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## Lawyers as Assimilators and Preservers

Thomas L. Shaffer

*Notre Dame Law School*, [thomas.l.shaffer.1@nd.edu](mailto:thomas.l.shaffer.1@nd.edu)

Mary M. Shaffer

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# LAWYERS AS ASSIMILATORS AND PRESERVERS\*

*Thomas L Shaffer\*\*  
with Mary M. Shaffer\*\*\**

In one sense he is the salt of humanity with his tremendous energy and ambitions. But being salt, he gives humanity high blood pressure. He's neither a real Jew nor a real Gentile. He has no roots in any group. He digs all the time in other people's soil, but he never reaches any roots. He tries consciously and subconsciously to wipe out the individuality of nations and cultures. Like those who built the Tower of Babel, he often tries to transmute the whole world into one style. He often preaches a sort of liberalism which is false and is the opposite of liberal. The worst thing about the assimilationist is that he has no pride. He always wants to be where he is not wanted . . . . The idea of roots is not to deny anything. You have to make the best of your origin and your upbringing. You did not grow up in a vacuum . . . . If you are going to write a cosmopolitan novel, just about a human being, you will never succeed, because there isn't such a thing as 'just a human being.'

*Isaac Bashevis Singer<sup>1</sup>*

The United States, more than most nation-states, has a history of confrontations between one culture and another, and of law as a means of ending cultural confrontations. Again and again in America, our dominant Anglo-Saxon Protestant culture

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\*\* B.A., J.D., LL.D.; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

\*\*\* B.A., University of Virginia. Mary M. Shaffer studied at the Universities of Siena and Pavia and taught in Italy, 1985-1988; she is a graduate student in Italian literature at Johns Hopkins University.

<sup>1</sup> I. SINGER AND R. BURGIN, *CONVERSATIONS WITH ISAAC BASHEVIS SINGER* 63-64 (1985).

has dealt with an alien culture and, as the story is usually told, overcome it. The dominant culture has used the law to bring the vulnerable culture into conformity to what we have referred to as "the American way."

This has been true where the vulnerable culture came to us as was true of the African slaves and of the European immigrants who came to farm the Midwest and to tend the machinery of the industrial Northeast. It has been true also when the dominant culture was the invader, as was the case, all over the continent, when our European ancestors settled in territories populated by native Americans — from the commercial adventurers of the Southeast, to the Pilgrims in Massachusetts Bay, to the Conquistadores among the Navajo, to Father Junipero Serra among the Indians of California, to my pioneer ancestors among the Arapaho of central Wyoming.

Coercive law has been the means of domination, more than overt force, in all of these cases; cultural domination has been turned over to lawyers more often than it has been turned over to soldiers. In most cases lawyers have served the function soldiers would have: The professional mission was conquest. Law was force used by the dominant culture, and lawyers were the legions of the law. If the dominant society has sometimes become liberal toward the conquered, the result in the American case — unlike that of the Romans or biblical conquerors — is that the law dealt with the individual, not with the conquered culture. Our liberal jurisprudence speaks in terms of individual rights — rights not of a culture or a people, but rights of individuals who are considered one at a time, and dealt with in terms defined by the individualistic law and morals of the dominant culture. That was true of the nation-state's treatment of the Mormon culture that found biblical warrant for the practice of polygamy in the 19th century;<sup>2</sup> it has been true, so far, of Indian tribes that use hallucinogens in religious ritual;<sup>3</sup> it was true a few years ago of a Jewish military chaplain who wanted to

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<sup>2</sup> Reynolds v. United States, 98 U.S. 145 (1878). See Kendall White's brief discussion in S. Hauerwas, S. Levinson, and M. Tushnet, *Faith in the Republic*, 45 WASH. AND LEE L. REV. 467, 492 (1988) (hereinafter *Faith in the Republic*).

<sup>3</sup> Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 808 (1963).

wear a yarmulke under his military hat.<sup>4</sup>

American constitutional law deals with vulnerable cultures in terms of the rights of individuals. It ignores or at least bypasses cultures by focusing on the individual as if he were the cause of his own culture. But the law's narrow focus on rights does not dispose of cultures; the law can only pretend that cultures are absent. Judge Learned Hand, for example, wrote some of the opinions for the federal court of appeals in a series of cases involving a clause in the immigration statute that says an immigrant applying for citizenship is required to demonstrate that he has "good moral character."<sup>5</sup> Such cases raised the cultural question of what character means, and often involved a confrontation between two cultures. They involved evidence of mercy killing,<sup>6</sup> or living with a person of the opposite sex without benefit of marriage,<sup>7</sup> of visits to prostitutes,<sup>8</sup> and, in one case, an applicant who had married his niece<sup>9</sup> — a practice that was not considered immoral in his immigrant culture but was immoral so far as the executive branch of the federal government was concerned.

These situations were typically situations in which the dominant culture had already prevailed: The marriage to a niece, for example, was illegal and invalid, as much as a polygamous Mormon marriage would have been. The issue was what good moral character meant; there were at least three ways available to impose the dominant culture's position on what good moral character meant: One would have been to consult public opinion. Hand declined to do that; he thought it wasn't judicial. He consulted

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<sup>4</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986). See Mark Tushnet's discussion in *Faith in the Republic*, at 470-71.

<sup>5</sup> Note, *Aliens — Naturalization — Good Moral Character as a Prerequisite*, 34 NOTRE DAME L. REV. 375; see J. O'Meara and T. Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME L. REV. 1, 6 n.13, 10 n.23 (1964); Special Project, *Jurisprudence — Naturalization — Moral Standard*, 33 MARQ. L. REV. 202 (1950).

<sup>6</sup> *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947).

<sup>7</sup> *Petitions of Rudder, et al.*, 159 F.2d 695 (2d Cir. 1947); see also *Estrin v. United States*, 80 F.2d 105 (2d Cir. 1935).

<sup>8</sup> *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949)(discussing *United States v. Manfredi*, 168 F.2d 752 (3d Cir. 1948)).

<sup>9</sup> *United States v. Francioso*, 164 F.2d 163 (2d Cir. 1947).

precedent and judicial instinct instead, as more appropriate to his office. A second method, one suggested to him by a law review editor, would have been to claim universal validity, "immutable objective morality," for American culture;<sup>10</sup> Hand did not discuss that, but there was warrant for it in the precedents. The third method would have spoken of a right to a cultural view of marriage — saying, in effect, that such a marriage is not allowed but a person has a right to believe privately that it should be; the individual has that private right. Character requirements cannot intrude into that privacy.

Judge Hand can be read to have taken the third alternative.<sup>11</sup> He can also be read to have taken the vulnerable immigrant culture into account in deciding what good moral character meant. He was reactively calm in such cases — he usually ordered the government to grant citizenship — perhaps because he saw himself, a lawyer and a judge, standing between two cultures and having to deal with the morals of each, rather than as a dispenser of rights to individuals. The possibility suggests what I would like to talk with you about — the lawyer, not as an agent of conquest, a manager of the law of the dominant culture as a means of security from the vulnerable culture, but as a legal professional who stands between two cultures and uses his or her professional status as a way to fit them together.

A rather different example here is the group of black civil-rights lawyers that gathered in the 1930s and 1940s around Dean Charles Hamilton Houston: Thurgood Marshall, Spottswood Robinson, William Hastie, James W. Nabrit, Jr., Robert L. Carter and Oliver W. Hill. They were the architects of a stunning change in American constitutional law. It took years of wary, wily, patient lawyers' work in scores of cases.<sup>12</sup> It was an argument over three decades, and it was an argument between cultures. Although we talk of it as a matter of rights, it was at its

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<sup>10</sup> See Special Project *supra* note 5.

<sup>11</sup> See *supra* note 6; compare *In re Spenser*, 22 F. Cas. 921 (D. Oregon 1878).

