliday shot at him, both balls taking effect, either of which would have proved fatal, as one struck him in the

right temple and the other in the left breast. As he started across the street, however, he pulled his gun down in Holliday saying, “I've got you now.” “Blaze away! You're a daisy if you do,” replied Doc. This shot of McLowry's passed through Holliday's pocket, just grazing the skin.

While this was going on Billy Clanton had shot Virgil Earp in the right leg, the ball passing through the calf, inflicting a severe flesh wound. In turn he had been shot by Morgan Earp in the right side of the abdomen, and twice by Virgil Earp, once in the right wrist and once in the left breast. Soon after the shooting commenced Ike Clanton ran through the O.K. Corral, across Allen Street into Kellogg's saloon, and thence into Toughnut Street, where he was arrested and taken to the county jail. The firing altogether didn't occupy more than twenty-five seconds, during which time thirty shots were fired.

Id. at 184-85 (orthography original).

[FN58]. See Barra, supra note 3, at 178.

[FN59]. Id. at 178-79.

[FN60]. See Tefertiller, supra note 1, at 125-26.

[FN61]. Barra, supra note 3, at 185.

[FN62]. See Marks, supra note 4, at 255-56; Tefertiller, supra note 1, at 126.

[FN63]. Barra, supra note 3, at 188.

[FN64]. See Tefertiller, supra note 1, at 129.

[FN65]. See Barra, supra note 3, at 193; Tefertiller, supra note 1, at 129.

[FN66]. See Barra, supra note 3, at 194. The defendants had little difficulty raising the money for bond, both from their own resources and from funds contributed by supporters. See Tefertiller, supra note 1, at 130.

[FN67]. The longhand transcripts of both the inquest and the preliminary hearing survived until the 1930s when they came into the possession of a Works Projects Administration writer named Hal L. Hayhurst. Hayhurst produced an edited, typewritten version of the transcripts, that included much of the verbatim record along with his own summaries and editorial comments. The Hayhurst document was published in 1981 by Alford Turner, under the title The O.K. Corral Inquest. Turner himself critiques the Hayhurst document as incomplete and anti-Earp. See Turner, supra note 11, at 16. Nonetheless, Turner's edition is acknowledged today as the best, most accessible version of the trial record. See Marks, supra note 4, at 12. Unfortunately, the original transcript was destroyed along with Hayhurst's personal effects when the writer died. See Barra, supra note 3, at 192.

[FN68]. See Tefertiller, supra note 1, at 130-31.

[FN69]. Id. at 135.

[FN70]. See Marks, supra note 4, at 260.

[FN71]. See Tefertiller, supra note 1, at 130.

[FN72]. See Turner, supra note 11, at 56.

[FN73]. Id.

[FN74]. See id.

[FN75]. Barra, supra note 3, at 197.

[FN76]. Most scholars believe that Doc, a trusted friend, was brought along to guard the rear, perhaps explaining why he had been given Virgil's shotgun. See Tefertiller, supra note 1, at 147. At trial, Virgil explained that he had deputized his brothers, but of Holliday he would say only that, "I called on him on that day for assistance to help disarm the Clantons and McLaurys." Marks, supra note 4, at 285; Turner, supra note 11, at 190.

[FN77]. Marks, supra note 4, at 220, 264-65; Turner, supra note 11, at 40, 66.

[FN78]. Turner, supra note 11, at 138.

[FN79]. Id. at 138-39.

[FN80]. See Tefertiller, supra note 1, at 133; Turner, supra note 11, at 139. On cross-examination, however, Behan was forced to concede that Tom McLaury might have had a concealed pistol; he remained certain that Ike Clanton had no weapon. See Turner, supra note 11, at 147.

[FN81]. Turner, supra note 11, at 139; Marks, supra note 4, at 228.

[FN82]. See Tefertiller, supra note 1, at 132.

[FN83]. See Barra, supra note 3, at 190.

[FN84]. Id. at 184.

[FN85]. See supra notes 32-33 and accompanying text; see also Tefertiller, supra note 1, at 103, 107.

[FN86]. See Barra, supra note 3, at 129.

[FN87]. Id. at 113.

[FN88]. See id. at 101.

[FN89]. Josie remained living in a house once shared with Behan, but the sheriff moved out and Wyatt spent much of his time there. According to one researcher, "Wyatt was away one night when Behan appeared to demand that [[Josie] get out or move the house, as the lot was in his name. Morgan Earp had thoughtfully shown up to protect her in Wyatt's absence... and flattened the demanding Behan." Marks, supra note 4, at 160.

[FN90]. Barra, supra note 3, at 234-35. Allen Barra doubts the full veracity of Allie Earp's memoirs, but does conclude that Josephine and Wyatt were involved with each other by the time of the trial. See id. at 233-36. At a minimum, "they must have talked and made some kind of pact to meet outside Arizona later." Id. at 235.

[FN91]. See id. at 101. See also Turner, supra note 11, at 154. In fact, the two would live together for almost fifty years, until Wyatt's death in 1929, sharing adventures at "every mining camp and racetrack from Texas to Mexico to Alaska." Barra, supra note 3, at 101.

[FN92]. See Barra, supra note 3, at 113.

[FN93]. See Turner, supra note 11, at 144-46; see also Marks, supra note 4, at 263.

[FN94]. See Marks, supra note 4, at 263.

[FN95]. Turner, supra note 11, at 142; Tefertiller, supra note 1, at 133.

[FN96]. Turner, supra note 11, at 142.

[FN97]. See Tefertiller, supra note 1, at 134.

[FN98]. Turner, supra note 11, at 143. Perhaps that "something" concerned Wyatt's attentions to Josephine Marcus. Perhaps it had to do with local politics, or with a dispute over a stolen racehorse that involved Behan, Wyatt, and the Clantons. See Barra, supra note 3, at 198-99.

[FN99]. The witnesses were Billy Claiborn and West Fuller, both to some extent associated with the Cowboys. See Barra, supra note 3, at 178-90, 199-200; see also Turner, supra note 11, at 71, 76-77.

[FN100]. See Tefertiller, supra note 1, at 136-37.

[FN101]. See Barra, supra note 3, at 200; see also Tefertiller, supra note 1, at 136, 149.

[FN102]. See Barra, supra note 3, at 200. Their fears were far from illusory. Prosecutor Will McLaury bragged at the time that he had "a large number of my Texas friends here who are ready and willing to stand by me and with Winchesters if necessary." Marks, supra note 4, at 283-84. And as history records, the Cowboys did indeed take matters into their own hands following the trial, maiming Virgil and murdering Morgan in separate ambushes. Wyatt took his own revenge in what has since come to be known as the "Vendetta Ride." See Barra, supra note 3, at 231-85; Tefertiller, supra note 1, at 163-247.

[FN103]. Turner, supra note 11, at 91.

[FN104]. Tefertiller, supra note 1, at 138; Turner, supra note 11, at 99.

[FN105]. See Turner, supra note 11, at 93.

[FN106]. See id. at 94.

[FN107]. Id. at 95-96.

[FN108]. Clanton admitted having said something to the effect of, "the Earp crowd had insulted [me] the night before when [I was] unarmed--I have fixed, or heeled myself now and they have got a fight on sight." Tefertiller, supra note 1, at 138; Turner, supra note 11, at 102.

[FN109]. See Turner, supra note 11, at 104-05.

[FN110]. See id. at 105-06.

[FN111]. See Tefertiller, supra note 1, at 139-41.

[FN112]. See id at 141;Turner, supra note 11, at 105-08.

