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The Great Arizona Orphan Abduction[1]: Racism, Religion and States Rights

"Racism is a 'pigment of the imagination'," Ruben Rumbaut[2]

The Abduction

On Saturday, October 1, 1904, on the request of a newly arrived French priest filling in for the priest on holiday, a group of Irish-American children arrived in Clifton, Arizona from the Catholic Foundling Hospital in New York to be adopted by Mexican families in Clifton and Morenci who attended the parish. When the priest and Mexican women met the children at the train station, some white woman, "Americans" they called them, gathered to watch the spectacle. The children, white, pretty, neatly dressed, some with long blonde curls, shocked these "Americans". One of the women, Mrs. Gatti, asked the priest if she could have a child because her husband was Catholic though she wasn't. All the children were already assigned to others, the priest explained.

The assigned families left with some of the children that Saturday afternoon but most went with the priest and accompanying Sisters to the church to spend the night. The Mexican families gathered up those children on Sunday afternoon. The American women reported to their husbands that these white children were being given to Mexican families who were inappropriate to care for them, and they, the American women, wanted them. After a quick Saturday afternoon meeting, a delegation of three, including the Deputy Sheriff Jeff Donagan, Thomas Simpson (from the Duncan hotel), and Charles Mills, Superintendent for Phelps Dodge, went to see the agent for the Foundling Hospital, Mr. Swayne. Unsympathetic to their concerns, Swayne said that the Sisters would be visiting every house and if unsuitable, they would take the children back. This promise was not good enough.

By Sunday afternoon, the American citizens of Clifton-Morenci held another meeting at which over 300 attended. The meeting was chaired by Judge Little who advised the group that they had no legal claim to the children without the approval of the Foundling Hospital. Regardless, the committee selected a group of twenty-five to go to the Mexican homes and take the children. This they did.

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[1] The Great Arizona Orphan Abduction, Linda Gordon, Harvard University Press, Cambridge, MA 1999.

[2] Pigments of Our Imagination: On the Racialization and Racial Identities of "Hispanics" and "Latinos" Rubén G. Rumbaut [Pp. 15-36 in: How the U.S. Racializes Latinos: White Hegemony and Its Consequences, edited by José A. Cobas, Jorge Duany and Joe R. Feagin. Paradigm Publishers (2009)]

Neville Leggatt, the delivery person for Arizona Copper, knew the location of all of the homes and thus was an important member of the group. Neville said it was a wet and wild night, raining and storming, as the posse, including George Frazer, the smelter superintendent, rode from house to house snatching children out of their beds, as late as eleven p.m. on Sunday night, and then delivering the sleepy, half-dressed children to the women.

On Monday, October third, Swayne and the priest met with a crowd of 200-300 people in Clifton. Swayne repeated his promise that the Sisters would stay two-three weeks to make sure the homes were fit and if not, they would remove the children. The crowd again rejected these assurances and threatened both Swayne and the priest.

The next day, Swayne visited homes and took other children who were returned to New York, save three that were given to the Deputy Sheriff. Swayne said he feared that if he didn't give Donagan those three children, the town mob would keep them all.

On the sixteenth of October, those families who received the children applied for guardianship. Judge Little granted it two weeks later in the Graham County Probate Court. The Foundling Hospital challenged the guardianships and filed a habeas corpus on the basis that the children were deprived of their freedom and being held against the will of the Hospital who had the legal right to them.

The Supreme Court of the Arizona Territory tried the case that was appealed to the U.S. Supreme Court.

<u>The Case</u>

Eugene S. Ives and Bennett & Williams represented the plaintiffs in *New York Foundling Hospital v. John C. Gatti*. The attorney for the Foundling Hospital, Eugene Ives, a wealthy and prominent Anglo Catholic, was at the time president of the upper house of the Territorial Assembly. A New York lawyer, he had come to Tucson when he was 37. He was the most prominent Catholic lawyer and a Democrat. He complained afterward that people shunned him for representing the hospital.

William Henry Brophy, Manager of the Phelps Dodge (PD) company store in Bisbee and a banker, organized the Bisbee Knights of Columbus to investigate the incident. Their report found that anti-Catholicism was a major factor in the conflict, that some of the Anglo parents were not good Catholics, and some were saloonkeepers. Brophy recommended Eugene Ives to the Sisters, spent money on the local litigation and organized support.

In trial, no one represented the Mexicans and no Mexicans appeared as witnesses. Only Margarita Chacon (an Anglo who had married a Mexican) was subpoenaed, but she refused to come.

The Sisters' strategy was to say they had made a mistake giving the children to the Mexicans and would take them back to New York. Thus strategy dictated that they make a racial attack on the Mexicans. Ives had stipulated in the initial pleadings that the families were unsuitable, the homes degraded, ragged, poor, destitute etc. The Sisters lied about their initial meeting with the Mexican mothers. But Ives even let stand that they did not know the name of one of the families to whom the children had been given, which was blatantly untrue.