<sup>12</sup> R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975); G.R. McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights*, in J.H. FRANKLIN & AUGUST MEIER, *BLACK LEADERS OF THE TWENTIETH CENTURY* 221-240 (1982), excerpted in T. SHAFFER, *AMERICAN LEGAL ETHICS* 546-55 (1985).

deepest not that at all. It was argued in those terms because it had to be; that was the category laid down by the dominant culture.

But this movement, from the *Gaines* case in 1938 through the last of the education cases in the 1970s, was an argument not for individual rights but for participation in America by a culture of oppressed people.<sup>13</sup> That is why integrated education was critical in Dean Houston's view: The law's task, as he saw it, was to fit two cultures together. It would not have been enough to confer rights on the individual black person. Neither Houston nor the great prophet of the movement, Dr. King, argued from Hobbs and Rousseau; Dr. King argued from the Bible.<sup>14</sup> Black people in America are, like biblical Israel, a people.<sup>15</sup>

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Let me see if I can pose this proposition with a couple of anecdotes. I am a descendant of frontier women and cowboys. I am the only male in three generations in my family who is not a cowboy (and my wife sometimes wonders about me). All four of my grandparents and four of my great-grandparents homesteaded in Montana, Wyoming, and Colorado. My maternal grandfather was one of the first law-enforcement officers in Hot Springs County, Wyoming. As far as I can tell, he was the very first who was earnest about bringing law and order to Thermopolis, a little cow town that, in those days, had more saloons than it had churches. My parents' people were Baptist settlers; they went to churches, not to saloons; they sank roots and tried to make a living from raising the gentle, durable little Hereford

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<sup>13</sup> I am grateful for the unpublished scholarship of Steven Hobbs on this point; see my brief discussion of it in Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699 (1988).

<sup>14</sup> J. McCLENDON, JR., *BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY* 265-286 (1974).

<sup>15</sup> And, like Moses, Dr. King said to the dominant culture: Let my people go. Kluger, *supra* note 12, at 128. " 'Frankly,' says a Howard law graduate who went on to become a federal judge, 'the purpose there then was to learn how to bend the law to the needs of blacks.' Beyond that . . . was Houston's belief that a law case was a splendid opportunity to lead and teach the black population in whatever community the case arose." The Dean was so earnest in this that he had at first preferred to avoid the federal courts and argue his cases before local judges and juries — i.e., to argue them as confrontations between cultures rather than as matters of federal constitutional right.

cattle that British investors imported into the Mountain West at about the time my ancestors settled there.

The Herefords shared those mountains and prairies with native wild life; the cows and the settlers had to learn to share their world with creatures who were there first. You may remember Jim Burden's grandmother, in Willa Cather's *My Antonia*, deciding to put up with the badger in her garden, even though, as she put it, "He takes a chicken once in a while, but I won't let the men harm him. In a new country a body feels friendly to the animals. I like to have him come out and watch me when I'm at work."<sup>16</sup> But the settlers also took what God had provided for them in nature: They killed the animals they needed for food, when they needed food. I can remember going for two weeks with our neighbor, who had a summer ranch in the mountains: We took some flour, sugar, baking powder, and a bag of apples, but no meat. The first thing we did when we got to the summer camp with our pack horses was to kill a deer.

We had, even as late as my childhood in western Colorado, a settled, white-man's frontier culture. The dominant culture had come to it, much as the Pilgrims had come to Massachusetts, and there were confrontations. Game and fish laws are an example; with those laws came peace officers who had the power to arrest a cowboy who killed a deer for his summer food — out of season, without a license, and when he was not wearing the prescribed clothing.

Farrington Reed Carpenter tells of coming in 1912 from the Harvard Law School to practice law in the town of Hayden, in Routt County, Colorado.<sup>17</sup> Hayden is a cow town, still under 2,000 in population, on the road from Steamboat Springs to Craig, not far from where I grew up. The first thing Carpenter says he noticed in Hayden, an event that had a lot to do with his learning to practice law there, was a confrontation between the dominant culture and the vulnerable culture. The dominant culture came to town in the person of a game warden named Hob-

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<sup>16</sup> W. CATHER, *MY ANTONIA* 17 (1918).

<sup>17</sup> F. CARPENTER, *CONFESSIONS OF A MAVERICK: AN AUTOBIOGRAPHY* (1984). The excerpt I use here, which is reproduced in my *AMERICAN LEGAL ETHICS*, at 530-35 (1985), was first published at 8 *COLORADO LAWYER* 212 (1979).

son. He came from eastern Colorado, settled in a bit, and obtained from Denver official credentials that empowered him to enforce the game and fish laws. Officer Hobson arrested a rancher named Matt Gates, at Gates' ranch, on the charge of having there killed three sage chickens out of season.

"News of this arrest spread like wildfire and aroused great indignation all over the county," Carpenter said. "Many of the inhabitants felt they had a constitutional right to shoot sage chickens any time they wanted to on their own land, for their needs. A committee of the most prominent citizens . . . tried to persuade James C. Gentry, the District Attorney, to dismiss the case. When Mr. Gentry refused, they came back predicting that he would be overwhelmingly defeated at the next election.

"On the day the case was called in the . . . log cabin courthouse, the room was crowded with concerned spectators . . . . Officer Hobson took the stand, and Mr. Gentry had him tell what he had seen the accused do. Finally, Gentry asked him, 'Are you sure it was sage chickens that were killed?'

"'Yes,' answered the witness, 'I took possession of them as evidence, and placed them in a gunny sack in the vault of the Courthouse. They are here with me today.'

"'Show them to the jury,' demanded Mr. Gentry in a stentorian voice. The witness carefully emptied the sack in front of the jury.

"Three dead owls fell out.

"Hobson turned plaintively to the Judge and said, 'Your Honor, someone has played a joke on me' . . . . Against a background of feet shuffling on the floor, the Judge beckoned the Sheriff and ordered him to escort the witness out of the courtroom."

"The Sheriff took Hobson out the back door and he was never seen again in Routt County," Carpenter says. He leaves us to our own conclusions as to how the owls got into the gunny sack. I think we are free to guess that the District Attorney knew the answer. He was a lawyer standing between cultures. Maybe he manipulated the facts a bit, as Faulkner's Gavin Stevens, Mississippi county attorney, did in similar cases.<sup>18</sup>

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<sup>18</sup> I have in mind the episode in which bootleg whiskey is found in Montgomery

The other anecdote comes from Utica, New York. In the first few years of this century — a decade before Farrington Carpenter went from Cambridge to Hayden to practice law — there was in Utica, as in many American cities, a community of immigrants from southern Italy. There were a couple of Italian-language newspapers published there, both of which carried items of local interest to those who could read Italian or had someone who could read it to them. One was called *L'Avvenire*; the other was *La Luce*. There is a series of stories in those papers about an immigrant who stood between the two cultures in Utica — a man named Nick Camelo.

Signor Camelo was, functionally, as much a lawyer as James Gentry in Hayden or Gavin Stevens in Jefferson, Mississippi — although Camelo was not educated or licensed to be a lawyer. Nick Camelo first appears in the news in 1900, when he was elected secretary of a company that manufactured liqueurs.<sup>19</sup> He appears again in 1902 when he was nominated by both police and fire commissioners to be *speciale polisie della citta di Utica*, a representative to these agencies, apparently, from the Italian community. The writer for *L'Avvenire* said the commissioners could not have chosen a better person “than this fine young man who willingly lends himself for the good of all.”<sup>20</sup>

The same paper reported the next year that Camelo had managed to get one Michele Lombardi out of prison. Signor Lombardi was unjustly sentenced, *L'Avvenire* said, by a judge in Greene, New York, on a charge of third-degree assault. He was accused by his wife Carmela of, as the newspaper reported it, *aggressione*. “Young and valiant Nick Camelo,” the story said, was able to obtain an annulment of the sentence and Lombardi’s liberation from prison.<sup>21</sup> *La Luce* reported the same story and added the fact that it had cost Camelo two hundred dollars<sup>22</sup> —

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Ward Snope’s back-alley picture room, with the consequence that M.W. is sent to the state penitentiary instead of federal prison. W. FAULKNER, *THE TOWN* 154-76 (1957) (ch. 10)(Vintage ed. 1961). Faulkner dedicated the novel to Oxford lawyer Phil Stone: “He did half the laughing for thirty years.” *Id.*

<sup>19</sup> *L'Avvenire*, Nov. 10, 1900.