[FN113]. Turner, supra note 11, at 116. Clanton initially testified that he would not help the Earps "capture" the robbers, but he quickly changed the word to "kill," a verb that was more consistent with the theory of lawmen gone bad. See Tefertiller, supra note 1, at 141.

[FN114]. Turner, supra note 11, at 117.

[FN115]. Id. at 119. See Barra, supra note 3, at 203; Tefertiller, supra note 1, at 142.

[FN116]. Judge Spicer sustained objections to both questions. See Barra, supra note 3, at 203; Tefertiller, supra note 1, at 142; Turner, supra note 11, at 119.

[FN117]. See Turner, supra note 11, at 148.

[FN118]. The statute is described in the court record as Section 133, page 22 of the laws of Arizona, approved February 12, 1881. See id. at 155; Tefertiller, supra note 1, at 142.

[FN119]. Tefertiller, supra note 1, at 142 (quoting the Tombstone Nugget).

[FN120]. Turner, supra note 11, at 156.

[FN121]. Id. at 156-57.

[FN122]. Wyatt named seven citizens who could testify to such threats. Barra, supra note 3, at 205; Tefertiller, supra note 1 at 143.

[FN123]. Turner, supra note 11, at 159.

[FN124]. I d. at 159.

[FN125]. Id. at 160.

[FN126]. Id.

[FN127]. Id. at 164.

[FN128]. Id.

[FN129]. Tefertiller, supra note 1, at 144.

[FN130]. Turner, supra note 11, at 164.

[FN131]. Id. at 164.

[FN132]. Id.

[FN133]. Id. at 164-65.

[FN134]. Id. at 166; Tefertiller, supra note 1, at 145.

[FN135]. Tefertiller, supra note 1, at 144-45; Turner, supra note 11, at 163-64.

[FN136]. Tefertiller, supra note 1, at 145; Turner, supra note 11, at 166.

[FN137]. Indeed, it was a far more audacious act of lawyering than is initially apparent. The statute itself evidently dated to an earlier time when accused criminals were not allowed to testify under oath in their own defense. Strange as it may seem today, it was once the law in every state and territory that "interested parties," including defendants, were incompetent to take the stand. See generally Henry E. Smith, The Modern Privilege: Its Nineteenth-Century Origins, in The Privilege Against Self Incrimination: Its Origins and Development 145 (R.H. Hemholz et al. eds., 1997) (explaining the relationship between defendants' incompetence and the privilege against self incrimination). To ease the harsh burden of this rule, a number of jurisdictions, apparently including Arizona, began to allow defendants to make unsworn statements that were not considered formal testimony and which, therefore, could not be subjected to cross-examination. Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 427 (8th ed. Philadelphia, Kay and Brother 1880) ("At common law, a defendant, at least in capital cases, is entitled to address the jury, at the conclusion of the case, giving his own story as to any relevant facts. In making this statement he is not subject to cross-examination."). Arizona, however, had abolished the defendants' incompetence in 1871. See Ferguson v.

Georgia, 365 U.S. 570, 577 n.6 (1960) (listing the years in which each United States jurisdiction abolished the rule of "disqualification for interest"). Hence, Wyatt's lawyers were boldly invoking a statute which, though still in effect, had been substantively superseded for a decade. The ploy must have been transparent at the time, but the judge allowed it.

[FN138]. See Turner, supra note 11 at 165.

[FN139]. They may also have been exposed to threats of murder, as Tombstone's tense atmosphere made it a very real possibility that Cowboy partisans might attempt to eliminate adverse witnesses. See Tefertiller, supra note 1, at 142.

[FN140]. See id. at 147. The defense refrained from calling either Doc Holliday or Morgan Earp, however, a provocative decision given the claims that either Doc or Morgan had fired the first shot. Doc, of course, was well-known for his volatile temper, which might have been reason enough to keep him off the stand. Morgan, the youngest Earp, was also thought to be less steady than his older brothers. Marks, supra note 4, at 299.

[FN141]. See Tefertiller, supra note 1, at 145; Turner, supra note 11, at 166.

[FN142]. See Turner, supra note 11, at 143.

[FN143]. Literature and folklore extol the nobility of such a selfless gesture, as in the case of the "Long Black Veil":

> Ten years ago/on a cold dark night/
> Someone was killed/beneath the town hall light.
> There were few at the scene/but they all agreed/
> That the man who ran/looked a lot like me.
> The judge said son/what is your alibi?
> If you were somewhere else/you don't have to die.
> I spoke not a word/although it meant my life.
> I had been in the arms/of my best friend's wife.

See Joan Baez, Long Black Veil (D. Dill, M. Wilkin), on One Day at a Time (Vanguard Records 1970). There are numerous contemporary recordings of this folk song, each making the same point with slightly different lyrics, including thirteen separate renditions by Joan Baez. See, e.g., Nancy Lutzow, The Joan Baez Web Pages - Discography (visited Sep. 11, 2000) <http:// baez.woz.org/jbdiscSA.html#LBV>.

A similar, though less tragic, instance is found in the play Inherit the Wind, by Jerome Lawrence and Robert Lee, in which the prosecution calls the defendant's girlfriend as a surprise witness. As defense counsel--obviously Clarence Darrow, but here called Henry Drummond--rises to launch into a devastating cross-examination, he is restrained by the defendant himself, who says, "Don't plague her. Let her go." The crusty lawyer pauses, sighs, and reluctantly replies, "No questions." The defendant prevails and the witness is excused without further questioning. Jerome Lawrence & Robert E. Lee, Inherit the Wind act II sc. 2 (1955).

[FN144]. Tefertiller, supra note 1, at 147.

[FN145]. Id. at 147; Turner, supra note 11, at 193.

[FN146]. Tefertiller, supra note 1, at 147; Turner, supra note 11, at 193.

[FN147]. Turner, supra note 11, at 193.

[FN148]. See Tefertiller, supra note 1, at 147-48.

[FN149]. Turner, supra note 11, at 211. Army surgeon J.B.W. Gardiner also testified to the same effect. Id. at 213.

[FN150]. Id. at 211.

[FN151]. Id. at 212.

[FN152]. The prosecutor's efforts at recovery did not fare much better. “Do you know every good citizen in Tombstone, or did you on that day?” he asked. The unfazed Bilicke replied, “I know not all of them, but a great many.” Id. at 212.

[FN153]. See Barra, supra note 3, at 208; Tefertiller, supra note 1, at 148; Turner, supra note 11, at 188.

[FN154]. Barra, supra note 3, at 208; Tefertiller, supra note 1, at 148; Turner, supra note 11, at 182.

[FN155]. See Turner, supra note 11, at 182.

[FN156]. Sills' testimony was significant for a third reason as well. Shortly after he left the stand, defense counsel argued that the prosecution evidence had become so weak that Wyatt and Doc should be restored to bail. Judge Spicer agreed, setting bond at $20,000 each. The money was easily raised, and Doc and Wyatt remained free for the balance of the hearing. Marks, supra note 4, at 288.

[FN157]. See Tefertiller, supra note 1, at 148; Turner, supra note 11, at 182-85.

[FN158]. See Turner, supra note 11, at 207.

[FN159]. See id. at 210.

[FN160]. See Barra, supra note 3, at 209-10.

[FN161]. Tefertiller, supra note 1, at 151; Turner, supra note 11, at 210.

[FN162]. Tefertiller, supra note 1, at 151.

[FN163]. Tefertiller, supra note 1, at 151; see also Turner, supra note 11, at 217.

[FN164]. Turner, supra note 11, at 156. To the extent the Cowboys had an acknowledged leader, it was probably Curly Bill Brocius or John Ringo. See Barra, supra note 3, at 205.