Ives decided to concede the bad character of the Mexicans to avoid negative testimony about them – that didn't happen. He objected once that such testimony was cumulative, but his objection was overruled as the defense attorney claimed: 1) the testimony was different (it wasn't), and 2) he needed to show why the Americans were so outraged and were forced to engage in self defense, evoke *parens patriae*, and carry out citizens arrests in defense of the children. The defense strategy was to raise racism at every opportunity.

W.C. McFarland and Bennett and Bennett put forth six arguments for the defendants:

1. The New York charter gave the hospital the right to hold children in New York only, not ship them out to other places;
2. The Corporation could not sue in Arizona as they not complied with Arizona rules;
3. The Defendants already had guardianship by Graham County probate court;
4. Caucasian children were abandoned into care of unfit Mexicans;
5. The Mexicans voluntarily relinquished the children;
6. The Defendants are fit and proper and the best interest of the children calls for them to remain where they are.

The Trial

During the trial at the Territorial Supreme Court of Arizona in January 1905, the defense objected a lot and mostly was sustained. The plaintiff rarely objected even when the testimony was clearly hearsay and at odds with the facts. When the plaintiff did object, he often lost and even when he won, the defense just brought the same testimony up again and the judge let it in the next time.

The first witness for the plaintiff testified that the nuns were threatened, ordered to leave town, told they were not nuns, and claimed that they were paid for the children. She said the men were armed and the Sisters feared for their lives. The deputy sheriff told her that the engineer of the train would not run the train if the children were on it so she had no choice but to leave them.

Deputy Sheriff L. J. Donagan testified on direct that the "committee" had asked him to arrest the Foundling Hospital agent, and he admitted to hearing "general" threats

like “tar and feather him” (referring to Swayne, the agent) and “hanging”. He admitted that he told the Sisters they could not take the children, and that he knew nothing of the families even whether they were Mexican or Indian or the character of their homes.

When Swayne, the Foundling Hospital agent, testified, he said that the Sisters had rejected two or three of the families because of the color of their skins, and that they had indications of Indian blood, so “naturally we objected”. Racism was just as much on the minds of the plaintiff as on the defendants. Swayne praised Donagan for protecting his life and followed the deputy’s advice to get out of town by seven p.m. or the deputy could not protect him. The priest skedaddled out of town with the agent. Swayne swore he did not know the families were Mexican because some were light skinned and that some white mothers were to be given children because they were Catholic.

Neville Leggatt, the Arizona Copper delivery man, one of the twenty-five from the “committee” or “mob”, depending on your point of view, testified that he knew all the Mexican families, and that they opened their doors and gave the children willingly. What else one would do with several armed white men at your door, I don’t know? But he claimed no force or violence was used, no one said they wanted to keep the children, and one asked who would repay her. The court said several times that talk of payment was inadmissible, but the witnesses continued to mention it, and the plaintiff’s attorney let it pass. With that, the plaintiff rested.

The defense called nineteen witnesses, eleven of whom berated the Mexican families. The women all testified nearly identically – when the children were picked up they were scantily clad, their hair was matted, the faces and clothes dirty, they were ill and vomiting chili, beans, tortillas, watermelon and other improper food, and they smelled of whiskey and beer. Since it was night, the children were in bed so of course they were not fully clothed and their hair would be matted from sleeping. The children might have been sick from the water in Clifton-Morenci. Everyone knew it was polluted from the waste of the mines, mills and smelters dumped into the San Francisco River.

The women testified that the children’s heads were filled with lice, which was common in institutions such as the Foundling Hospital. It would have been impossible for the children to get massive lice infections in the Mexican homes in the twenty-four hours they had been off the train.

According to the Anglos, the Mexicans or Indians, whichever they were, all were illiterate, drank, gambled, and earned a pittance if anything. In one of many ironies, the Anglos said the Mexicans had lower living standards because they didn’t require a higher standard. Thus, the mines justified their refusal to pay the Mexicans more and then criticized the Mexicans for that lower living standard.

The men testified to add gravitas. H.B. Rice, a member of the legislative council, assured the court that the children were placed with the proper class of people: Clifton's biggest real estate developer, a Graham County Board of Supervisor member, vice president of the First National Bank, Department head for Detroit Cooper, and treasurer of Arizona Copper. All of the couples who received the children were business owners or with Arizona Copper.

T. J. Simpson who owned the hotel in Duncan that still bears his name today (at which I found the book and became fascinated with it) at first testified he knew all the families, and that they were the lowest of the low, but he could recite no details about any of them. He then admitted he didn't know any of them and paid no attention to Mexicans and Indians anyhow. Henry Hill, on the county board of supervisors from Solomonville, admitted he knew none of the Mexicans but testified that they were of a poor class.