<sup>20</sup> *L'Avvenire*, Jan. 11, 1902.

<sup>21</sup> *L'Avvenire*, Jan. 10, 1903.

<sup>22</sup> *La Luce*, Jan. 10, 1903.

the paper didn't say to whom the money was paid or where Camelo got it. He was functioning according to the dominant culture's requirements, but possibly with the methods and values of the vulnerable culture. He was clearly functioning as a lawyer.

In 1904, *L'Avvenire* reported that Camelo had defended an Italian immigrant who was stopped on the street, taken to prison, and fined fifty dollars. This person was unable to pay the fine and had been in prison fifty-nine days before Camelo learned about him.<sup>23</sup> Camelo had, by this time, apparently left the liquor business and was operating as a notary public and banking and steamship agent for families who sought to bring relatives to this country from Italy. He was also working as an interpreter in the city court, the paper said.<sup>24</sup>

Camelo was asked to run for alderman in Utica in 1905; he declined, but he said he would continue to listen to his people.<sup>25</sup>

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We propose to look more closely at the situation displayed in these stories from Hayden and from Utica, to look at the lawyer as he stood in these stories between a dominant culture and a vulnerable culture. We want to suggest that such a legal figure has two ways of using his legal power to deal between cultures — ways that are different in their effect on both cultures. One way is to conform the vulnerable culture to the dominant culture: We will call that the way of *assimilation*.<sup>26</sup>

The other way is to protect the vulnerable culture and, as the lawyer manages to locate openings in the law and politics of the time, to manipulate the dominant culture into coming to terms with the vulnerable culture. We will call that the way of

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<sup>23</sup> *L'Avvenire*, Feb. 10, 1904.

<sup>24</sup> *L'Avvenire*, Sept. 12, 1903; Feb. 20, 1904; June 11, 1904.

<sup>25</sup> *L'Avvenire*, Aug. 26, 1905.

<sup>26</sup> I OXFORD ENGLISH DICTIONARY 510 (1933) gives five definitions of assimilation: (1) the state of being like, or similarity, resemblance; (2) the action of becoming conformed; (3) the acknowledgement of likening; (4) "conversion into a similar substance," which is physiological but also metaphorical, as in Burke's reference to "the sentiments which beautify and soften private society"; and (5) the change of bodily fluids after death, into "the nature of any morbid matter" (pathology), a usage that has metaphorical promise for the thesis of this paper.

*preservation.* In America, both methods have resulted in substantial freedom for the individual in the vulnerable culture, but the freedom that has resulted from assimilation has been a freedom expressed in theories of rights, and therefore a freedom that belongs to the individual without regard to his culture. He is, in one way of putting it, free to believe in his old vulnerable culture or to abandon it. If the vulnerable culture is in some way preserved in him, or through him, it is not because the culture has value but because the individual has rights.

The freedom that results from the preservation of culture is different ethically and politically: If the vulnerable culture is preserved rather than assimilated, it is usually because the dominant culture accords it value and — to use a word the Italian immigrants used — respect. That means the dominant culture has rendered itself vulnerable: It has put itself in a position to learn from the vulnerable culture. It is in danger of change as a result of what it learns. (The Civil Rights Movement's partial success is, again, the most prominent modern American example.)

## I. TWO MODELS

About a decade after Nick Camelo told the voters of Utica that he would prefer not to be an alderman, but would continue to listen to his people, Salvatore A. Cotillo functioned in a licensed capacity as a lawyer in Little Italy, in Harlem. Cotillo was a preserver. I want to linger over his story. It is available in English.<sup>27</sup>

Cotillo's family emigrated from Naples in 1892, when Salvatore was six years old. He went to school in New York. He earned a law degree from Fordham in 1911 and was admitted to the New York Bar in 1912. He would later be the first Italian-American to serve in either house of the New York Legislature (he served in both), and the first to sit on the bench of the New York Supreme Court. But in the days when he was acting as

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<sup>27</sup> N. FERBER, *A NEW AMERICAN: FROM THE LIFE STORY OF SALVATORE A. COTILLO, SUPREME COURT JUSTICE, STATE OF NEW YORK (1938)* (hereinafter FERBER); T. Henderson, *Immigrant Politician: Salvatore Cotillo, Progressive Ethnic*, 13 INT'L MIGRATION REV. 81 (1979); cf. SALVATORE A. COTILLO, *ITALY DURING THE WORLD WAR* (1922).

Nick Camelo had in Utica, he was a lawyer practicing in the street in front of his father's gelato and pastry shop on East 116th Street.

Cotillo was a scrivener for his clients, most of whom could not read or write in either language. "He was . . . required to translate intimately personal letters, business papers and legal documents," his biographer says. "Neighbors and friends sought his aid in the preparation of applications for various licenses, or petitions on behalf of their relatives who wished to emigrate to the United States. Cotillo served an apprenticeship in human problems . . ." <sup>28</sup> Cotillo was the only lawyer in the neighborhood; his biographer says there were forty or fifty Italian-American lawyers working there thirty years later. <sup>29</sup>

Cotillo, like Camelo, advised and represented his clients as they faced the world outside their Italian neighborhood. "Many problems were personal; but some had a community aspect and Cotillo was exhilarated by the challenge they offered to find a solution . . . An earnest group of the more frequent callers regarded him as their leader in planning for the realization of a better life for their immigrant neighbors." <sup>30</sup>

One way to put the comparison of assimilation and preservation is to ask a question about this "better life," a question also about what *L'Avvenire* meant when it said Nick Camelo, although he had been *speciale polisie*, declined nomination for alderman and said he would continue to listen to his people. These lawyers interpreted one culture to the other. When they were willing to mute or even renounce the power they had to serve the conquerors, they interpreted powerless cultures to powerful cultures. Signori Camelo and Cotillo in this way interpreted the Protestant and Irish-Catholic, English-speaking cultures of Utica and New York City to the vulnerable Calabrian and Sicilian cultures Southern Italians brought to the United States when they came here, eighty years ago, looking for work. And, more significantly we think, they interpreted the Calabrians and Sicilians to New York.

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<sup>28</sup> See N. FERBER, *supra* note 27, at 19.

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

<sup>30</sup> *Id.* at 21.

There is probably a hope, when lawyers interpret in the way Camelo and Cotillo did, that they or their descendants can achieve a cultural synthesis, that they can *put* the cultures together, rather than *fit* them together. There is a hope that the need for interpretation will disappear, because the differences between the cultures will disappear. That, I take it, was the romantic American dream of the melting pot. American lawyers, no doubt, often did what they did because they thought of themselves as guardians of the melting pot. Arthur Miller's Italian-American lawyer, Mr. Alfieri, was a guardian of the melting pot. Marco, the illegal immigrant who had, as we say, taken the law into his own hands, said to Mr. Alfieri, "All the law is not in a book." "Yes," Mr. Alfieri said. "In a book. There is no other law." Mr. Alfieri was an assimilator, and it was important to him that Marco know who wrote the book. Marco had to be conquered; his culture had to become irrelevant. Mr. Alfieri was the servant, not of Marco's culture, but of Marco's rights.<sup>31</sup>

We are going to pass by this melting-pot possibility. We do so for moral reasons. The melting pot meant what Officer Hobson meant when he arrested Matt Gates at the Gates ranch near Hayden — not that the game laws would adjust to ranchers (they never have) but that ranchers would stop shooting sage chickens out of season.