[FN165]. Tom Fitch, representing only the Earp brothers, also declined what might have seemed like an open invitation to blame everything on Doc Holliday (who had separate counsel). The prosecution witnesses repeatedly identified Doc as the first to open fire. If that were the case, and especially if the second round came from Billy Clanton or Frank McLaury, Wyatt and Virgil could have claimed that they drew their guns only after the shooting had commenced, not knowing whether the shots had come from Holliday or the Cowboys. Wyatt, however, testified that he fired the first shot, and Virgil agreed, thus protecting Holliday from taking sole blame. The most likely explanation for the Earps' testimony is that it was true--Wyatt fired first when he saw (or didn't see) Frank McLaury reach for his gun. Another possibility, however, is that Wyatt was covering up for Doc, whom he said had once saved his life in Dodge City. See Turner, supra note 11, at 158. Or, as the anti-Earpists might claim, perhaps Doc was in a position to incriminate the Earps regarding either the shootout or the Benson stage robbery, in which case their favorable testimony might have been the price for his silence.

[FN166]. Id. at 219; see also Barra, supra note 3, at 210.

[FN167]. Turner, supra note 11, at 220; see also Barra, supra note 3, at 210-11.

[FN168]. Turner, supra note 11, at 221; see also Barra, supra note 3, at 212.

[FN169]. Turner supra note 11, at 223; see also Tefertiller, supra note 1, at 153-54.

[FN170]. Turner, supra note 11, at 221; see also Tefertiller, supra note 1, at 152-53.

[FN171]. Turner, supra note 11, at 220.

[FN172]. Id. at 223; see also Tefertiller, supra note 1, at 154.

[FN173]. Turner, supra note 11, at 224-25; see also Tefertiller, supra note 1, at 154-55.

[FN174]. See Turner, supra note 11, at 226.

[FN175]. J.B.W. Gardner testified that he believed Tom McLaury to have been armed. See Tefertiller, supra note 1, at 149; see also Turner, supra note 11, at 214.

[FN176]. There were several, including Julius Kelley, E.F. Boyle, and Albert Bilickie. See Turner, supra note 11, at 203, 173, 211.

[FN177]. Addie Bourland, of course. See id. at 207.

[FN178]. The witness was Winfield Scott Williams, an assistant to the prosecutor Lyttleton Price. He was called to contradict certain statements of Sheriff Behan's. See Tefertiller, supra note 1, at 149.

[FN179]. The witness, named John H. Lucas, had relatively little to say. See Turner, supra note 11, at 214; see also Tefertiller, supra note 1, at 151.

[FN180]. Rezin Campbell testified to threats made to Morgan Earp by Ike Clanton. See Tefertiller, supra note 1, at 149; see also Turner, supra note 11, at 204-05.

[FN181]. When Spicer reinstated Doc and Wyatt's bail, their bond was guaranteed by E.B. Gage and James Vizina, two of Tombstone's leading mine owners. See Marks, supra note 4, at 288. The support of the defense by important business interests is not likely to have escaped Spicer's attention.

[FN182]. Turner, supra note 11, at 222; see also Barra, supra note 3, at 212-13.

[FN183]. Tefertiller, supra note 1, at 156.

[FN184]. See Marks, supra note 4, at 262.

[FN185]. For example, on the very day of the gunfight, General William Tecumseh Sherman had written to the United States Secretary of War requesting permission for the army to pursue American raiders into Mexico. Wrote Sherman, "[I]t is notorious that the civil authorities of Arizona on that extensive frontier are utterly powerless to prevent marauders from crossing over into Sonora and to punish them when they return for asylum with stolen booty." Marks, supra note 4, at 298.

[FN186]. See id. at 258.

[FN187]. Turner, supra note 11, at 220.

[FN188]. Mayor John Clum, for example, saw the gunfight, and therefore the trial, strictly in terms of the good Earps against the dangerous Cowboys: "Was the police force of Tombstone to be bullied and cowed?" he asked rhetorically. Marks, supra note 4, at 298.

[FN189]. See Turner, supra note 11, at 150.

[FN190]. On cross-examination, Behan was asked about "the reputation of the Clantons and McLaurys in the section of the county in which they live and roam for turbulence?" Turner, supra note 11, at 148. It made little matter that an objection was sustained. Judge Spicer clearly knew all about the "turbulence." Id.

[FN191]. See Marks, supra note 4, at 298-99.

[FN192]. Id.

[FN193]. See, Barra, supra note 3, at 214-15, 225-26; see also Tefertiller, supra note 1, at 87.

[FN194]. Spicer said as much himself, noting that the prosecution claimed that the Earps:

> [P]recipitated the triple homicide by a felonious intent then and there to kill and murder the deceased, and that they made use of their official characters as a pretext. I cannot believe this theory, and cannot resist the firm conviction that the Earps acted wisely, discretely and prudentially, to secure their own self-preservation.

Turner, supra note 11, at 224.

[FN195]. Will McLaury went even further than Ike Clanton, apparently believing that his brothers were murdered because they "had got up facts intending to prosecute... Holliday, and the Earps, and Holliday had information of it." Marks, supra note 4, at 265.

[FN196]. See generally Barra, supra note 3; Tefertiller, supra note 1.

[FN197]. See generally Marks, supra note 4.

[FN198]. Given that the hearing convened less than a week following the gunfight, one wonders whether the prosecutors were even aware of Sills as they shaped their theory and presented their case.

[FN199]. Steven Lubet, Modern Trial Advocacy 9 (2d ed. 1997).

[FN200]. There has been much suggestion that Ike's farfetched story may have been drug induced. He requested and obtained a few days off in the middle of his testimony, in order to obtain medical attention for persistent headaches (due to the pistol whipping by Virgil Earp). At the time, administration of cocaine was the accepted remedy for headaches. See Tefertiller, supra note 1, at 138.

[FN201]. Turner, supra note 11, at 220.

[FN202]. Id.

[FN203]. Marks, supra note 4, at 277.

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Steven Lubet, The Forgotten Trial of Wyatt Earp, 72 U. Colo. L. Rev. 1 (2001). Reprinted with permission of the University of Colorado Law Review and Steven Lubet.
Mr. Lubet has also published a book on this subject: Murder in Tombstone: The Forgotten Trial of Wyatt Earp,
http://www.amazon.com/Murder-Tombstone-Forgotten-Western-History/dp/030011527X/ref=ed_oe_p/102-9839173-1116115?ie=UTF8&qid=1118092664&sr=1-5.
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Review

Culture

***48** WYATT EARP TAKES THE STAND

Was the Quintessential American Lawman Guilty of Manslaughter for His Role in the Gunfight at the O.K. Corral?

John Swansburg [FNa1]

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ONE OF THE MOST PECULIAR GAMES IN THE history of poker was convened on the evening of October 25, 1881. The players were Johnny Behan, Ike Clanton, Tom McLaury, John Holliday, and Morgan, Virgil, and Wyatt Earp--men who would face off the next morning in the most famous gunfight in the history of the West. By the evening of the 25th, the suspicions, rivalries, and grudges that would spark the next day's violence at the O.K. Corral were already well established. It seems that was no reason, however, that the men couldn't sit down to a game of cards.

The hands were dealt at the Occidental Saloon in Tombstone, a booming mining town not far from the Mexican border in what was then the Arizona Territory. Like many frontier outposts, Tombstone was a town divided. On one side was the business establishment, invested in stability and law enforcement. These men tended to vote Republican and read the Tombstone *Epitaph*.

On the other side were the men who'd come to town with dreams of making quick money, leaving behind a dark past, or both. These men tended to be distrustful, if not plain disrespectful, of the law, they usually supported Democrats, and they had a newspaper of their own, the Tombstone *Nugget*.