Neville Leggatt repeated his earlier testimony this time for the defense. Ives never objected to any of Leggatt's hearsay statements about what the Mexicans said or thought. During his cross-examination, Leggatt testified that the plaintiff's attorney, T.D. Bennett, was one of the original twenty-five in the mob that went to pick up the children. Bennett talked to some of the families himself that night. That should have disqualified him to then represent the Foundling Hospital, but nothing was said on the record. Leggatt agreed that two of those who received children ran saloons themselves and that good people get drunk and gamble too – but they can afford it and the Mexicans can't.

The deputy sheriff also made a repeat performance. This time he testified that only two of the families included members who could sign their name and seven to eight of them demanded money back. The judge had ruled that testimony about money was inadmissible, but the plaintiff did not object.

George Frazier, a superintendant for the mines, testified that the Mexicans came to work dirty and sweaty. Ironically, one of the strike demands the year before had been for washing places. Frazer refused. He knew none of the Mexican families but he had an opinion that, "These foreigners generally drink up everything they make, yes sir" (p. 218). While he claimed all their houses were dirty and their children uncared for, these very same women cleaned the houses of the whites and took care of their children.

Most astounding was when Mrs. Olive Freeman repeated the negative comments about the Mexicans. Finally, Ives stood up, argued that it was cumulative testimony and that, "We have no evidence to controvert it." (Trial Transcript, p. 224) Of course they had none because: 1) they had conceded from the beginning that the families were improper, and 2) they didn't call any witnesses to controvert it though they could have had many. Some of the Mexicans were businessmen and women, teachers, and skilled craftsmen, some owned their own homes, one a seventeen-room palace.

The defense rested after the judge rejected questions to Henry Hill about his religion. On redirect, the issue of religion was brought right back up again. Several family members testified they were Catholics in good standing but had not gone to church or confession for years. The Sister then testified that to be a Catholic in good standing, one had to go to confession at least once a year. Ives stipulated that there was no motive to remove the children from Catholic homes to Protestant so there was no reason for him to go into this, especially since the judge had ruled it inadmissible.

By modern standards, the trial was a joke. The judge let in evidence that was clearly inadmissible, hearsay was rampant, the witnesses knew nothing about the Mexican families but testified about them in detail, the judge was clearly biased in his rulings, and even when he had disallowed evidence, it was let in. And of course the verdict was for the "Americans".

The Territorial Ruling

Kent, C.J. wrote the opinion in *New York Foundling Hospital v. John C. Gatti*,[3] most of which was simply copied from a case in Massachusetts. That case said that the laws of a foreign state that are repugnant cannot have any import in this state. Using *parens patriae* rationale, the court said no one has an absolute right to the child so it's up to the court according to best interest, not legal niceties. Neither of these parties had a greater legal claim, and therefore, the court relied strictly on best interest.

With no testimony from any Mexican, and with testimony from people who could not name a single Mexican, had never been in their homes, did not even know where they lived and never associated with them, the court determined that with one or two exceptions the Mexicans were of the lowest class, impecunious, didn't speak English, several were prostitutes and people of bad character, their homes were crude abode with dirt floor and roofs, and many had children they could not support.

The court adopted wholesale the language of the defendant: "children of the Caucasian race placed in homes of poor, illiterate, and vicious half-breed Mexican Indians,"… (p. 105) were "taken by American residents, the respondents, fit persons, by reason of their character, standing and age, to have them in their custody and control, who cared for them in suitable homes." (P. 103) and determined that their best interest was served by leaving the children where they were.

[3] Arizona 1905, Arizona Territorial Supreme Court, State of Arizona Department of Library, Archives, and Public Records, Phoenix, AZ, 9 Arizona 105, 79 P. 231 (1905)

The judge said the mobs were "committee meetings" and the Mexicans had volunteered to give up the children. To the judges, the conflict was between the Americans and the Mexicans, and in that, there was no contest. The court never mentioned unclean hands or religion or racism. The Sisters were guilty of an unintentional blunder, the priest of ignorance, and Swayne of tactless stubbornness. The whites in fact rescued these children from evil. Given the high connections of the defendants, any other decision would have had serious political costs.

A month after the Arizona court decision, H.B. Rice, assistant manager of the Detroit Copper company store, introduced a bill to change the territorial law of custody and guardianship retroactively to give probate judges more discretionary power – power that Judge Little lacked. As president of the upper house, Ives tried to kill it but it passed without being retroactive.

The Appeal to the U.S. Supreme Court

The Foundling Hospital appealed the case to the U.S. Supreme Court. [4] Ives tried to have the Arizona Statement of Facts reflect reality but had no success. In April 1906 the case was heard and in December dismissed for lack of jurisdiction.