In our opinion, the melting pot is not a desirable possibility; it never was. It was a product of Anglo-Saxon imagination. It did not honestly hope for a synthesis of cultures in America. What "melting pot" meant to Italians who came here at the time Camelo and Cotillo did was that they would melt into the republican society Thomas Jefferson and Benjamin Franklin described: God's New Israel, Jefferson called it. President Reagan said as he left office that America is the keeper of the miracle. There is no trace of Italy in such an imaginary republic — no trace of Latin America or Africa or China, either. From an Italian's point this Jeffersonian vision was dishonest, crude, materialistic, and frantic. Italians, and the lawyers who sought to preserve Italian culture in America, were not interested in being melted into that pot. Americans were, as one immigrant put it, a

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<sup>31</sup> A. MILLER, *A VIEW FROM THE BRIDGE* 103 (1955) (Bantam ed. 1961).

people who eat their fruit green.<sup>32</sup>

The principal example we will use of the lawyer as *assimilator* is John Horace Mariano,<sup>33</sup> an Italian immigrant, American lawyer, and sociologist, who published in 1925 a book called *The Italian Immigrant and Our Courts*. He was somewhat more successful in his work — or at any rate somewhat more persuasive — than Game Warden Hobson was in Routt County.

The example we will use of the lawyer as *preserver* is Salvatore Cotillo, immigrant lawyer, Tammany Hall politician, and Italian-American leader. (It might be more fun to use Nick Camelo, but we have told you all we can find out about him, and it's not enough for sound scholarship.)

## II. JOHN HORACE MARIANO

Mariano's and Cotillo's vantage points on Italian immigrants confronting American law were substantially identical: Both were in New York City; they were contemporaries. The immigrant families they addressed were in cohesive Italian-American communities; the families they spoke of had immigrant parents and American-born children reaching adulthood as World War I ended. Both Cotillo and Mariano lived and wrote in contemplation of extensive, pervasive prejudice against Italians,<sup>34</sup>

<sup>32</sup> M. LASORTE, *IMAGES OF THE ITALIAN GREENHORN EXPERIENCE* 147, 195-97 (1985).

<sup>33</sup> Mariano was a psychologist, sociologist, and divorce lawyer, as well as a sometime academic. He died in 1959, at the age of 81, after a long and eminent career in all four disciplines. Two of his books were on psychological problems in marriage; he was counsel for the New York State Psychological Association, for the United Transit Association, and for unions in cases involving the Busch Jewelry Company and its affiliates. He had his education (B.A., LL.B., and Ph.D) from Columbia, and was a member of the New York Bar. *The New York Times*, Aug. 13, 1972, p. 59 col. 2. His books, for present purposes, include *THE ITALIAN IMMIGRANT AND OUR COURTS* (1925) (hereinafter *COURTS*), and *THE ITALIAN CONTRIBUTION TO AMERICAN DEMOCRACY*, published in 1921 by the Christopher Publishing House in Boston, and republished in 1975 by Arno Press.

<sup>34</sup> Both *FERBER* and *COURTS* document the prejudice against immigrants and their children, as does any responsible social history of Italians in America. *See, e.g.* LASORTE, *supra* note 32; The Center for Migration Studies of New York, Inc., *IMAGES: A PICTORIAL HISTORY OF ITALIAN AMERICANS* (1981) (includes newspaper cartoons); MUSMANNO, *THE STORY OF THE ITALIANS IN AMERICA* (1965). The prejudice has not disappeared; it has surfaced in recent political discussions of candidates for national office — Geraldine Ferraro, for example; see the unsigned editorial, *ITALIAN MEN*, *The National Review*, Nov. 2, 1984, p. 18; and D. Keith Mano, *GERALDINE FERRARO*, *The National Review*, March 28, 1986, p. 67, for two unsubtle examples, and JUDITH ANN WARNER, *MARGINALITY AND SE-*

and in the last years of open immigration, just before Congress closed the door on Italians in 1924.<sup>35</sup>

Mariano generalized the legal situation as one in which (1) American-born Italian children met the law as delinquents, and (2) Italian families did not turn to the law for protection, for planning, or for rights. In one direction, the social problem Mariano sought to describe was deviance — too much involvement with the law. In the other direction the problem was too little involvement: Individual Italians failed to use American law when they might have used it to ease their adjustment to their new country. Mariano's cure, for both problems, was assimilation.

Mariano said the first generation of Italian-Americans born here were afflicted with a disease. The disease was that they were neither Italians nor Americans. He called them not Italians, but Americans of Italian extraction. Evidence of the disease was that members of this generation were uncommonly present in criminal and juvenile courts.

Mariano's assessment was in two steps (and on each he gave elaborate statistical information): (1) Italian immigrant parents were law-abiding people; the Italian immigrant was not found in the courts, but "his children are met there in overwhelming numbers."<sup>36</sup> (2) These children were not Italians, but they were not Americans either. The cure was *not* to form children in the culture of their parents, but to make them Americans — to keep them from being Italians.

In the first step, Mariano demonstrated that Italian immigrants were law-abiding people.<sup>37</sup> Mariano was vociferous in de-

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LECTIVE REPORTING (doctoral description of the subtle process). FERBER summarizes the situation that Cotillo and Mariano grew up in:

. . . the olive-skinned, dark-eyed children of Europe's southland were markedly alien breed. . . . Their hands were generally gnarled and stained by grime and soil, hands which fashioned objects, large and small. They performed the heaviest work, burrowing underground in tunnels, erecting sky-piercing, ornate structures, providing healthful sanitation for the many while themselves living under conditions too 'reprehensible' for their so-called betters to contemplate.

FERBER *supra* note 27, at 5.

<sup>35</sup> Immigration Act of 1924, 8 U.S.C. § 145ff (repealed 1952).

<sup>36</sup> See COURTS *supra* note 33, at 17.

<sup>37</sup> For example, they were rarely in trouble because of alcohol. Alcohol (wine and

fense of Italian immigrants when, for example, they were said to be unreliable witnesses (and parties) in court.<sup>38</sup> He reacted with umbrage to suggestions by leaders of the American (A.B.A.) and New York bars that Italian-American lawyers and law students lacked the sophistication to carry on the institutions and traditions of American law. ("Is Such criticism just? Hardly!")<sup>39</sup>

So, Mariano asked himself, what was the matter with the first American-born generation? He decided they were not cultural Italians (a disputable assertion at best): "[T]he American of Italian extraction has been born here, passed through our schools and knows little, and appreciates less, of whatever is Italian or pertains to Italian culture."<sup>40</sup> But he was not an American either, or at least not a good American. The schools through which he passed had not (apparently) done for him what school did for Americans whose families had been in this country longer. The schools failed, *but* it was the *families*, not the schools, that had to be reformed.

Mariano thus concluded that the cure lay not in supporting these young people in formation in the law-abiding Italian culture of their parents, but in making them less Italian and more American. For example, three of the commonest juvenile problems among Italian-American children born in this country were truancy, petit larceny, and gambling. (Those may not have been offenses, with the possible exception of petit larceny, in Southern Italy). "A corps of trained and experienced investigators ought to be kept constantly at work on this problem seeking the causes in the different [Italian] homes. . . ." It may be, he said, that Italian children didn't realize the importance of curbing self-expression when it is "tabooed by our man-made [read

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cordials) is, to Italians, food. "[A]buses of it are rarely encountered." *Id.* at 32-35. Among twelve ethnic groups reported on by the Census Bureau in 1910, for juvenile commitments for drunkenness, the Italians were the lowest (Polish the highest). The Italians, Mariano assumes, but does not say, were immigrant children. "The Italian has as much scorn for the individual who debases himself by abusing liquor as he has for the fanatic dry." *Id.* at 35.

<sup>38</sup> *Id.* at 48-49.

<sup>39</sup> *Id.* at 54 (lack of proper regard for the oath).

<sup>40</sup> *Id.* at 51; see our "Character and Community: *Rispetto* as a Virtue in the Tradition of Italian-American Lawyers," \_\_\_\_\_ NOTRE DAME L.R. \_\_\_\_\_ (1989).