Both sides of Tombstone were represented at the Occidental's poker table. Ike Clanton and Tom McLaury were Cowboys, a term describing not benign drovers but a loosely federated band of cattle rustlers, many of them Confederate veterans. Johnny Behan was the Democratic county sheriff, but he was more a politician than a policeman and was well disposed toward the Cowboys, who voted Democrat and were known to encourage others to do the same.

Across the table from Behan and the Cowboys was a trio of Republicans, the Earp brothers. Virgil, the eldest, was serving as a deputy U.S. marshal and Morgan had served under him. Wyatt had been a peace officer in Wichita and Dodge City, two of the West's roughest cow towns, where he'd earned a reputation as a staunch lawman. In the aftermath of the gunfight the next day, he would become a symbol of the American brand of law and order, morally upstanding, yet brutally effective when necessary.

There is no record of who prevailed in the poker game that night, but the smart money is on the final player at the table, John “Doc” Holliday. Raised a Southern gentleman on a Georgia plantation, Holliday attended a dentistry program in Philadelphia and made his name in the West as a gambler and a killer. Evidence of murder never seemed to catch up with him, however, and his allegiance in Tombstone was to the lawman Wyatt Earp, with whom he had forged an unlikely friendship back in Dodge City. (Holliday is said to have saved Earp's life, but there is no more evidence of this than of the many killings attached to his name.)

After the last player folded and the game broke up, whatever civility the two sides had mustered quickly evaporated. The Earps and the Cowboys differed over a lot more than their choice of newspaper, and now the enmity that had been simmering for months threatened to boil over. In January 1881, Behan and Wyatt had faced off in an election for county sheriff. Behan promised his rival that he would appoint him deputy if Wyatt dropped out of the race, but then reneged on his half of the bargain--perhaps to get back at Wyatt for stealing the affections of a woman to whom he had proposed. Ike Clanton, meanwhile, had recently quarreled with Wyatt over a plan the latter had hatched to bring some stagecoach robbers to justice. Wyatt was sore at Ike's little brother Billy for trying to steal his horse. Tom McLaury was angry that Virgil Earp had shown up at his ranch looking for some stolen Army mules. Virgil was none too pleased with McLaury when he found them there.

After leaving the Occidental, Ike Clanton spent the morning hours in a liquor-fueled rage, walking about town waving a Winchester rifle and telling anyone who would listen that he intended to kill Doc Holliday and the Earp brothers. That behavior soon earned him a visit from Virgil and Morgan, who promptly pistol-whipped him. (Frontier lawmen much preferred “buffaloing” a man to shooting him.) Tom McLaury would suffer the same fate a few hours later, at the hands of Wyatt. Soon after, Clanton and McLaury made their way to the O.K. Corral, where they were joined by their respective brothers, Billy and Frank. There they continued making threats, which traveled down the Tombstone streets to Hafford's Corner Saloon, where the Earp brothers had gathered.

Standing in the O.K. Corral, the Cowboys weren't breaking any laws. But when they crossed into the adjacent lot where the (misnamed) gunfight would actually take place, the Cowboys violated***49** a town ordinance that prohibited the carrying of firearms on the city streets. It was then that Virgil Earp decided it was his duty to disarm the Cowboys, after Behan made a half-hearted and unsuccessful attempt to disarm them himself. With his brothers and Doc Holliday acting as his deputies, Virgil and his posse began their storied walk to the O.K. Corral.

According to witnesses, Virgil informed the Cowboys that he'd come to take their guns, and he ordered them to put up their hands. What happened next is unclear. Earp sympathizers believe Billy Clanton and Frank McLaury cocked and started to draw their pistols. Earp detractors believe the Earp brothers, or more likely Holliday, shot first, with some even contending that they fired on men who were raising their arms in surrender. Whoever drew first, a volley of gunfire rang out.

Unlike the poker game, which had lasted all night, the gunfight took less than 30 seconds. Billy Clanton and Tom and Frank McLaury were fatally shot. Holliday and Virgil and Morgan Earp were wounded. Ike Clanton fled. Only Wyatt Earp was left standing, unscathed. “The 26th of October, 1881, will always be marked as one of the crimson days in the annals of Tombstone,” the *Nugget* wrote the next day, “a day when blood flowed as water, and human life was held as a shuttlecock.”

In the movies, that is typically that. The gunfight is the unfortunate (maybe) but necessary (clearly) denouement to the conflict between the Earps and the Cowboys--frontier justice served. But even in the Old West, and even when lawmen were the shooters, killings had consequences. Five days later, on October 31, Ike Clanton pressed first-degree murder charges against the Earp brothers and Doc Holliday. If you were to watch every Wyatt Earp movie from *Law & Order* (1932) to *Wyatt Earp* (1994), you'd see a lot of riding off into the sunset led by the legendary Wyatt, the lawman who tamed the West. What you wouldn't find is a scene depicting what actually happened in the aftermath of the gun battle: Wyatt hauled to a cell in Johnny Behan's county jail, where he sat awaiting trial for a capital offense.

Even the films that don't show Earp as a paragon of law enforcement--think Burt Lancaster in *Gunfight at the O.K. Corral* (1957)--stop short of imagining him as a murderer. *Tombstone*, the 1993 film based on history as well as myth, portrays Earp as an opportunist more interested in money than marshaling. But the Cowboys are still the bad guys, and there's little to suggest that the shoot-out was anything but a fair fight.

Yet Earp not only went on trial for the shootings, he easily could have been convicted. In his new book *Murder in Tombstone*, a careful study of the legal proceedings that followed the gunfight, Northwestern Law School professor Steven Lubet argues that the prosecution held the better hand. But they didn't play it. “The prosecutors probably had a winning case,” Lubet writes, “but it was not the one they ended up presenting.” Lubet's book shows how badly the prosecution played its cards and how well the defense played theirs. Given the peculiarities of justice in the Arizona Territory, the winner of the trial would be the side whose counsel best sized up the players and best exploited the house rules. According to Lubet, that lawyer was Tom Fitch, counsel for the Earps. Along with the prosecution's miscues, Fitch's maneuverings saved Wyatt Earp and his brethren from being hanged--and helped give birth to a legend that otherwise might have died on the gallows with its would-be hero.

THE TRIAL OF WYATT EARP WASN'T really a trial at all. It was a preliminary hearing before a justice of the peace named Wells Spicer. The purpose of the hearing was to determine whether a crime had been committed and whether there was “sufficient cause” to believe the four defendants were the ones who committed it. It seemed assured that they would be forced to stand trial. With Sheriff Behan willing to testify that the Earps and Holliday had fired on men who were trying to surrender, “the hearing before Wells Spicer could well have been a quick and tidy matter,” Lubet writes. But the hearing in Spicer's court proved to be anything but. Instead, the preliminary hearing turned into the longest in Arizona history, with 30 witnesses testifying in as many days. Both sides decided that it was in their interest not to hold anything back. “As befit a bunch of Arizona gamblers,” Lubet observes, “everyone decided to go for broke.”

The prosecution, led by Tombstone's chief prosecutor Lyttleton Price, adopted a strategy of pinning Holliday as the first shooter, hoping in turn to indict Virgil Earp for allowing the notorious gambler to join his posse. The Earps all had law ***50** enforcement on their résumés, and there was no shortage of character witnesses willing to attest to their integrity. The defense submitted a petition signed by 62 citizens from Dodge City and Wichita attesting that Wyatt Earp “was ever vigilant in the discharge of his duties, and while kind and courteous to all, he was brave, unflinching, and on all occasions proved himself the right man in the right place.” No former dental patients stood up to attest to Doc Holliday's bedside manner--and he had his reputation as a killer to reckon with. The prosecutors' theory was that Holliday started the shooting with the nickel-plated pistol he is said to have favored because it was small enough to conceal in his vest during a poker game.