The plaintiff argued that:

1) *Habeas corpus* is a question of personal freedom;
2) New York has *parens patriae* and absolute right to custody;
3) The Kings right to *parens patriae* is over that of the guardian and even the parent;
4) Comity prevents Arizona from depriving New York of the infants; and
5) As a territory, Arizona has no comity anyhow.

The defense argued that:

1. *Habeas corpus* to award care of a child is not an action invoking a question of personal freedom, and therefore, the Supreme Court has no jurisdiction;
2. The New York charter has no power outside of the state;
3. The New York hospital is a foreign corporation and has no power over the child and no standing as a corporation in the Arizona territory;
4. A guardian could not as matter of law be guilty of restraining or depriving his ward of liberty;
5. Best interest of the child is controlling law.

Justice Day wrote the opinion, and said it was not necessary to consider the Arizona court's findings of fact but then went on to repeat the racist defense language.

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[4] 203 U.S. 429, 27 S. Ct. 53, 51 L. Ed. 154 (1906)

The court recited a history of the writ and of *parens patriae* but said best interest was the original principle. Like the Arizona and Massachusetts courts, the justices said the case would not be decided on legal rights but on best interests. The use of best interest reinforced the idea that dominant groups can seize the children of subordinate groups on the claim that they are inferior parents. The record of kidnapping Native American children in the U.S. and aboriginal children in Australia is proof of that.

Sec. 1909 of the law that provided for appeals from territories on *habeas corpus* applied only to a question of personal freedom. The court found that the case was not a question of freedom since infants are not entitled to freedom only to care and custody, that the Sisters voluntarily took the children to Arizona and placed them in the custody of unfit persons, and therefore, the court has no jurisdiction.

Cultural Atmosphere

Racism, though a reality, was not a word used then. The U.S. Census at that time considered Mexicans white. Jews and Irish Catholics were considered white but of some other race. Just before this abduction, in 1892 and 1891, two books had come out that told scandalous stories about clerical drunkenness, sexual immorality and venality [5]– much like the problems of child abuse and bank fraud in the church today. Those revelations heightened anti-Catholic feelings.

This incident occurred a year after the 1903 minors strike. The whites viewed their actions as restoring order, the Mexicans as imposing more oppression. The Anglos rejected the very grievances that had ignited the strike –poverty, illness, and dirtiness – and then a year later used those same issues as justification for the abductions. An east/west dichotomy also existed as in the East they viewed the action as mob rule, but in Arizona they viewed it as taking care of children.

Religion v. Race v. States Rights

The media took different views of the decision. Western papers viewed it as a victory for Arizona Anglos over New York Catholics; Arizona papers said it was a victory for states rights over a corrupt New York state; southwest coverage sensationalized the story against the Mexicans claiming they were buying children for slavery. Some papers spoke of religious bigotry but only one, the Democratic Dallas Times Herald, spoke of racism. Some eastern Republican papers thought the families were Spaniards.

The defense attorneys focused on race not religion; the plaintiff focused on religion i.e. the threats to the Sisters, the priest and Swayne. But even the Catholic leaders who defended Mexicans did so because they knew that Mexicans were vital to

[5] My Life in the Convent, Barbara Ubryk, and Fifty Years in the Church of Rome, Charles Chiniquy, originally published in 1886, London, by the Protestant Literature Depository.

maintain congregations – a phenomenon still true today. But at the same time, the bishop conducted separate confirmation services for Americans and Mexicans.

Conclusion

We would like to think that the example of this case is a relic of the past. Unfortunately, it is not. Assumptions about race and class are still used in society and the courts. Treyvon Martin and Marissa Alexander are only two of many recent examples.

The best interest of the child is still based on a white, Anglo-Saxon model, with a two-parent, working father that existed only briefly in the 1950s. Studies for years have shown that in family court battered women who complain of violence or report child abuse are more likely to lose custody of their children because they are blamed rather than believed. Much research exists to show that Black and Hispanic families and children suffer serious discrimination in Child Protective Services agencies.

The theme of blaming the poor, so prominent today e.g. in the Shanesha Taylor arrest, recurred throughout the *Gatti* case. The whites had caused the problem (poor pay, bad water, no showers, poor housing) and then blamed the Mexicans for the result. Many similar themes recur in the Arizona legislature including refusal of federal oversight (states rights argument), using the legislature for powerful individuals or private profit not the public good, (an attempted gift of $900,000 to GEO by Kavanagh) and using religion to justify discrimination (the battle over SB 1062).

Science has proven beyond doubt that there is only one race – Homo sapiens. We all have descended from a common ancestor. We are one race. Law must be in the forefront of challenging racism. If as lawyers we respect the rule of law, if we believe in equality before the law, we must use our training, skills and talent to bring it about. Starting today.