American] laws.”<sup>41</sup> Therefore, the cure was to “Americanize” the homes in which the children were growing up; they would learn appropriate reticence from reformed Italian mothers who, he evidently thought, would be like those in Louisa May Alcott stories.

Deeper evidence from the lives of those Mariano was talking about is quizzical — representing, more than anything else, the fact that Italian-Americans of the first generation born in America were ambivalent about being Italians. Helen Barolini’s novel, *Umbertina* (1979), describes their painful, hybrid identity through four generations of Italian-American women. Barolini also edited a book of memoirs of Italian-American women, *The Dream Book*, which gives biographical accounts of the situation of Italian-American women. One of these women, Fran Claro, says that the troubles she felt as an Italian-American were the troubles of her mother (a first-generation-born Italian-American). Claro’s mother was a person who tried too hard to make herself into an American. She created grief and frustration for her children and for herself. Her story indicates that Mariano was wrong about reforming Italian homes in America, or, at any rate, that he failed to count the cost.

Claro remembers being taken by her grandfather to watch the annual parade of “The Saint” in their community (the major holiday of the year in an Italian-American community). “Oh, how I wanted to be part of that parade,” Claro says. “I wanted to be on that float. I dreamed about pinning bills on the Saint. But my mother was becoming an American.”<sup>42</sup> Claro’s mother cherished stories of Anglo-Saxon American girls, as the teenagers in *Umbertina* learned about America at the Saturday matinees:<sup>43</sup>

She escaped from her Italian world by reading. *Rebecca of Sunnybrook Farm* became her favorite book. For long hours — after she finished helping my grandmother with younger children and the sewing homework — she would sit and read. Her

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<sup>41</sup> *Id.* at 22.

<sup>42</sup> *THE DREAM BOOK: AN ANTHOLOGY OF WRITINGS BY ITALIAN AMERICAN WOMEN* 79 (H. Barolini ed. 1985).

<sup>43</sup> *Id.* at 78.

heroines were fair-skinned, blond-haired, blue-eyed. She could not identify with them, but their world intrigued her. She wanted to absorb the culture of these American heroines. Because her parents were not educated [in American culture] she grew up listening to Italian soap operas and being entertained at street festivals. She rebelled against this gaudy, flashy brand of entertainment. As she grew into adulthood, her childhood dreams of American respectability grew into a determination to separate her children from a culture she had learned to despise. She would never allow her children to get involved with any of the activities which were dear to her parents' hearts. Their culture, she believed, was not one to pass to a new generation.

### III. ASSIMILATION AND PRESERVATION

Similar evidence, as to both generations, is available in the lives of early Italian-American lawyers. But there is more evidence in those lives of opposite convictions, of the desire to be Italian in America, rather than, as Mariano put it, Americans of Italian extraction. Governor Alfred E. Smith said of Justice Cotillo that he was a giant, steadfast in his ideals, "which are exemplified by his relentless preaching to his fellows that America, their new home, was entitled to nothing less than a 100 per cent undivided loyalty; entitled to their spiritual fealty as well as to the fruits of their physical labor."<sup>44</sup> Ferber's biography of Cotillo, though, paints the picture of a young lawyer, legislator, and judge far more attached to and representative of American-born Italians, and much more at one with them in a cohesive Italian culture, in Harlem's Little Italy, than Governor Smith or Mariano allowed for.

The immigrants and young Italian-Americans of Cotillo's early practice were more often victims of American society (and sometimes of their Italian neighbors) than rebels against it:<sup>45</sup>

Cotillo's activities in the courts [in his first year as a lawyer] more than ever convinced him that the body politic was too often responsible for the ills of his neighbors. Italian-Ameri-

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<sup>44</sup> See N. FERBER *supra* note 27, at vii.

<sup>45</sup> *Id.* at 26-27.

cans intent on honest employment, even if only at the push-carts, were told they must pay illicit tribute to get permits. Others seeking berths in the municipal street-cleaning department were asked to pledge themselves to pay weeks and months of their earnings when appointed. Recreation pier concessions were paid for. So, too, were even permits for boot-blacks and newsstands. Each had its price. The exploiters, in the main, came from among their own. This racket system preyed on the fears and ignorance of the poor. The victims poured their troubles into the ears of Frank Cotillo and he relayed them to his son.<sup>46</sup>

"Certainly," Frank Cotillo said to his son, "these people ask little enough. They are eager to do the humblest work, by no means in competition with your Americans, and they are asked to pay bribes. Is it any wonder that they resist Americanization?"

"[Y]oung Cotillo set aside several hours of each day and almost all of the evenings to take up the problems of his father's friends," the biographer says. "Above all, he learned, they were puzzled. They could not understand why in this land, where freedom was presumed to await them, they should be denied the right to work. Some were subdued, broken by this interference with their making a livelihood. Others, recalcitrant, called down anathema on the heads of the politicians, officeholders and the commonwealth itself."<sup>47</sup> A few no doubt dealt with their persecutors as Miller's Marco dealt with his: All the law is not in a book.

Mariano's evident view of the immigrant generation was that they could not be Americanized, and therefore had to be survived. Meanwhile they had to learn to trust American legal institutions.<sup>48</sup> He recognized that these immigrants saved from

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<sup>46</sup> *Id.* at 26.

<sup>47</sup> *Id.* at 26-27. There is, here, a cultural difference in the view that freedom implies, or doesn't imply, access to work.

<sup>48</sup> *See, Courts supra* note 33, at 78, 80. Mariano argued that Italian contadini were mistaken in their preference for urban life and the protection of the Little Italies; more of them should be, as they had been in the Mezzogiorno and Sicily, farmers. They would, he said, find farming in America more stable and profitable than farming in Italy had been. 85% had been farmers, or had worked on farms, in Italy; 75% had taken up urban life in this country — 50% in three or four eastern states. *Compare S. LAGUMINA, FROM*

their meager wages toward ownership of their homes and small businesses; he saw that they needed legal services to protect them as they did so. He argued that the Italian immigrants needed to be taught to trust other American institutions as well — courts, banks, land brokers. They would have to turn to these institutions, he thought, if they were to own farms, businesses, and homes.

The older generation of Italians in America, Mariano said, suffered from “indifference to our method of righting wrongs.”<sup>49</sup> The immigrant’s thoughts about American law “need guidance or they will soon lapse from mere indifference into contempt and disdain.”<sup>50</sup> The Italian immigrant “needs to be shown that the measure of justice . . . is . . . what the public opinion of his community demands . . . . [H]e should not be allowed to drift into racial communities, forming habits of thot [sic] and ways of thinking that are limited and warped.” The fact that the immigrants were law-abiding and respected legal authority (by Mariano’s account) should have made it easy for assimilators “to help him adopt an attitude of mind toward our courts, both proper and sane.” That this did not work out to be so easy after all was, he said, due to Italian habits of secretiveness in business and family matters; but that, too, would yield to reform. Of course, he said, “the training period for the Italian . . . should be longer than it properly is for others who have no such traditional background to overcome.”<sup>51</sup>

Mariano’s argument for reforming Italian families resembled Leonard Covello’s more famous study of Italian-American school children (those in the first generation born in America). “[I]t is necessary to take into account the adverse influence of the Italian family mores upon the process of formal school edu-

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STEEERAGE TO SUBURB: LONG ISLAND ITALIANS (1988). LaGumina argues that the lives of the contadini in Southern Italy were so miserable that return to agriculture in “the land of opportunity” was not likely to be attractive as a way to earn the family’s living; but they were attracted, he says, to the Long Island suburbs because homes there provided light, air, and room for a family garden. The 50 suburban communities LaGumina studied are today from 25% to 50% Italian-American and retain an Italian-American cultural character.

<sup>49</sup> See COURTS *supra* note 33, at 39.

<sup>50</sup> *Id.* at 41-42.