This theory has occupied scholars for over a hundred years, offering a glimpse into the depth and fractiousness of the scholarship devoted to the Tombstone legend. There seem to be as many theories about how Doc Holliday may or may not have touched off the fracas as there are historians who have delved into the subject. It's hard to read the work of, say, Paula Mitchell Marks, author of *And Die in the West--The Story of the O.K. Corral Gunfight,* without smiling at the notion of her facing off against other historians over whether Doc Holliday might have started the fight with his signature pistol and then switched to the shotgun he was seen carrying to the fight mid-melee. That's Marks's stand. Others have suggested that Holliday held on to the pistol while firing the shotgun one-handed. Given a shotgun's kick, that seems unlikely, particularly since Holliday moved to the West in part to nurse his tuberculosis.

Lubet doesn't wade too deeply into these debates, preferring to remain within his bailiwick, the court of law. That

doesn't exempt him from having an opinion about how the events in Tombstone unfolded, of course. He clearly doesn't put much stock in the revisionist theory offered by Ike Clanton's grandson, among others, which argues that the Cowboys were defending Tombstone from the encroachments of the federal government personified by the Earps. But Lubet isn't an Earp partisan, either.

If Lubet has a cause, it's the counsel for the defense. In the author's retelling, Tom Fitch takes a place in the pantheon of Tombstone's heroes. Wily legal strategist and champion cross-examiner may sound like odd attributes for a Western hero, even in a story that stars a dentist-turned-shootist. But Lubet, who is an expert in trial advocacy, makes a surprisingly compelling argument for the importance of Fitch's contribution. The book is more impressive still for its readability: Lubet essentially presents a case study in advocacy, but his storytelling skills and his obvious affection for the subject keeps his nuanced consideration of Fitch's legal craftsmanship from feeling arcane.

Lubet explores Fitch's work at the level of strategy and of tactics, with particular attention given to the latter. He believes that Fitch's skill as a cross-examiner may have made the difference in the case, and he reads those portions of the transcript with special attention. Lubet argues that Fitch had a knack for using a witness's own words against him, luring one after another into assertions they couldn't substantiate and so undermining the authority of their entire testimony.

The cross-examination of Billy Claiborne offers a good example. A friend of the Clantons and McLaurys, Claiborne witnessed the gunfight and testified that he saw Morgan Earp shoot Billy Clanton at point-blank range. On cross, Fitch asked Claiborne if he saw any powder burns on Clanton's corpse. The question put Claiborne in a pickle. If the witness said there were no powder marks, he would be contradicting his own claim that Morgan had fired at close range. If he said there *were* powder burns, he'd be running afoul of the coroner, who'd testified there were none. Cornered, Claiborne said lamely that he couldn't remember.

NOT ALL OF THE EXAMPLES LUBET OFFERS up demonstrate Fitch's aptitude as clearly and convincingly. Occasionally, the author stretches to establish his hero's lawyerly chops, reading the lines of the trial transcript too closely, and reading between the lines too loosely. Yet Lubet also takes note of factors outside of Fitch's control that contributed to his success, giving space to serendipity as well as skill.

Tellingly, the career paths of Fitch and Spicer had crossed before. The judge had worked as a lawyer in Utah before coming to Tombstone, taking part in what was probably the most closely followed trial of the 19th century, the prosecution of John D. Lee for his role in the Mountain Meadows massacre. Lee was the only person brought to trial for the attack, in which a band of Mormons dressed as Paiute Indians ambushed a wagon train heading to California and killed more than a hundred innocents.

Spicer served as one of Lee's lawyers and, Lubet contends, the experience made a lasting impression on him. It's now widely accepted, at least outside the Mormon Church, that the conspiracy stretched all the way to Saints leader Brigham Young, who was eager to prove his strength to a federal government trying to rein him in. But at the time Lee was offered up as a scapegoat by his other, church-appointed lawyers, who cut a deal with the prosecution to protect Young and others. That left Spicer to fight a losing battle against perjured testimony and a rigged jury. Lee was executed by a firing squad, and Lubet suggests that his fate made Spicer "inclined to look long and hard at evidence, taking seriously his duty to protect the rights of defendants." Fitch guessed this about the judge because Fitch had also spent considerable time among the Utah Mormons, at ***51** one point doing legal work for Young. He seems to have felt he could rely on Spicer to give his clients a chance to tell their side of the story. He was right.

An Arizona statute on the books at the time of the Earp hearing allowed a defendant to take the stand and offer testimony without being cross-examined. It was the perfect chance for the defense to present its version of the events uninterrupted, and Fitch seized it, calling Wyatt Earp to the stand. After answering a handful of perfunctory questions about his age (32) and profession (he said he was a "saloon keeper at present. Also have been deputy sheriff and also a detective"), Earp began reading from a written manuscript. The prosecution objected vociferously, but the statute didn't specify whether it was legal for a defendant to read his statement, and Spicer allowed the testimony to go forward.

Indeed, throughout Wyatt's testimony, Spicer gave him wide latitude to tell his story, despite further objections from the prosecution. Wyatt started at the beginning, describing the series of confrontations that led up to the gunfight. Having summed up a year's worth of threats by the Cowboys, he concluded: “I believe I would have been legally and morally justified in shooting any of them on sight, but I did not do so, nor attempt to do so .... I did not intend to fight unless it became necessary in self-defense and in the performance of official duty.”

Wyatt's statement bears the mark of Fitch's influence. As Lubet notes, the lawman was smart, but men in his profession didn't typically speak legalese, and Wyatt probably wouldn't have written a phrase like “morally and legally justified” on his own. But more important than the precision of Wyatt's narrative was the care he and Fitch took to justify his actions. “There was no doubt that the Earps killed the three Cowboys, but the question was whether it amounted to a crime,” Lubet writes. “Tom Fitch realized, far better than the prosecutors, that *what* happened was less important than *why* it happened.” Lubet argues that in Wyatt's testimony, Fitch gave Spicer an answer the judge could find palatable: Tombstone's citizens and its economic prospects were under attack by the Cowboys. Far from being murderers, the Earps had acted to defend the town from a group of armed and dangerous outlaws.

PERHAPS BECAUSE OF ITS NAME, perhaps because of the imperatives of frontier life, Tombstone had a nonchalant attitude toward death. The *Epitaph* ran a regular column called “Death's Doings.” The actual epitaphs in Boot Hill, Tombstone's graveyard, were in the same blithe spirit. One infamous inscription read:

> Here lies Lester Moore, Six slugs from a forty-four, No less, no more. The city had not taken the deaths of Billy Clanton and the McLaury brothers lightly, however, as even pro-Earp chroniclers had to admit. Spicer clearly understood the gravity of the case before him, and the mixed public opinion. It could hardly have escaped his notice that nearly the whole town had turned out for the Cowboys' funeral, an event that even the *Epitaph* called a “saddening sight.” Yet after taking scarcely a day to write his opinion, Spicer returned to the courtroom with a decision in favor of the defense.

As Spicer recounted the events leading up to the gunfight, he reprimanded Virgil Earp for having called on Doc Holliday to disarm the Clantons and the McLaurys. Spicer said Virgil acted “incautiously and without due circumspection.” Still, it was clear that whatever Virgil had done, the judge had accepted Tom Fitch's explanation of why he had done it. “When we consider the condition of affairs incident to a frontier country; the lawlessness and disregard for human life,” Spicer wrote, “I can attach no criminality to his unwise act.”