<sup>51</sup> *Id.* at 41-42.

cation," Covello said, "[T]here is even evidence of collusion between the parents and the child in violating school attendance regulations . . . . The problem . . . would seem to suggest a need to modify Italian family mores — an undertaking which is tantamount to cultural modification . . . a substitution of American patterns for old-world patterns. . . ." <sup>52</sup>

Italian-Americans, when they did get into criminal trouble, Mariano said, tended to commit crimes of violence rather than crimes of stealth. Often, he said, as Miller's Mr. Alfieri would have, such incidents occurred because Italians had an emotional and pressing sense of injustice and applied the law that was not written in books. For such cases, they had to be taught respect, restraint, and patience toward the bureaucratic, laconic, mundane operation of American law enforcement and American courts. "[I]t may be said without fear of contradiction that the Italian is a peaceful, law-abiding, thrifty and home-loving citizen," he said (speaking of the immigrants, again, not of their American-born children).<sup>53</sup> Italians had only to learn that justice can still be justice without "long and impassioned oration" and the absence of uniforms, and can be justice despite the presence of protracted laconic arguments over the admission of evidence, "great importance . . . attributed to the taking of the oath . . . the brusqueness of the court attendants . . . but little show and no seeming authority . . . [and] an entire absence of atmosphere befitting a place where judgments deciding rights, duties, and obligations . . . are permanently passed upon."<sup>54</sup>

The lawyers who would help change these Italian attitudes would not at first be Italians. Italians who were qualified as lawyers in Italy, before emigration, could not function in this country as lawyers. And few Italian immigrants were able to undertake and complete law study in this country.<sup>55</sup> Mariano<sup>56</sup>

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<sup>52</sup> L. COVELLO, *THE SOCIAL BACKGROUND OF THE ITALO-AMERICAN SCHOOL CHILD: A STUDY OF THE SOUTHERN ITALIAN FAMILY MORES AND THEIR EFFECT ON THE SCHOOL SITUATION IN AMERICA* 406 (1967). Covello's conclusions have been challenged: For an example, see the discussion in T. SHAFER, *supra* note 40.

<sup>53</sup> See *COURTS*, *supra* note 33, at 17.

<sup>54</sup> *Id.* at 40-41.

<sup>55</sup> A modern instance of that is the St. Louis lawyer Paul B. Rava, who came to the U.S. with his wife and children in 1940, fleeing the anti-Semitism of Nazi-controlled It-

mentions education, preparation, and cultural difficulties. He does not mention money, but money was undoubtedly a factor, along with the fact that most of the immigrants he refers to were poor Southern Italian peasants — illiterate, wary of institutions, often without training in useful trades — and pervasively discriminated against in America. In any case, there were virtually no Italian-speaking lawyers in the immigrant generation.

Salvatore A. Cotillo saw the confrontation of immigrant and American law more in terms of power and less in terms of the excellence of American institutions — and he spoke far less of the Italians coming to terms with (as Mariano put it) “our” courts and much more in the language of Southern Italian peasant wisdom.

The barrier was language, Cotillo said. Once that barrier was overcome, Italians would be capable of seeing to their own social welfare. The percentage of illiteracy, he said, was about the same on the Mayflower as it was in Harlem’s Little Italy when Cotillo went to law school, but the Pilgrims were illiterate in English.<sup>57</sup> Beyond language, Cotillo appears to have had in mind, as relevant to Italian-American politics, the long and bitter history of the peasant village in Southern Italy and the fact that the political power of the village and of its old way, *la via vecchia*, in the extended family was its ability to draw in to itself and survive — literally and culturally — the corrupting force of powerful outsiders.

Cotillo did not emphasize being American. He emphasized voting: “Become citizens,” Cotillo said, “You will then have the right to take part in the government. This is a system of self-government. You Italians, more than others, should understand this. For so long as you leave it to others you will be oppressed by these others,” he said, “the longer you remain inarticulate

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aly. Mr. Rava was a lawyer and law teacher in Venice; he qualified for the bar there in 1936. In this country he found his experience and expertise “not saleable” and enrolled in Washington University Law School under a World War II program sponsored by the American Bar Association. It may be indicative of his immigrant roots that much of his practice since he was admitted in Missouri in 1942 has been in immigration law. *Judges and Lawyers: First Generation Success Stories*, THE JUDGES J. 5, 9 (1986).

<sup>56</sup> See COURTS, *supra* note 33, at 47-48.

<sup>57</sup> See N. FERBER, *supra* note 27, at 27.

and inactive, by so much longer will you be looked upon as not merely alien in blood and temperament, but in thought and moral philosophy. You will be looked upon as outlaws. Do not delay, for the longer you are held in low esteem, so much the longer will it require to establish yourself as worthy citizens in the eyes of those who today look down on you."<sup>58</sup>

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Covello's study of Italian-American school children argued, as Marino had, that the confusion of being in the first generation born in America led to moral breakdown: "Weakened social controls within the family and the local community have contributed to the development of attitudes ranging from disobedience to defiance of all adult authority," Covello said. "The decline of family authority has engendered, on the part of the younger generation, a feeling of superiority to parents who are poor, socially handicapped in language, manners, or dress, and who are therefore considered alien to a complex social environment. The younger Italo-American is often ashamed of his parents."<sup>59</sup>

Helen Barolini's literary and biographical evidence supports Covello's perception of cultural confusion, but neither those sources of insight, nor the implications of Cotillo's law practice in Little Italy, supports the argument Covello and Mariano make that there was a breakdown in respect for parental authority. For one thing, neither Covello nor Mariano distinguishes between defiance parents approved of and even encouraged — truancy for example, in Covello's account — and defiance of the values of *la via vecchia*. Both leave out of account the belief among Italian-Americans that education deeply conceived — as moral formation — was the province of the family, not of the government. Neither gives sufficient respect to *l'ordine della famiglia* as having the cultural survival value in America that it had in Southern Italy. Both make the assimilator's mistake: They want the vulnerable culture to conform without being val-

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<sup>58</sup> *Id.*; see also T. Henderson, *supra* note 27.

<sup>59</sup> See *supra* note 52, at 416.

ued. They want to settle for individual rights.

Fran Claro's mother yearned to separate herself from her immigrant parents, but she did not; her father was there to take his granddaughter to the *festa* parade. She yearned as well to renounce homespun Italian entertainment, but she did not; her defiance amounted to finding a corner where she could read *Rebecca* and rebel quietly.<sup>60</sup> The distinction is subtle but important, because continuing connections with Italian culture in Fran Claro's mother's generation (as in the first, second, and third American-born generations in *Umbertina*) is what made it possible in the next generation, and the one after it, for Italian-Americans to begin to learn to appreciate and acknowledge their heritage. Modern Italian-Americans owe that opportunity to the fact that their grandparents ignored Mariano's argument and listened to Cotillo's.

#### IV. EARLY ITALIAN-AMERICAN LAWYERS

There were Italian-American lawyers in the generation that grew up in the 1920s. Mariano says they were frequently scoundrels. The Italian-American lawyer who was honest and apparently not well assimilated had no experience beyond the workmen's compensation system, minor courts in the civil system, and criminal law.<sup>61</sup> In his 1925 book, Mariano counted three hundred Italian-American law students in New York City and estimated that ten years earlier there had been as few as fifty. The Italian population of New York City was 750,000 when he wrote and there were not "even one thousand lawyers of Italian parentage" in the city.<sup>62</sup>

Whether the American legal system was as benign and nurturing as Mariano said, or as power-driven as Cotillo expected it to be, Italian-American lawyers should have been in a position to mediate between the dominant American culture and the children of the Italian immigrants. Mariano thought Italian distrust of American law got in the way of what Italian-American lawyers were able to do. Italians often let their legal rights go

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<sup>60</sup> See *supra* note 43.

<sup>61</sup> In contrast, he says, to Jewish lawyers. See *COURTS*, *supra* note 43, at 46.

<sup>62</sup> *Id.* at 63. He counted 900. *Id.* at 44, 63.

unvindicated "for fear of falling into the hands of unscrupulous attorneys," he said,<sup>63</sup> because "in the past . . . the illiterate were easy prey for their unscrupulous fellow Italians."<sup>64</sup> He does not mention — as other descriptions of this immigrant society often do — the possibility that the Italian-American lawyer, who had gone out from the community to study English common law, in English, with Anglo-Saxon, Protestant Americans, was seen as a threat to *la via vecchia*, and distrusted for that reason — not because he was either simple-minded or a swindler, but because he proposed the corruption of *l'ordine della famiglia*.<sup>65</sup> Fiorello LaGuardia is an example: Many — in some elections more than half — of the Italian-Americans in New York City voted for LaGuardia's opponents. His personal life (he had married a non-Italian, who was not a Catholic) and his political program threatened *la via vecchia*; it did not matter enough that he was an Italian-American. Ethnic loyalty was not what was at stake; the preservation of culture was at stake.<sup>66</sup> The possibilities Mariano neglected were that Americanizers were distrusted and the Italian-Americans in law practice were seen as Americanizers.

Mariano says another reason Southern Italians and their children did not go to Italian-American lawyers was that they did not like to give personal information to anybody they knew, and did not trust professional assurances of confidentiality. He may have been closer to the real reason when he hinted that the immigrants and their children did not believe, as Mariano did, that the Italian-speaking lawyer was "a power for untold good among his people . . . the one person who by training and by experience is best fitted to interpret his people to others . . . their best *public* interpreter."<sup>67</sup> The suggestion we construct here is that an Italian-American lawyer had to demonstrate that he was not an assimilator. He had the burden of proof, and he

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<sup>63</sup> *Id.* at 39, 53.

<sup>64</sup> *Id.* at 45.

<sup>65</sup> *E.g.* J. BARTON, PEASANTS AND STRANGERS: ITALIANS, RUMANIANS, AND SLOVAKS IN AN AMERICAN CITY, 1890-1950 (1950) at 156-58.

<sup>66</sup> R. GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN AMERICANS 297 (1974).

<sup>67</sup> See COURTS, *supra* note 33, at 50.

sometimes failed to meet it to the satisfaction of the wary Southern Italians Mariano wanted him to assimilate.

Mariano had hope for the future, hope for Italian-American lawyers as they became more numerous and experienced. But the hope he had was for an assimilated Italian citizenry — assimilated in significant part by the efforts of Italian-American lawyers. These lawyers would themselves come from assimilated Italian families, he said, “along the same lines as . . . among the members of other racial groups . . . who are older here in point of time.”<sup>68</sup> These lawyers would teach their Italian neighbor that “the laws of this land are made for his good . . . and that there is usually sound reason for many of the laws and prohibitions that face the bewildered newcomer.”<sup>69</sup> He said the task of the Italian-American lawyer was the task “of Americanizing the Italian,” teaching him to esteem the stars and stripes rather than “the Flag of the House of Savoy.”<sup>70</sup> This change in flags would give Italian-Americans an understanding of spiritual and economic opportunity in America, and a common language, Mariano said, developing among Italians “American nationalism in times of peace as well as in times of war . . . patriotism and loyalty to American tradition . . . the elimination of race hatreds . . . an American standard of living . . . [and] the full and free emancipation of the Italian women.”<sup>71</sup>

#### V. COTILLO AS A PRESERVER

Salvatore A. Cotillo's life as a young lawyer in Harlem's Little Italy was more clearly an Italian experience than the life of the Americanized Italian lawyer as Mariano visualized it, although in some ways what Cotillo did for his Italian clients was

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<sup>68</sup> *Id.* at 49.

<sup>69</sup> *Id.* at 55.

<sup>70</sup> *Id.* at 73. As if a Southern Italian would have had esteem for the flag of the House of Savoy!

<sup>71</sup> See COURTS *supra* note 33, at 73-74. V. D'Andrea, *The Social Role Identity of Italian-American Women: An Analysis and Comparison of Familial and Religious Expectations*, in *THE FAMILY AND COMMUNITY LIFE OF ITALIAN AMERICANS* 61 (R. JULIANI ed. 1983), argues that the immigrant Italian married woman was better off, economically and spiritually, under *l'ordine della famiglia* than her counterparts in families in the dominant American and Irish-American cultures were.

what a lawyer would have done for them in his native Naples. He was a legal counselor in his neighborhood,<sup>72</sup> but he was also, in those years, attorney for the Bank of Naples and Consul General in New York City for the government of Italy. During World War I, when he was within the first five years of his practice, he lived in Italy and there represented the American Bureau of Public Information.<sup>73</sup>

Cotillo also exhibited the professional rectitude Mariano hoped for in the new generation of American-born, Italian-American lawyers. For example there were unscrupulous Italians in Cotillo's neighborhood — notably bankers, steamship-ticket sellers, and thugs. One Giosue Gallucci met American law with bribery and violence. He boasted that he could "fix" things with the police and gain advantage through force and intimidation where Cotillo sought advantage, then and later, through compromise and political competence.<sup>74</sup>

Gallucci boasted that murder could be bought and paid for. Stories were circulated that he caused witnesses to disappear, that an unwanted wife could be loaded upon a boat, given some money, and shanghaied back to "the old country." Gallucci was arrested for carrying concealed weapons, and Cotillo was asked to testify on his behalf as a character witness. He refused, making palpable the breach between himself and the district's underworld. After Cotillo was admitted to the Bar, he refused, despite the tender of attractive fees, to help men of Gallucci's character secure pistol permits and the break flared into open hostility.

Gallucci was later killed by another gangster (which is no more a vindication of American law than it is of Gallucci's way of dealing with American law).

Cotillo dealt with employment and family situations, with the same swindlers and the same bias and weakness in the law.<sup>75</sup> He functioned as listener and guide in a way that was more like

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<sup>72</sup> See N. FERBER *supra* note 27, at 19.

<sup>73</sup> Cotillo's book about Italy, *supra* note 27, was based on his experiences during those war years in Italy.

<sup>74</sup> See FERBER, *supra* note 27, at 20.

<sup>75</sup> *Id.* at 21.

the lives of nineteenth-century American "republican" lawyers than the lives of lawyers in Southern Italy:<sup>76</sup>

Coming home at night Cotillo often found groups of young people on the front stoop. They had gathered for what they knew would prove an interesting and inspiring talk. Before he went in for dinner, Sal spoke to them. There were discussions about every conceivable topic, but dominating everything that Cotillo had to say was his conviction that the new Italian element in American life ought to command an important role in the process and drama of government. This role, he told his listeners, could begin in their own neighborhood.

Ferber's biography of Cotillo also describes in Cotillo's early law practice a lot of uncompensated charity for neighbors. But it is evident in Ferber's description that Cotillo was building alliances, from his earliest days as a lawyer, that would make it possible for him to use un-Americanized, Italian-voter power as his Irish elders in New York and Boston were using the power of other immigrant groups.

Cotillo's opinion of American jurisprudence was far different from Mariano's. He saw that American law was flawed, and particularly so as it was imposed on immigrants and their children. His early career went well beyond what Mariano described. He used political means to preserve Italian culture where Mariano would have used professional influence to turn the immigrants into melting-pot Americans. He went from his law practice to be the first Italian-American assemblyman, thence to become the first Italian-American senator, in the New York legislature — and in both houses his principal activity was the development and passage of social-welfare legislation. He was later the first Italian-American appointed to the Supreme Court (trial) bench in New York. Governor Smith said Cotillo served as a judge with "mellowness of spirit" and "the same interest and activity which influenced his early work in the Legislature."<sup>77</sup>

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<sup>76</sup> *Id.* See R. CAPORALE, THE VALUE SYSTEM OF SOUTHERN ITALIAN-AMERICAN PROFESSIONALS: A COMPARATIVE PROFILE, in ITALIAN AMERICANS IN THE PROFESSIONS 275 (R. Pane ed. 1983).