Lubet of course credits Fitch with laying the groundwork for Spicer's decision, while at the same time acknowledging that the prosecution dug its own grave by refusing to consider a lesser charge of manslaughter. Lubet guesses that the prosecution was influenced by William McLaury. The eldest McLaury brother was a Texas lawyer who rode to Tombstone after the deaths of his brothers and joined the prosecution team in the first week of the trial. Letters he wrote during his stay make clear that he wanted vengeance more than justice, and Lubet believes that he may have pressured the other prosecutors into insisting on charging the defendants with a capital offense.

Whatever the rationale, the failure to bring a lesser charge was an egregious error. In Lubet's hands, the evidence presented at trial strongly supports a manslaughter finding. What's more, Lubet offers proof that Spicer himself might have found the Earps and Holliday guilty of that crime. In a nice piece of close reading, he notes that the judge's reprimand of Virgil Earp for having acted “incautiously and without due circumspection” might well have intentionally paraphrased the Arizona manslaughter statute, written to punish killers who acted without “due caution or circumspection.”

Intent on a hanging, however, the prosecution had tried to get the Earps by leveling the weight of its case against Holliday, just as Frank McLaury had leveled his pistol at him in the back of the O.K. Corral. (“I have you now,” the doomed McLaury is said to have told Holliday. Holliday's response is the stuff of legend: “Blaze away,” he replied. “You're a daisy if you do.”)

Lubet's efforts notwithstanding, Tom Fitch is probably not the stuff of legend--the next Tombstone movie won't be a courtroom drama. But Lubet does establish that without Fitch there might not have been a Tombstone legend in the first place. The lawyer's cagey work saved the Earps and Holliday from a death sentence. And not just that. As the

earliest attempt to cast the gunfight as a parable of order imposed upon lawlessness, Wyatt's testimony might be said to be the ur-text of the Tombstone myth. It would take several decades and a series of articles and books to bring the myth to the masses. But one of the most influential of those texts, Stuart Lake's hagiography *Wyatt Earp, Frontier Marshal*, relied heavily on Wyatt's testimony in establishing Wyatt as the quintessential Old West lawman. The first author of the Wyatt Earp legend, then, might be said to be Tom Fitch.

[FNa1]. **John Swansburg** is a senior editor at *Legal Affairs*.

END OF DOCUMENT

Wyatt Earp Enterprises v. Sackman, Inc.,
D.C.N.Y. 1958.

United States District Court S.D. New York.
WYATT EARP ENTERPRISES, Inc., a corporation, Plaintiff,
v.
SACKMAN, Inc., also known as Sackman Brothers Company, a New York corporation, Sackman Brothers Company, also known as Sackman Brothers Company, Inc., a Pennsylvania corporation, Doe One Corporation, a corporation, Doe Two Corporation, a corporation, Doe Three Corporation, a corporation, Doe Four to Doe Ten Corporations, and John Doe Partnership, Defendants.
Arbitration between SACKMAN BROTHERS COMPANY and Sackman, Inc., Petitioners,
v.
WYATT EARP ENTERPRISES, Inc., Respondent.
Jan. 10, 1958.

Suit by proprietor of television program for injunction against unfair competition, consisting in marketing of goods under name of hero of the program, wherein plaintiff moved for injunction pendente lite and defendant petitioned for stay of proceedings and to compel arbitration. The District Court for the Southern District of New York, David N. Edelstein, J., held that the name 'wyatt Earp,' though belonging to an actual historical person, had not become such a part of public domain as to preclude commercial monopolization thereof, and hence proprietor of television program based on such person's life and legend could restrain manufacturer of children's playsuits from manufacturing and merchandising playsuits under the name, by proving that the name had been invested with a commercial significance and good will.

Plaintiff's motion granted and defendant's motion denied.
West Headnotes
[1] Trademarks 382T 1042

382T Trademarks
382TII Marks Protected
382Tk1040 Names as Marks
382Tk1042 k. Persons, Names Of. Most Cited Cases
(Formerly 382k491, 382k70(3))
The name "Wyatt Earp," though belonging to an actual historical person, had not become such a part of public domain as to preclude commercial monopolization thereof, and hence proprietor of television program based on such person's life and legend could restrain manufacturer of children's playsuits from manufacturing and merchandising playsuits under the name, by proving that the name had been invested with a commercial significance and good will that was likely to be appropriated by consumer-confusion.

[2] Trademarks 382T 1032

382T Trademarks
382TII Marks Protected
382Tk1029 Capacity to Distinguish or Signify; Distinctiveness
382Tk1032 k. Acquired Distinctiveness and Secondary Meaning in General. Most Cited Cases
(Formerly 382k475.1, 382k475, 382k71)
The only protected private interest in words of common speech is after they have come to connote, in addition to their colloquial meaning, provenience from single source of the goods to which they are applied.

[3] Trademarks 382T 1629(1)

382T Trademarks
382TIX Actions and Proceedings

382TIX(C) Evidence
382Tk1620 Weight and Sufficiency
382Tk1629 Similarity; Likelihood of Confusion
382Tk1629(1) k. In General. Most Cited Cases
(Formerly 382k575, 382k93(1))
Where a symbol is not fanciful but merely descriptive, plaintiff in suit for unfair competition has a very heavy burden of proving that confusion is likely.

[4] Antitrust and Trade Regulation 29T 30

29T Antitrust and Trade Regulation
29TII Unfair Competition
29TII(A) In General
29Tk30 k. Sponsorship, Approval, or Connection, Representations Concerning. Most Cited Cases
(Formerly 382k440, 382k70(3) Trade Regulation)

Trademarks 382T 1525(2)

382T Trademarks
382TVIII Violations of Rights
382TVIII(D) Defenses, Excuses, and Justifications
382Tk1521 Justified or Permissible Uses
382Tk1525 Use by Prior Consent
382Tk1525(2) k. Duration of Consent; Post-Termination Use. Most Cited Cases
(Formerly 382k440, 382k70(3) Trade Regulation)
Where manufacturer of children's playsuits, after expiration of its privileges under licensing agreement with proprietor of “Wyatt Earp” television program, continued to mark the name on its boxes with the legend “official outfit”, the word “official” implied the idea of sponsorship, as affecting liability for unfair competition.

[5] Trademarks 382T 1032

382T Trademarks
382TII Marks Protected
382Tk1029 Capacity to Distinguish or Signify; Distinctiveness
382Tk1032 k. Acquired Distinctiveness and Secondary Meaning in General. Most Cited Cases
(Formerly 382k478, 382k71)
The critical question in a case of secondary meaning always is whether the public is moved in any degree to buy article because of its source and what are the features by which it distinguishes that source, since likelihood of consumer-confusion is the test of secondary meaning under the common law of unfair competition as well as under the Lanham Act. 9 U.S.C.A. § § 3, 4; Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.; General Business Law N.Y. § 368-c, subd. 3; Penal Law N.Y. § 964.

[6] Trademarks 382T 1707(6)

382T Trademarks
382TIX Actions and Proceedings
382TIX(F) Injunctions
382Tk1701 Preliminary or Temporary Injunctions
382Tk1707 Proceedings
382Tk1707(6) k. Weight and Sufficiency. Most Cited Cases
(Formerly 382k626, 382k95(3))
In action by proprietor of television program for unfair competition by marketing of goods under name of historical person who was hero of program, evidence was sufficient to show the likelihood of consumer-confusion for purposes of preliminary injunctive relief.