<sup>77</sup> See N. FERBER, *supra* note 27, at vii.

Cotillo's biographer, who, I think, missed the point, celebrated Cotillo's judicial qualities with a quotation from Shakespeare. He might better have used Dante — or even Machiavelli: Cotillo's position within Little Italy was an Italian position, most particularly in his insistence that Italians in America would not be able to take advantage of American opportunity unless they did so with political power, and in his courageous resistance to the darker elements in Little Italy's culture. An example on both points involves his early encounter, as a beginning lawyer, with another gangster:<sup>78</sup>

He was retained to defend a man involved in a sex crime. The next day he was waited upon by the local Camorra leader — son of a Camorraist notorious in the old country. This fellow blandly announced that he would arrange Counsellor Cotillo's fee in the case; that henceforth all defense arrangements for persons arrested for crime would be handled by the Camorra leader or his lieutenants, and that the young attorney must govern his conduct and regulate his fees by his dictation. By way of mitigating his effrontery, the Camorraist assured Cotillo that if he fell in with this plan, his speedy financial independence was assured; but that, on the other hand, if he did not, great harm would come not only to him but to his family as well. In response, Cotillo, young, idealistic and with his recent quaffing at the cup of legal ethics pounding righteously in his bosom, rose to daring and dramatic heights. He replied that his law practice was his own; that he would look for guidance only to the courts and the tenets of the Bar Association; that the Camorra might know once and for all that he did not intend to be coerced or intimidated. He ordered the man from his office. The enraged Camorraist lifted his cane and this struck Sal as funny. Though the moment had been tense, he smiled. The mobster was puzzled by the smile. It unnerved him. He hesitated. Men threatened by him did not smile. In that fleeting moment Cotillo recalled that a useless antique gun lay in his desk. It had been given him as a harmless toy . . . by his grandfather. Cotillo reached into a drawer, withdrew the pistol and leveled it at the bandit . . . The terror-dealing Camorraist lost his nerve . . . shrieked in fear . . . Cotillo booted him

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<sup>78</sup> *Id.* at 23-24.

out of his office . . . .

News of how young Catillo had dealt with the much-feared "bad man" spread rapidly among the Italians of the city. The better element, enormously in the majority, applauded his courage. He became their champion; and was from that day feared and avoided by the underworld.

## VI. CONCLUSION

The significant contrast between the Italian-American lawyer Mariano envisioned and hoped for, and the Italian-American lawyer Cotillo typified, is an earthy appreciation for the uses of power. It is, as the biographer says, ethics — but the ethics has more of Italy in it than of the vaporous and contemporary rhetoric of the Bar Association of the City of New York. The antique pistol Cotillo kept in his law office was not, after all, a toy; it was the effective device of a wily, resourceful young lawyer, who — as is often the case with lawyers — found out how to use power he did not have.

Cotillo knew that American legal institutions were *not* excellent and that native Italian disgust for hypocrisy would make it impossible for Italians to trust them. But, whether the institutions remained as they were or became — not excellent, but useful — the key to justice for Italians was to use these institutions and with them gain political power.<sup>79</sup> Cotillo was a co-founder, with his father, of an Italian-American political club called the Tomahawk Democratic Club. The Cotillos and their club took on the Hayes Machine in 1911. The club got beat in the electoral contest, but Cotillo made a deal with Hayes that gave Little Italy a political foothold in the city.<sup>80</sup> The Italian community later brought as much pressure as it had to bear on Hayes, and Hayes and his machine put Cotillo in the legislature.

"I want to help my people," Salvatore A. Cotillo said, "and can do so only with the backing of those in power."<sup>81</sup> It is indicative of the arguments Cotillo made when he spoke in Little Italy

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<sup>79</sup> T. Henderson, *supra* note 27, describes this political activity and relates it to later developments in Italian-American influence in American politics. Justice Cotillo remained interested in Democratic politics until his death in 1939.

<sup>80</sup> *Id.* at 84.

<sup>81</sup> See N. FERBER, *supra* note 28-29.

that he, alone among the speakers who attacked Hayes in 1911, was left alone by Hayes's goons. He was as bold with his voice and (very local) influence as he had been with his grandfather's antique pistol:<sup>82</sup>

[I]t was on the stump that [the club] encountered all their difficulties. For no sooner did they mount the tailboard of a truck at some street corner than they were stoned and thrown off. The only one immune from such treatment was the popular young Cotillo. Throwing stones or offering violence to one of their own — an Italian — particularly this popular son of a popular father, was taboo. Even the fiery Hayes took heed of this viewpoint of his Italian constituents and ordered that young Cotillo should not be molested when making a speech, regardless how bitter his attack, even on Hayes himself. Cotillo thus became the lone champion of his group, fighting single-handed against an array of Tammany orators long schooled in their work.

Italian culture in America has survived longer than Mariano thought it would. It has survived long enough to be valued by the dominant culture, even to be learned from. We think it will probably survive as a permanent influence on the practice of law in America, as well as on American politics. There is evidence of influence in the daily newspapers: one of the country's most prominent and popular governors;<sup>83</sup> its first female candidate for national office;<sup>84</sup> many judges, mayors, legislators, and presidential advisors;<sup>85</sup> and the first Italian-American on the bench of

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<sup>82</sup> *Id.*

<sup>83</sup> DIARIES OF MARIO M. CUOMO: THE CAMPAIGN FOR GOVERNOR (1984); see H. Boyte, *The Politics of Community*, THE NATION, Jan. 12, 1985, p. 12.

<sup>84</sup> *The Making of a Trailblazer*, People, July 30, 1984, p. 24; A. Hughes and F. LaVenness, *Congresswoman Geraldine A. Ferraro: An American Legacy*, in A. LAVENNESS AND J. SWEENEY, *WOMEN LEADERS IN CONTEMPORARY U.S. POLITICS* 35 (1987); G. FERRARO, *MY STORY* (1985); see W. Schneider, *The New Shape of American Politics*, The Atlantic Monthly, January, 1987, p. 39.

<sup>85</sup> S. Hall, *Italian-Americans: Coming Into Their Own*, The New York Times Magazine, May 15, 1983, p. 28; A. Parker, *Not Only a Great Man, But a Decent Man*, Trial, February 1986, p. 11 (on Peter W. Rodino, Jr.); S. LaGumina, *John Pastore, Italian-American Political Pioneer*, and J. Paolini, Jr., *An American Italian: The Life and Times of Luigi DePasquale (1892-1958)*, both in *THE MELTING POT AND BEYOND: ITALIAN AMERICANS IN THE YEAR 2000* 1, 15 (J. Krase & W. Egelman eds. 1987); R. Angell, *The Sporting Scene*, The New Yorker, Aug. 22, 1988, p. 50 (on A. Bartlett Giamatti, the

the United States Supreme Court<sup>86</sup> — all of these national leaders are lawyers and all are visible and openly within their Italian culture. They are Italian Americans. In some ways, they are, as their immigrant ancestors were, Italians in America. Their argument — and ours — is that being Italian in America is a good thing for them, for other Italian Americans, and for the country. They have something worth preserving.<sup>87</sup>

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Commissioner of Baseball); J. BRIGGS, *AN ITALIAN PASSAGE: IMMIGRANTS TO THREE AMERICAN CITIES 1890-1930* 169-70 (1978) (on lawyers); G. QUILICI, *THE ITALIAN AMERICAN LAWYERS OF CHICAGO* (1968).

<sup>86</sup> *The Supreme Court with a Smile*, U.S. News and World Report, Jan. 12, 1987, p. 23; *New Kid on the Block*, A.B.A. Journal Aug. 1, 1986, p. 20; S. Adler, *Live Wire on the Circuit*, *The American Lawyer*, March, 1985, p. 86; R. Nagareda, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. (1987).

<sup>87</sup> We are grateful for the assistance of Linda Harrington, Kenneth Kinslow, Peter Noone, Robert S. Redmount, Nancy J. Shaffer, and Michael J. Slinger.