[7] Trademarks 382T 1424

382T Trademarks
382TVIII Violations of Rights
382TVIII(A) In General
382Tk1423 Particular Cases, Practices, or Conduct
382Tk1424 k. In General. Most Cited Cases
(Formerly 382k471, 382k71)

Trademarks 382T 1714(1)

382T Trademarks
382TIX Actions and Proceedings
382TIX(F) Injunctions
382Tk1712 Permanent Injunctions
382Tk1714 Grounds and Subjects of Relief
382Tk1714(1) k. In General. Most Cited Cases
(Formerly 382k471, 382k71)
Where secondary meaning and consumer-confusion are established, use of a trade name even upon noncompeting goods may be enjoined.

[8] T 196

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk190 Stay of Proceedings Pending Arbitration
25Tk196 k. Particular Cases. Most Cited Cases
(Formerly 33k23.5(1), 33k23.5 Arbitration, 95k284(2))
Where manufacturer of children's playsuits, after expiration of its licensing agreement with proprietor of "Wyatt Earp" television program, continued to market goods under quoted name, suit for injunction against unfair competition was not based on the licensing contract and involved broader issues than violation of the contract, and filing of such suit was not a failure to perform agreement to arbitrate in the licensing contract, and hence motion for stay and to compel arbitration would be denied. 9 U.S.C.A. § § 3, 4.

Abraham K. Weber, New York City, for Wyatt Earp Enterprises, Inc.
Strasser, Spiegelberg, Fried & Frank, New York City for Sackman, Inc., and others.
EDELSTEIN, District Judge.
In a suit for an injunction based upon alleged unfair competition[FN1] the plaintiff moves for an injunction pendente lite to restrain the defendant [FN2] from manufacturing and merchandising children's playsuits under the name, mark and symbol of 'Wyatt Earp.' After the service of the complaint and the motion for a preliminary injunction, the defendant in that suit petitioned for a stay of proceedings and to compel arbitration, under the United States Arbitration Act, 9 U.S.C. § § 3 and 4. Both matters were brought on to be heard by orders to show cause, and were heard together.

Plaintiff is a producer of motion pictures for television and is the proprietor of a very successful series entitled 'The Life and Legend of Wyatt Earp', nationally and internationally televised over the facilities of the American Broadcasting Company. The defendant has been in the business of manufacturing children's playsuits for many years, and, after the commencement of the 'Wyatt Earp' television program by the plaintiff, entered into a license agreement with it purporting to grant the right to defendant to use 'the name and likeness of Hugh O'Brian in the characterization of Wyatt Earp', O'Brian being the star of the program, portraying the title character. The agreement was not renewed by the plaintiff upon its expiration, another manufacturer having been licensed in place of defendant. The defendant has, after the expiration of its rights under the agreement, continued to manufacture and market children's playsuits

under the name, mark and symbol of 'Wyatt Earp', although without using the name and likeness of Hugh O'Brian and without specific reference to 'ABC-TV'.

[1][2][3] The plaintiff seeks to enjoin the defendant's use of the name, mark and symbol 'Wyatt Earp' on its playsuits on the ground that, by plaintiff's efforts, the name has come to have a secondary meaning indicative of origin, relationship and association with the television program; and that the public is likely to attribute the use of the name 'Wyatt Earp' by the defendant to the plaintiff as a source of sponsorship and buy defendant's merchandise in this erroneous belief. The defendant denies the possibility of secondary meaning attaching to the name, arguing that it belonged to a living person out of the nation's history, and hence has become a part of the public domain not subject to commercial monopolization by anyone. Such a contention, I believe, overstates the law. Certainly the defendant, along with the plaintiff and everyone else, has some interest in a name out of history, as they have in words of common-speech. 'The only protected private interest in words of common-speech is after they have come to connote, in addition to their colloquial meaning, provenience from some single source of the goods to which ***624** they are applied.' Adolph Kastor & Bros. v. Federal Trade Commission, 2 Cir., 138 F.2d 824, 825. The question is, in determining whether there is a protected private interest, whether the name 'Wyatt Earp' has come to have such a connotation of provenience. If it has, the plaintiff has a cognizable interest in preventing the likelihood of consumer confusion, and it is such an interest as the law will protect against an opposing interest no greater than that of all persons in the use of the names in history. It is true that where a symbol is not fanciful but merely descriptive, the plaintiff bears a very heavy burden of proving confusion is likely. See dissenting opinion of Judge Frank in Triangle Publications v. Rohrlich, 2 Cir., 167 F.2d 969, 974, 976. Or it may be that a nonfanciful, real name is such a part of the national fabric that all have a measurable interest in its use, to the extent that it acquires no secondary meaning extending into a defendant's field so as to cause a likelihood of confusion. Durable Toy & Novelty Corp. v. J. Chein & Co., 2 Cir., 133 F.2d 853, Certiorari denied 320 U.S. 211, 63 S.Ct. 1447, 87 L.Ed. 1849. '* * * Each case presents a unique problem which must be answered by weighing the conflicting interests against each other.' Id., 133 F.2d at page 855. Although 'Wyatt Earp' is the name of an historical person, the defendant's interest in it is, I feel, not so strong as was the defendant's interest in the name 'Uncle Sam' in the toy case, nor is the possibility of a secondary meaning attaching to 'Wyatt Earp' so unlikely. If the plaintiff can show that it is likely to succeed, at trial, in proving that it invested the name of Wyatt Earp with a commercial significance and good will that is attributable to itself and that is likely to be appropriated by the defendant by way of consumer-confusion, it will be entitled to the relief it seeks.

It is perhaps not too much to say, even at this preliminary stage of the proceedings, that the name of Wyatt Earp has been battered into the public consciousness by the television program to an extent far beyond any fame or notoriety ever previously attached to the marshal's name. Between September of 1955 and the end of November, 1957, 102 motion picture films have been produced under the general title, 'The Life and Legend of Wyatt Earp', which is also a service mark owned by the plaintiff and registered in the United States Patent Office. The films have been televised each week, 52 weeks a year, on the transcontinental release facilities of the American Broadcasting Company. More than $3,000,000 has been spent by the plaintiff in producing the films, and more than $3,500,000 has been received by the television network for its time and facility charges during the two year period commencing in September of 1955 and ending in August of 1957. Such charges continue to be made and received at the rate of more than $2,000,000 per year. By reason of the popularity of the production, enormous publicity has been generated in other media of mass communication. Popularly known as the 'Wyatt Earp Program', it has from its inception been among the most popular television entertainments in the nation, viewed weekly on millions of television receivers by additional millions of persons. As an indication of the public acceptance of the program, there has been a great and increasing nation-wide demand for articles and products sponsored by the plaintiff and bearing the name, mark and symbol of 'Wyatt Earp'. It has been asserted without denial or other comment that goods and merchandise marketed under the name of 'Wyatt Earp' were unheard of prior to the first telecast of the show. The finding is nearly inescapable that the commercial value now enjoyed by the name is attributable almost entirely to the program. The plaintiff, as a result, has entered into the business of licensing merchandise rights in connection with the program under agreements controlling the nature and quality of the goods licensed so as to maintain high standards and to preserve the integrity of its good will. Under these agreements the royalties to be received for the year 1957 ***625** will exceed $100,000. The merchandise so promoted, in no way unique aside from its program identification, obviously sells much more readily than the same merchandise would sell without the program identification, as borne out by the fact that manufacturers pay and seek to pay substantial sums of money for the privilege of sponsorship, by way of licensing agreements. It can be found preliminarily, therefore, that the name and characterization of 'Wyatt Earp' as televised by the plaintiff has become

identified in the mind of the consumer public with merchandise upon which the name has been imprinted; that this identification and good will has extended to the field of children's playsuits sold and distributed under the name, mark and symbol ‘Wyatt Earp’; and that defendant is merchandising ‘Wyatt Earp’ playsuits because of a popular demand for merchandise identified with the program and the plaintiff.

[4] Since the expiration of its privileges under the licensing agreement with the plaintiff, the defendant was marketed its play clothes without the name and likeness of the star of the television program and without specific reference to ‘ABC-TV’. It further has made certain modifications in the design of its suits. Samples of suits made by the defendant under its license and made after the expiration of its license, as well as a sample made by the current licensee, together with their boxes were handed up to the court as exhibits. Defendant's present outfit, despite the changes, appears to bear a striking resemblance to the outfit it previously made under license and to the one made by the present licensee; and these costumes, approximating the one worn by the television ‘Wyatt Earp’, indeed seem to be markedly different from other ‘western’ costumes. The defendant continues to mark on its boxes the name ‘Wyatt Earp’ together with the legend ‘official outfit’. Moreover, in its catalogue, the Wyatt Earp outfit is advertised in a context with three ‘TV personality’ western outfits, all of them being characterized as ‘official’, but with the ‘TV personality’ designation omitted from the Wyatt Earp display. The text and layout are presented in such a manner as to convey the impression of an identification of defendant's Wyatt Earp playsuit with the Wyatt Earp television program. Indeed, it is so difficult to understand how any other impression could be conveyed that the finding of an intent to convey an erroneous notion of association with the program is highly probable. Unless the word ‘official’ is passed over as sheer gibberish, the idea of sponsorship is inescapably implied.

[5][6] The ‘critical question’ in a case of secondary meaning ‘always is whether the public is moved in any degree to buy the article because of its source and what are the features by which it distinguishes that source.’ Charles D. Briddell, Inc. v. Alglobe Trading Corp., 2 Cir., 194 F.2d 416, 419. For under the common law of unfair competition, as well as under the Lanham Act, the likelihood of consumer-confusion is the test of secondary meaning. Id., at page 421. I find that, for the purposes of preliminary injunctive relief, plaintiff has met the burden of proving the likelihood of consumer-confusion. The public is moved to buy merchandise because of an identification with the name ‘Wyatt Earp’ as developed by the plaintiff's television program. The defendant's use of the name created a likelihood that the public would believe, erroneously, that its playsuits were licensed or sponsored by the plaintiff, to the injury of the plaintiff's good will and to the hazard of its reputation. There is a high probability that, upon the trial of the issues, plaintiff will be able to establish that the name, mark and symbol ‘Wyatt Earp’ has acquired a secondary meaning in the minds of the public as identified and associated with the television program and the plaintiff, and extending into the field of children's playsuits.

[7] It is true that the plaintiff and defendant are not direct competitors in the same field of endeavor. The plaintiff ***626** does not manufacture children's playsuits. But where secondary meaning and consumer-confusion are established, use of a trade name even upon non-competing goods may be enjoined. See Triangle Publications v. Rohrlich, 2 Cir., 167 F.2d 969, 972, 973. And as held by the Court of Appeals in that case, the same principle applies to the situation of confusion about sponsorship. ‘In either case, the wrong of the defendant consisted in imposing upon the plaintiff a risk that the defendant's goods would be associated by the public with the plaintiff, and it can make no difference whether that association is based upon attributing defendant's goods to plaintiff or to a sponsorship by the latter when it has been determined that plaintiff had a right to protection of its trade name.’ Id., at page 973. See also, Hanson v. Triangle Publications, 8 Cir., 163 F.2d 74, certiorari denied 332 U.S. 855, 68 S.Ct. 387, 92 L.Ed. 424; Adolph Kastor & Bros. v. Federal Trade Commission, supra; Esquire, Inc. v. Esquire Bar, D.C., 37 F.Supp. 875. Furthermore, in the case at bar, it would seem that something more than mere sponsorship is involved, something that very closely approaches direct competition. The plaintiff does not manufacture children's playsuits, but it licenses another to do so on a royalty basis. Any customers purchasing from the defendant on the strength of the ‘Wyatt Earp’ name are customers diverted from plaintiff's licensee, to its direct pecuniary injury, in addition to any danger to its reputation.

While there is little doubt that the violation of plaintiff's rights by a diversion of purchasers to the defendant could readily be compensated for in a judgment for money damages, it also appears that a denial of preliminary injunctive relief would work irreparable and serious injury to the plaintiff by jeopardizing the entire licensing system it has built at great effort and expense. On a balance of the harms, the plaintiff stands to suffer much greater injury by a denial of injunctive relief than any which can befall defendant by granting such relief. Accordingly, the motion for a

preliminary injunction will be granted.

In its motion for a stay and to compel arbitration, the petitioner-defendant takes the position that what is involved in the respondent-plaintiff's action is the rights of the latter under the agreement between the parties and alleged violations of those rights by the former. Breach of the agreement is denied and the contention is made that the contract created no rights in the licensor (respondent-plaintiff) that entitled it to the protection of this court. It is demanded that the suit for an injunction be stayed and arbitration be compelled of the question of the violation of the licensing agreement and any rights created thereby.

[8] Section 3 of Title 9 U.S.C. authorizes the court to grant a stay 'upon being satisfied that the issue involved * * * is referable to arbitration.' The written agreement between the parties provides for the arbitration of any dispute or disagreement between the parties 'arising out of or relating to' the licensing contract. But the controversy between the parties, certainly the claim of the plaintiff, is one involving the issue of unfair competition. The action sounds not in contract but in tort, and the issue is not defined by the question of the rights of the parties under the agreement. If the dispute were confined to issues of whether or not the contract was violated, it would be referable to arbitration. But 'the issue involved', see International Union, United Automobile Aircraft v. Benton Harbor Malleable Industries, 6 Cir., 242 F.2d 536, 539, 542, is much broader in scope, requiring a consideration of facts and factors beyond the contract. Even if any existing subordinate contract issues were resolved by arbitration, 'the issue involved' would remain. Indeed, in the absence of a license agreement and of defendant's operation under it, the broad issue would remain. No arbitration decision interpreting the contract could determine the controversy at bar. To delay the suit for injunctive relief and ***627** require arbitration would merely add to the 'costliness and delays of litigation' it was the purpose of the Arbitration Act to eliminate. 68 Cong., 1st Sess., House of Rep. Report No. 96. For the controversy between the parties would still have to be decided by this court. Whether or not defendant has competed unfairly with the plaintiff presents an issue far transcending one merely 'arising out of or relating to' the contract between the parties, and it is inconceivable that they intended such a dispute to be settled by arbitration. While the parties have made an agreement to arbitrate, the filing of suit for injunctive relief does not constitute a failure, neglect or refusal of the respondent-plaintiff to perform its agreement under 9 U.S.C. 4. The motion for a stay and to compel arbitration will be denied.

FN1. Plaintiff also claims violations of provisions of the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq., 15 U.S.C.A. § 1051 et seq., of the provisions of § 368-c(3) of the General Business Law of New York McKinney's Consol.Laws, c. 20 and of the provisions of § 964 of the Penal Law of New York, McKinney's Consol.Laws, c. 40.

FN2. Of the several defendants mentioned in the style of the case, the one referred to in the opinion as the defendant, is Sackman Brothers Company, a Pennsylvania corporation qualified to do business in the State of New York. It is a wholly owned subsidiary of Sackman, Inc., a New York corporation whose sole activity is that of a real estate management and holding company. These two parties defendant are the only parties mentioned in the caption that have any existence. The plaintiff is a corporation organized and existing under the laws of the State of California.

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